

Complaint

125 F.T.C.

LONDON INTERNATIONAL GROUP, INC.

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

Docket C-3800. Complaint, April 7, 1998--Decision, April 7, 1998

This consent order prohibits, among other things, the Georgia-based condom manufacturer from making any comparative claims about the strength, efficacy or risk of breakage of any condom in the future, unless the respondent possesses and relies upon competent and reliable scientific evidence to substantiate the claims.

Appearances

For the Commission: *Linda Badger, Kerry O'Brien and Jeffrey Klurfeld.*

For the respondent: *Wayne H. Matelski, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that London International Group, Inc., a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent London International Group, Inc. is a New Jersey corporation with its principal office or place of business at 3585 Engineering Drive, Norcross, Georgia.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including "Ramses" brand condoms. Ramses brand condoms are "devices," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. Respondent has disseminated or has caused to be disseminated advertisements for Ramses brand condoms, including but not necessarily limited to the attached Exhibits A through C. These advertisements contain the following statements and depictions:

A. "it won't give you X-ray vision or bionic strength. but it will make you a hero tonight.

Ramses* gives you the sensitivity and natural feeling you want. and because it's 30% stronger than the leading brand, it performs like a champ. so you can too.

Ramses®. a trusted companion.

*Ramses® regular strength condoms."

[The advertisement depicts an individual condom wrapper labeled: "RAMSES CONDOM"] (Exhibit A).

B. "WOMEN PREFER THE STRONG SENSITIVE TYPE.

Ramses provides both strength and sensitivity with that exquisite natural feel. And 30% more strength* than the leading brand. Now all you need to do is learn to cry.

Ramses. A Trusted Companion.

*Ramses regular strength condoms."

[The advertisement depicts an individual condom wrapper labeled: "durex RAMSES 1 *PREMIUM* CONDOM LATEX"] (Exhibit B).

C. "IT'S TRUE. WOMEN WANT WHAT'S IN YOUR WALLET.

It's not the money they're after. It's the sensitivity. The natural feel. All that added strength* (30% more than the leading brand). An empty wallet can be a beautiful thing. **Ramses. A Trusted Companion.**

*Ramses regular strength condoms."

[The advertisement depicts an individual condom wrapper labeled: "durex RAMSES 1 *PREMIUM* CONDOM LATEX"] (Exhibit C).

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. Ramses brand condoms are thirty percent stronger than the leading brand.

B. Ramses brand condoms break thirty percent less often than the leading brand.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. Respondent submitted inadequate data to substantiate its claim that Ramses brand condoms are thirty percent stronger than other condoms. Respondent also submitted inadequate substantiation for the claim that Ramses brand condoms break thirty percent less often than other condoms. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

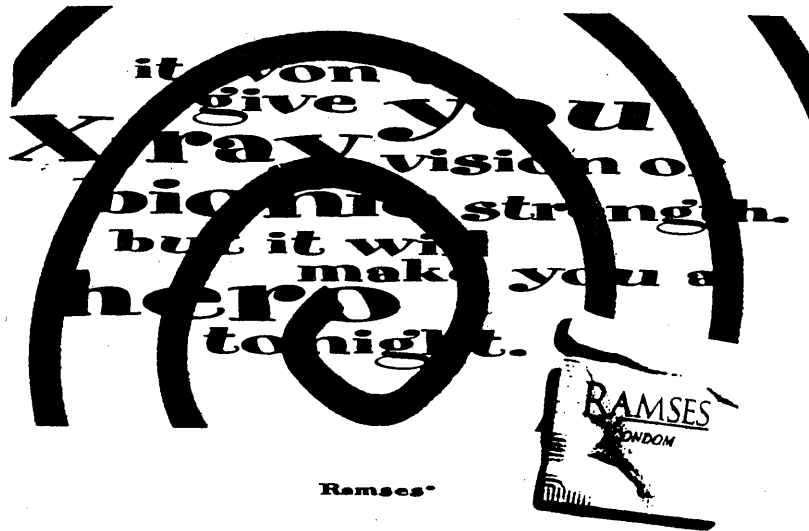
8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

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EXHIBIT A

EXHIBIT A



Ramses®

gives you the

sensitivity and natural

feeling you want. and because it's 30x

stronger than the leading brand, it performs like a

champ. so you can too. Ramses! a trusted companion.

EXHIBIT B

EXHIBIT B

**WOMEN
PREFER
STRONG
SENSITIVE
TYPE**

000065LI
9623004

Provides both strength and sensitivity with
ultra natural feel. And 30% more strength*
the leading brand. Now all you need to do is
start to cry. Ramses. A Trusted Companion.

*Ramses regular Distributed by L © 2002, FL 342

EXHIBIT C

EXHIBIT C

**WOMEN
WANT
WHAT'S IN
YOUR WALLET.**

It's not the money they're after. It's the sensitivity. The natural feel. All that added strength* (30% more than the leading brand). An empty wallet can be a beautiful thing. **Ramses. A Trusted Companion.**

000064LI
9623004

Ramses regular size
Durex International, Inc. Sarasota, FL 34236-7100

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 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 a 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 London International Group, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 3585 Engineering Drive, in the City of Norcross, State of Georgia.

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

ORDER

DEFINITIONS

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

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "*respondent*" shall mean London International Group, Inc., a corporation, its successors and assigns and its officers, agents, representatives and employees.

3. "*In or affecting commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of "Ramses" brand condoms or any other condom in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

- A. The comparative or quantifiable strength of any condom;
- B. The comparative or quantifiable risk of breakage of any condom; or
- C. The comparative or quantifiable efficacy of any condom,

unless, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Provided, that respondent shall not be deemed in violation of Part I of this order for any representation if the Food and Drug Administration has approved such representation pursuant to 21 U.S.C. 352 or 360. Provided, however, that clearance of a report submitted under 21 U.S.C. 360(k) ("pre-market notification") shall not be deemed an approval of a representation under this paragraph unless the Food and Drug Administration clears such representation based on its review and evaluation of substantiation submitted with such report.

II.

It is further ordered, That respondent London International Group, Inc. and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

It is further ordered, That respondent London International Group, Inc. and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent London International Group, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent London International Group, Inc. and its successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on April 7, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF
GUINNESS PLC, ET AL.

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

Docket C-3801. Complaint, April 17, 1998--Decision, April 17, 1998

This consent order requires, among other things, Guinness and Grand Met, producers and sellers of Dewar's Scotch, Bombay Original gin, and Bombay Sapphire gin brands, to divest, within six months of this order, certain assets to Commission approved buyers.

Appearances

For the Commission: *Joseph Brownman, Phillip Broyles and William Baer.*

For the respondents: *Ron Rolfe, Cravath, Swaine & Moore, New York, N.Y. and Bill Norfolk, Sullivan & Cromwell, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Guinness plc ("Guinness") and Grand Metropolitan plc ("Grand Met") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. 18, and Guinness and Grand Met, having also merged into a successor corporation known as Diageo plc ("Diageo"), 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 as follows:

I. RESPONDENT GUINNESS PLC

1. Respondent Guinness was, until on or about December 17, 1997, a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 39 Portman Square, London, England W1H 0EE.

2. Among other things, respondent Guinness, through United Distillers, a wholly-owned subsidiary corporation, produced and sold Scotch from distilleries located in Scotland and gin from distilleries located in England.

3. Respondent Guinness had total sales, for all products, of about \$8 billion in 1996. Respondent Guinness' United States sales of all products totaled about \$645 million in 1996.

4. Respondent Guinness was, and at all times relevant herein has been, engaged in the sale and distribution of distilled spirits, including "premium Scotch" and "premium gin," in the United States. Respondent Guinness' premium Scotch brands in the United States were Johnnie Walker Red and Dewar's White Label. Respondent Guinness' premium gin brands in the United States were Tanqueray gin and Tanqueray Malacca gin.

5. Respondent Guinness was, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

II. RESPONDENT GRAND MET

6. Respondent Grand Met was, until on or about December 17, 1997, a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

7. Among other things, respondent Grand Met, through International Distillers and Vintners, a wholly-owned subsidiary corporation, produced and sold Scotch from distilleries located in Scotland and gin from distilleries located in England.

8. Respondent Grand Met had total sales, for all products, of about \$14 billion in 1996. Respondent Grand Met's United States sales of all products totaled about \$8 billion in 1996.

9. Respondent Grand Met was, and at all times relevant herein has been, engaged in the sale and distribution of distilled spirits, including "premium Scotch" and "premium gin," in the United States. Respondent Grand Met's premium Scotch brands in the United States included J&B Rare, J&B Select, and The Famous Grouse. Respondent Grand Met's premium gin brands in the United States were Bombay Original and Bombay Sapphire.

10. Respondent Grand Met was, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

II. RESPONDENT DIAGEO

11. Respondent Diageo is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

12. Respondent Diageo is the successor corporation to respondents Guinness and Grand Met.

13. Respondent Diageo is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

III. THE MERGER

14. On or about May 11, 1997, respondents Guinness and Grand Met executed an agreement to merge their two companies. The value of the merger, measured by the aggregate market capitalization, was approximately \$36 billion.

15. On or about December 17, 1997, respondents Guinness and Grand Met merged their two corporations, creating respondent Diageo.

IV. TRADE AND COMMERCE

A. *Relevant Product Markets*

16. Relevant product markets in which it is appropriate to assess the effects of the proposed merger include (a) premium Scotch and (b) premium gin. Product markets broader than premium Scotch and premium gin may also exist. Total United States sales for premium Scotch are about 3.2 million 9-liter case equivalents, which represents over \$600 million in retail sales. Total United States sales of all premium gin is about 2.2 million 9-liter case equivalents, which represents over \$400 million in retail sales.

17. Premium Scotch is blended Scotch whisky that is made and bottled in Scotland, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of the Johnnie Walker Red, Dewar's White Label, and J&B Rare brands.

18. Premium gin is gin that is made and bottled in England, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of Tanqueray, Bombay Original, and Bombay Sapphire brands.

B. Relevant Geographic Markets

19. The relevant geographic market in which it is appropriate to assess the effects of the proposed merger is the United States.

C. Conditions of Entry

20. Entry into the relevant markets would not be timely, likely, or sufficient to prevent anticompetitive effects.

V. MARKET STRUCTURE

21. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschmann Index (or "HHI") or by two-firm and four-firm concentration ratios. The proposed merger, if consummated, will substantially increase that concentration.

22. In the premium Scotch product market, respondent Guinness was the largest competitor in the United States with about a 68% share and respondent Grand Met was the second largest, with about a 24% share. Together, they would control approximately 92% of all United States premium Scotch sales. The proposed merger would increase the HHI by over 3000 points and produce an industry concentration of over 8000 points.

23. In the premium gin market, respondent Guinness was the largest competitor in the United States with about a 58% share and respondent Grand Met was the third largest, with about a 15% share. Together, they would control approximately 73% of all United States premium gin sales. The proposed merger would increase the HHI by over 1700 points and produce an industry concentration of over 6000 points.

VI. EFFECTS OF THE MERGER

24. The merger may substantially lessen competition in the relevant markets in the following ways, among others:

(a) By eliminating direct competition between Guinness and Grand Met;

(b) By increasing the likelihood that respondents will unilaterally exercise market power; and

(c) By increasing the likelihood of, or facilitating, collusion or coordinated interaction; each of which increases the likelihood that the prices of premium Scotch and premium gin will increase.

VII. VIOLATIONS CHARGED

25. The agreement entered into between respondents Guinness and Grand Met for their merger constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Further, the already consummated merger of Guinness and Grand Met is a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed merger between Guinness plc ("Guinness") and Grand Metropolitan plc ("Grand Met"), and Guinness and Grand Met, having merged into a successor corporation known as Diageo plc ("Diageo"), all sometimes referred to herein as "respondents," and respondents having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act;

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment received, 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 Guinness plc was a corporation organized, existing, and doing business under and by virtue of the laws of the

United Kingdom with its office and principal place of business located at 39 Portman Square, London, England W1H 0EE.

2. Respondent Grand Metropolitan plc was a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

3. Respondent Diageo plc is a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Guinness*" means Guinness plc, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Guinness plc, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. "*Grand Met*" means Grand Metropolitan plc, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Grand Metropolitan plc, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

C. "*Respondents*" means Guinness and Grand Met, individually and collectively, and their successor, Diageo.

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

E. "*Dewar's*" means "Dewar's," "Dewar's White Label," and any other brand of Scotch whisky that uses the name "Dewar's" in connection with Scotch whisky.

F. "*Bombay*" means "Bombay," "Sapphire," "Bombay Original," "Bombay Sapphire" and any other brand that uses the name "Bombay" in connection with gin.

G. "*Assets To Be Divested*" means:

1. All assets, properties, business and goodwill, tangible and intangible, owned or controlled by Guinness, anywhere in the world,

used in the manufacture, distribution, marketing, and sale of Scotch whisky under any trade name or trademark that incorporates the term Dewar's, including, without limitation (except that distilleries, distilling capacity, storage capacity, inventory, and cooperage services, are limited as specified in subparagraphs (i) - (k) below), the following:

a. The trade name or trademark "Dewar's" and all trademarks, trade dress, trade names, and logos associated with the sale of any "Dewar's" Scotch whisky;

b. The Dewar's profit and loss statements, Dewar's contribution statements and Dewar's advertising, promotional, and marketing spend records;

c. All Dewar's customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, blend specifications, formulas;

d. All names of manufacturers and suppliers under contract with respondents who produce for, or supply to, respondents in connection with the manufacture or sale of Dewar's;

e. Copies of all product testing required by any regulatory authority relating to Dewar's;

f. All price lists for Dewar's;

g. Molds currently in use for bottling Dewar's in its various sizes sufficient to produce 3 million 9-liter cases of Dewar's per year;

h. All inventories of finished case goods and packaging relating to Dewar's;

i. Sufficient distilling capacity to produce 3 million 9-liter cases of Dewar's per year, including the distillery located in Aberfeldy, Scotland;

j. Sufficient inventory of aged, distilled malt and grain whisky and storage capacity to produce 3 million 9-liter cases of Dewar's White Label per year for seven (7) years, provided, however, that the acquirer may utilize such stocks solely for the purpose of producing Dewar's or for trading for other stocks to be used in producing Dewar's.

k. Sufficient cooperage services to produce 3 million 9-liter cases of Dewar's per year;

l. To the extent transferable or assignable, all rights, titles, and interests in and to the contracts relating to Dewar's entered into in the ordinary course of business with customers (together with associated bid and performance bonds), other Scotch distillers, suppliers, sales

