

## IN THE MATTER OF

## ONKYO U.S.A. CORPORATION

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

*Docket C-3092. Consent Order, July 2, 1982--Modifying Order, Oct. 24, 1996*

This order reopens a 1982 consent order -- that prohibited the New Jersey manufacturer from attempting to fix the resale prices for its products, and from restricting the lawful use of its trademarks and brand names -- and this order modifies the consent order by permitting Onkyo to impose lawful price restrictive cooperative advertising programs and to unilaterally terminate a dealer for failing to adhere to previously announced resale prices.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST  
TO REOPEN AND MODIFY ORDER ISSUED JULY 2, 1982

On April 23, 1996, Onkyo U.S.A. Corporation ("Onkyo"), filed its "Petition to Reopen Proceedings and Modify Consent Order" ("Petition") in Docket No. C-3092, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51 ("Rules"). Onkyo asks the Commission to reopen and modify the consent order issued by the Commission on July 2, 1982, in *Onkyo U.S.A. Corporation*, 100 FTC 59 (1982) ("order").

Among other things, Onkyo asks the Commission to modify the order by adding provisions stating that the order will not be construed to prohibit Onkyo (1) from implementing lawful price restrictive cooperative advertising programs; and (2) from announcing resale prices in advance and unilaterally refusing to deal with or terminating dealers who fail to adhere to such resale prices. Onkyo also asks the Commission to eliminate or modify several order provisions. These provisions either limit Onkyo's ability to impose restrictions on its dealers' advertised prices in connection with the sale of its home audio products or limit its ability unilaterally to terminate a dealer for failure to adhere to previously announced resale prices. In addition, Onkyo requests the Commission to set aside the requirement that it furnish a copy of the order to certain employees and that the Commission terminate the order twenty years after the date it was

issued.<sup>1</sup> Onkyo maintains that reopening and modification is warranted by changes in the law and is in the public interest. Onkyo's Petition was placed on the public record for thirty days. No comments were received.

Onkyo has shown that it is in the public interest to reopen and modify the order. Onkyo's inability to condition advertising allowances on advertised price and unilaterally to announce pricing restrictions to its dealers has harmed its ability to market its products consistent with a marketing strategy that emphasizes knowledgeable sales personnel, attractive showrooms and "quality over price."<sup>2</sup> Consequently, Onkyo cannot operate its business as effectively as its competitors and is thus competitively disadvantaged in a manner that was not contemplated when the order was issued by the Commission. Onkyo has demonstrated that the modifications the Commission has determined to implement would enable it to use what Onkyo considers the most efficient and cost effective marketing strategy with respect to its products and would put Onkyo on an equal basis with its competitors.<sup>3</sup> Permitting Onkyo unilaterally to terminate a dealer for failure to adhere to previously announced resale prices is also consistent with prior order modifications and would permit Onkyo to engage in conduct that is lawful under the Colgate doctrine and would give Onkyo greater control over its dealer network. *See United States v. Colgate Co.*, 250 U.S. 300 (1919). The order, as modified, will continue to prohibit unlawful resale price maintenance.

In light of the recent civil penalty action and settlement against Onkyo arising out of several alleged order violations, the Commission has determined, as discussed below, to deny Onkyo's requests (1) that the Commission set aside the provision requiring Onkyo to furnish a copy of the order to certain of its employees and (2) that the Commission allow the order to sunset after twenty years pursuant to Section 3.72(b)(3)(i) of the Rules.

---

<sup>1</sup> On July 25, 1995, the Commission filed a civil penalty action and settlement against Onkyo arising out of several alleged order violations. Consequently, the Onkyo order would now remain in effect for twenty years from the date the complaint alleging Onkyo's order violations was filed, pursuant to Section 3.72(b)(3)(ii) of the Rules. In its Petition, Onkyo requests that the Commission exercise its discretion to provide for termination of the order consistent with Section 3.72(b)(3)(i) of the Rules, which provides that existing orders would automatically terminate twenty years from the date that the order was issued.

<sup>2</sup> Petition at 3.

<sup>3</sup> The Commission recently reopened and made similar modifications to orders in *Interco Incorporated, et al.*, Docket No. C-2929 (March 27, 1995), and *Pendleton Woolen Mills, Inc.*, Docket No. C-2985 (September 30, 1996). Likewise, the Commission modified the orders in *U.S. Pioneer Electronics Corp.*, Docket No. C-2755 (April 8, 1992) and *The Magnavox Co.*, Docket No. 8822 (March 12, 1990).

## I. 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 modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); see *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").<sup>4</sup>

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 (unpublished) ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and

<sup>4</sup> See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether 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 petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

## II. REOPENING IS IN THE PUBLIC INTEREST

In support of its Petition, Onkyo states that the relief it seeks is required by changed conditions of law and the public interest. Because the Commission has determined that the order should be reopened and modified in the public interest, it need not and does not consider whether Onkyo has shown changed conditions of law that would require reopening the order.

Onkyo has demonstrated that the order prevents Onkyo, but not its competitors, from freely choosing with whom it will deal.<sup>5</sup> The order, according to Onkyo, also prevents Onkyo from unilaterally imposing price-related restrictions on cooperative advertising, a practice "freely engaged in by [Onkyo's] competitors."<sup>6</sup> In addition, Onkyo, unlike its competitors, is unable to seek and obtain pricing information from its dealers with respect to its own and competing products,<sup>7</sup> nor may it announce in advance suggested resale prices, and unilaterally choose to cease dealing with a dealer because of its

<sup>5</sup> For example, some authorized Onkyo dealers discount Onkyo products by "cutting back on display, service and ambience, and by trading on the display and promotion which other dealers provide." Affidavit of Theodore W. Green, Vice President, Sales and Marketing, Onkyo U.S.A. Corporation (April 18, 1996) ("Green Aff.") ¶ 9.

<sup>6</sup> Green Aff. ¶ 14.

<sup>7</sup> According to Onkyo, "consumers, dealers, and manufacturers are constantly focused on the price of their [consumer electronics] products relative to the competition." Green Aff. ¶ 6. Onkyo characterizes the relevant market as highly price competitive and cites, as an example, the rapid decline in prices for new products. For example, when first introduced, mini-stereo systems sold for approximately \$1,000. Within months of their introduction, such systems became available for \$400 or less. *Id.*

Onkyo states that because of such rapid price changes, "it is vital to [Onkyo's and its dealers'] success" that Onkyo maintain "regular and effective communication about the competitiveness of our pricing and that of our competitors." *Id.* ¶ 7. Onkyo also needs "accurate feedback on market prices in order to plan the design and introduction of new products." *Id.*

pricing practices.<sup>8</sup> As a result, Onkyo is a less effective competitor because it cannot structure its distribution system to meet the demands of the marketplace with respect to its products.<sup>9</sup> Onkyo has thus shown that it is in the public interest to reopen and modify the order. Onkyo claims that it is a less effective competitor because it cannot structure its distribution system to meet the demands of the marketplace in lawful ways that are available to its competitors.

### III. THE ORDER SHOULD BE MODIFIED

Onkyo requests that the order be modified to permit Onkyo to implement price restrictive cooperative advertising programs and unilaterally to terminate a reseller that refuses to sell Onkyo products at Onkyo's previously announced resale prices. For these purposes, Onkyo has requested that the following paragraphs be added to the order:

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

*It is further ordered,* That nothing in this order shall prohibit respondent from announcing any resale prices for any products in advance and unilaterally refusing to deal with or terminating any dealer who fails to advertise, offer for sale or sell such products at the announced prices.

The addition of these provisions would permit Onkyo to impose price restrictions on its dealers in connection with its cooperative advertising programs and would restore Onkyo's Colgate doctrine rights allowing it unilaterally to terminate a dealer who refuses to advertise and sell products at previously published resale prices. Modifying the order in this respect is consistent with the

<sup>8</sup> For example, Onkyo cannot "readily refuse to deal with discounting retailers and thereby support its full-service dealers who educate potential consumers about the features of its products, but who frequently lose the ultimate sale to the 'free-riding' retailer who offers the same product at a discounted price." Petition at 21.

<sup>9</sup> For example, unlike many of its competitors, Onkyo is unable to offer its dealers cooperative advertising programs that establish minimum advertised price restriction ("MAP") because the order may be construed to prohibit such programs. Consequently, Onkyo has been unable to expand its dealer base because dealers "are less inclined to carry the Onkyo line because [Onkyo] does not have a MAP program." Green Aff. ¶ 28.

Commission's actions in *The Advertising Checking Bureau, Inc.*, 109 FTC 146 (1987); *The Magnavox Co.*, 113 FTC 255 (1990); U.S. Pioneer Elec. Corp., Trade Reg. Rep. (CCH) ¶ 23,172 (1992); Clinique Laboratories, Inc., Trade Reg. Rep. (CCH) ¶ 23,330 (1993); Interco Incorporated, et al., Docket No. C-2929, Order Granting in Part and Denying in Part Request to Reopen and Modify Order Issued September 26, 1978 (March 27, 1995); and Pendleton Woolen Mills, Inc., Docket No. C-2985, Order Granting in Part Request to Reopen and Modify Order Issued July 31, 1979 (September 30, 1996).

The approach followed by the Commission in adopting its new cooperative advertising policy by setting aside the order in *The Advertising Checking Bureau* and in the subsequent modifications, applies to Onkyo's request for a paragraph regarding price restrictive cooperative advertising. Without this provision, the order prohibits price restrictions that Onkyo might want to impose on its dealers in connection with cooperative advertising programs it may wish to implement. Such restrictions may not necessarily be part of an illegal RPM scheme and have now been recognized as reasonable in many circumstances.<sup>10</sup> Of course, any cooperative advertising program implemented by Onkyo as part of an RPM scheme would be *per se* unlawful and would violate the order even if Onkyo's requested modification is granted.

The proposed second paragraph would permit Onkyo unilaterally to terminate a reseller for failure to adhere to previously announced prices. This type of conduct is lawful under the Colgate doctrine and would allow Onkyo greater control over its retailer network. Under the Colgate doctrine, a supplier can "announce its resale prices in advance and refuse to deal with those who do not comply."<sup>11</sup> The requested modification should enable Onkyo to afford some protection to Onkyo dealers who invest in significant pre-sale services and promotion and thereby have greater success in attracting and retaining these retailers within its distribution network. Such control would assist Onkyo in implementing its overall marketing plans.

The remaining order modifications requested by Onkyo are aimed at removing language that is in direct conflict with the proposed

---

<sup>10</sup> See, e.g., *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988) (a vertical restraint of trade is not *per se* illegal unless it includes some arrangement on price or price levels); *In re Nissan Antitrust Litigation*, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (agreements that withhold cooperative advertising allowances from dealers who advertise discounted prices are analyzed under the rule of reason).

<sup>11</sup> *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919).

cooperative advertising and "Colgate rights" provisions. Some of these changes, as discussed below, are appropriate to make the order consistent with the two paragraphs the Commission has determined to add to the order:

1. Onkyo's request to delete the words "directly or indirectly" from the order's preamble and from subparagraphs I.1, I.2, and I.3.

In support of this proposed modification, Onkyo states that the use of the modifier "indirectly" unnecessarily inhibits Onkyo from lawful, competitive behavior, "which has had a chilling effect on interbrand competition."<sup>12</sup> Onkyo asserts that the prohibition of acts that "indirectly" have an unlawful result constitute mere "fencing-in" relief that, "[a]fter more than thirteen years, is no longer necessary or appropriate".<sup>13</sup>

Onkyo's request to delete the phrase "directly or indirectly" from the order's preamble is denied. This standard language appears in virtually all of the Commission's orders, and serves to assure that a respondent is not able to do by indirect means what the order prohibits it from doing directly. Moreover, this phrase in the preamble prevents Onkyo from engaging in conduct that, although lawful, could lead to or facilitate an unlawful RPM scheme; for example, a threat to terminate dealers for failure to adhere to resale prices. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices.<sup>14</sup> Onkyo may, consistent with the order as modified, announce in advance its intention to terminate any dealer who fails to adhere to its previously announced resale prices, and it may terminate any such dealer, but "it may not threaten a dealer to coerce compliance with or agreement to suggested retail prices."<sup>15</sup> Thus, retaining the "directly or indirectly" language in the order's preamble will ensure that Onkyo will not be able to engage in lawful conduct that could lead to or facilitate unlawful conduct.

Onkyo's request to delete the phrase "directly or indirectly" from subparagraphs I.1, I.2, and I.3 of the order is granted. The preamble

---

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *Id.* at 12.

<sup>14</sup> See *Monsanto v. Spray-Rite Service Corporation*, 465 U.S. 752, 765 and n.10 (1984); see also *Lenox, Inc.*, 111 FTC 612, 617 (1989).

<sup>15</sup> See *In re Interco Incorporated, et al.*, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10.

covers Onkyo's conduct under the order's specific substantive provisions and inclusion of the phrase "directly or indirectly" in the preamble extends to Onkyo's conduct under those provisions. It is, therefore, not necessary to repeat the phrase "directly or indirectly" in the order's provisions prohibiting specific conduct.

2. Onkyo's request to delete the words "advertise, promote," from subparagraph I.1 of the order.<sup>16</sup>

Onkyo requests that the words "advertise, promote," be deleted from subparagraph I.1 of the order to enable Onkyo to implement minimum advertised price programs as part of cooperative advertising arrangements.<sup>17</sup> Although Onkyo's Petition does not expressly discuss the reasons Onkyo believes these words should be deleted from the order,<sup>18</sup> presumably, Onkyo is concerned that even with the added cooperative advertising provision, the reference to advertising in subparagraph I.1 of the order could be confusing and, consequently, could exert a chilling effect on Onkyo's ability to implement price-restrictive cooperative advertising and promotional programs.

The language of the cooperative advertising proviso added to the order is sufficient to permit Onkyo to implement lawful price restrictive cooperative advertising programs. Deleting the words "advertise, promote" from subparagraph I.1, however, could be construed to allow agreements on advertised prices that go beyond such lawful cooperative advertising programs. Onkyo has not requested or shown that it should be permitted to enter such agreements outside lawful cooperative advertising programs. Accordingly, the request to delete the words "advertise, promote," from subparagraph I.1 of the order is denied.

3. Onkyo's request to delete the word "Requesting" from subparagraph I.2 and delete subparagraph I.4 in its entirety.<sup>19</sup>

Onkyo states that the prohibition on "requests" is inconsistent with Commission's removal of the prohibition on the use of suggested

<sup>16</sup> Petition at 13, 25. Subparagraph I.1 prohibits Onkyo from: "Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product."

<sup>17</sup> *Id.* at 13, 25.

<sup>18</sup> Onkyo requests that the words "advertise, promote," be deleted in the context of its discussion of why the Commission should add the cooperative advertising provision to the order.

<sup>19</sup> Subparagraph I.2 prohibits Onkyo from: "Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price."

Subparagraph I.4 prohibits Onkyo from: "Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price."

In the alternative, Onkyo requests that the words "requesting, or" be deleted from subparagraph I.4 of the order and that the words "where such requirement is imposed to fix, maintain, control or enforce the resale price at which any product is sold" be added to subparagraph I.4. Petition at 13.

resale prices that was part of the order as originally proposed.<sup>20</sup> It also argues that deletion of "Requesting" and subparagraph I.4 in its entirety would be consistent with the recent Interco modification. In Interco, the Commission deleted a restriction on "suggesting" that a reseller refrain from advertising products at a certain resale price.<sup>21</sup>

Onkyo's request to delete the word "Requesting" from subparagraph I.2 and to delete subparagraph I.4 in its entirety, or, in the alternative, to delete the words "requesting, or" from subparagraph I.4 of the order is denied. Allowing Onkyo to suggest resale prices to its dealers does not mean that Onkyo can enter into vertical agreements to fix resale prices with its dealers. Such agreements are *per se* unlawful. In Interco, the Commission modified the order to permit the respondent only to suggest prices at which a reseller may wish to advertise a product without permitting the respondent to require a reseller to advertise products at a specified price.<sup>22</sup> Subparagraphs I.2 and I.4 of the order, which, among other things, bar Onkyo from requesting dealers to adhere to resale prices and from requesting dealers to discontinue selling or advertising any product at any resale price, in essence prohibits Onkyo from directly or indirectly "inviting" its dealers to participate in a resale price maintenance scheme.<sup>23</sup> Requests, or any similar cooperative means of accomplishing the maintenance of resale prices fixed by Onkyo, in the context of its business relationship with its dealers, are analogous to threats to obtain dealer acquiescence in resale prices and thus are "plainly relevant and persuasive to a meeting of the minds."<sup>24</sup> Although cooperation and coordination between Onkyo and its dealers "to assure that their product will reach the consumer persuasively and efficiently" is not unlawful,<sup>25</sup> cooperation (*i.e.*: a request by Onkyo and acquiescence by the dealer) to maintain resale prices clearly is unlawful. The language of the new paragraphs is sufficient to permit Onkyo to implement lawful price restrictive cooperative advertising programs and makes it clear that Onkyo can

<sup>20</sup> The Commission stated in this regard that:

"In prohibiting Onkyo from restricting its dealers' prices, the Commission intends to prohibit only those actions that are aimed at maintaining specific resale prices . . . . However, the order does not preclude Onkyo from initially selecting its dealers and establishing performance criteria that are otherwise reasonable under the antitrust laws." 100 FTC at 61.

<sup>21</sup> See Interco, 5 Trade Reg. Rep. (CCH) ¶ 23,791 at 23,541-42.

<sup>22</sup> *Id.*

<sup>23</sup> In Lenox, the Commission denied a request to delete a provision that barred the respondent from requesting dealers to report any person who did not observe suggested resale prices. See *Lenox, Inc.*, 111 FTC 612 (1989).

<sup>24</sup> Monsanto, 465 U.S. at 765 and n.10.

<sup>25</sup> *Id.* at 763-64.

take any lawful steps with respect to its customers' pricing practices, but leaves in place the core prohibitions prohibiting price fixing.

4. Onkyo's request to delete subparagraph I.3.<sup>26</sup>

The first part of subparagraph I.3 of the order is consistent with *Monsanto and Sharp* in which the Court said that vertical agreements to fix price are *per se* unlawful. The first part of subparagraph I.3, which bars Onkyo from "requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price,"<sup>27</sup> prohibits Onkyo from inviting its dealers to participate in a resale price maintenance scheme.<sup>28</sup> This provision does not bar dealers from complaining to Onkyo about price cutters. Instead, it bars Onkyo from seeking the dealers' participation in policing and maintaining resale prices.

The second part of subparagraph I.3 prohibits Onkyo from "acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer."<sup>29</sup> As written, this provision applies only when Onkyo solicits and obtains the cooperation of its dealers in enforcing compliance with resale prices and acts on the information so obtained.

In addition, termination of a price cutting dealer is not lawful in all circumstances. For example, a manufacturer's threat to refuse to deal to obtain compliance with resale prices can evidence an invitation to an unlawful agreement on price.<sup>30</sup> Nevertheless, as the Court explained in *Monsanto*, dealers "are an important source of information for manufacturers," dealer complaints about price cutters "arise in the normal course of business and do not indicate illegal concerted action" and a manufacturer's termination of a dealer following complaints from other dealers would not, by itself, support an inference of concerted action.<sup>31</sup> To the extent that this second part of subparagraph I.3 may inhibit Onkyo from legitimate unilateral conduct it may cause competitive injury. Because any conduct that

---

<sup>26</sup> This provision prohibits Onkyo from: "Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer." 100 FTC at 63.

In the alternative, Onkyo requests that the Commission modify this provision to read as follows: "Requiring any dealer to report the identity of any other dealer who deviates from any resale price, where such requirement is imposed to fix, maintain, control or enforce the resale price at which any product is sold." Petition, Exhibit C.

<sup>27</sup> 100 FTC at 63.

<sup>28</sup> See *Monsanto*, 465 U.S. at 764 n.9 and 765.

<sup>29</sup> 100 FTC at 63.

<sup>30</sup> *Monsanto*, 465 U.S. at 765.

<sup>31</sup> *Id.* at 763-64.

would be unlawful under this part of subparagraph I.3 would be prohibited by core provisions of the order, the reasons to set aside the second part of subparagraph I.3 outweigh any reasons to retain it.<sup>32</sup>

5. Onkyo's request to delete subparagraphs I.5, I.4 and I.6 in their entirety or, in the alternative, delete the words "advertising" and "or advertised" from subparagraphs I.5, I.4 and I.6.<sup>33</sup>

With the addition of the cooperative advertising proviso to the order, the references to "advertising" in subparagraphs I.5, I.4 and I.6 of the order are confusing and could, therefore, hinder Onkyo's ability to institute a lawful, price-restrictive cooperative advertising program. Deleting these words makes clear that Onkyo can impose price restrictions on its dealers in connection with any lawful cooperative advertising program. Price restrictions in cooperative advertising programs, standing alone, are not *per se* unlawful. *See* Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs -- Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987). The request to delete the words "advertising" and "or advertised" from subparagraphs I.5, I.4 and I.6 of the order is granted.

Onkyo's request to delete subparagraph I.5 in its entirety is denied. The prohibition against Onkyo's conducting surveillance programs to determine dealers' resale prices for the purpose of fixing such prices should remain in place for the duration of the order. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices.<sup>34</sup> Onkyo may, consistent with the order, as modified, announce in advance its intention to terminate any dealer who fails to adhere to its previously announced resale prices, and it may terminate any such dealer; but "it may not threaten a dealer to coerce compliance with or agreement to suggested retail prices."<sup>35</sup>

---

<sup>32</sup> This recommendation is consistent with the Commission's determination to set aside a similar order provision in 1989. *See Lenox, Inc.*, 111 FTC 612, 617-18 (1989).

<sup>33</sup> Subparagraphs I.4 and I.6 are discussed elsewhere. Subparagraph I.5 prohibits Onkyo from: "Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised." 100 FTC at 63.

<sup>34</sup> *See Monsanto Co. v. Spray-Rite Corporation*, 465 U.S. 752, 765 and n.10 (1984); *see also Lenox, Inc.* 111 FTC 612, 617 (1989).

<sup>35</sup> *See In re Interco Incorporated, et al.*, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10.

6. Onkyo's request to delete subparagraph I.6 in its entirety or, in the alternative, delete the word "Terminating" from subparagraph I.6.<sup>36</sup>

Onkyo states that the word "Terminating" in subparagraph I.6 of the order is inconsistent with the new Colgate rights proviso and that the word "Terminating" has a chilling effect on Onkyo's ability unilaterally to terminate a dealer in response to price complaints by other dealers.<sup>37</sup>

Onkyo's request to delete the word "Terminating" from subparagraph I.6 of the order is granted. Deleting this word is consistent with the Commission's action in *Lenox, Inc.*, 111 FTC 612, 617-18 & 620 (1989). In *Lenox*, the Commission modified the order by deleting the words "or acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported" from a provision barring *Lenox* from requesting its dealers to report any retailer that did not observe the resale prices suggested by *Lenox*. The conduct prohibited by the deleted words in *Lenox* includes termination of a dealer. Likewise, in *Pioneer*, the Commission deleted the word "terminating" from a similar order provision "as [that word] relates to advertising," and issued an Order to Show Cause why the *Pioneer* order should not be "further modified to remove the restriction on *Pioneer* to unilaterally terminate a dealer for not following suggested resale prices."<sup>38</sup> Unilateral termination of a dealer for discounting is not in itself unlawful.<sup>39</sup>

The request to adopt Onkyo's proposed new language for subparagraph I.6 is denied. The proposed language is not consistent with similar provisions in other orders, and its prohibition on Onkyo's "preventing" the sale of products because of a dealer's deviation from any resale price is narrow and vague. The language proposed by Onkyo for subparagraph I.6 implicitly would allow Onkyo to "restrict" or "limit" (conduct currently expressly prohibited by subparagraph I.6) the sale of products because of a dealer's deviation

<sup>36</sup> Subparagraph I.6 prohibits Onkyo from: "Terminating, coercing or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product." 100 FTC at 63.

<sup>37</sup> See *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-764 (1984) (Court held that a *per se* unlawful agreement could not be inferred from nothing more than a dealer termination following competitors' complaints); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) (vertical agreement to terminate a price-cutting dealer is not *per se* unlawful unless there is also an agreement on price or price levels).

<sup>38</sup> U.S. *Pioneer Electronics Corp.*, Docket No. C-2755, Order Reopening and Modifying Order Issued October 24, 1975 (April 8, 1992) at 28-30.

<sup>39</sup> See *Interco Incorporated*, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10.

from resale prices acceptable to Onkyo. Other than the termination of a dealer, subparagraph I.6 involves conduct that if engaged in with regard to resale prices could lead to or be used as part of a resale price maintenance scheme. Subparagraph I.6 should be retained as written, with the exception of deletion of the word "Terminating." For clarity, the words "(other than termination)" should be added to subparagraph I.6 following the word "action."

7. Onkyo's request to delete subparagraph I.7 in its entirety.<sup>40</sup>

In support of its request to delete subparagraph I.7, Onkyo states that to the extent that the law would permit Onkyo to take steps to prevent unauthorized dealers from using its trademarks, "Onkyo should be permitted, like its competitors, [to take] appropriate steps to prevent such use."<sup>41</sup> Onkyo is concerned that unauthorized "free-riding" dealers have created a situation "in which authorized [Onkyo] dealers lose interest in carrying Onkyo products because they cannot profitably distribute such products."<sup>42</sup> Onkyo asserts that in the context of the order's broad definition of the term "dealer,"<sup>43</sup> and unlike its competitors, it feels constrained in its ability to take action against authorized dealers who deviate from Onkyo's performance criteria and against dealers who sell Onkyo products but are not authorized by Onkyo to do so. According to Onkyo, "[t]rademark law itself provides protection for any dealer who lawfully utilizes the Onkyo trademark,"<sup>44</sup> and dealers who "unlawfully or inappropriately" use the Onkyo trademark "and thereby injure Onkyo's competitiveness in the market or its image and reputation should not be shielded by the existing prohibition in the order."<sup>45</sup>

Onkyo's request to delete subparagraph I.7 from the order is denied. Given the two new order paragraphs allowing Onkyo to employ price restrictive cooperative advertising programs and to exercise Colgate rights, subparagraph I.7 does not prevent Onkyo from taking lawful steps to prevent the unlawful use of its trademark by authorized and unauthorized Onkyo dealers. Subparagraph I.7 prohibits coercion or threats against discounting retailers, which may

---

<sup>40</sup> Subparagraph I.7 prohibits Onkyo from: "Taking any action to hinder or preclude the lawful use by any dealer of respondent's trademarks in conjunction with the sale or advertising of any product." 100 FTC at 63.

<sup>41</sup> *Id.* at 16.

<sup>42</sup> *Id.*

<sup>43</sup> The term "dealer" is defined to mean "any person, partnership, corporation or firm which sells any product in the course of its business." 100 FTC at 63.

<sup>44</sup> Petition at 17.

<sup>45</sup> *Id.*

form the basis of *per se* unlawful resale price maintenance agreements.<sup>46</sup>

A threat by Onkyo, to hinder or preclude a retailer from using the Onkyo trademark if the retailer did not stop discounting Onkyo products<sup>47</sup> could result in an implicit, yet nonetheless *per se* unlawful, resale price maintenance agreement. Onkyo will continue to be able to prevent the unauthorized use of its trademarks by any dealer. Of course, this provision also does not prohibit Onkyo from entering into and enforcing so-called transshipment bans.

8. Onkyo's request with respect to its obligations under paragraphs II and IV of the order.<sup>48</sup>

Onkyo states that these provisions of the order "have outlived their usefulness and are inconsistent with more recent FTC consent orders."<sup>49</sup> In addition, Onkyo asserts that its competitors are not subject to similar obligations and that Onkyo, unlike its competitors, incurs "a significant expenditure of employee time and management supervision, which cut into Onkyo's profitability"<sup>50</sup> in connection with its perpetual compliance obligations under paragraphs II and IV

<sup>46</sup> See, e.g., *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1159 (7th Cir. 1987) (Posner, J.), cert. denied, 486 U.S. 1005 (1988), (manufacturer's threat to mix up a retailer's orders if the retailer did not raise prices to have resulted in an implicit, yet nonetheless *per se* unlawful, agreement).

<sup>47</sup> Similarly, fixing advertised prices, entering into advertised price agreements with dealers, sanctioning dealers who fail to enter into advertising agreements and threatening, intimidating or coercing dealers that do not comply with suggested advertised prices are all conduct which, depending on the circumstances, could fall within the *per se* ban. See, e.g., *Pioneer*, Docket No. C-2755, Order Reopening and Modifying Order Issued October 25, 1975 (April 8, 1992) at 25-26. Although advertising price arrangements standing alone may not be *per se* unlawful, threats, or Onkyo "taking any [other] action" to hinder or preclude the lawful use of its trademarks in conjunction with the sale of its products, may come dangerously close to or be used in conjunction with unlawful resale price maintenance activities.

<sup>48</sup> Paragraph II of the order reads as follows:

*It is further ordered*, That respondent 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:

THE RESALE PRICES QUOTED HEREIN ARE SUGGESTED ONLY.

YOU ARE FREE TO DETERMINE YOUR OWN RESALE PRICES.

100 FTC at 64.

Paragraph IV of the order provides:

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

*Id.*

<sup>49</sup> Petition at 23. In support of its position, Onkyo cites the Commission's Policy Statement Regarding Duration of Competition Orders, 59 Fed. Reg. 45,286, 45,288 (September 1, 1994) (supplemental provisions that impose affirmative obligations similar to those imposed by paragraph II of the order terminate after three or five years). In addition, recent consent orders limited comparable relief to five years. See, e.g., *Reebok*, Docket No. C-3592, *Keds*, Docket No. C-3490, *Nintendo of America, Inc.*, 114 FTC 702 (1991) and *Kreepy Krauly USA, Inc.*, 114 FTC 777 (1991). Similarly, fencing-in provisions similar to paragraph IV of the order usually expire within ten years. See 60 Fed. Reg. 42,569, 42,571 (August 16, 1995). See also *Reebok* and *Keds*.

<sup>50</sup> Green Aff. ¶¶ 25-26.

of the order. Onkyo's Petition, however, does not include any information supporting its assertion that it incurs significant costs in connection with its obligations under paragraphs II and IV of the order.

Paragraph II restricts Onkyo's use of suggested resale prices. Specifically, Onkyo must clearly and conspicuously state on each page of any material on which such suggested price is stated that such price is suggested only and that dealers are free to determine their own resale prices. In Clinique<sup>51</sup> the Commission concluded that a similar provision addressed conduct (suggested prices) that may not be unlawful and was no longer necessary to ensure compliance with the law. Consistent with Clinique, paragraph II should be set aside.

Onkyo's request to delete the paragraph IV requirement to distribute a copy of the order to present and future employees having sales, advertising or policy responsibilities with respect to resale prices is denied. In support of its request, Onkyo states that it "has been in effect for 13 years and has outlived its usefulness."<sup>52</sup> Paragraph IV has not "outlived its usefulness." Onkyo's failure to comply with this provision may have contributed to the violation of the order alleged in the civil penalty complaint recently filed by the Commission against Onkyo. To help prevent future violations of the order by Onkyo, the order distribution requirement should be retained for two years after the date on which the modified Onkyo order becomes final, to familiarize Onkyo employees with the modified order and help ensure Onkyo's compliance with the order's core provisions.

9. Onkyo's request that the Commission retain the order's original sunset date.

Onkyo requests that the Commission "exercise its discretion"<sup>53</sup> to provide for termination of the order consistent with Section 3.72(b)(3)(i) of the Rules<sup>54</sup> and with the Commission's Statement of Policy with Respect to Duration of Competition and Consumer Protection Orders.<sup>55</sup> Specifically, Onkyo requests the Commission to add a new paragraph to the order stating that: "*It is further ordered,*

---

<sup>51</sup> Clinique Laboratories, Inc., Docket No. C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330.

<sup>52</sup> Petition at 24.

<sup>53</sup> Petition at 29.

<sup>54</sup> Section 3.72(b)(3)(i) of the Rules states that "an order issued by the Commission before August 16, 1995, will be deemed, without further notice or proceedings, to terminate 20 years from the date on which the order was first issued . . . ."

<sup>55</sup> See Fed. Reg., Vol. 60, No. 158 (August 16, 1995) at 42,569.

That this order shall terminate on July 2, 2002."<sup>56</sup> In support of its request, Onkyo asserts that the "modest . . . circumstances of the recent enforcement proceeding"<sup>57</sup> justify "establishing the sunset date for the order as twenty years from its original entry."<sup>58</sup>

Onkyo's request is denied. On July 25, 1995, the Commission brought a civil penalty action against Onkyo because it had reason to believe the order had been violated. The usual presumption that Onkyo should not remain subject to the order beyond twenty years does not apply and the Onkyo order should remain in effect until July 25, 2015, consistent with Section 3.72(b)(3)(ii) of the Rules.<sup>59</sup> But for the filing of the complaint against Onkyo alleging the order violations, the order in this matter would have terminated on July 2, 2002, pursuant to Section 3.72(b)(3)(i) of the Rules.

The Policy Statement and the Rules are clear on the duration of existing competition orders. Existing administrative orders automatically sunset twenty years after they were issued, unless the Commission or the Department of Justice has filed a complaint (with or without an accompanying consent decree) in federal court to enforce such order pursuant to Section 5(l) of the FTC Act during the twenty years preceding the adoption of the Policy Statement. In that event, "the order would run another twenty years from the date that the most recent complaint was filed with the court."<sup>60</sup> The Commission can adopt a different sunset period for core provisions "[o]nly in an exceptional case,"<sup>61</sup> which has not been shown.

The request to terminate the order twenty years from the date of its entry is denied. A new paragraph is added to the order stating that the order shall terminate on July 25, 2015.<sup>62</sup>

<sup>56</sup> Petition at 28-29.

<sup>57</sup> *Id.* at 29. According to Onkyo, it consented to settle charges involving only supplemental order provisions. In addition, Onkyo states that it was not charged with *de novo* violations and with conspiring with its dealers to enter into unlawful RPM schemes. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Section 3.72(b)(3)(ii) states that "where a complaint alleging a violation of the order was . . . filed . . . in federal court by the United States or the Federal Trade Commission while the order remains in force . . . [the] order subject to this paragraph will terminate 20 years from the date on which a court complaint . . . was filed . . . ."

<sup>60</sup> *See* Fed. Reg., Vol. 60, No. 158 (August 16, 1995) at 42,481. The filing of such a complaint, however, does not affect the duration of the order if the complaint is dismissed or the 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. In the enforcement action against Onkyo, the complaint was not dismissed and there was no court ruling that Onkyo did not violate the order.

<sup>61</sup> *Id.* at 42,573 n.18.

<sup>62</sup> Onkyo may file another petition to reopen and modify the order pursuant to Section 5(b) of the FTC Act, 15 U.S.C. 45(b), or Section 2.51 of the Rules, 16 CFR 2.51. If Onkyo files such a petition requesting the Commission to terminate the order prior to its termination date, it would have to make a satisfactory showing that changed conditions of law or fact require reopening of the order or that the public interest so requires.

## V. CONCLUSION

Onkyo has shown that reopening the order is in the public interest and that the order should be modified as described above.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's order in Docket No. C-3092 be, and it hereby is, modified, as of the effective date of this order, as follows:

(a) By adding the following paragraphs at the end of the order:

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

*It is further ordered*, That nothing in this order shall prohibit respondent from announcing any resale prices for any products in advance and unilaterally refusing to deal with or terminating any dealer who fails to advertise, offer for sale or sell such products at the announced prices.

(b) Onkyo's request to delete the words "directly or indirectly," from the order's preamble is denied.

(c) Onkyo's request to delete the words "advertise, promote," from subparagraph I.1 is denied.

(d) Subparagraphs I.1, I.2 and I.3 are modified by deleting the words "directly or indirectly,".

(e) Onkyo's request to delete the word "Requesting" from subparagraph I.2 is denied.

(f) Onkyo's request to delete subparagraph I.4, or, in the alternative, to delete the words "requesting, or" from subparagraph I.4 is denied; subparagraph I.4 is modified to read as follows:

— Requesting or requiring that any dealer refrain from or discontinue selling any product at any resale price.

(g) Onkyo's request to delete subparagraph I.3 is denied; subparagraph I.3 is modified to read as follows:

Requesting or requiring any dealer to report the identity of any other dealer who deviates from any resale price.

(h) Onkyo's request to delete subparagraph I.5 is denied; subparagraph I.5 is modified to read as follows:

Conducting any surveillance program to determine whether any dealer is offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold.

(i) Onkyo's request to delete subparagraph I.6 is denied; subparagraph I.6 is modified to read as follows:

Coercing, or taking any action (other than termination) to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold, is selling or is suspected of selling any product.

(j) Onkyo's request to delete subparagraph I.7 is denied.

(k) Paragraph II of the order is set aside.

(l) Onkyo's request to delete paragraph IV is denied; paragraph IV is modified to read as follows:

*It is further ordered*, That for a period ending two (2) years from the date this order becomes final, the respondent shall forthwith distribute a copy of the July 2, 1982, order in Docket No. C-3092, as modified, to all operating divisions of said corporation, and to present and future personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of the order in Docket No. C-3092, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

(m) Onkyo's request to terminate the order on July 2, 2002 is denied; the order is modified by adding the following paragraph:

*It is further ordered*, That the order in Docket No. C-3092, as modified, shall terminate on July 25, 2015.

Commissioner Starek concurring in the result only.

IN THE MATTER OF  
GREY ADVERTISING, INC.

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

*Docket C-3690. Complaint, Oct. 30, 1996--Decision, Oct. 30, 1996*

This consent order prohibits, among other things, the New York-based advertising agency, that handled the Hasbo, Inc., paint-sprayer toy account, from using deceptive demonstrations or otherwise misrepresenting the performance of any toy.

*Appearances*

For the Commission: *Rosemary Rosso and Michael Ostheimer.*

For the respondent: *Leonard Orkin, Kay, Collyer & Boose, New York, N.Y.*

COMPLAINT

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

PARAGRAPH 1. Respondent Grey Advertising, Inc. is a New York corporation, with its principal office or place of business at 777 Third Avenue, New York, New York.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Hasbro, Inc., and prepared and disseminated advertisements to promote the sale of Colorblaster Design Toys, spray painting toys.

PAR. 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.

PAR. 4. The Colorblaster Design Toy consists of a plastic drawing tray with an oblong plastic air tank underneath. An attached handle is used to pump up pressure inside the air tank. Special color pens are inserted into a sprayer connected to a hose attached to the air tank. Several sets of stencils, four color pens and blank paper are included with the toy. The enclosed instructions state: "Fully extend

handle and pump it quickly 50 strokes. . . The more you pump, the more you spray."

PAR. 5. Respondent has disseminated or has caused to be disseminated advertisements for the Colorblaster Design Toy ("Colorblaster"), including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements and depictions:

A.

VIDEO

Children playing with a Colorblaster.  
Tight shot of hand spraying stencil and removing it to reveal a picture of a car followed by a scene of children using the Colorblaster.  
Hand pumping toy four times.  
Several scenes of the Colorblaster spraying stencils and quickly creating multi-colored pictures.  
Girl pumping toy twice.  
Red spray filling screen.  
(Exhibit A, television advertisement).

AUDIO

Boy: It's a blast!  
Song: Something hip just blew into town spraying art with a blast of air. It's the Colorblaster.  
Girl: Nothing like it anywhere!  
Boy: It's a blast!  
Song: PPPump, pump...  
Song: Spray. Blast away. Spray'n stencils. Hot designs. Spray cool colors. Pictures so fine.  
Boy: Wild!  
Song: It's the Colorblaster.  
Spraying art with a blast of air.

B.

VIDEO

Hand pumping toy four times.  
Super: FEEL  
Super: REAL  
Close-up of the Colorblaster  
Tight shot of hand spraying car stencil and removing stencil to reveal multi-colored picture of car followed by shot of boy free spraying the car picture.  
Split-screen image of hand pumping toy four times.  
Several scenes of the Colorblaster spraying stencils and quickly creating multi-colored pictures.  
Hand pumping toy three times. —  
Super: FEEL  
Super: REAL  
The Colorblaster.  
(Exhibit B, television advertisement).

AUDIO

Announcer: Get the feel...  
Announcer: of the real...  
Announcer: Colorblaster.  
Song: The super hot way to spray with a blast of air.  
Boy: Wow!  
Song: Pump, pump. Spray.  
Song: Blast away. The real Colorblaster.  
Announcer: Get the feel...  
Announcer: Of the real...  
Announcer: Colorblaster.

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five,

including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that the demonstrations in the television advertisements of the operation of the Colorblaster Design Toy were unaltered and that the results shown accurately represent the performance of actual, unaltered Colorblaster Design Toys under the depicted conditions.

PAR. 7. In truth and in fact, the demonstrations in the television advertisements of the operation of the Colorblaster Design Toy were not unaltered and the results shown do not accurately represent the performance of actual, unaltered Colorblaster Design Toys under the depicted conditions. Among other things, the Colorblaster Design Toy depicted in the advertisements was not manually pumped to provide the air pressure necessary to operate the paint sprayer. Instead, a motorized air compressor was attached to the Colorblaster Design Toy to provide the air pressure necessary to operate the paint sprayer, making it appear that children can operate the Colorblaster Design Toy and complete multi-part stencils with a small amount of pumping and little effort. Therefore, the representations set forth in paragraph six were, and are, false and misleading.

PAR. 8. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that children can operate the Colorblaster Design Toy and complete multi-part stencils with a small amount of pumping and little effort.

PAR. 9. In truth and in fact, children cannot operate the Colorblaster Design Toy and complete multi-part stencils with a small amount of pumping and little effort. To operate the Colorblaster Design Toy and complete multi-part stencils, children must engage in substantial pumping and significant manual effort. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Respondent knew or should have known that the representations set forth in paragraphs six and eight were, and are, false and misleading.

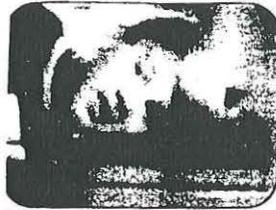
PAR. 11. The acts and practices of the respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

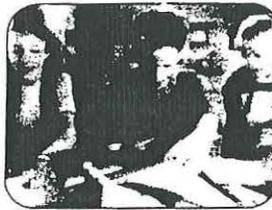
TV

PRODUCT: KENNER COLORBLASTER  
TITLE: "SOMETHING HIP"  
PROGRAM: MUPPET BABIES  
STATION: WNYW

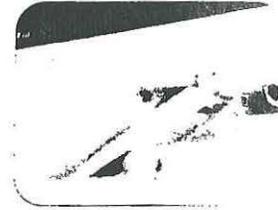
91-10106  
9-15-91 30  
(NEW YORK) 2:54PM



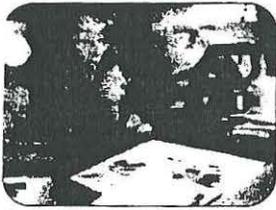
BOY: It's a blast!



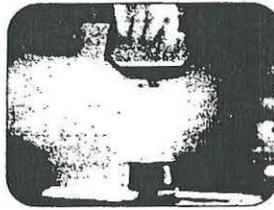
MAN SINGS: Something hip just  
blew into town, spraying



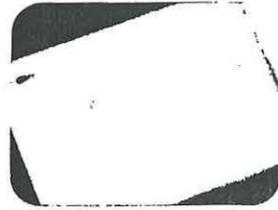
art with a blast of air.



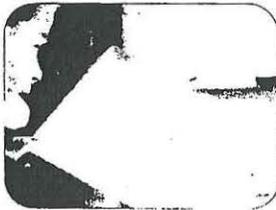
CHORUS: It's the Colorblaster!  
GIRL: Nothing like it anywhere!  
BOY'S VOICE: It's a blast!



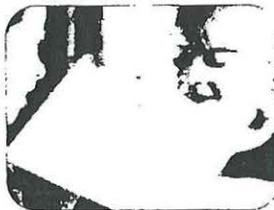
MAN: Pump, pump spray, blast  
away.



MAN SINGS: Spray 'n stencils hot  
designs, spray cool colors, pictures  
so fine!



BOY: Wild!



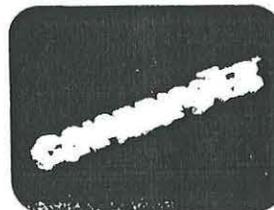
CHORUS: It's the Colorblaster!



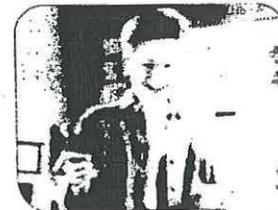
MAN SINGS: Spraying art with a  
blast of air.



ANNCR: Extra pens and stencils  
sold separately.



BOY'S VOICE: Colorblaster!



BOY: Yo, it's a blast. (MUSIC)

Exhibit A

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Wides Media TV Feature: endeavor to ensure the accuracy of material provided by it. It cannot be responsible for mistakes or omissions.

Complaint

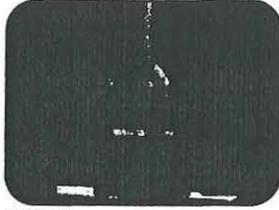
EXHIBIT B

**RTV**

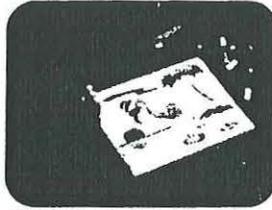
PRODUCT KENNER COLOR BLASTER  
TITLE:  
PROGRAM STATION BREAK  
STATION WPIX

09 17 93  
(NEW YORK)

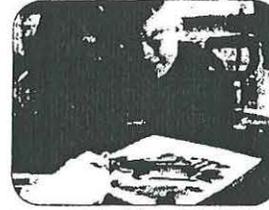
5:57PM



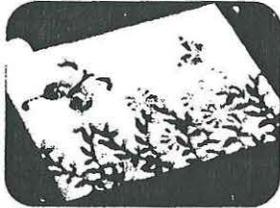
(MUSIC)



ANNCR: Get the feel of the real Color Blaster! CHORUS: The super hot way



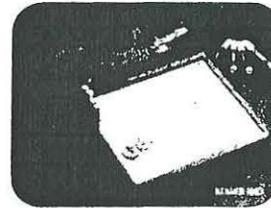
to spray with a blast of air. BOY: Wow! MEN SING: Pump pump, spray.



blast away.



EXTRA PENS AND STENCILS SOLD SEPARATELY.  
CHORUS: The real Color Blaster. ANNCR: Extra pens and hot new stencils sold separately.



Get the feel of the real Color Blaster. (MUSIC OUT)

Exhibit B

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE  
While Radio TV Reports endeavors to ensure the accuracy of material supplied by it, it cannot be responsible for omissions or inaccuracies.

## 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 complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, 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 complaint, a statement that the signing of the 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 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 Grey Advertising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office or place of business at 777 Third Avenue, New York, New York.

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

## ORDER

## I.

*It is ordered*, That respondent Grey Advertising, Inc., a corporation, its successors and assigns, and its officers, agents, representatives 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 toy in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. In connection with any advertisement depicting a demonstration, experiment or test, making any representation, directly or by implication, that the demonstration, experiment, or test depicted in the advertisement proves, demonstrates, or confirms any material quality, feature, or merit of any toy when such demonstration, experiment, or test does not prove, demonstrate, or confirm the representation for any reason, including but not limited to:

1. The undisclosed use or substitution of a material mock-up or prop;
2. The undisclosed material alteration in a material characteristic of the advertised toy or any other material prop or device depicted in the advertisement; or
3. The undisclosed use of a visual perspective or camera, film, audio, or video technique;

that, in the context of the advertisement as a whole, materially misrepresents a material characteristic of the advertised toy or any other material aspect of the demonstration or depiction.

Provided, however, that notwithstanding the foregoing, nothing in this order shall be deemed to otherwise preclude the use of fantasy segments or prototypes which use otherwise is not deceptive.

Provided further, however, that it shall be a defense hereunder that respondent neither knew nor had reason to know that the demonstration, experiment or test did not prove, demonstrate or confirm the representation.

B. Misrepresenting, in any manner, directly or by implication, any performance characteristic of any Colorblaster Design Toy or any other toy.

## II.

*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 a dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the respondent which may affect compliance obligations arising under this order.

## III.

*It is further ordered,* That respondent shall, within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertisements or other materials covered by this order.

## IV.

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

1. All materials that were relied upon in disseminating such representation;

2. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers, and complaints or inquiries from governmental organizations; and

3. Any and all affidavits or certificates submitted by an employee, agent, or representative of respondent to a television network or to any other individual or entity, other than counsel for respondent, which affidavit or certification affirms the accuracy or integrity of a

demonstration or demonstration techniques contained in a toy advertisement.

## V.

This order will terminate on October 30, 2016, or twenty 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 paragraph in this order that terminates in less than twenty 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 paragraph.

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 paragraph as though the complaint was never 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.

## VI.

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

Complaint

122 F.T.C.

IN THE MATTER OF

## GREY ADVERTISING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3691. Complaint, Oct. 30, 1996--Decision, Oct. 30, 1996*

This consent order prohibits, among other things, the New York-based advertising agency, that handled The Dannon Company's Pure Indulgencé frozen yogurt account, from misrepresenting the fat, saturated fat, cholesterol, or calories in any frozen yogurt, frozen sorbet, and most ice cream products.

*Appearances*For the Commission: *Rosemary Rosso and Michael Ostheimer.*For the respondent: *Leonard Orkin, Kay, Collyer & Boose, New York, N.Y.*

## COMPLAINT

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

PARAGRAPH 1. Respondent Grey Advertising, Inc. is a New York corporation, with its principal office or place of business at 777 Third Avenue, New York, New York.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of The Dannon Company, Inc., and prepared and disseminated advertisements to promote the sale of Dannon Pure Indulgence frozen yogurt, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 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.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for Dannon Pure Indulgence frozen yogurt ("DPI"), including but not necessarily limited to the attached

Exhibit A. This advertisement contains the following statements and depictions:

VIDEO

Super: **BEWARE:** THE FOLLOWING GRAPHIC IMAGES MAY PROMPT FEELINGS OF GUILT AMONG VIEWERS.

Close-ups of frozen dessert.

Super: HEY

Super: IT'S OK

Man with frozen dessert container.

Scoops of frozen dessert falling into dish.

Super: It's FROZEN YOGURT

Close-up of container of DPI.

Woman eating DPI. Super: It's Pure Heaven

Scoops of DPI variously identified in supers as caramel pecan, heath bar crunch, and cookies n cream.

Containers of DPI. Super: New Dannon Pure Indulgence Frozen Yogurt

Scoops of DPI. Super: PROCEED WITHOUT CAUTION

(Exhibit A, television advertisement).

AUDIO

Announcer: The following graphic images may prompt feelings of guilt among viewers.

Announcer: New Dannon Pure Indulgence Frozen Yogurt.

Announcer: Very well... Proceed without caution.

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that Dannon Pure Indulgence frozen yogurt is low in fat, low in calories, and lower in fat than ice cream.

PAR. 6. In truth and in fact, at the time the advertisements were disseminated, certain flavors of Dannon Pure Indulgence frozen yogurt were not low in fat, not low in calories, and not lower in fat than many ice creams. Therefore, the representations set forth in paragraph five were false and misleading.

PAR. 7. Respondent knew or should have known that the representations set forth in paragraph five were false and misleading.

PAR. 8. The acts and practices of the 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.

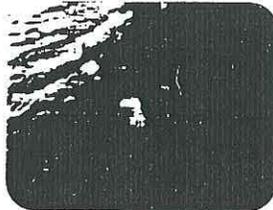
EXHIBIT A

# RTV

THE FOLLOWING GRAPHIC IMAGES  
MAY PROMPT FEELINGS OF

AMONG VIEWERS.

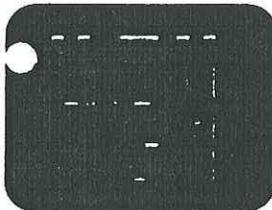
ANNCR: The following graphic images may prompt feelings of guilt among viewers



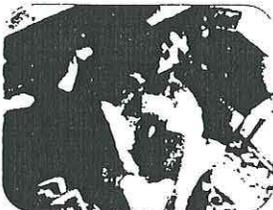
MUSIC



MUSIC



MUSIC



MUSIC



MUSIC



MUSIC



MUSIC



MUSIC



MUSIC



MUSIC



MUSIC

ON VIDEO-TAPE CASSETTE

## 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 complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, 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 complaint, a statement that the signing of the 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 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 Grey Advertising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office or place of business at 777 Third Avenue, New York, New York.

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

## ORDER

## I.

*It is ordered,* That respondent Grey Advertising, Inc., a corporation, its successors and assigns, and its officers, agents, representatives 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 frozen yogurt, frozen sorbet or ice cream product (excluding all other food or confection products in which ice cream is an ingredient comprising less than fifty percent of the total weight of the involved product) in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of fat, saturated fat, cholesterol, or calories in any such product. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

## II.

Nothing in this order shall prohibit respondent from making any representation that is specifically permitted in labeling for any frozen yogurt, frozen sorbet or ice cream by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

## III.

*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 a dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the respondent which may affect compliance obligations arising under this order.

## IV.

*It is further ordered,* That respondent shall, within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertisements or other materials covered by this order.

## V.

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

1. All materials that were relied upon in disseminating such representation; and
2. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers, and complaints or inquiries from governmental organizations.

## VI.

This order will terminate on October 30, 2016, or twenty 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 paragraph in this order that terminates in less than twenty 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 paragraph.

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 paragraph as though the complaint was never 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.

## VII.

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

## IN THE MATTER OF

## RUSTEVADER CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket 9274. Complaint, Aug. 30, 1995--Decision, Oct. 30, 1996*

This consent order prohibits, among other things, David F. McCready, a Pennsylvania-based former owner and officer of RustEvader Corporation, from representing that the products he markets are effective in preventing or substantially reducing corrosion in motor vehicle bodies or making any representation concerning the performance, efficacy or attributes of such products, unless such representations are true and the respondent possesses competent and reliable evidence to substantiate such claims, and from misrepresenting the existence or results of any test or study. In addition, the consent order requires the respondent to pay \$200,000 in consumer redress.

*Appearances*

For the Commission: *Michael Milgrom, John Mendenhall, Brinley H. Williams and Dana C. Barragate.*

For the respondents: *Keith Whann and Jay McKirahan, Whann & Associates, Dublin, OH. Mark Wendekier, Patton, PA.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that RustEvader Corporation, and David F. McCready, individually and as an officer of RustEvader Corporation (referred to collectively herein as "respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent RustEvader Corporation a/k/a Rust Evader Corporation, sometimes d/b/a REC Technologies ("REC") is a Pennsylvania corporation with its office and principal place of business located at 1513 Eleventh Avenue, Altoona, Pennsylvania.

At times material to the allegations of this complaint, respondent David F. McCready ("McCready") has been the president and an owner and director of REC. His business address is the same as that

of REC. Individually, or in concert with others, McCready has directed, formulated and controlled the acts and practices of REC, including the acts and practices alleged in this complaint.

PAR. 2. Respondents manufacture, label, advertise, offer for sale, sell, and distribute an electronic corrosion control device for use on automobiles, trucks and vans (hereinafter "motor vehicles") under the names Rust Evader, Rust Buster, Electro-Image, Eco-Guard and others (referred to collectively herein as "Rust Evader").

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

PAR. 4. Respondents have disseminated, or have caused to be disseminated, advertisements and promotional materials for the Rust Evader including, but not necessarily limited to, the attached Exhibits A through E. These advertisements and promotional materials contain the following statements:

(a) Rust Buster Electronic Corrosion Control

This is the original multi-patented Electronic Corrosion Control for automobiles. Over a decade of test market experience and Consumer satisfaction guarantees our product as the best in today's hi-tech market.

MOST COMMONLY ASKED QUESTIONS

What can I expect from this product? Corrosion rate is reduced and auto body life is extended.

....

The Rust Buster C.D.O.I. interferes with the rusting process. Since the rusting process is gradual, the amount of energy consumed is very small. Rust Buster C.D.O.I. effectively reduces corrosion rate.

....

Rust Buster C.D.O.I. provides a source of free electrons that interfere with coupling of ferrous metal electrons with oxygen -- reducing the corrosion rate.

....

... complete interference in the rusting process cannot be expected, but rust retardation is dramatically demonstrated.

....

You want your car to look good while you're driving it, when you are ready to sell or trade it and particularly if you decide to give the car a major overhaul. If you lease a car, you are responsible to maintain a certain cosmetic standard or pay a penalty. Rust Buster C.D.O.I. wants your car to last and maintain its maximum value.

....

Over a decade of proven effectiveness. Thousands of satisfied customers. Inside-out & outside-in corrosion reduction. (Exhibit A)

(b) The invisible shield of protection for your vehicle!

The invisible shield of protection used worldwide!

359

Complaint

Protect your car, truck or van 24 hours a day -- rain or shine -- with the world leader in electronic automotive rust control! The RustEvader \* system retards rust and corrosion, and protects your vehicle with a lifetime guarantee. Common nicks, scratches and abrasions won't deteriorate into rust-through damage from the outside in -- or inside out. The RustEvader\* system safeguards your investment. . . .

- ....
- helps increase your car's value at trade-in time
- protection against rust-through damage as result of stone chips, abrasions, salt, snow, sleet and sea-spray
- the original multi-patented electronic corrosion control device
- over 10 years of consumer satisfaction

....  
Your best investment in your vehicle's future value!

\*See printed warranty for exact description of warranty coverage and exclusions!  
(Exhibit B)

(c) Rust Evader

ELECTRONIC CORROSION CONTROL

The RustEvader interferes with rusting process. Electro-chemists have made great progress in understanding corrosion. RustEvader Corp. has applied the results of this progress in developing the RustEvader Automotive Corrosion Control System and since the rusting process is gradual, the amount of energy consumed is very small -- RustEvader reduces the corrosion rate.

RustEvader Electronic Corrosion Control gives you unmatched protection from salt, snow, sleet and sea spray corrosion. Rust perforation (rust-through) from either side of the sheet metal is warranted not to occur on your vehicle.

....  
THE INTELLIGENT APPROACH TO PRESERVING AUTOMOTIVE APPEARANCE

- ....
- \* Established track record in reducing corrosion -- documented by users.
- \* Recapture your investment at trade-in time. . .for New and Used cars. (Exhibit C)

(d) NOW!! ELECTRONIC CORROSION CONTROL

Rust Evader Automotive Corrosion Control

....  
The Rust Evader interferes with the rusting process. . . . Environmental conditions that promote rusting also prompt a counter response from the RustEvader system. Energy for the electron bath is provided by the car's battery and since the rusting process is gradual, the amount of energy consumed is very small -- RustEvader reduces the corrosion rate. "The Logical Choice for Controlling Rust" (Exhibit D, reduced copy of dealer display board)

(e) The Rust Buster system Beats Rust!

The Rust Buster system keeps your car, truck or van beautiful for years! Common nicks, scratches and road salt won't deteriorate into rust-through damage, so you'll save on costly autobody repairs and preserve your investment!

The Rust Buster system also offers unmatched protection! Unlike traditional undercoatings, it protects hard to reach, corrosively vulnerable areas by impressing electrons throughout the metal body panels of the vehicle and interfering [sic] with oxygen's natural ability to couple with these ferrous metals. (Exhibit E, reduced copy of dealer display board)

PAR. 5. Through the use of the trade names "Rust Evader" and "Rust Buster" and the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the promotional materials attached as Exhibits A-E, respondents have represented, directly or by implication, that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies.

PAR. 6. In truth and in fact, the Rust Evader is not effective in substantially reducing corrosion in motor vehicle bodies. Therefore, respondents' representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the trade names "Rust Evader" and "Rust Buster" and the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the promotional materials attached as Exhibits A-E, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 8. In truth and in fact, at the time they made the representation set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. In connection with the promotion and sale of the Rust Evader, respondents have disseminated or caused to be disseminated to distributors and dealers materials to conduct a demonstration of the efficacy of the Rust Evader. Respondents have also disseminated depictions of the same demonstration, of which Exhibit G, attached hereto, is an example. The demonstration places two pieces of metal in a transparent tank containing salt water. One piece of metal is connected to a Rust Evader and the other is not. In connection with this demonstration, respondents make, and instruct the distributors and dealers to make the following (or similar) statements:

This Laboratory Test provides the "worst case scenario" to test RustEvader Technology. Two (2) identical pieces of sheet steel are suspended in salt bath. The RustEvader protects Sample "A" while Sample "B" rusts severely. (Exhibit G)

PAR. 10. Through the use of the depictions, materials and statements set forth in paragraph nine, respondents have represented,

directly or by implication, that the demonstration described in paragraph nine accurately represents how the Rust Evader protects motor vehicle bodies from corrosion.

PAR. 11. In truth and in fact, the demonstration described in paragraph nine does not accurately represent how the Rust Evader protects a motor vehicle body from corrosion. The process utilized in the demonstration -- impressed current cathodic protection -- is much more effective under water than under conditions that a motor vehicle would normally encounter. Therefore, respondents' representation set forth in paragraph ten was, and is, false and misleading.

PAR.12. In connection with the promotion and sale of Rust Evader, respondents have disseminated or have caused to be disseminated, to distributors and dealers, reports of laboratory and other tests performed on the Rust Evader. Some of these reports represent, directly or by implication, that the reported test constitutes scientific proof that Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies. In addition, respondents have represented orally, directly or by implication, that these tests constitute scientific proof that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies.

PAR. 13. In truth and in fact, such tests do not constitute scientific proof that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies. Therefore, respondents' representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. In connection with the sale of the Rust Evader, respondents have provided purchasers with a limited warranty in the form attached hereto as Exhibit F. That warranty contains the following provision:

INSPECTIONS REQUIRED: The vehicle must be inspected every 24 months within 30 days of anniversary of installation date, by an authorized Rust Evader Dealer who may charge his current labor rate up to one hour for the inspection. FAILURE TO HAVE VEHICLE INSPECTED AS REQUIRED VOIDS THE WARRANTY.

PAR. 15. The warranty provision described in paragraph fourteen is in violation of Section 102(c) of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act (15 U.S.C. 2302(c)) because it conditions a warranty pertaining to a consumer product actually costing the consumer more than \$5 on the consumer's use of

a service (other than a service provided without charge) which is identified by brand, trade, or corporate name.

PAR. 16. In providing advertisements, promotional materials and product demonstrations, such as those referred to in paragraphs four through thirteen, to their distributors and dealers, respondents have furnished the means and instrumentalities to those distributors and dealers to engage in the acts and practices alleged in paragraphs five through thirteen.

PAR. 17. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

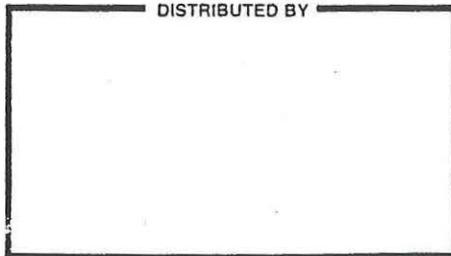
EXHIBIT A

THE INTELLIGENT APPROACH TO PRESERVING AUTOMOTIVE APPEARANCE

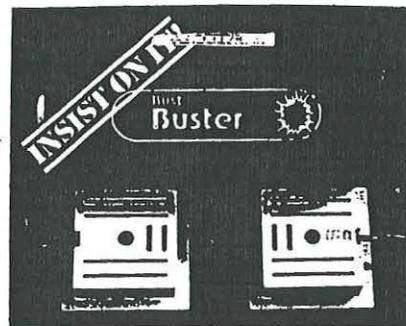
Technology That Works.  
Benefits You'll Appreciate.

- Over a decade of proven effectiveness.
- Thousands of satisfied customers.
- Inside-out & outside-in corrosion reduction
- Transferrable to a second automobile.
- No interference with your vehicle's manufacturer warranty.
- Uses less power than the car's clock.
- No holes drilled - autobody integrity is preserved.
- Safe - no hazardous chemicals.
- Liability Warranties: A comprehensive \$1 million dollar product liability policy is underwritten by major insurance companies.
- Sold around the world.

EASY INSTALLATION - INSTALLS UNDER THE HOOD IN JUST 20 MINUTES.



"Rust Buster" is a Registered Trademark of Rust Evader Corp., Altoona, PA.  
Entire contents Copyright © 1993, Rust Evader Corp., Altoona, PA.  
All Rights Reserved  
"Rust Buster" system U.S. Patents #4,647,353, #4,828,665, #4,915,808, #4,921,588, #4,950,372, and #5,102,514.  
Foreign Patents Pending



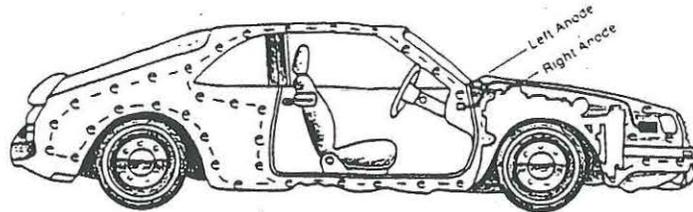
This is the original multi-patented Electronic Corrosion Control for automobiles. Over a decade of test market experience and Consumer satisfaction guarantees our product as the best in today's hi-tech market.

MOST COMMONLY ASKED QUESTIONS

- What can I expect from this product? *Corrosion rate is reduced and auto body life is extended.*
- Will this product effect any other electrical component in my vehicle? *If properly installed, No!*
- If my car has been chemically rustproofed, is this product compatible with Rust Buster? *Yes.*
- Since this product consumes a small amount of electrical energy, how long would it take to drain my battery below starting power? *Up to 30 days.*
- How long is this product guaranteed? *It is guaranteed for as long as you own it. Replacement - Free of charge.*
- What kind of vehicles can benefit from this product? *automobile manufactured after 1980, and most light trucks and vans.*
- Is it transferrable from vehicle to vehicle? *Yes, however the purchase of a reinstallation kit is necessary.*
- Do you have customer assistance available? *Yes, through a nationwide WATT'S number, 1-800-458-3474.*

OUR PRIDE IS CUSTOMER SATISFACTION

## EXHIBIT A



*The Rust Buster® C.D.O.I. interferes with the rusting process. Since the rusting process is gradual, the amount of energy consumed is very small. Rust Buster® C.D.O.I. effectively reduces corrosion rate.*

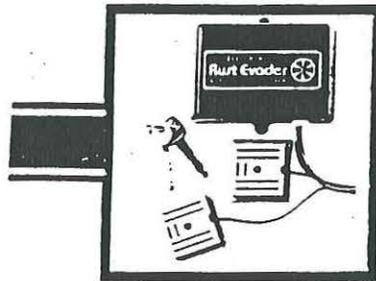
The most common way of preventing automotive corrosion is to apply a barrier between oxygen and the metal. This is why we paint automobiles. The paint is a suitable barrier. When the metal loses paint or is incompletely painted, corrosion begins and continues until all of the metal is converted to an oxide or rust. Extra barriers have been developed such as undercoatings, rustproofing and paint sealants; but they are effective only as long as they insulate the metal from oxygen. Paint, rustproofing and sealants are known as di-electrics (not permitting electron transfer). As long as these di-electrics are in place without any small breaks, cracks, or crevices, nicks, scratches or stone chips, the automotive body has a fair chance of surviving the environment. However, in the real world, a constant attack is underway to break down these barriers. Once broken, the barriers permit the migration of electrons from iron to oxygen – the result is rust and corrosion. Rust Buster® C.D.O.I. provides a source of free electrons that interfere with coupling of ferrous metal electrons with oxygen – reducing the corrosion rate.

#### Capacitive Discharge Oxidation Interference "CDOI"

Since automobiles are produced essentially totally coated with a di-electric barrier of paint and rustproofing, the need to protect breaks in these barriers is of significant importance. The Rust Buster® C.D.O.I. forces electrons to escape or exit at the very site where the barrier has broken down or worn away "CDOI" effect. Compromises had to be considered in the Rust Buster® C.D.O.I. design. Therefore, complete interference in the rusting process cannot be expected, but rust retardation is dramatically demonstrated.

You want your car to look good while you're driving it, when you are ready to sell or trade it and particularly if you decide to give the car a major overhaul. If you lease a car, you are responsible to maintain a certain cosmetic standard or pay a penalty. Rust Buster® C.D.O.I. wants your car to last and maintain its maximum value.

EXHIBIT B



Distributed By:



World Headquarters:  
 RustEvader Corporation  
 1513 11th Ave., Altoona, PA 16601, USA  
 800-458-3474 • 814/944-8700 • fax: 814/943-3752



**ET**  
 electronic technology

from  
**RustEvader**

The  
 invisible  
 shield of  
 protection  
 for your  
 vehicle!

**World's Leading  
 Electronic Automotive  
 Rust Control System!**

Complaint

122 F.T.C.

## EXHIBIT B

The invisible shield  
of protection used  
worldwide!

Protect your car, truck or van 24 hours a day — rain or shine — with the world leader in electronic automotive rust control! The RustEvader<sup>®</sup>\* system retards rust and corrosion, and protects your vehicle with a lifetime guarantee. Common nicks, scratches and abrasions won't deteriorate into rust-through damage from the outside in — or inside out. The RustEvader<sup>®</sup>\* system safeguards your investment — and helps preserve the environment!

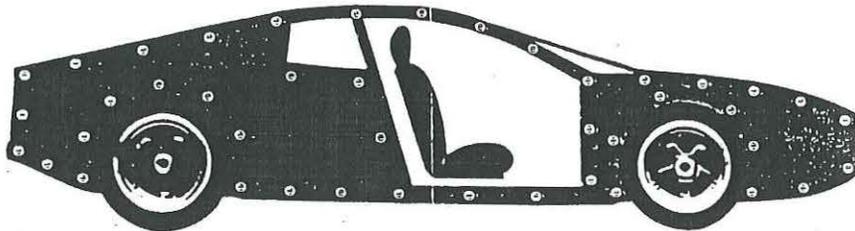
**ET**

**electronic technology**  
by RustEvader<sup>®</sup>\*

*The environmentally intelligent  
approach to protecting your  
automotive investment!*

- helps increase your car's value at trade-in time
- protection against rust-through damage as a result of stone chips, abrasions, salt, snow, sleet and sea-spray
- the original multi-patented electronic corrosion-control device
- over 10 years of consumer satisfaction
- nearly one million installed worldwide
- limited transferable lifetime new vehicle warranty\* and used vehicle warranties\* available
- insured by major international underwriters
- won't invalidate your vehicle's warranties
- won't interfere with vehicle electrical systems
- made in the USA!

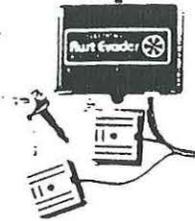
*Your best investment in your  
vehicle's future value!*



\*See printed warranty for exact description of warranty coverage and exclusions!  
© 1992 • "RustEvader" is patented and trademarked by RustEvader Corporation, Altoona, PA.

EXHIBIT C

RUSTEVADER® ET "EXTENDED TECHNOLOGY"



Specifications: Input Voltage: 12 Volt DC, Ground: (-) Negative, Current Draw: 23.4 ma, Anode Composition: "Carbosil™ Capsules" non sacrificial, Command Module Size: 3 1/2" x 3" x 1 1/4", Anode: 2" x 2" (2), Weight: 8 oz.

RustEvader® Wants Your Car To Last

RustEvader® products were designed for people who care about their car and understand the value of careful maintenance and effect on their pocketbook. RustEvader® wants your car to last and maintain it's maximum value.



- Paint Protector, Radiator Protector, Fabric Protector, Engine Oil Additive

DISCLAIMER

The warranty discussed in this brochure is for informational purposes only. Your warranty application provides the details of the warranty. Please read it thoroughly

RustEvader Corp 1513 11th Avenue P.O. Box 351 Altoona, PA 16603 814-944-8700 1 800-458-3474

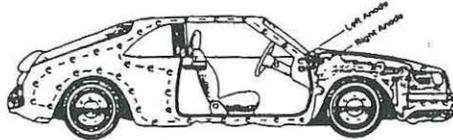
\*Lovers Carcare Copyright © 1990 RustEvader Corp. Altoona, PA. All Rights Reserved. RustEvader®, AEL®, Power Powder® are registered trademarks of RustEvader Corp. Altoona, PA. Rust Evader® System U.S. Patent # 4,921,588; 4,950,372. Power Powder® additive U.S. Patent # 4,886,122. Foreign Patents Pending.

Advertisement for Rust Evader featuring the slogan 'The Original Patented Rust Evader', an image of the product unit, and the text 'The World's Leading Electronic Rust Control System'. It also includes U.S. Patent numbers 4,921,588 and 4,950,372, and a stamp that reads 'EXHIBIT 6(a)'.

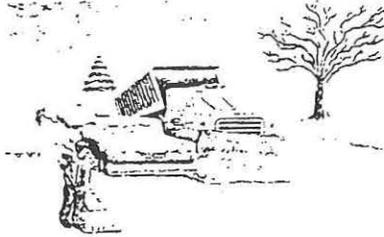
## EXHIBIT C

## Rust Evader®

ELECTRONIC CORROSION CONTROL

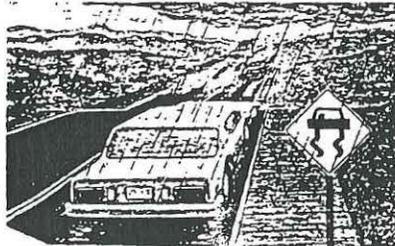


The RustEvader® interferes with rusting process. Electro-chemists have made great progress in understanding corrosion. RustEvader® Corp. has applied the results of this progress in developing the RustEvader® Automotive Corrosion Control System and since the rusting process is gradual, the amount of energy consumed is very small—RustEvader® reduces the corrosion rate.



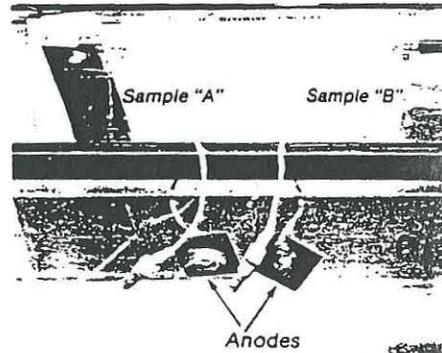
RustEvader® Electronic Corrosion Control gives you unmatched protection from salt, snow, sleet and sea spray corrosion. Rust perforation (rust-through) from either side of the sheet metal is warranted not to occur on your vehicle. (see actual warranty for details).

This is the original multi-patented Electronic Corrosion Control for automobiles. Over 10 years of consumer satisfaction and test market experience guarantees your dealing with the best and with the respect of the marketplace.



### THE INTELLIGENT APPROACH TO PRESERVING AUTOMOTIVE APPEARANCE

- ★ RustEvader® emphasizes customer satisfaction thousands in service worldwide.
- ★ Established track record in reducing corrosion — documented by users.
- ★ Recapture your investment at trade-in time...for New Used cars.
- ★ Used car warranty available depending upon age of ve and mileage.
- ★ Limited lifetime new car warranty, transferable to a se owner.
- ★ RustEvader® warrants that should the sheet metal of vehicle be perforated with/by rust, we will fix the ho
- ★ Consult RustEvader® Warranty Application for e description of coverage and exclusions.
- ★ Insured by major insurance companies.
- ★ RustEvader® is transferable from car to car.
- ★ Limited lifetime new car warranty available in the and Canada.
- ★ Optional 10 year limited new car warranty avai worldwide.



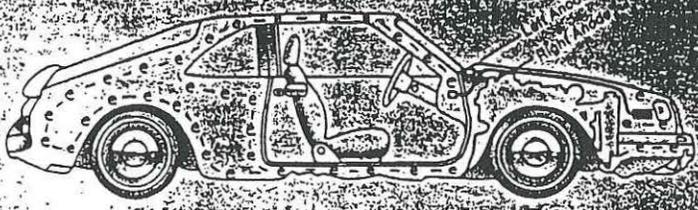
This Laboratory Test® provides the "worst case scenar to test RustEvader® Technology. Two (2) ident pieces of sheet steel are suspended in salt bath. T RustEvader® protects Sample "A" while Sample " rusts severely.

EXHIBIT D

# ELECTRONIC CORROSION CONTROL

## RUSTEVADER

### AUTOMOTIVE CORROSION CONTROL




---

**THE INTELLIGENT APPROACH TO  
PRESERVING AUTOMOTIVE APPEARANCE**

The RustEvader® overcomes the rusting process. Electrochemicals have made great progress in understanding corrosion. RustEvader® uses this applied the results of this progress in developing the RustEvader® Automotive Corrosion Control System. The RustEvader® impregnates a system built on the vehicle's surface that interferes with oxygen's ability to react with ferrous metals. Environmental conditions that promote rusting also prompt a counter response from the RustEvader® system. Energy for the electron path is provided by the car's battery and since the rusting process is gradual, the amount of energy consumed is very small — RustEvader® reduces the corrosion rate.

**The Logical Choice for Controlling Rust™**

- Recapture your investment at trade-in time for New and Used cars
- RustEvader® emphasizes customer satisfaction: thousands in service worldwide
- Limited lifetime new car warranty, transferable to a second owner
- Used car warranty available depending upon age of vehicle and mileage
- Insured by a major insurance company
- RustEvader® the original patented protection
- Protection you can keep and take with you when you sell your car

Exhibit D

Complaint

122 F.T.C.

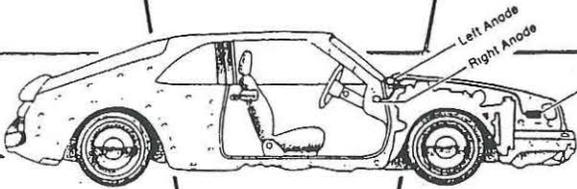
## EXHIBIT E

**NOW!**

THE ORIGINAL PATENTED

**Rust Buster®**

**WORLD'S LEADING AUTOMOTIVE  
ELECTRONIC RUST CONTROL SYSTEM**



DON'T BE  
FOOLED BY  
IMITATIONS!

### The Rust Buster® System Beats Rust!

The Rust Buster® system keeps your car, truck or van beautiful for years! Common nicks, scratches and road salt won't deteriorate into rust-through damage, so you'll take on costly auto-body repairs and preserve your investment.

The Rust Buster® system also offers unmatched protection for the road that deteriorates it protects hard to reach, otherwise vulnerable areas by impressing throughout the metal body panels of the vehicle and maintaining a continuous natural ability to couple with these corrosive metals.

- eliminates the need for other costly rustproofing methods
- uses less battery power than your car's clock
- won't void your vehicle's warranties
- transferable to a second vehicle
- protects rain or shine
- installs in 30 minutes
- small & compact device
- no chemical mess or smell
- year-after-year protection
- for 1977 and newer models
- environmentally safe

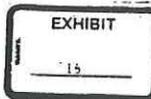
Exhibit E

Complaint

EXHIBIT F

RUST EVADER Electronic Corrosion Control LIMITED WARRANTY

RUST EVADER Electronic Corrosion Control LIMITED WARRANTY Plastic Card



Form with fields for RUST EVADER DEALER, EFFECTIVE DATE, RUST EVADER SERIAL NO, OWNER'S LAST NAME, FIRST NAME, TELEPHONE NUMBER, ADDRESS, CITY, STATE, ZIP, INSTALLATION DATE, MILEAGE, DATE OF MANUFACTURE, VEHICLE YEAR, MAKE, MODEL, VIN.

TERMS AND CONDITIONS Rust Evader Corp. warrants that the Rust Evader Electronic Corrosion Control when installed by an authorized Rust Evader Dealer on a new vehicle as described above...

ELECTRONIC CORROSION CONTROL UNIT Rust Evader Corp. warrants that the Rust Evader Electronic Corrosion Control Unit when installed on a new or used vehicle as described above...

NEW VEHICLE DEFINITION A new vehicle is one which was manufactured within 15 months of the date of this warranty and has 500 miles or fewer original miles...

USED VEHICLE DEFINITION A used vehicle is one manufactured within 3 years of the date of this warranty and has 150,000 miles or fewer original miles...

WHAT'S COVERED UNDER THIS WARRANTY The new or used vehicle described herein is warranted not to rust thru rust damage that perforates the metal in any of the following designated areas of the vehicle...

EXCLUSIONS 1. All areas not listed as designated areas including but not limited to engine power drive train heat exchangers electrical system exhaust system suspension and brake system bumpers and energy absorbing beams or crumple zones...

ADDITIONAL EXCLUSION This warranty is secondary to any existing vehicle manufacturer's warranty. Coverage is limited to the designated areas listed in this warranty...

INSPECTION REQUIRED The vehicle must be inspected every 24 months within 30 days of anniversary of installation date by an authorized Rust Evader Dealer...

RUST THRU CLAIM PROCEDURE If another rust thru warranty (vehicle manufacturer or other) was in effect at time this Rust Evader warranty is issued, owner shall file to the other existing warranty for claim service...

REPAIRS - CLAIMS All claims are subject to prior inspection of the vehicle and approval by Rust Evader Corp. Rust Evader Corp. is not responsible for matching the color of the repaired areas to the paint colors on the rest of the vehicle...

TRANSFER OF WARRANTY Upon change of ownership of the vehicle, the balance of the term of the warranty may be transferred to the new owner provided an authorized Rust Evader Dealer inspects the vehicle just prior to transfer...

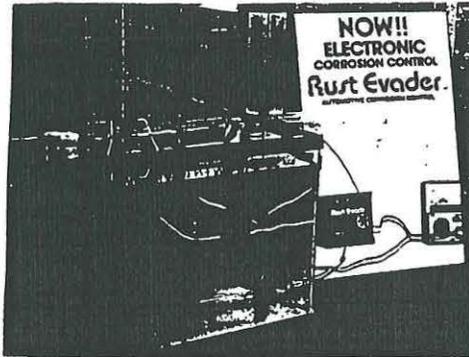
INSURANCE An insurance policy is in force for payments of claims. All claims, however, should be made as set forth in "RUST THRU CLAIM PROCEDURE" section. LIMITATIONS ON COVERAGES THIS WARRANTY COVERS ONLY THE DESIGNATED AREAS LISTED UNDER "WHAT'S COVERED UNDER THIS WARRANTY" ABOVE...

RUST EVADER CORP. WARRANTY TRANSFER APP. CAR. This application must be completed in full and given to the Rust Evader Dealer. The warranty for the balance of the term will be applied to the new owner.

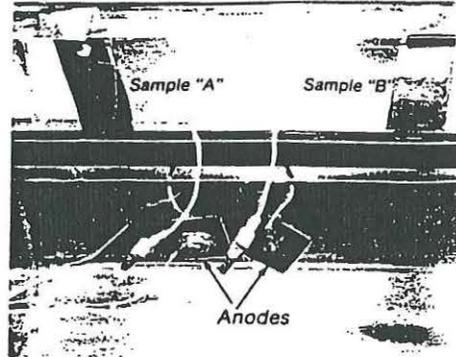
Form with fields for TRANSFER DATE, OWNER'S NAME, ADDRESS, CITY, STATE, ZIP, OWNER'S SIGNATURE, DEALER'S SIGNATURE.

EXHIBIT G

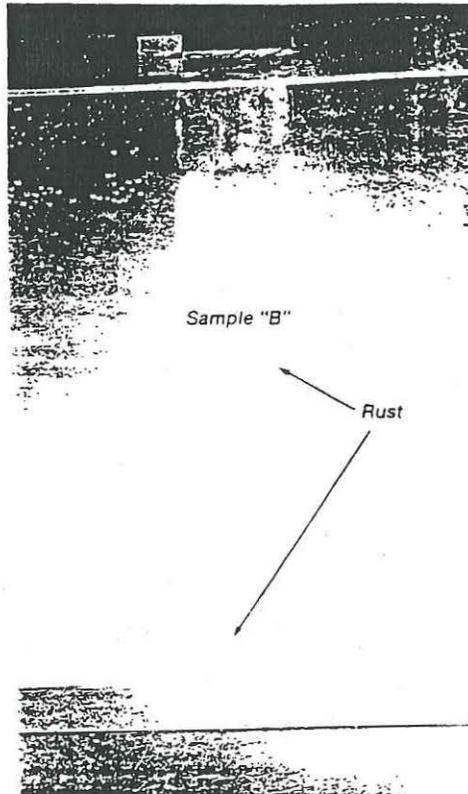
This Laboratory Test provides the "worst case scenario" to test RustEvader Technology. Two(2) identical pieces of sheet steel are suspended in salt bath. The RustEvader protects Sample "A" while Sample "B" rusts severely.



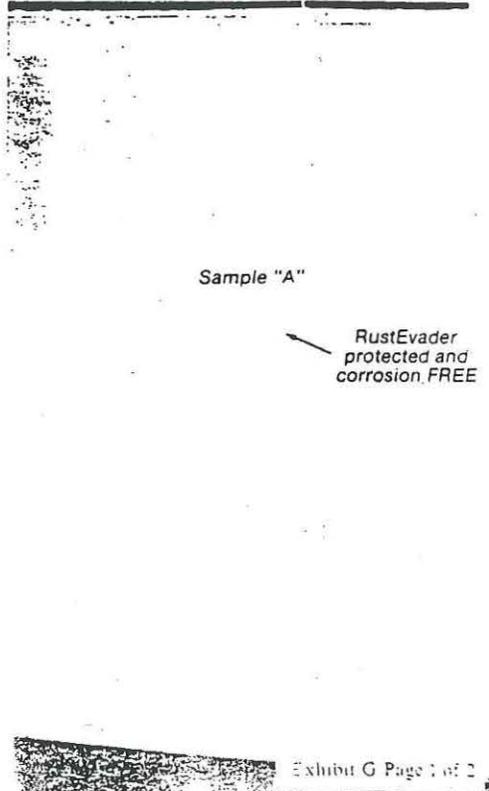
4 1/2 gallons of 10% NaCl Solution. 70° F



Sample "A" is made cathodic (-) No Rust



Sample "B" after 24 hours



## EXHIBIT G

**For Your Information!**

How do you judge an automotive value? Ask those in the industry and they will tell you that condition and appearance are paramount in the evaluation. If you are purchasing a new car, its value several years down the road is important, so condition and appearance dictate the value of the car at any point beyond the day it was manufactured. A RustEvader and good maintenance will pay off by increasing the projected value of your car by reducing the rate of corrosion and retard rusting. The RustEvader was designed specifically to retard cosmetic corrosion. The normal imperfections in the paint along with small scratches, nicks and scars are less susceptible to cancerous body corrosion, or that ugly, scabby appearance. It is hard to imagine that your new car is so vulnerable but just look at any car that is two or three years old and you can see the devastation that has already begun.

It is easy to understand how hidden corners, bends and shapes of sheet metal body parts are consumed by a hostile environment. Abrasions from sand, stone and salt and freezing and thawing of water activate microscopic corrosion sites and pores in the paint that rapidly advance into body panel failure. Even galvanized sections that have been welded or bent in the factory-forming process are open to attack.

Rust and corrosion occur when the three essential ingredients interact: oxygen, metal and moisture, (H<sub>2</sub>O). The metal provides the electrons to satisfy oxygen's craving for electrons. Moisture is needed to provide the pathway of electron transfer from iron to oxygen. The most common way of preventing automotive corrosion is to apply a barrier between oxygen and the metal. This is why we paint automobiles. The paint is a suitable barrier. When the metal loses paint or is completely painted corrosion begins and continues until all of the metal is converted to an oxide or rust. Extra barriers have been developed such as undercoatings, rustproofing and paint sealants; but they are effective only as long as they insulate the metal from oxygen and water. Paint, rustproofing and sealants are known as di-electrics (not permitting electron transfer). As long as these di-electrics are in place without any small breaks, cracks or crevices, nicks, scratches or stone chips, the automotive body has a fair chance of surviving the environment. However, in the real world, a constant attack is underway to break down these barriers. Once broken, the barriers permit the migration of electrons from iron over a moist pathway to oxygen — the result is rust and corrosion. RustEvader provides a source of free electrons that interferes with the migration and coupling of ferrous metal electrons with oxygen — reducing the corrosion rate.

Capacitive Discharge Oxidation Interference "CDOI"  
Since automobiles are produced essentially totally coated with di-electric barrier of paint and rustproofing, the need to detect breaks in these barriers is of significant importance. The RustEvader forces the impressed electrons to escape or exit at

the very site where the barrier has broken down or worn away "CDOI" effect. RustEvader only works where and when needed. This is accomplished by pumping excess electrons to the car body creating a condenser effect (when the electric is essentially intact) between the car body and RustEvader anodes. Electrons repel each other resulting their desire to return to a more positive home (anodes in atmosphere). In their escape from the automotive body at breaks or pores in the di-electric coatings, these impressed electrons interfere with the rusting process and retard rusting at local corrosion sites. There are variables that effect this interfering process: the composition of the metal, the type and concentration of the electrolyte, temperature and humidity. Generally speaking, increases in humidity and moisture increases the rate and quantity of electron escape. However even when the relative humidity is very low electrons will frequently escape into the atmosphere. The impressed electrons escape in two ways: by displacing other electrons and by direct individual movement. If a continuous electrolyte exists (such as complete submersion in salt water) between the breaks in the coating on the car body and anodes, displacing electrons will move from the negative car body to the positive anode. In this condition the greatest rust retardation effect will exist. RustEvader works best where and when it is needed most, under mild conditions. Compromises had to be considered in the RustEvader design. Therefore, complete interference in the rusting process cannot be expected but rust retardation dramatically demonstrated.

Unibody construction and modern autobody panel design extremely vulnerable to corrosion; therefore, they are naturally presented to the consumer for use in a totally coated (painted) form. RustEvader has been designed to assist in the care maintenance program by retarding corrosion at breaks in the coating. The smaller the break, the more concentrated the RustEvader effect. Most of the protection is provided at the perimeter (interface) of the paint and the abrasion. Therefore components such as exhaust systems and suspension components, which are normally not coated, are not protected. Body panel abrasions are not normally neglected by the owners and are repainted (coated) soon after abraded. Therefore, the RustEvader was designed to assist the owner who is conscious of careful maintenance.

You want your car to look good while you're driving it, when you are ready to sell or trade it and particularly if you decide to give the car a major overhaul. If you lease a car, you are responsible to maintain a certain cosmetic standard or pay a penalty.

RustEvader was designed for people who care about their car and understand the value of careful maintenance and effort on their pocketbook. RustEvader wants your car to last and maintain its maximum value.

# Rust Evader

CDOI™ RustEvader Corp.  
1513 11th Avenue P.O. Box 351  
Altoona, PA 16603  
800-458-3474 in PA 814-944-8700  
Copyright 1989 RustEvader Corp.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging David F. McCready (hereinafter "respondent") and RustEvader Corporation with violation of Section 5 of the Federal Trade Commission Act, as amended, and respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

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

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments 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. RustEvader Corporation, a/k/a Rust Evader Corporation, sometimes d/b/a REC Technologies(REC)is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1513 Eleventh Avenue, Altoona, Pennsylvania.

Respondent David F. McCready has been an owner, officer and director of said corporation. At times material to the complaint herein, he formulated, directed, and controlled the policies, acts, and practices of said corporation. His address is RD 4 Box 92 B, Altoona, Pennsylvania.

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

## ORDER

## DEFINITIONS

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

A. "*Electronic corrosion control device*" shall mean any device or mechanism that is intended, through the use of electricity, static or current, to control, retard, inhibit or reduce corrosion in motor vehicles.

B. "*Rust Evader*" shall mean the electronic corrosion control device sold under the trade names Rust Evader, Rust Buster, Electro-Image, Eco-Guard, and any other substantially similar product sold under any trade name.

C. "*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.

## I.

*It is ordered*, That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of the Rust Evader, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from representing, in any manner, directly or by implication, that such product is effective in preventing or substantially reducing corrosion in motor vehicle bodies.

## II.

*It is further ordered*, That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising,

promotion, offering for sale, sale, or distribution of any product for use in motor vehicles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from making any representation, directly or by implication, concerning the performance, efficacy or attributes of such product unless such representation is true and, at the time such representation is made, respondent possesses and relies upon competent and reliable evidence, which, when appropriate, must be competent and reliable scientific evidence, that substantiates the representation.

### III.

*It is further ordered,* That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in motor vehicles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, interpretations or purpose of any test, study, or survey.

### IV.

*It is further ordered,* That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in motor vehicles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that any demonstration, picture, experiment or test proves, demonstrates or confirms any material quality, feature or merit of such product.

### V.

*It is further ordered,* That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or

through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of the Rust Evader in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from employing the terms Rust Evader or Rust Buster in conjunction with or as part of the name for such product or the product logo.

## VI.

*It is further ordered,* That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any consumer product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act and actually costing the consumer more than five dollars (\$5.00), shall forthwith cease and desist from conditioning any written or implied warranty of such product on the consumer's purchase or use, in connection with such product, of any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name.

## VII.

*It is further ordered,* That respondent David F. McCready, individually and as an officer of RustEvader Corporation, his successors and assigns, shall be liable for consumer redress in the amount of two hundred thousand dollars (\$200,000.00) as provided herein:

A. Not later than five (5) days from the date this order becomes final, respondent shall deposit into an escrow account to be established by the Commission for the purpose of receiving payment due under this order ("Commission escrow account"), the sum of two hundred thousand dollars (\$200,000.00).

B. Provided however, that if, at the time this order becomes final, respondent has not completed the sale of respondent's property known as RD 4 Box 92B, Altoona, Pennsylvania, then respondent shall deposit, into the Commission escrow account, not later than five

(5) days from the date this order becomes final, the sum of forty thousand dollars (\$40,000.00). Respondent shall deposit the remaining one hundred sixty thousand dollars (\$160,000.00) into the Commission escrow account upon the sale of respondent's property known as RD 4 Box 92B, Altoona, Pennsylvania at the time of the sale of said property or six months from the date that this order becomes final, whichever first occurs. Respondent shall provide security for the one hundred sixty thousand dollars (\$160,000.00) by means of a mortgage on the property known as RD 4 Box 92B, Altoona, Pennsylvania. Such mortgage shall be in a form, and shall be entered into by such date as agreed to by the parties, but no later than five (5) days from the date this order becomes final.

C. In the event of any default in payment to the Commission escrow account, which default continues for more than ten (10) days beyond the date of payment, respondent shall also pay interest as computed under 28 U.S.C. 1961, which shall accrue on the unpaid balance from the date of default until the date the balance is fully paid.

D. The funds deposited by respondent in the Commission escrow account, together with accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of the Rust Evader in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondent shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.

E. At any time after this order becomes final, the Commission may direct the agent for the Commission escrow account to transfer funds from the escrow account, including accrued interest, to the Commission to be distributed as herein provided. The Commission, or its representative, shall, in its sole discretion, select the escrow agent.

F. Respondent relinquishes all dominion, control and title to the funds paid into the Commission escrow account, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondent shall make no claim to

or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondent, respondent acknowledges that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

### VIII.

*It is further ordered*, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent David F. McCready, or his successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

### IX.

*It is further ordered*, That respondent David F. McCready shall, for a period of ten (10) years from the date of issuance of this order, notify the Federal Trade Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

### X.

*It is further ordered*, That this order will terminate on October 30, 2016, 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 complaint will not affect the duration of:

A. Any paragraph 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 paragraph.

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 paragraph as though the complaint was never 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.

## XI.

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

## IN THE MATTER OF

## DEL MONTE FOODS COMPANY, ET AL.

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-3569. Consent Order, April 11, 1995--Modifying Order, Oct. 31, 1996*

This order reopens a 1995 consent order -- that required the Del Monte Corporation and Pacific Coast Producers to terminate the purchase option agreement and certain provisions of the supply agreement, and also required respondents to obtain Commission approval before acquiring any stocks or assets of a U.S. canned fruit manufacturer and before entering into agreements with competitors -- and this order modifies the consent order by ending Del Monte's obligation to obtain Commission approval before making certain acquisitions or entering into certain marketing agreements and co-pack arrangements. The Commission substituted the prior-approval requirement with a requirement that Del Monte provide to the Commission prior notice of the specified transactions.

## ORDER REOPENING AND MODIFYING ORDER

On May 24, 1996, Del Monte Foods Company and its wholly-owned subsidiary Del Monte Corporation ("Del Monte"), respondents named in the consent order issued by the Commission on April 11, 1995, in Docket No. C-3569 ("order"), filed a Petition To Reopen and Modify Consent Order ("Petition") in this matter. On October 3, 1996, Pacific Coast Producers ("PCP"), a respondent subject to the requirements of paragraphs VII and VIII of the order, filed a Statement In Support of Petition to Reopen and Modify Consent Order ("Statement"). Del Monte and PCP ("respondents"), in their Petition and Statement, respectively, ask that the Commission reopen and modify the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").<sup>1</sup> Del Monte's Petition requests that the Commission reopen and modify the order to remove the prior approval requirements and replace them with prior notice requirements by deleting paragraphs III, VI.A and VII in

<sup>1</sup> 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

their entirety, substituting the phrase "without providing advance written notification" for the prior approval requirement in paragraph V, and modifying the current advance written notification requirement in paragraph VI.B of the order by replacing the phrase "for a period beginning on the fifth anniversary of the date this order becomes final until ten years from the date this order becomes final" with the phrase "for a period of ten (10) years from the date this order becomes final."<sup>2</sup> The thirty-day public comment period on the Petition ended on July 1, 1996. No comments were received. For the reasons discussed below, the Commission has determined to grant the Petition in part and modify the order as set forth herein.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.<sup>3</sup> The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements."<sup>4</sup>

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."<sup>5</sup>

<sup>2</sup> Petition at 2. In its Statement, PCP requests that paragraph VII be modified by replacing the prior approval requirement with the phrase "without providing advance written notification to the Commission," or otherwise in a manner consistent with the Prior Approval Policy Statement. Statement at 1.

<sup>3</sup> Prior Approval Policy Statement at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 3.

As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order."<sup>6</sup> The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement.<sup>7</sup>

The presumption is that setting aside the general prior approval requirement in this order is in the public interest. No facts have been presented that overcome this presumption, and nothing in the record suggests that respondents would engage in the same transaction as alleged in the complaint but for the existence of the prior approval provision. Accordingly, the Commission has determined to reopen the proceedings and modify the order by deleting the prior approval provisions and by substituting prior notification provisions pursuant to the exception set out in the Prior Approval Policy Statement.

The record in this case evidences a credible risk that respondents could engage in future anticompetitive transactions that would not be reportable under the HSR Act. Among other things, the challenged transactions that led to issuance of the complaint and order in this matter were not subject to the premerger notification and waiting period requirements of the HSR Act. The complaint in this case charged that Del Monte's supply agreement with PCP, pursuant to which PCP was to provide to Del Monte virtually all of PCP's output of canned fruit, and Del Monte's option agreement with PCP, pursuant to which Del Monte acquired an irrevocable and exclusive option to purchase certain rights in, and title to, certain assets of PCP, including long term contracts with growers, substantially lessened competition in the manufacture and sale of canned fruit in the United States in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act. There has been no showing that the

---

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.*

competitive conditions that gave rise to the complaint and the order no longer exist. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraphs III, V, VI.A and VII of the order to substitute a prior notification requirement for the prior approval requirement in those provisions.

Del Monte's Petition requests that the prior approval requirements of the order be removed, and prior notice requirements substituted, by deleting paragraphs III, VI.A and VII in their entirety, replacing the prior approval requirements in paragraph V with an advance written notification requirement, and modifying the current advance written notification requirement in paragraph VI.B of the order. PCP's Statement alternatively requests that paragraph VII be modified by replacing the prior approval requirement with the phrase "without providing advance written notification to the Commission." However, Del Monte's request that paragraph III be deleted in its entirety does not, for example, address the credible risk that future transactions now covered only by paragraph III.A of the order could be anticompetitive but would not be reportable under the HSR Act. In addition, advance written notification, the form of prior notice which respondents propose to substitute for the order's prior approval requirements, is significantly different from the HSR-like prior notification which the Prior Approval Policy Statement states may be used in circumstances where narrow prior notification is appropriate.<sup>8</sup> There has been no showing that a deviation from this form of prior notification, which has been employed in all previous order modifications granted pursuant to the Prior Approval Policy Statement, is warranted in this case. Finally, Del Monte requests that the Commission modify the advance written notification provision in paragraph VI.B by replacing the phrase "for a period beginning on the fifth anniversary of the date this order becomes final until ten years from the date this order becomes final" with the phrase "for a period of ten (10) years from the date this order becomes final." The Prior Approval Policy Statement provides that:

No presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this statement.<sup>9</sup>

Thus, Del Monte may not rely on the Statement in seeking such a modification. Furthermore, Del Monte has not alleged that changed

<sup>8</sup> *Id.* at 3 n.4.

<sup>9</sup> *Id.* at 4-5.

conditions of law or fact or the public interest requires the Commission to reopen this provision of the order. The Commission has determined that, consistent with the Prior Approval Policy Statement, the order's prior approval requirements will be set aside and HSR-like prior notification substituted for acquisitions not otherwise reportable under the HSR Act. Respondents' requested modifications inconsistent with this determination are therefore denied.<sup>10</sup>

Finally, the Commission has determined to correct a typographical error in paragraph VIII of the order by changing the incorrect cross-reference to paragraph VI in that provision to a correct cross-reference to paragraph VII. Respondents have consented to this modification.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened;

*It is further ordered*, That paragraphs I, III, IV, V, VI.A., VII and VIII of the Commission's order issued on April 11, 1995, be, and they hereby are, modified, as of the effective date of this order, to read as follows:

I.

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

\* \* \*

K. "*Prior Notification*" means the Prior Notifications required by paragraphs III, V, VI.A and VII of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the

---

<sup>10</sup> Del Monte's Petition does not explicitly seek the precise modifications which the Commission has determined to grant. However, because Del Monte seeks reopening of the order pursuant to the Prior Approval Policy Statement, it has invoked the Commission's authority to modify the order consistent with the Statement. PCP's Statement expressly requests, as an alternative to the specific modification sought, modification "in a manner consistent with the Prior Approval Policy Statement." Statement at 1.

Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods pursuant to the required Prior Notifications may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding the foregoing, Prior Notification shall not be required for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

\* \* \*

### III.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, Del Monte shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the two years preceding such acquisition, in the manufacture of any type of Canned Fruit in the United States; provided, however, that an acquisition shall be exempt from the requirements of this paragraph if it is solely for the purpose of investment and Del Monte will not hold more than one percent of the shares of any publicly traded class of security; or

B. Acquire any assets, other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States; provided, however, that an acquisition of assets will be exempt from the requirements of this paragraph if the purchase price of the assets-to-be-acquired is less than \$1,500,000.00, and the purchase price of all assets used for, or previously used for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States that Del Monte has acquired from the same person (as that term is defined in the premerger notification rules, 16 CFR 801.1(a)(1)) in the twelve-month

period preceding the proposed acquisition, when aggregated with the purchase price of the to-be-acquired assets, does not exceed \$1,500,000.

#### IV.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, unless Del Monte is required to give Prior Notification to the Commission pursuant to paragraph III, and unless Del Monte has given such Prior Notification, Del Monte shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any assets other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States.

\* \* \*

#### V.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, Del Monte shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Except with respect to agreements covered by paragraphs VII and VIII, enter into any agreement or other arrangement to purchase or market any type of Canned Fruit with any corporate or non-corporate entity, engaged, at the time of entering into such agreement or other arrangement or within two years preceding entering into such agreement or other arrangement, in the manufacture of any type of Canned Fruit in the United States; provided, however, that entering into such an agreement or other arrangement will be exempt from the requirements of this paragraph if the agreement or other arrangement is for the purchase of Canned Fruit on the Spot Market; or

B. Enter into any agreement or other arrangement with Tri Valley Growers to have any type of Canned Fruit manufactured on Del Monte's behalf.

## VI.

*It is further ordered, That,*

A. For a period of five (5) years from the date this order becomes final, Del Monte shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, except with respect to agreements covered by paragraphs V, VII, and VIII, enter into any agreement or other arrangement to have Canned Fruit manufactured on Del Monte's behalf ("co-pack agreement") with any corporate or non-corporate entity, engaged, at the time of entering into such co-pack agreement or within the two years preceding entering into such co-pack agreement, in the manufacture of any type of Canned Fruit in the United States;

\* \* \*

## VII.

*It is further ordered, That,* for a period of ten (10) years from the date this order becomes final, respondents shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, enter into an agreement requiring PCP to manufacture any type of Canned Fruit on behalf of Del Monte ("co-pack agreement"); provided, however, that such a co-pack agreement between Del Monte and PCP will be exempt from the requirements of this paragraph if the aggregate of all co-pack agreements entered into in any calendar year meet all of the following criteria: 1) the amount of retail sizes (net weight under two pounds) does not exceed ten percent of PCP's output of Canned Fruit, measured in basic cases (24 2 1/2 can sizes), manufactured in the same year as the Canned Fruit manufactured pursuant to the co-pack agreements; 2) the amount of peaches grown by PCP used for the co-pack agreements does not exceed 8,000 tons in any year and none of PCP's peaches is used for retail sizes manufactured pursuant to the co-pack agreements; and 3) the total amount of the Canned Fruit manufactured pursuant to the co-pack agreements a) in each of the years 1995 and 1996 constitutes forty percent or less of PCP's output of Canned Fruit manufactured in each of those years, measured in basic cases; and b) in each year thereafter constitutes thirty percent or

less of PCP's output of Canned Fruit manufactured in that year, measured in basic cases.

#### VIII.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, unless respondents are required to give Prior Notification to the Commission pursuant to paragraph VII, and unless respondents have given such Prior Notification, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, enter into a co-pack agreement with each other. Said notification shall be provided to the Commission by PCP on or before March 1 of each year in which Del Monte and PCP plan to enter into a co-pack agreement. Said notification shall include a copy of the proposed co-pack agreement, all schedules and attachments, the amount of the planned co-pack stated in basic cases (24 2 1/2 can sizes) and the amount, stated in basic cases, for PCP's planned production of Canned Fruit for the same year.

## IN THE MATTER OF

GEORGETOWN PUBLISHING HOUSE LIMITED PARTNERSHIP, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3692. Complaint, Nov. 19, 1996--Decision, Nov. 19, 1996*

This consent order prohibits, among other things, the Washington, D.C.-based publishing firms from misrepresenting that any advertisement is an independent review or article, or that it is not a paid advertisement.

*Appearances*For the Commission: *Joel Winston and Lesley Anne Fair.*For the respondents: *Pro se*, Washington, D.C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Georgetown Publishing House Limited Partnership, a limited partnership, Georgetown Publishing House, Inc., a corporation, and Daniel Levinas, an officer of said corporation ("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. Respondent Georgetown Publishing House Limited Partnership is a District of Columbia limited partnership with its principal office or place of business at 1101 30th Street, N.W., Washington, D.C.

Respondent Georgetown Publishing House, Inc., is a District of Columbia corporation with its principal office or place of business at 1101 30th Street, N.W., Washington, D.C. Georgetown Publishing House, Inc., is General Partner of Georgetown Publishing House Limited Partnership.

Respondent Daniel Levinas is an officer of Georgetown Publishing House, Inc. Individually or in concert with others, he formulates, directs, and controls the policies, acts and practices of Georgetown Publishing House, Inc., including the acts and practices

alleged in this complaint. His principal office or place of business is 1101 30th Street, N.W., Washington, D.C.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed books, including "The American Speaker: Your Guide to Successful Speaking," to the public.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for "The American Speaker: Your Guide to Successful Speaking," including but not necessarily limited to the attached Exhibit A, entitled "Applause, Applause." Exhibit A, a print advertisement, was disseminated by respondents via direct mail to consumers. It appears to be a review of the book "The American Speaker: Your Guide to Successful Speaking." The advertisement is printed on glossy stock that has been ripped along the left edge. The page is headed with the word "REVIEW" and includes the byline "By Leah Thayer." On the bottom of the page is the date "NOVEMBER 1994." The advertisement bears the page numbers 17 and 18. On the reverse side of the page is the carry-over conclusion of an unrelated article that begins "(continued from page 12)." Affixed to the advertisement is a small stick-on paper with the handwritten note:

[Recipient's name],  
Try this  
It works!  
J.

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that "Applause, Applause" is a book review written by an independent journalist or reviewer, containing the independent opinions of the journalist or reviewer, and was disseminated in a magazine or other independent publication.

PAR. 6. In truth and in fact, "Applause, Applause" is not a book review written by an independent journalist or reviewer, does not contain the independent opinions of a journalist or reviewer, and was not disseminated in a magazine or other independent publication.

"Applause, Applause" is an advertisement written and disseminated by respondents for the purpose of selling the book, "The American Speaker: Your Guide to Successful Speaking." Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

R E V I E W

# Applause, Applause

Anyone can win over a tough audience  
speechwriter. Just ask Lee Iacocca.

Matthew,  
try this.  
It works!  
J.

By Leah Thayer



**THE AMERICAN SPEAKER**  
*Your Guide to Successful Speaking*  
Aram Bakshian, Jr., Editor  
600 pages  
Georgetown Publishing House

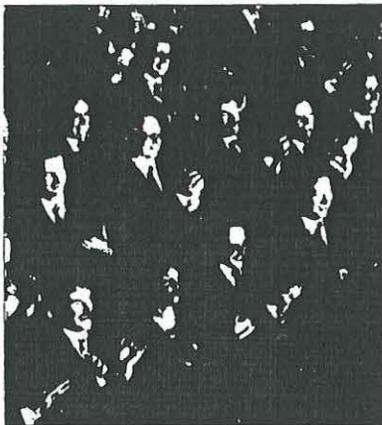
assured man  
NBC News

No less principally contemporary example is Lee Iacocca, who saved the Chrysler Corporation by using his enormous talent as a speaker to win the support of the Congress, the White House and the American people for the biggest corporate bailout in history. Iacocca himself attributes his business success to speaking. In his autobiography, he writes: "I've seen a lot of guys who are smarter than I am and a lot who know more about cars. And yet I've lost them in the smoke. Why? Because I'm tough? No ... You've got to know how to talk to them, plain and simple."

**T**HE DIFFERENCE BETWEEN SUCCESS AND failure, writes Aram Bakshian, Jr., in this remarkable new resource for public speakers, is the ability to communicate clearly and effectively. Never has this been more true than in today's intensely competitive business climate.

Bakshian should know. Speechwriter to "The Great Communicator" himself, Ronald Reagan, as well as to two other former presidents and the heads of several major corporations, Bakshian has witnessed the rise and fall of international leaders based in their ease — or lack of ease — on the podium. Anyone can master the art of speaking in public, Bakshian says. "In the last analysis, the spoken word is still king."

Fear and loathing of the rubber chicken circuit have long plagued public figures. "No one knows how I hate making speeches," President Calvin Coolidge once complained to a friend. Veteran television commentator John Chancellor, who has been Hayes and Jose Ferrer great Sir Alec Guinness offered from stage time. "I've seen audiences tremble in impediment before



The charmen of Fortune 500 companies like Coca-Cola, IBM and General Motors make more speeches in a year than most politicians do. And not just on television. They speak all the time in the workplace and to colleagues, customers and the media.

Bette Midler sings "like a man" in Briskaway overcome speaking the comfortable.

sensitive boardroom presentation, speech keeps the wheels of commerce turning." In making a first impression, for instance, "Your appearance can raise expectations, but what

Bakshian tackles head-on the challenges of public speaking in *AMERICAN SPEAKER*. "As with alcoholism," he writes, "there is no known cure for stage fright. You're either a chronic sufferer or a recovering sufferer." In either case, it's easy to minimize that suffering — or even turn it into an advantage, as he deftly outlines. Bakshian quotes Carroll O'Connor, the legendary "Archie Bunker": "A professional actor has a kind of tension," says the veteran actor. "The amateur is thrown by it, but the professional needs it."

The ability to speak well in public is the most important skill any political or business leader can have, says Bakshian.

The simple biggest rhetorical arena, in fact, "is the world of business. From the simplest of retail sales spiels to the most sensitive boardroom presentation, speech keeps the wheels of commerce turning." In making a first impression, for instance, "Your appearance can raise expectations, but what

## EXHIBIT A

you say and how you say it will determine how people evaluate you." Good speaking also is the key to leadership. "Whether your forum is a corporate boardroom or a PTA meeting, your degree of speaking skill will determine to a great extent how seriously people take your ideas and whether they'll follow your lead." Plus, a good speaker is always in demand. At events from business conventions to weddings, "a good speaker not only adds to the occasion, he also benefits from 'free advertising' that adds to his stature in the community and attracts future business," Bakshian argues.

Unusual for a book or periodical of any kind, *AMERICAN SPEAKER* is more of a personal mentor — a do-it-yourself guide designed to save hours or days of preparation time, or, conversely, an enormous bill from a professional speech-writer or "coach."

It's a clever, accessible concept: a three-ring binder crammed with hundreds of pages of material on every imaginable aspect of public address: finessing your body language, delivering an inspiring eulogy, antidotes to nervousness, using humor, developing a powerful speaking voice, or engaging the audience in a positive question-and-answer session. Bakshian leaves few questions unanswered. He offers sensible, uplifting advice for every occasion, from the Thanksgiving toast to a defense of your industry before a hostile audience.

Arranged alphabetically, *AMERICAN SPEAKER* is easy to navigate, highly entertaining and loaded with good ideas. In the calendars section, for instance, Bakshian compiles thousands of speech pegs for every day of the year in three calendars: famous birthdays, today in history and the months at a glance. "Every audience gathered to share a common interest

or celebrate a specific occasion has a built-in common bond," Bakshian writes. "A good speaker doesn't just know this; a good speaker takes advantage of it." He demonstrates how a shared reference can warm up the audience, for example, draw a favorable analogy or build a bridge from past to present.

What about actual speeches themselves? They're all over *AMERICAN SPEAKER*. A section on acceptance speeches includes as an example Winston Churchill's masterful appearance before Parliament in 1954, on the occasion of his 80th birthday. To illustrate the business address, Bakshian quotes nine speeches that used humor and anecdote to deliver serious messages to several very different audiences. In the Education section, Bakshian shows how cartoonist Garry Trudeau hilariously (but normaliciously) defused the "political correctness" time bomb in speaking to a graduating class at Yale University. And so on.

But here's what really makes *AMERICAN SPEAKER* stand out from the crowd of business publications. In addition to the basic 600-page volume, readers also receive timely updates, transcripts of recent, powerful speeches and a free consulting service with Bakshian, to resolve those last-minute speaking challenges. Best of all, the entire package is guaranteed. Review *AMERICAN SPEAKER* for 30 days. If it doesn't meet your expectations, return it to Georgetown Publishing House for a complete refund.

Few professionals can afford to ignore a promise like that. *AMERICAN SPEAKER* (\$297, including bimonthly updates) is not available in any bookstore. Copies are available only from Georgetown Publishing House, 1101 30th St., N.W., Dept. SDK105, Washington, DC 20007. Or call 800-915-0022. Fax 202-337-1512. ■

(Continued from page 12)

PepsiCo, Ralph Lauren, Miller Beer, Coca-Cola and others employ this unorthodox marketing device.

In-person house calls will continue to proliferate. In the years ahead, however, businesses that can save money by conducting transactions electronically will hit the digital road.

Peapod (415-929-1600) produces software that lets shoppers order groceries via PCs. US Order (703-834-9480) makes ScanFone, which electronically orders groceries, pays bills and accesses bank accounts. All varieties of business, from television networks to clothing retailers, will reach consumers at home via the data superhighway.

Nomadic, high-tech life-styles will prompt a surge in products that are flexible, portable and compatible in different settings. Designers of everything from homes to packages will adopt a new mantra: "Ease of use."

High-tech systems will become increasingly universal. Japanese giant NEC redefined versatility with the UltraLite Versa notebook computer, introduced last April. Users can snap in every major component for home, office or travel use: remove disk drives; upgrade memory cards, and carry the

whole thing in one hand. Apple Computer, aiming to reduce its isolation in the PC world, is on a parallel track. Its new Macintosh computer runs both Mac and IBM-compatible software.

Fixed systems — or even unwieldy ones — will become history. More electronic products will join laptop computers and pocket phones in linking mobile professionals with the comforts of home and office. As living spaces become smaller, designers will churn out more foldable products, as they've done with infant carriers and wheelchairs.

High quality at a disposable price will be available in new devices modeled on the single-use camera concept. Remote-controlled devices also will proliferate. General Motors' new mini-van, with an optional remote control for its side-passenger door, may spark a revolution among other automakers focusing on the family market.

One last note on the ubiquitous-change theory: Companies that mean it — that truly want to succeed and grow in a world unlike that of the '70s or '80s — must reexamine their vertical hierarchies and welcome new sources of strategies and leadership. Three sources surge with power: shareholders, support staff and customers. ■

## DECISION AND ORDER

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

The respondents 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, 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 respondents have 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 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 Georgetown Publishing House Limited Partnership is a limited partnership organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business at 1101 30th Street, N.W., Washington, D.C.

Respondent Georgetown Publishing House, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business at 1101 30th Street, N.W., Washington, D.C.

Respondent Daniel Levinas is an officer of Georgetown Publishing House, Inc. He formulates, directs, and controls the

policies, acts and practices of said corporation, and his office and principal place of business is located at the above stated address.

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

## ORDER

### I.

*It is ordered,* That respondents Georgetown Publishing House Limited Partnership, a limited partnership, and its successors and assigns; Georgetown Publishing House, a corporation, its successors and assigns, and its officers; and Daniel Levinas, individually and as an officer of said corporation; and respondents' agents, representatives, 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 in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or indirectly, that such product has been independently reviewed or evaluated;

B. Misrepresenting, directly or indirectly, that an advertisement is an independent review or article or is not a paid advertisement.

### II.

*It is further ordered,* That respondents Georgetown Publishing House Limited Partnership and Georgetown Publishing House, Inc., their successors and assigns, shall for a period of five (5) years from the date of entry of this order maintain and make available to the Federal Trade Commission, within seven (7) business days of the date of the receipt of a written request, business records demonstrating compliance with the terms and provisions of this order.

### III.

*It is further ordered,* That respondents Georgetown Publishing House Limited Partnership and Georgetown Publishing House, Inc., their successors and assigns, shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of its current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of ten (10) years from the date of entry of this order, provide a copy of this order to each of its future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order within three (3) days after the person commences his or her responsibilities.

#### IV.

*It is further ordered,* That respondents Georgetown Publishing House Limited Partnership and Georgetown Publishing House, Inc., their successors and assigns, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in structure, including but not limited to dissolution, assignment, or sale resulting in the emergence of a successor corporation or partnership, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition, or any other change in the corporation or partnership that may affect compliance obligations arising out of this order.

#### V.

*It is further ordered,* That respondent Daniel Levinas shall, for a period of five (5) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment which involves the sale of consumer products. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

## VI.

*It is further ordered,* That this order will terminate on November 19, 2016, or twenty 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 paragraph in this order that terminates in less than twenty 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 paragraph.

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 paragraph as though the complaint was never 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.

## VII.

*It is further ordered,* That respondents shall, within sixty (60) days after 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.

## IN THE MATTER OF

## HALE PRODUCTS, INC.

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

*Docket C-3694. Complaint, Nov. 22, 1996--Decision, Nov. 22, 1996*

This consent order prohibits, among other things, the Pennsylvania-based manufacturer of fire truck-mounted fire pumps from entering into, continuing or enforcing any requirement that fire truck manufacturers refrain from purchasing mid-ship mounted fire pumps from any company, or that any purchaser sell only the relevant respondent's pumps. In addition, the respondent is required to send a specifically-worded notice to fire truck manufacturers stating that it has entered into an agreement with the Commission concerning the sale and installation of fire pumps.

*Appearances*

For the Commission: *William Baer and Mark Whitener.*

For the respondent: *James F. Rill, Collier, Shannon, Rill & Scott,*  
Washington, D.C.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 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 Hale Products, Inc. (sometimes referred to as "Hale Products" or "respondent"), has violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

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

a. *"Mid-Ship Mounted Fire Pumps"* are truck mounted fire pumps that meet the National Fire Protection Association Standard for Pumper Fire Apparatus known as "NFPA 1901."

b. *"OEM's"* [sic] are original equipment manufacturers who buy and install Mid-Ship Mounted Fire Pumps, as well as many other

components, into a final fire truck. OEM's then sell the trucks to fire departments in the United States.

#### RESPONDENT

2. Respondent Hale Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Pennsylvania with its principal place of business located at 700 Spring Mill Avenue, Conshohocken, Pennsylvania. Respondent Hale Products manufactures and sells Mid-Ship Mounted Fire Pumps in the United States, and in 1993 accounted for approximately 50 percent of Mid-Ship Mounted Fire Pump sales in the United States.

#### JURISDICTION

3. Respondent Hale Products sells and ships Mid-Ship Mounted Fire Pumps from its production facility located in Pennsylvania to customers located throughout the United States. Respondent maintains and has maintained a substantial course of business, including the acts and practices herein alleged, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

#### MID-SHIP MOUNTED FIRE PUMP INDUSTRY

4. The market for Mid-Ship Mounted Fire Pumps in the United States includes three principal competitors. In addition to respondent Hale Products, two other companies sell Mid-Ship Mounted Fire Pumps to OEM's in the United States, Waterous Company, Inc. (sometimes referred to as "Waterous"), and W.S. Darley & Company, Inc. (sometimes referred to as "Darley"). These three firms have each sold fire pumps in the United States for over 50 years, and in that time there has been little if any attempted *de novo* entry into the United States market. Respondent Hale Products and Waterous are the two largest manufacturers and together account for close to or more than 90 percent of Mid-Ship Mounted Fire Pump sales in the United States.

#### EXCLUSIVE DEALING PRACTICES

5. For over 50 years, and until approximately 1991, respondent Hale Products sold Mid-Ship Mounted Fire Pumps through a network

of exclusive OEM's. Respondent Hale Products sold or contracted for the sale of such pumps to OEM's with the understanding that those OEM's would commit to selling only Hale Mid-Ship Mounted Fire Pumps. Waterous also sold on an exclusive basis, but to a different group of OEM's. Thus, prior to approximately 1991, few if any OEM's offered Mid-Ship Mounted Fire Pumps manufactured by more than one fire pump manufacturer, and fire truck buyers were able to choose between Mid-Ship Mounted Fire Pumps manufactured by different firms only by considering different OEM's.

6. Respondent Hale Products believed that continued adherence to the exclusive sales policy by both itself and Waterous would exclude or tend to exclude other competitors and would tend to reduce competition between manufacturers of Mid-Ship Mounted Fire Pumps over price and over non-price terms such as quality differences and delivery times.

7. During the 1980's and until approximately 1991, respondent Hale Products continued to adhere to its exclusive dealing policy. Hale Products solicited new OEM's on the condition that they deal in Mid-Ship Mounted Fire Pumps manufactured by Hale Products exclusively. Hale Products told prospective OEM's that they must deal exclusively in Mid-Ship Mounted Fire Pumps manufactured by Hale Products, asked newly approved OEM's to sign written acknowledgments of the exclusive term, and threatened to terminate OEM's who failed to honor the exclusive term.

#### ANTICOMPETITIVE EFFECTS

8. The acts, practices, and methods of competition of respondent Hale Products, as alleged in paragraphs five through seven, were and are substantially to the injury of the public in the following ways, among others:

a. By substantially lessening competition in the sale and marketing of Mid-Ship Mounted Fire Pumps, or by excluding or tending to exclude other actual or potential pump manufacturers from selling Mid-Ship Mounted Fire Pumps to a substantial number of OEM's; and

b. By facilitating an allocation of customers between respondent Hale Products and Waterous.

## VIOLATION OF LAW

9. Therefore, the acts, practices and methods of competition of respondent Hale Products, as herein alleged, were and are all to the prejudice and injury of the public and constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts practices and methods of competition of respondent, as herein alleged, or the effects thereof, are continuing or could recur in the absence of the relief herein requested.

Commissioners Azcuenaga and Starek dissenting.

## 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 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, 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 had 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 Hale Products is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business at 700 Spring Mill Avenue, Conshohocken, Pennsylvania.

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

## ORDER

### I.

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

(a) "*Respondent Hale Products*" means (1) Hale Products, Inc.; (2) its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Hale Products, Inc., and their successors and assigns; (3) all companies or entities that any parent of Hale Products, Inc., creates in the future and that engage in the manufacture or sale of Mid-Ship Mounted Fire Pumps, or Hale's parent if it engages in the manufacture or sale of Mid-Ship Mounted Fire Pumps; (4) the respective directors, officers, employees, agents and representatives of any of the entities described in subparagraphs (1), (2) and (3) above.

(b) "*Mid-Ship Mounted Fire Pumps*" [sic] are truck mounted fire pumps that meet the National Fire Protection Association Standard for Pumper Fire Apparatus known as "NFPA 1901."

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

(d) "*OEM's*" [sic] are original equipment manufacturers who buy and install Mid-Ship Mounted Fire Pumps, as well as many other components, into a final fire truck. OEM's then sell the trucks to fire departments in the United States.

### II.

*It is further ordered*, That respondent Hale Products, directly or through any corporation, subsidiary, division, or other device,

including franchisees or licensees, in connection with the offering for sale or sale of any Mid-Ship Mounted Fire Pump in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from entering into, continuing, or enforcing any condition, agreement or understanding with any OEM that such OEM will refrain from the purchase or sale of Mid-Ship Mounted Fire Pumps of any manufacturer, or will purchase or sell Mid-Ship Mounted Fire Pumps of only respondent Hale Products; provided however, that nothing in this order shall prohibit any price differentials that make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which Mid-Ship Mounted Fire Pumps are sold or delivered, or that are otherwise lawful under the provisions of the Robinson-Patman Act, 15 U.S.C. 13.

### III.

*It is further ordered,* That respondent Hale Products shall provide a copy of this order with the attached complaint, and a copy of the notice set out in Appendix A:

(a) Within thirty (30) days after the date this order becomes final, one notice to each OEM to whom it sold a Mid-Ship Mounted Fire Pump at any time during the two (2) years prior to the date this order becomes final; and

(b) For a period of three (3) years after the date this order becomes final, to each OEM not covered by subparagraph (a) above to whom it provides a price list for or a price quotation on a Mid-Ship Mounted Fire Pump. Such notice shall accompany the price list or price quotation, or in the case of telephone quotations shall be delivered as soon as practical after such quotation, and need only be provided once to each OEM not covered by subparagraph (a) above.

### IV.

*It is further ordered,* That respondent Hale Products shall file with the Commission within sixty (60) days after the date this order becomes final, and annually on the anniversary of the date this order becomes final for each of the three (3) years thereafter, a report, in writing, signed by the respondent, setting forth in detail the manner and form in which it has complied and is complying with this order.

## V.

*It is further ordered,* That respondent shall 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, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this order. Such notification shall be at least thirty (30) days in cases not subject to the notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a, and at least ten (10) days in the case of transactions subject to the notification provisions of the Hart-Scott-Rodino Act.

## VI.

*It is further ordered,* That this order shall terminate on November 22, 2016.

Commissioners Azcuenaga and Starek dissenting.

## APPENDIX A

[Hale Products' Letterhead]

## PLEASE READ THIS

Enclosed with this notice is a copy of a Consent Order agreed to between the Federal Trade Commission and Hale Products, Inc. In the order, Hale has agreed that it will not refuse to sell, or refuse to contract to sell, Mid-Ship Mounted Fire Pumps on the grounds that an OEM refuses to sell Hale pumps exclusively. The order does not prohibit OEMs from purchasing only Hale Mid-Ship Mounted Fire Pumps if, in the OEM's sole discretion, it deems it advisable. Moreover, Hale retains the right to refuse to sell Mid-Ship Mounted Fire Pumps to any OEM for lawful reasons. THE TYPE OF PUMP YOU USE IS YOUR BUSINESS, AND YOU ARE FREE TO OFFER AND INSTALL COMPETING PUMPS AS ALTERNATIVES TO HALE PUMPS.

#####

SEPARATE STATEMENT OF CHAIRMAN PITOFSKY, AND  
COMMISSIONERS VARNEY AND STEIGER

We write separately to respond to some of the concerns raised in Commissioner Starek's dissent.

First, we cannot concur with Commissioner Starek's suggestion that, for customer allocation of a component product to work, the

participants must be able to allocate the ultimate customers of the finished product (p.1). There will be situations where downstream competition will undermine a customer allocation scheme of a component of a final good. For example, that might be the case where the component is a significant part of the cost of the final product, or where the ultimate consumers have a much stronger preference for the component than the ultimate good.

None of those conditions was present in this case. Fire truck buyers make purchase decisions primarily on the basis of truck brand, the pump price is only a small part of the final purchase price, and pump features are only a small part of the entire truck package. Evidence of relatively high profits at the component level supports this interpretation.

Second, Commissioner Starek suggests that these exclusive dealing arrangements would not increase the likelihood of successful collusion because of the difficulty of detecting cheating. (p.2) We agree that maintaining collusion requires the ability to detect and discipline cheating. But here that methodology was simple: if a fire engine manufacturer used an alternative pump it would be readily identified. Moreover, the fact that the customer allocation through exclusive dealing was maintained over almost five decades suggests that there was an effective method for enforcing the exclusive dealing arrangements.

Third, Commissioner Starek observes that instability at the truck manufacturing stage (*i.e.*, changes in market share) may lead to the demise of any customer allocation agreement with respect to a component. We agree that might be the case where a very large portion of a pump manufacturer's sales were tied to a single truck manufacturer. Here, however, the arrangements were durable; the fact is that instability among truck manufacturers did not deter the effectiveness of these agreements.

Finally, Commissioner Starek suggests that the arrangements did not foreclose new entry because they were not really exclusive. He relies on the fact that some OEMs were willing to install the pumps of a third manufacturer at customers' request. (p.3) The fact that the exclusive policy was not perfect and that some truck manufacturers may have offered the pumps of a third pump manufacturer, accounting for a very small share of pump sales, did not have a significant effect on competition at the pump level. The key to competition in this market was the competitive positions of Hale and Waterous, which together account for more than 90% of the market.

The evidence establishes that Hale and Waterous understood that as long as both firms maintained the exclusive dealing arrangements, competition between them would be diminished, prices would be higher and entry would be more difficult. That is in fact how things worked in this industry for several decades, and those are the anticompetitive effects that the Commission's orders are intended to address.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I generally endorse the views expressed by Commissioner Starek in his dissenting statement. The evidence does not in my view suggest a market in which competition has been unlawfully restrained, and I do not find reason to believe that the law has been violated.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue complaints and final consent orders against Waterous Company, Inc., and Hale Products, Inc., two producers of midship-mounted pumps for fire trucks. The complaints claim anticompetitive effects arising from alleged exclusive dealing arrangements between each respondent and its direct customers, the original equipment manufacturers of fire trucks ("OEMs"), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. I remain unpersuaded that the arrangements between respondents and their customers can be characterized accurately as "exclusive." More important, however, there is no sound theoretical or empirical basis for believing that these relationships, even if exclusive, harmed competition; in fact, there are good reasons to believe the contrary. In any event, even if one assumes *arguendo* the validity of the theories of anticompetitive effects, the orders issued today are unlikely to remedy those alleged effects.

The complaints allege, *inter alia*, that the arrangements between Waterous, Hale, and their OEM customers reduce competition in two ways -- by facilitating an allocation of customers between Waterous and Hale, and by creating a barrier to the entry of new pump manufacturers. The first theory posits that Waterous and Hale wish to set the prices of their fire pumps collusively but find themselves unable to reach and maintain a direct agreement on price. Under this hypothesis, in order to achieve collusive pricing without a direct agreement on prices, Waterous and Hale have entered into a *de facto*

agreement to allocate fire truck OEMs between themselves. That agreement, combined with an agreement not to bid for each other's OEM business, makes each pump maker a monopolist with respect to its OEMs. As monopolists, it is argued, the pump manufacturers are able to set supracompetitive prices.

This theory is fatally flawed. For a customer allocation scheme to allow Waterous and Hale to set supracompetitive prices, it *necessarily* must entail the allocation of the *final* customers -- the fire departments -- between the two pump makers. Absent such an allocation, an exclusive dealing contract between a pump maker and one or more OEMs -- or even outright vertical integration between the pump producer and one or more OEMs -- does not allow the pump producer to raise prices anticompetitively. Under the Commission's theory of competitive harm, Waterous and Hale "allocate customers" in lieu of trying to enter into direct pump price agreements that presumably would break down under each party's incentives to undercut the collusive price. In other words, the pump makers' "customer allocation" scheme solves this instability problem. However, unless Waterous and Hale also agree not to compete against one another for the patronage of the fire departments -- *i.e.*, unless they collusively allocate fire departments between themselves -- each pump maker retains its incentive to take business from its rival through price cuts. Absent allocation of fire department customers, one should expect the same sort of "cheating," with the equivalent competitive result, that the Commission believes frustrated direct collusion between Waterous and Hale.<sup>1</sup>

Thus, it is implausible that "exclusive dealing" arrangements between respondents and their OEMs increase the likelihood of successful collusion between Waterous and Hale. Indeed, there are compelling reasons why such an arrangement might actually *reduce* this likelihood. Maintaining collusion requires the reasonably accurate identification and punishment of cheating.<sup>2</sup> If Waterous and Hale bid directly and repeatedly for OEM business, cheating might be inferable from one firm's loss of a pump sale to its rival. On the other hand, when Waterous and Hale compete indirectly -- *i.e.*, when, as here, their affiliated OEMs submit bids to a fire department

<sup>1</sup> The majority's assertion that pump prices and pump brands are relatively unimportant to final consumers (*i.e.*, fire departments) is inconsistent with the events that triggered this investigation -- namely, complaints from OEMs that they suffered significant competitive harm from their alleged inability to offer multiple pump brands. It is hard to reconcile those complaints with the majority's claimed end-user indifference to pump brands.

<sup>2</sup> See, e.g., Stigler, "A Theory of Oligopoly," 72 *J. Pol. Econ.* 44 (1964), reprinted in *THE ORGANIZATION OF INDUSTRY*, ch. 5 (1968).

incorporating not merely the pump price but rather the prices of all of the truck's components -- it will be more difficult for a pump maker to determine whether a loss of business is attributable to price-cutting by the rival pump maker or to reductions in the prices of other components.<sup>3</sup>

The difficulty of maintaining coordination is exacerbated if there is substantial market share volatility among the affiliated customers for reasons unrelated to the pumps. Such volatility makes it difficult for a pump maker to infer whether a sales loss stems from secret pump price concessions or from some other cause. Moreover, if the fortunes of buyers (here, fire truck OEMs) are expected to differ over time -- some flagging, others flourishing -- the utility of customer allocation as a long-run aid to collusion appears questionable. The pump producer with the misfortune to have affiliated with unsuccessful buyers will have still greater incentives to depart from the collusive scheme. In this regard, the fire truck OEM market witnessed substantial turnover during the period in which Waterous and Hale allegedly maintained exclusive distribution agreements.<sup>4</sup> Thus, even if one could overcome the defects in the Commission's collusion theory, these other factors would continue to cast substantial doubt upon this theory's applicability.<sup>5</sup>

The Commission's second theory of harm alleges that exclusive arrangements between pump makers and OEMs have created a barrier to the entry of new pump manufacturers, thereby allowing the incumbent pump sellers to set and maintain supracompetitive prices. Although the vertical section of the 1984 Merger Guidelines<sup>6</sup> is not

---

<sup>3</sup> The majority appears to have misunderstood my point with regard to the detection of cheating. By "cheating," I am not referring to an effort by, say, Hale to sell to Waterous OEMs (or vice-versa). Rather, I refer to Hale's hidden reduction in pump prices to its own customers, which consequently allows those customers to take business from OEMs affiliated with the rival pump brand. This form of cheating is extremely difficult to detect, because an OEM's capture of sales from a rival OEM could be attributable to many reasons other than a reduced pump price.

<sup>4</sup> For example, just since 1990, at least four major OEMs -- Grumman, Mack, FMC, and Beck -- have exited the market. This period also witnessed entry by such OEMs as Firewolf and Becker. As discussed below, substantial entry into and exit from the OEM market also bear on the applicability of the complaints' second theory of competitive harm (entry deterrence).

<sup>5</sup> With regard to the pump makers' ostensibly high accounting profits, antitrust economists no longer consider accounting profits as a reliable indicator of high economic profits (which can themselves be as consistent with superior efficiency as with collusion). Fisher and McGowan, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits," 73 *Am. Econ. Rev.* 82 (1983). Moreover, concerning the longevity of the arrangements between pump makers and OEMs, that factor testifies only to their profitability; it does not distinguish between anticompetitive and procompetitive (or competitively neutral) explanations for their use. Indeed, the asserted instability of OEMs' market shares lends greater credence to an efficiency explanation: one would not expect the parties to an efficient exclusive dealing arrangement to abandon it simply because a customer loses market share, while (as I have explained above) the same cannot be said of an anticompetitive arrangement.

<sup>6</sup> U.S. Department of Justice, Merger Guidelines, 4.2 (1984), 4 Trade Reg. Rep. (CCH) ¶ 13,103.

cited explicitly, the theory here appears to have been drawn from those Guidelines. That analysis focuses on a market in which, but for ease of entry, conditions are favorable to the exercise of market power, and asks whether a vertical merger (or, in the current case, vertical integration through contract) might reduce entry so that market power could be exercised.<sup>7</sup>

Although this effect might occur in some settings, in this case I find the evidence to support invoking this theory tenuous at best. The Commission's complaints apparently rest on the difficulty allegedly experienced by another pump maker in obtaining the patronage of OEMs.<sup>8</sup> An alternative explanation for that firm's failure to achieve a larger market share is that fire departments find its pumps significantly less attractive than those of Hale and Waterous for reasons unrelated to the pump makers' distribution policies. The evidence adduced by the staff is far from sufficient to establish that this firm, or any other actual or potential competitor, was anticompetitively excluded from selling pumps to OEMs.<sup>9</sup>

In addition to the weaknesses in the anticompetitive theories outlined above, a factual problem plagues this case: evidence gathered in the investigation calls into question whether Waterous's and Hale's relationships with their respective OEM customers can even be characterized as "exclusive." Although many OEMs have tended to deal principally with only one pump maker -- a fact, I note in passing, that is as consistent with an efficiency rationale for exclusivity as it is with an anticompetitive theory -- several larger OEMs affiliated with Waterous and Hale have expressed a willingness to install another manufacturer's pumps at customers' request. Indeed, several OEMs -- including at least one of the largest

---

<sup>7</sup> The 1984 Merger Guidelines (4.21) identify three necessary but not sufficient conditions for this problem to exist. First, the market in which power would be exercised (the "primary" market) must be sufficiently conducive to anticompetitive behavior that the impact of vertical integration in reducing entry would allow such behavior to occur. Second, the degree of vertical integration subsequent to the merger must be so extensive that an entrant into the primary market would also have to enter the other market (the "secondary" market). If substantial unintegrated capacity remains in the secondary market after the vertical merger, it is less likely that the merger will facilitate an anticompetitive outcome. Third, the requirement that a firm enter both the primary and secondary markets -- rather than just the primary market -- must make entry into the primary market significantly more difficult and therefore less likely to occur. 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,565-66; *see also* Blair and Kaserman, *LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL* 152 (1983).

<sup>8</sup> The evidence supporting the Commission's entry-deterrence theory appears to consist of that producer's experience in trying to erode OEMs' preferences for Waterous and Hale pumps.

<sup>9</sup> The majority's assertion with respect to the entry-detering effects of the arrangements is simply that -- an assertion. All of the evidence gathered in this investigation is easily reconciled with an efficiency rationale for the challenged arrangements between pump makers and OEMs. In this market, as in any other, superior efficiency on the part of incumbents is a powerful entry deterrent. It is not an antitrust violation.

ones affiliated with Hale -- have installed another competitor's pumps, and this investigation produced no evidence to suggest that any dealer was terminated for selling that firm's pumps. In any case, however, even if OEM exclusivity could be convincingly demonstrated, it should be clear from the discussion above that a great deal more is required to prove that the exclusive arrangements had anticompetitive effects.<sup>10</sup> The evidence on the competitive effects of existing arrangements between pump makers and OEMs is as consistent with the view that the arrangements induce greater efficiency in the production and marketing of pumps as it is with a market power theory.

I am therefore unpersuaded that respondents' distribution policies have harmed competition in any relevant market. Even had I concluded otherwise, however, I would not endorse the consent orders, which require each respondent to cease and desist from requiring OEM exclusivity as a condition of sale. As I have noted elsewhere,<sup>11</sup> the problems with remedies of this sort are significant.<sup>12</sup> A formal ban on exclusive dealing accomplishes little if respondents have alternative means available to achieve the same end. One readily available method in this case, fully consistent with the terms of the orders, would be to establish a set of quantity discounts providing a customer with substantial financial incentives to procure all of its pumps from a single seller. Moreover, nothing in the orders would prevent a pump manufacturer from unilaterally refusing to sell to an OEM so long as the refusal was not conditioned on a promise of exclusivity. Another possible method would be to give exclusive OEMs better service (*e.g.*, faster delivery times) than their non-exclusive rivals receive.

I cannot endorse an ineffective remedy for a nonexistent harm.

---

<sup>10</sup> *Cf. Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (plaintiff must demonstrate anticompetitive effects and defendant's market power when challenging vertical restraints).

<sup>11</sup> Dissenting Statement of Commissioner Roscoe B. Starek, III, in *Silicon Graphics, Inc.*, Docket No. C-3626.

<sup>12</sup> For a discussion of why nondiscrimination remedies are problematic, see Brennan, "Why regulated firms should be kept out of unregulated markets: understanding the divestiture in *United States v. AT&T*," 32 *Antitrust Bull.* 741 (1987).

## IN THE MATTER OF

## WATEROUS COMPANY, INC.

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

*Docket C-3693. Complaint, Nov. 22, 1996--Decision, Nov. 22, 1996*

This consent order prohibits, among other things, the Minnesota-based manufacturer of fire truck-mounted fire pumps from entering into, continuing or enforcing any requirement that fire truck manufacturers refrain from purchasing mid-ship mounted fire pumps from any company, or that any purchaser sell only the relevant respondent's pumps. In addition, the respondent is required to send a specifically-worded notice to fire truck manufacturers stating that it has entered into an agreement with the Commission concerning the sale and installation of fire pumps.

*Appearances*

For the Commission: *William Baer and Mark Whitener.*

For the respondent: *Gary M. London, Burr & Forman,*  
Birmingham, AL.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 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 Waterous Company Inc. (sometimes referred to as "Waterous" or "respondent"), has violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

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

a. "*Mid-Ship Mounted Fire Pumps*" are truck mounted fire pumps that meet the National Fire Protection Association Standard for Pumper Fire Apparatus known as "NFPA 1901."

b. "*OEM's*" [sic] are original equipment manufacturers who buy and install Mid-Ship Mounted Fire Pumps, as well as many other

components, into a final fire truck. OEM's then sell the trucks to fire departments in the United States.

#### RESPONDENT

2. Respondent Waterous Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Minnesota with its principal place of business located at 300 John E. Carroll Avenue East, South Saint Paul, Minnesota. Waterous manufactures and sells Mid-Ship Mounted Fire Pumps in the United States. In 1993, Waterous accounted for more than 40 percent of U.S. Mid-Ship Mounted Fire Pump sales.

#### JURISDICTION

3. Respondent Waterous sells and ships Mid-Ship Mounted Fire Pumps from its production facility located in Minnesota to customers located throughout the United States. Respondent maintains and has maintained a substantial course of business, including the acts and practices herein alleged, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

#### MID-SHIP MOUNTED FIRE PUMP INDUSTRY

4. The market for Mid-Ship Mounted Fire Pumps in the United States includes three principal competitors. In addition to respondent Waterous, two other companies sell Mid-Ship Mounted Fire Pumps to OEM's in the United States, Hale Products, Inc. (sometimes referred to as "Hale Products"), and W.S. Darley & Company, Inc. (sometimes referred to as "Darley"). These three firms have each sold fire pumps in the United States for over 50 years, and in that time there has been little if any attempted *de novo* entry into the United States market. Respondent Waterous and Hale Products are the two largest manufacturers and together account for close to or more than 90 percent of Mid-Ship Mounted Fire Pump sales in the United States.

5. For over 50 years, and until approximately 1991, respondent Waterous sold Mid-Ship Mounted Fire Pumps through a network of exclusive OEM's. Respondent Waterous sold or contracted for the sale of such pumps to OEM's with the understanding that those OEM's would commit to selling only Waterous Mid-Ship Mounted

Fire Pumps. Hale Products also sold on an exclusive basis, but to a different group of OEM's. Thus, prior to approximately 1991, few if any OEM's offered Mid-Ship Mounted Fire Pumps manufactured by more than one fire pump manufacturer, and fire truck buyers were able to choose between Mid-Ship Mounted Fire Pumps manufactured by different firms only by considering different OEM's.

6. Respondent Waterous believed that continued adherence to the exclusive sales policy by both itself and Hale Products would exclude or tend to exclude other competitors and would tend to reduce competition between manufacturers of Mid-Ship Mounted Fire Pumps over price and over non-price terms such as quality differences and delivery times.

7. During the 1980's and until approximately 1991, respondent Waterous continued to adhere to its exclusive dealing policy. Waterous terminated or threatened to terminate OEM's that resold Mid-Ship Mounted Fire Pumps manufactured by Waterous Company to OEM's outside of Waterous Company's exclusive OEM network, or delayed or threatened to delay shipments to such OEM's.

#### ANTICOMPETITIVE EFFECTS

8. The acts, practices, and methods of competition of respondent Waterous as alleged in paragraphs five through seven, were and are substantially to the injury of the public in the following ways, among others:

a. By substantially lessening competition in the sale and marketing of Mid-Ship Mounted Fire Pumps, or by excluding or tending to exclude other actual or potential pump manufacturers from selling Mid-Ship Mounted Fire Pumps to a substantial number of OEM's; and

b. By facilitating an allocation of customers between respondent Waterous and Hale Products.

#### VIOLATION OF LAW

9. Therefore, the acts, practices and methods of competition of respondent Waterous, as herein alleged, were and are all to the prejudice and injury of the public and constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts practices and

methods of competition of respondent, as herein alleged, or the effects thereof, are continuing or could recur in the absence of the relief herein requested.

Commissioners Azcuenaga and Starek dissenting.

#### 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 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, 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 had 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 Waterous is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal place of business at 300 John E. Carroll Avenue East, South Saint Paul, Minnesota.

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

(a) "*Respondent Waterous*" means (1) Waterous Company, Inc.; (2) its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Waterous Company, Inc., and their successors and assigns; (3) all companies or entities that any parent of Waterous Company, Inc., creates in the future and that engage in the manufacture or sale of Mid-Ship Mounted Fire Pumps, or Waterous' parent if it engages in the manufacture or sale of Mid-Ship Mounted Fire Pumps; (4) the respective directors, officers, employees, agents and representatives of any of the entities described in subparagraphs (1), (2) and (3) above.

(b) "*Mid-Ship Mounted Fire Pumps*" are truck mounted fire pumps that meet the National Fire Protection Association Standard for Pumper Fire Apparatus known as "NFPA 1901."

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

(d) "*OEM's*" [sic] are original equipment manufacturers who buy and install Mid-Ship Mounted Fire Pumps, as well as many other components, into a final fire truck. OEM's then sell the trucks to fire departments in the United States.

### II.

*It is further ordered*, That respondent Waterous, directly or through any corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the offering for sale or sale of any Mid-Ship Mounted Fire Pump in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from entering into, continuing, or enforcing any condition, agreement or understanding with any OEM that such OEM will refrain from the purchase or sale of Mid-Ship Mounted Fire Pumps of any manufacturer, or will

purchase or sell Mid-Ship Mounted Fire Pumps of only respondent Waterous; provided however, that nothing in this order shall prohibit any price differentials that make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which Mid-Ship Mounted Fire Pumps are sold or delivered, or that are otherwise lawful under the provisions of the Robinson-Patman Act, 15 U.S.C. 13.

### III.

*It is further ordered*, That respondent Waterous shall provide a copy of this order with the attached complaint, and a copy of the notice set out in Appendix A:

(a) Within thirty (30) days after the date this order becomes final, one notice to each OEM to whom it sold a Mid-Ship mounted fire pump at any time during the two (2) years prior to the date this order becomes final; and

(b) For a period of three (3) years after the date this order becomes final, to each OEM not covered by subparagraph (a) above to whom it provides a price list for or a price quotation on a Mid-Ship mounted fire pump. Such notice shall accompany the price list or price quotation, or in the case of telephone quotations shall be delivered as soon as practical after such quotation, and need only be provided once to each OEM not covered by subparagraph (a) above.

### IV.

*It is further ordered*, That respondent Waterous shall file with the Commission within sixty (60) days after the date this order becomes final, and annually on the anniversary of the date this order becomes final for each of the three (3) years thereafter, a report, in writing, signed by the respondent, setting forth in detail the manner and form in which it has complied and is complying with this order.

### V.

*It is further ordered*, That respondent shall 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, or the creation or dissolution

of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this order. Such notification shall be at least thirty (30) days in cases not subject to the notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a, and at least ten (10) days in the case of transactions subject to the notification provisions of the Hart-Scott-Rodino Act.

## VI.

*It is further ordered,* That this order shall terminate on November 22, 2016.

Commissioners Azcuenaga and Starek dissenting.

### APPENDIX A

[Waterous' Letterhead]

PLEASE READ THIS

Enclosed with this notice is a copy of a Consent Order agreed to between the Federal Trade Commission and Waterous Company, Inc. In the order, Waterous has agreed that it will not refuse to sell, or refuse to contract to sell, Mid-Ship mounted fire pumps on the grounds that an OEM refuses to sell Waterous pumps exclusively. The order does not prohibit OEMs from purchasing only Waterous Mid-Ship mounted fire pumps if, in the OEM's sole discretion, it deems it advisable. Moreover, Waterous retains the right to refuse to sell Mid-Ship mounted fire pumps to any OEM for lawful reasons. THE TYPE OF PUMP YOU USE IS YOUR BUSINESS, AND YOU ARE FREE TO OFFER AND INSTALL COMPETING PUMPS AS ALTERNATIVES TO WATEROUS PUMPS.

#####

### SEPARATE STATEMENT OF CHAIRMAN PITOFSKY, AND COMMISSIONERS VARNEY AND STEIGER

We write separately to respond to some of the concerns raised in Commissioner Starek's dissent.

First, we cannot concur with Commissioner Starek's suggestion that, for customer allocation of a component product to work, the participants must be able to allocate the ultimate customers of the finished product (p.1). There will be situations where downstream competition will undermine a customer allocation scheme of a

component of a final good. For example, that might be the case where the component is a significant part of the cost of the final product, or where the ultimate consumers have a much stronger preference for the component than the ultimate good.

None of those conditions was present in this case. Fire truck buyers make purchase decisions primarily on the basis of truck brand, the pump price is only a small part of the final purchase price, and pump features are only a small part of the entire truck package. Evidence of relatively high profits at the component level supports this interpretation.

Second, Commissioner Starek suggests that these exclusive dealing arrangements would not increase the likelihood of successful collusion because of the difficulty of detecting cheating. (p.2) We agree that maintaining collusion requires the ability to detect and discipline cheating. But here that methodology was simple: if a fire engine manufacturer used an alternative pump it would be readily identified. Moreover, the fact that the customer allocation through exclusive dealing was maintained over almost five decades suggests that there was an effective method for enforcing the exclusive dealing arrangements.

Third, Commissioner Starek observes that instability at the truck manufacturing stage (*i.e.*, changes in market share) may lead to the demise of any customer allocation agreement with respect to a component. We agree that might be the case where a very large portion of a pump manufacturer's sales were tied to a single truck manufacturer. Here, however, the arrangements were durable; the fact is that instability among truck manufacturers did not deter the effectiveness of these agreements.

Finally, Commissioner Starek suggests that the arrangements did not foreclose new entry because they were not really exclusive. He relies on the fact that some OEMs were willing to install the pumps of a third manufacturer at customers' request. (p.3) The fact that the exclusive policy was not perfect and that some truck manufacturers may have offered the pumps of a third pump manufacturer, accounting for a very small share of pump sales, did not have a significant effect on competition at the pump level. The key to competition in this market was the competitive positions of Hale and Waterous, which together account for more than 90% of the market. The evidence establishes that Hale and Waterous understood that as long as both firms maintained the exclusive dealing arrangements, competition between them would be diminished, prices would be

higher and entry would be more difficult. That is in fact how things worked in this industry for several decades, and those are the anticompetitive effects that the Commission's orders are intended to address.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I generally endorse the views expressed by Commissioner Starek in his dissenting statement. The evidence does not in my view suggest a market in which competition has been unlawfully restrained, and I do not find reason to believe that the law has been violated.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue complaints and final consent orders against Waterous Company, Inc., and Hale Products, Inc., two producers of midship-mounted pumps for fire trucks. The complaints claim anticompetitive effects arising from alleged exclusive dealing arrangements between each respondent and its direct customers, the original equipment manufacturers of fire trucks ("OEMs"), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. I remain unpersuaded that the arrangements between respondents and their customers can be characterized accurately as "exclusive." More important, however, there is no sound theoretical or empirical basis for believing that these relationships, even if exclusive, harmed competition; in fact, there are good reasons to believe the contrary. In any event, even if one assumes *arguendo* the validity of the theories of anticompetitive effects, the orders issued today are unlikely to remedy those alleged effects.

The complaints allege, *inter alia*, that the arrangements between Waterous, Hale, and their OEM customers reduce competition in two ways -- by facilitating an allocation of customers between Waterous and Hale, and by creating a barrier to the entry of new pump manufacturers. The first theory posits that Waterous and Hale wish to set the prices of their fire pumps collusively but find themselves unable to reach and maintain a direct agreement on price. Under this hypothesis, in order to achieve collusive pricing without a direct agreement on prices, Waterous and Hale have entered into a *de facto* agreement to allocate fire truck OEMs between themselves. That agreement, combined with an agreement not to bid for each other's

OEM business, makes each pump maker a monopolist with respect to its OEMs. As monopolists, it is argued, the pump manufacturers are able to set supracompetitive prices.

This theory is fatally flawed. For a customer allocation scheme to allow Waterous and Hale to set supracompetitive prices, it *necessarily* must entail the allocation of the *final* customers -- the fire departments -- between the two pump makers. Absent such an allocation, an exclusive dealing contract between a pump maker and one or more OEMs -- or even outright vertical integration between the pump producer and one or more OEMs -- does not allow the pump producer to raise prices anticompetitively. Under the Commission's theory of competitive harm, Waterous and Hale "allocate customers" *in lieu* of trying to enter into direct pump price agreements that presumably would break down under each party's incentives to undercut the collusive price. In other words, the pump makers' "customer allocation" scheme solves this instability problem. However, unless Waterous and Hale also agree not to compete against one another for the patronage of the fire departments -- *i.e.*, unless they collusively allocate fire departments between themselves -- each pump maker retains its incentive to take business from its rival through price cuts. Absent allocation of fire department customers, one should expect the same sort of "cheating," with the equivalent competitive result, that the Commission believes frustrated direct collusion between Waterous and Hale.<sup>1</sup>

Thus, it is implausible that "exclusive dealing" arrangements between respondents and their OEMs increase the likelihood of successful collusion between Waterous and Hale. Indeed, there are compelling reasons why such an arrangement might actually reduce this likelihood. Maintaining collusion requires the reasonably accurate identification and punishment of cheating.<sup>2</sup> If Waterous and Hale bid directly and repeatedly for OEM business, cheating might be inferable from one firm's loss of a pump sale to its rival. On the other hand, when Waterous and Hale compete indirectly -- *i.e.*, when, as here, their affiliated OEMs submit bids to a fire department incorporating not merely the pump price but rather the prices of all of the truck's components -- it will be more difficult for a pump maker

<sup>1</sup> The majority's assertion that pump prices and pump brands are relatively unimportant to final consumers (*i.e.*, fire departments) is inconsistent with the events that triggered this investigation -- namely, complaints from OEMs that they suffered significant competitive harm from their alleged inability to offer multiple pump brands. It is hard to reconcile those complaints with the majority's claimed end-user indifference to pump brands.

<sup>2</sup> See, e.g., Stigler, "A Theory of Oligopoly," 72 *J. Pol. Econ.* 44 (1964), reprinted in *THE ORGANIZATION OF INDUSTRY*, ch. 5 (1968).

to determine whether a loss of business is attributable to price-cutting by the rival pump maker or to reductions in the prices of other components.<sup>3</sup>

The difficulty of maintaining coordination is exacerbated if there is substantial market share volatility among the affiliated customers for reasons unrelated to the pumps. Such volatility makes it difficult for a pump maker to infer whether a sales loss stems from secret pump price concessions or from some other cause. Moreover, if the fortunes of buyers (here, fire truck OEMs) are expected to differ over time -- some flagging, others flourishing -- the utility of customer allocation as a long-run aid to collusion appears questionable. The pump producer with the misfortune to have affiliated with unsuccessful buyers will have still greater incentives to depart from the collusive scheme. In this regard, the fire truck OEM market witnessed substantial turnover during the period in which Waterous and Hale allegedly maintained exclusive distribution agreements.<sup>4</sup> Thus, even if one could overcome the defects in the Commission's collusion theory, these other factors would continue to cast substantial doubt upon this theory's applicability.<sup>5</sup>

The Commission's second theory of harm alleges that exclusive arrangements between pump makers and OEMs have created a barrier to the entry of new pump manufacturers, thereby allowing the incumbent pump sellers to set and maintain supracompetitive prices. Although the vertical section of the 1984 Merger Guidelines<sup>6</sup> is not cited explicitly, the theory here appears to have been drawn from those Guidelines. That analysis focuses on a market in which, but for

---

<sup>3</sup> The majority appears to have misunderstood my point with regard to the detection of cheating. By "cheating," I am not referring to an effort by, say, Hale to sell to Waterous OEMs (or vice-versa). Rather, I refer to Hale's hidden reduction in pump prices *to its own customers*, which consequently allows those customers to take business from OEMs affiliated with the rival pump brand. This form of cheating is extremely difficult to detect, because an OEM's capture of sales from a rival OEM could be attributable to many reasons other than a reduced pump price.

<sup>4</sup> For example, just since 1990, at least four major OEMs -- Grumman, Mack, FMC, and Beck -- have exited the market. This period also witnessed entry by such OEMs as Firewolf and Becker. As discussed below, substantial entry into and exit from the OEM market also bear on the applicability of the complaints' second theory of competitive harm (entry deterrence).

<sup>5</sup> With regard to the pump makers' ostensibly high accounting profits, antitrust economists no longer consider accounting profits as a reliable indicator of high economic profits (which can themselves be as consistent with superior efficiency as with collusion). Fisher and McGowan, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits," 73 *Am. Econ. Rev.* 82 (1983). Moreover, concerning the longevity of the arrangements between pump makers and OEMs, that factor testifies only to their profitability; it does not distinguish between anticompetitive and procompetitive (or competitively neutral) explanations for their use. Indeed, the asserted instability of OEMs' market shares lends greater credence to an efficiency explanation: one would not expect the parties to an efficient exclusive dealing arrangement to abandon it simply because a customer loses market share, while (as I have explained above) the same cannot be said of an anticompetitive arrangement.

<sup>6</sup> U.S. Department of Justice, Merger Guidelines, 4.2 (1984), 4 Trade Reg. Rep. (CCH) ¶ 13,103.

ease of entry, conditions are favorable to the exercise of market power, and asks whether a vertical merger (or, in the current case, vertical integration through contract) might reduce entry so that market power could be exercised.<sup>7</sup>

Although this effect might occur in some settings, in this case I find the evidence to support invoking this theory tenuous at best. The Commission's complaints apparently rest on the difficulty allegedly experienced by another pump maker in obtaining the patronage of OEMs.<sup>8</sup> An alternative explanation for that firm's failure to achieve a larger market share is that fire departments find its pumps significantly less attractive than those of Hale and Waterous for reasons unrelated to the pump makers' distribution policies. The evidence adduced by the staff is far from sufficient to establish that this firm, or any other actual or potential competitor, was anticompetitively excluded from selling pumps to OEMs.<sup>9</sup>

In addition to the weaknesses in the anticompetitive theories outlined above, a factual problem plagues this case: evidence gathered in the investigation calls into question whether Waterous's and Hale's relationships with their respective OEM customers can even be characterized as "exclusive." Although many OEMs have tended to deal principally with only one pump maker -- a fact, I note in passing, that is as consistent with an efficiency rationale for exclusivity as it is with an anticompetitive theory -- several larger OEMs affiliated with Waterous and Hale have expressed a willingness to install another manufacturer's pumps at customers' request. Indeed, several OEMs -- including at least one of the largest ones affiliated with Hale -- have installed another competitor's pumps, and this investigation produced no evidence to suggest that

---

<sup>7</sup> The 1984 Merger Guidelines ( 4.21) identify three necessary but not sufficient conditions for this problem to exist. First, the market in which power would be exercised (the "primary" market) must be sufficiently conducive to anticompetitive behavior that the impact of vertical integration in reducing entry would allow such behavior to occur. Second, the degree of vertical integration subsequent to the merger must be so extensive that an entrant into the primary market would also have to enter the other market (the "secondary" market). If substantial unintegrated capacity remains in the secondary market after the vertical merger, it is less likely that the merger will facilitate an anticompetitive outcome. Third, the requirement that a firm enter both the primary and secondary markets -- rather than just the primary market -- must make entry into the primary market significantly more difficult and therefore less likely to occur. 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,565-66; *see also* Blair and Kaserman, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 152 (1983).

<sup>8</sup> The evidence supporting the Commission's entry-deterrence theory appears to consist of that producer's experience in trying to erode OEMs' preferences for Waterous and Hale pumps.

<sup>9</sup> The majority's assertion with respect to the entry-detering effects of the arrangements is simply that -- an assertion. All of the evidence gathered in this investigation is easily reconciled with an efficiency rationale for the challenged arrangements between pump makers and OEMs. In this market, as in any other, superior efficiency on the part of incumbents is a powerful entry deterrent. It is not an antitrust violation.

any dealer was terminated for selling that firm's pumps. In any case, however, even if OEM exclusivity could be convincingly demonstrated, it should be clear from the discussion above that a great deal more is required to prove that the exclusive arrangements had anticompetitive effects.<sup>10</sup> The evidence on the competitive effects of existing arrangements between pump makers and OEMs is as consistent with the view that the arrangements induce greater efficiency in the production and marketing of pumps as it is with a market power theory.

I am therefore unpersuaded that respondents' distribution policies have harmed competition in any relevant market. Even had I concluded otherwise, however, I would not endorse the consent orders, which require each respondent to cease and desist from requiring OEM exclusivity as a condition of sale. As I have noted elsewhere,<sup>11</sup> the problems with remedies of this sort are significant.<sup>12</sup> A formal ban on exclusive dealing accomplishes little if respondents have alternative means available to achieve the same end. One readily available method in this case, fully consistent with the terms of the orders, would be to establish a set of quantity discounts providing a customer with substantial financial incentives to procure all of its pumps from a single seller. Moreover, nothing in the orders would prevent a pump manufacturer from unilaterally refusing to sell to an OEM so long as the refusal was not conditioned on a promise of exclusivity. Another possible method would be to give exclusive OEMs better service (*e.g.*, faster delivery times) than their non-exclusive rivals receive.

I cannot endorse an ineffective remedy for a non-existent harm.

---

<sup>10</sup> *Cf. Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (plaintiff must demonstrate anticompetitive effects and defendant's market power when challenging vertical restraints).

<sup>11</sup> Dissenting Statement of Commissioner Roscoe B. Starek, III, in *Silicon Graphics, Inc.*, Docket No. C-3626.

<sup>12</sup> For a discussion of why nondiscrimination remedies are problematic, see Brennan, "Why regulated firms should be kept out of unregulated markets: understanding the divestiture in *United States v. AT&T*," 32 *Antitrust Bull.* 741 (1987).

## IN THE MATTER OF

## HYDE ATHLETIC INDUSTRIES, INC.

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

*Docket C-3695. Complaint, Dec. 4, 1996--Decision, Dec. 4, 1996*

This consent order prohibits, among other things, a Massachusetts-based corporation from misrepresenting that footwear made wholly abroad is made in the United States, and the consent order contains a provision indicating that the respondent would not be in violation of the order if the company makes truthful statements concerning domestic production of footwear, as long as it is accompanied by certain disclosures.

*Appearances*

For the Commission: *C. Steven Baker and Theresa McGrew.*

For the respondent: *David Wolf, Wolf, Greenfield & Sachs,*  
Boston, MA.

## COMPLAINT

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

PARAGRAPH 1: Respondent Hyde Athletic Industries, Inc., is a Massachusetts corporation which manufactures and sells footwear. Its principal office or place of business is located at 13 Centennial Industrial Park Drive, Peabody, Massachusetts.

PAR. 2. Respondent has manufactured, assembled, advertised, labeled, offered for sale, sold, and distributed athletic and other footwear under the trademark "Saucony," to consumers.

PAR. 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.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, and other

promotional materials for footwear sold under the Saucony trademark including, but not necessarily limited to, the attached Exhibits 1-8.

The "Help The Country" advertisement (Exhibit 1) states:

"IT CAN EVEN HELP THE COUNTRY GET BACK ON ITS FEET."

"Built With Pride In BANGOR MAINE USA"

" Any running shoe company can help keep Americans in shape. At Saucony, we've helped keep America in shape. That's because we've been a major employer in New England since 1906. Generation after generation, our family-owned company has worked with the families of Bangor, Maine to build Saucony shoes and a history of quality craftsmanship."

"For 86 years, we've worked in America. And helped make America work. After all, it's the best way we know to keep athletes - and the economy - running smoothly."

The "Front-Runners" advertisement (Exhibit 2) states:

"IF ONLY THE OTHER FRONT-RUNNERS COULD KEEP A PROMISE FOR 86 YEARS."

"Built With Pride In BANGOR MAINE USA"

"Eight-six years ago, we pledged to build out footwear at home in New England. Since then, our family-owned company has worked with the families of Bangor, Maine to build Saucony shoes and a history of quality craftsmanship."

The "Economic Problems" advertisement (Exhibit 3) states:

"FURTHER PROOF THAT ECONOMIC PROBLEMS CAN BE SOLVED AT THE GRASS ROOTS LEVEL."

"Built With Pride In BANGOR MAINE USA"

"At Saucony, we've been a major employer in New England for 86 years. Generation after generation, our family-owned company has worked with the families of Bangor, Maine to build Saucony shoes and a history of quality craftsmanship."

"Through it all, we've discovered that the best way to solve economic problems is to build from the ground up."

The advertisements attached as Exhibits 4 and 5 include the statements made in Exhibits 2 and 3, respectively, and also include a fine print statement at the bottom of each advertisement which states:

"In-Line running shoes built in Bangor, Maine. 'Classic' running styles and some components are imported. Call 1-800-365-7282 for more details."

The advertisement attached as Exhibit 6 is a different version of the "Help The Country" Advertisement (Exhibit 1) which states:

"IT CAN EVEN HELP THE COUNTRY GET BACK ON ITS FEET."

"Built With Pride In BANGOR MAINE USA"

"Any running shoe company can help keep Americans in shape. At Saucony, we've helped keep America in shape. That's because we've been a major employer in New England since 1906. Generation after generation, our family-owned company has worked with the families of Bangor, Maine to build Saucony shoes and a history of quality craftsmanship."

A fine print statement at the bottom of this advertisement states:

"In-Line running shoes built in Bangor, Maine. 'Classic' running styles and some components are imported. Call 1-800-365-7282 for more details."

The "American" advertisement (Exhibit 7) states:

"PROUD TO BE AN AMERICAN"

"Built With Pride In BANGOR MAINE USA"

"The new wave of American patriotism sweeping the country has a few of our competitors shaking in their imported shoes. At Saucony, we've been a major employer in New England for 86 years. Generation after generation, our family-owned company has worked with the families of Bangor, Maine to build Saucony running shoes and a history of quality craftsmanship."

A fine print statement at the bottom of this advertisement states:

"In-Line running shoes built in Bangor, Maine. 'Classic' running styles and some components are imported. Call 1-800-365-7282 for more details."

The "PRIDE IN AMERICA" advertisement (Exhibit 8) states:

"PROUD TO BE AN AMERICAN."

"Built With Pride In BANGOR MAINE USA"

"For decades, the people of Bangor, Maine have been building Saucony running shoes with superior American craftsmanship."

"In honor of these American shoemakers..."

"The Saucony Bangor is the newest addition to our line of high quality American-built running shoes."

"TRADE IN YOUR IMPORTS AND WE'LL SEND YOU \$10 FOR BUYING THE SAUCONY BANGOR."

A fine print statement at the bottom of this advertisement states:

"In Line Running Shoes are built in Bangor, Maine using imported components, except the Class Running styles which are assembled abroad."

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisements attached as Exhibits 1-8, respondent has represented, directly or by implication, that all Saucony footwear is made in the United States.

PAR. 6. In truth and in fact, a substantial amount of Saucony footwear is wholly made in foreign countries. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Starek dissenting.

Complaint

EXHIBIT 1



# IT CAN EVEN HELP THE COUNTRY GET BACK ON ITS FEET.

Any running shoe company can help keep Americans in shape. At Saucony, we've helped keep America in shape. That's because we've been a major employer in New England since 1906. Generation after generation, our family-owned company has worked with the families of Bangor, Maine to build Saucony shoes and a

history of quality craftsmanship. In fact, the people of Saucony have built quite a reputation over the years. In 1942, we marched out a line of upward-winning army boots to help the war effort. During the "race for space" in the 1960's, the first astronaut to walk in space walked in a pair of Saucony boots. And when astronauts ran tests aboard the space

shuttle in 1991, they were running in our shoes. For 86 years, we've worked in America. And helped make America work. After all, it's the best way to know how to keep athletes - and the economy - running smoothly.



**Saucony.**

WE'RE IN THE SHOE BUSINESS, NOT SHOW BUSINESS.

Saucony Running Shoes are available at:

Kangaroo Crossing  
Worcester

The Frontrunner  
Mills

City Sports  
All Locations

Complaint

122 F.T.C.

## EXHIBIT 2



## IF ONLY THE OTHER FRONT-RUNNERS COULD KEEP A PROMISE FOR 86 YEARS.

Of all the big names in the running shoe business, Saucony is the only one with a history of keeping promises. Eighty-six years ago, we pledged to build our footwear at home in New England. Since then, our family-owned company has worked with the families of Bangor, Maine to build Saucony shoes and a history of quality craftsmanship.

In fact, the people of Saucony have built quite a reputation over the years. In 1942, we marched out a line of award-winning army boots to help the war effort. During the "race for space" in the 1960's, the first astronaut to walk in space walked in a pair of Saucony boots. And when astronauts ran tests aboard the space shuttle in 1991, they were running

in our shoes.

Since 1906, we've been a part of America. And tried to do our part for America. From Bangor to Baton Rouge to Bakersfield, that's a track record that will only improve in the future.



**Saucony.**

THE SHOE BUSINESS, NOT SHOW BUSINESS.

EXHIBIT 2

Complaint

EXHIBIT 3



## FURTHER PROOF THAT ECONOMIC PROBLEMS CAN BE SOLVED AT THE GRASS ROOTS LEVEL.

Maine's small running shoe company can't keep the entire country running strong, but we can certainly help our part of it. At Saucony, we've been a major employer in New England for 86 years. Generation after generation, our family-owned company has worked with the families of Bangor, Maine to build

Saucony shoes and a history of quality craftsmanship.

In fact, the people of Saucony have built quite a reputation over the years. In 1942, we marched out a line of award-winning army boots to help the war effort. During the "race for space" in the 1960's, the first astronaut to walk in space walked in a pair of Saucony boots. And when

astronauts ran tests aboard the space shuttle in 1991, they were running in our shoes.

Since 1906, we've helped shape America. And helped keep it in shape. Through it all, we've discovered that the best way to solve economic problems is to build from the ground up.



**Saucony.**

WE'RE IN THE SHOE BUSINESS, NOT SHOW BUSINESS.

Call 1-800-365-SALCONY for the dealer nearest you or visit:

Fast Feet  
Springfield

Edward Hanlon  
Framingham

Mohobe Sporting Goods  
Hewlett

Snowshoes  
Worcester

Selection Foot Locker and  
Lodi Foot Locker stores

EXHIBIT 4

# IF ONLY THE OTHER FRONT-RUNNERS COULD KEEP A PROMISE FOR 86 YEARS.



Of all the big names in the running these days, Saucony is the only one with a history of keeping promises. Eighty-six years ago, we pledged to build our shoes in New England. Since then, our company has worked

Bangor, Maine to build Saucony shoes and a history of quality craftsmanship. From Bangor to Baton Rouge to Bakersfield, that's a track record that will only improve in the future.



**Saucony.**

WE

**BUSINESS, NOT SHOW BUSINESS.**

Runners High  
Menlo Park

dealer nearest you or visit

Vintage Sports Company  
Sonoma

Sports A Foot  
Petaluma

for more information are invited. Call 1-800-365-7382 for more details.

EXHIBIT 4

EXHIBIT 5

# FURTHER PROOF THAT ECONOMIC PROBLEMS CAN BE SOLVED AT THE GRASS ROOTS LEVEL.



Maybe a small running shoe company can't keep the entire country running strong, but we can certainly help our part of it. At Saucony, we've been a major employer in New England for 86 years. Generation after generation, our family-owned company has worked with the families

of Bangor, Maine to build Saucony shoes and a history of quality craftsmanship. Through it all, we've discovered that the best way to solve economic problems is to build from the ground up.



## Saucony.

WE'RE IN THE SHOE BUSINESS, NOT SHOW BUSINESS.

Call 1-800-365-SALCONY for the dealer nearest you or visit

Athlete's Foot  
Greensboro

Omega Sports  
All Locations

R&M Sports  
Greensboro

Sportline of Hilton Head  
Greensboro

Athletic World  
Chapel Hill

Some running shoes built in Bangor, Maine. "Classic" running styles and some components are imported. Call 1-800-365-7382 for more details.

EXHIBIT

EXHIBIT 6

© 1992 Hise America Industries, Inc.

# IT CAN EVEN HELP THE COUNTRY GET BACK ON ITS FEET.



Any running shoe company can help keep Americans in shape. At Saucony, we've helped keep America in shape. That's because we've been a major employer in New England since 1906. Generation after generation, our family-owned company has worked with the town of Bangor, Maine to build Saucony shoes and a history of quality craftsmanship. After all, it's the way we know to keep the economy—running smoothly.

**Built With Pride in BANGOR MAINE USA**

**WE'RE IN THE SHOE BUSINESS NOT SHOW BUSINESS.**

Call 1-800-365-7272

Big 5 Sporting Goods All Locations  
Copelands Sports All Locations  
Fleet Feet Sports All Locations  
Sport Chalet All Locations

EXHIBIT 7

# PROUD TO BE AN AMERICAN.



The new wave of American patriotism sweeping the country has a few of our competitors shaking in their imported shoes. At Saucony, we've been a major employer in New England since 1906. Generation after generation, our family-owned company has worked with the families of Bangor, Maine to

build Saucony running shoes and a history of quality craftsmanship. So the next time you see a pair of Saucony shoes on the road, remember, our pride is showing.



## Saucony.

WE'RE IN THE SHOE BUSINESS, NOT SHOW BUSINESS.

Call 1-800-365-SAUCONY for the dealer nearest you or visit

Fleet Feet  
Davis

Fleet Feet  
Sacramento

Fleet Feet  
Fair Oaks

Fleet Feet  
Roseville

Sporting Feet  
All Locations

Some Saucony shoes built in Bangor, Maine. "Classic" running shoes and some components are imported. Call 1-800-365-7282 for more details.

EXHIBIT 7

