FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS AND ORDERS JULY 1, 1998 TO DECEMBER 31, 1998

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JULY 1, 1998 TO DECEMBER 31, 1998

ROBERT PITOFSKY, *Chairman*
Took oath of office April 12, 1995.

SHEILA F. ANTHONY, *Commissioner*
Took oath of office September 30, 1997.

MOZELLE W. THOMPSON, *Commissioner*
Took oath of office December 17, 1997.

ORSON SWINDLE, *Commissioner*
Took oath of office December 18, 1997.

DONALD S. CLARK, *Secretary*
Appointed August 28, 1988.

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Unless otherwise indicated in parentheses, the names below refer to cases in which orders to cease and desist have been entered by the Commission. The names in *italics* refer to cases which the Commission has dismissed.

IN THE MATTER OF

DIGITAL EQUIPMENT CORPORATION

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

Docket C-3818. Complaint, July 14, 1998--Decision, July 14, 1998

This consent order, in conjunction with Digital's sale of certain semiconductor business assets to Intel Corporation, requires, among other things, Digital to enter into or extend certain licensing agreements with Advanced Micro Devices, Inc., and Samsung Electronics Co., Ltd., or other Commission-approved licensees, and to begin the process of certifying International Business Machines, Inc. or other Commission-approved companies to manufacture Digital's Alpha microprocessor devices.

Participants

For the Commission: *Robert Cook, John Horsley, Joseph Krauss, William Baer, David Meyer, Jay Creswell,* and *Jonathan Baker.*

For the respondent: *Benjamin Crisman, Jr., Skadden, Arps, Slate, Meagher & Flom*, Washington, D.C. and *Michael Weiner, Skadden, Arps, Slate, Meagher & Flom*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that an agreement between Intel Corporation and Digital Equipment Corporation whereby Intel will acquire certain assets of Digital Equipment Corporation violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

A. THE RESPONDENT

1. Respondent Digital Equipment Corporation ("Digital") is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal executive offices located at 111 Powdermill Road, Maynard, Massachusetts.

2. Digital is an international corporation with worldwide sales of approximately $13 billion in 1997. Digital designs, develops, manufactures, markets, and sells computer hardware and software systems, including personal computers, workstations, and servers. Digital also designs, develops, manufactures, markets, and sells a variety of semiconductor products, including certain microprocessor products that are generally known, marketed, and sold under the trade name Alpha.

3. At all times relevant herein, Digital has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, Digital has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

B. THE PROPOSED TRANSACTION

4. Intel Corporation ("Intel") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2200 Mission College Boulevard, Santa Clara, California. Intel has annual worldwide sales of approximately $20.8 billion.

5. Intel designs, develops, manufactures, markets, and sells a variety of semiconductor products, including a line of microprocessor products that are generally known, marketed, and sold under the trade names Pentium, Pentium with MMX, Pentium Pro, and Pentium II (the "Pentium microprocessors").

6. Digital and Intel are currently litigating three pending lawsuits involving intellectual property and technology rights relating to microprocessors. Digital initiated that litigation on May 12, 1997, by filing a lawsuit in Massachusetts alleging that Intel has willfully infringed ten Digital patents by making and selling Pentium microprocessors. On May 27, 1997, Intel filed a related lawsuit in California alleging that Digital breached certain contractual duties

and violated Intel's trade secret rights by refusing to return certain technical information about Intel microprocessors. In August and September 1997, Intel filed counterclaims in Digital's Massachusetts lawsuit and a lawsuit in Oregon alleging that Digital willfully infringed fifteen Intel patents by, among other things, making and selling Alpha microprocessors.

7. On October 26, 1997, Digital and Intel executed a proposed Settlement Agreement, which provides for, among other things, the settlement of all pending litigation between Digital and Intel, the cross licensing of Intel and Digital patents for a period of ten (10) years, the sale of Digital's semiconductor business and operations to Intel, the establishment of contractual relationships pursuant to which Intel will serve as an Alpha microprocessor foundry for Digital and supply Alpha microprocessors to Digital, the retention by Digital of all intellectual property rights relating to Alpha microprocessor architecture and technology, and the retention by Digital of those Digital employees supporting the design and development of Alpha products. Since the execution of the Settlement Agreement, Digital and Intel have negotiated all of the subsidiary agreements that are contemplated by, and intended to implement the terms of, the Settlement Agreement (the "Implementing Agreements").

8. The proposed Settlement Agreement and Implementing Agreements provide, among other things, that Digital shall sell, and Intel shall acquire, Digital's semiconductor business and operations, including the facilities and manufacturing assets now used by Digital to produce Digital semiconductor products, including Alpha microprocessors. The proposed Settlement Agreement and Implementing Agreements require Intel to produce and supply exclusively to Digital Alpha microprocessor products for a period of seven (7) years from the closing date of the transactions contemplated by those Agreements, but do not restrict Digital's rights to establish or further develop any relationship or relationships with other semiconductor manufacturers to produce Alpha microprocessor devices, as a foundry for Digital or otherwise. In connection with the proposed Settlement Agreement, Digital also agreed to announce that it would support Intel's forthcoming IA-64 microprocessor devices by building computer systems designed around such devices.

9. The proposed Settlement Agreement and Implementing Agreements further provide, among other things, that Intel shall hire,

and Digital shall facilitate and encourage Intel's efforts to hire, all current employees of the Digital semiconductor business, with the exception of those Digital employees who currently support the design and development of Alpha microprocessor products. Among the Digital personnel to be hired by Intel under the Settlement Agreement are those Digital employees who currently conduct or support Digital's efforts to market and sell the Digital semiconductor product line, including Alpha microprocessor products, to the merchant market for semiconductor devices.

10. The proposed Settlement Agreement and Implementing Agreements further provide that Digital shall retain ownership of all intellectual property and technology rights relating to Alpha microprocessor architecture and devices, and contemplate that Digital will continue to develop the Alpha architecture and future generations of Alpha microprocessor products. Those Agreements also expressly give Digital the right to license Alpha intellectual property or technology rights to third parties, and do not prevent Digital from augmenting or establishing strategic alliances with third parties for the development of Alpha microprocessor technology.

C. THE RELEVANT MARKETS

11. One relevant line of commerce in which to analyze the likely competitive effects of the proposed Settlement Agreement is the manufacture and sale of high-performance, general-purpose microprocessors that are capable of running the computer operating system software in native mode that is currently being developed and sold by Microsoft Corporation ("Microsoft") under the trade name Windows NT.

12. A second relevant line of commerce in which to analyze the likely competitive effects of the proposed Settlement Agreement is the manufacture and sale of all general-purpose microprocessors.

13. A third relevant line of commerce in which to analyze the likely competitive effects of the proposed Settlement Agreement is innovation in the design and development of high-performance, general-purpose microprocessors.

14. The relevant geographic market in which to analyze the likely competitive effects of the proposed Settlement Agreement is the world.

D. CONCENTRATION

15. Intel has market power in the market for the supply of high-performance, general-purpose microprocessors that are capable of running the Windows NT operating system. Intel accounts for nearly 90 percent of dollar sales and nearly 85 percent of unit sales of such microprocessors. Digital accounts for approximately one percent of the dollar sales and unit sales of such devices. Moreover, Alpha microprocessors and Intel Pentium products are today the two closest substitutes -- and perhaps the only two viable devices -- available for computer system manufacturers and computer users who require a microprocessors capable of running in native mode the Windows NT operating systems.

16. Intel also has market power in the market for all general-purpose microprocessors. Intel accounts for nearly 90 percent of dollar sales and 80 percent of unit sales of general-purpose microprocessors. Digital accounts for approximately one percent of dollar sales and unit sales of such devices. No firm other than Intel accounts for more than four percent of dollar sales of microprocessors, and no firm other than Intel accounts for more than 10 percent of unit sales of microprocessors.

17. Digital and Intel are two of the most significant innovation competitors in the design and development of high-performance microprocessors. Even with its comparatively small share of the relevant markets, Digital's Alpha microprocessor represents the greatest technological challenge to Intel, and stands as the most significant threat to Intel's continued market dominance. For the last several years Digital's Alpha devices have consistently demonstrated industry-leading performance as measured by processing speed and related performance criteria generally recognized in the industry. Intel recognizes that the Alpha microprocessor has superior performance characteristics, poses a competitive threat to Intel's products, and establishes performance benchmarks that serve as goals to which Intel aspires in the development of its own future microprocessor products. Indeed, a current major goal for Intel is the development of a new 64-bit Intel microprocessor architecture (known as IA-64) to compete with Digital's current 64-bit Alpha architecture, and the development of new IA-64-based microprocessors (currently known by project names such as Merced and McKinley) to compete with Digital's Alpha devices.

E. ENTRY CONDITIONS

18. Entry into the relevant markets would not be sufficiently timely or likely to deter or otherwise correct the anticompetitive effects of the proposed Settlement Agreement.

19. A new entrant would need to develop a relevant microprocessor product, which development requires substantial capital expenditures and several years of engineering work. The entry cost required for developing a new high-performance microprocessor would likely exceed $250 million. The development of such a product would require a minimum of two years, and a high-performance microprocessor comparable to Digital's Alpha microprocessors and Intel's Pentium products would likely require at least four years. For example, although Intel began development of its new IA-64 microprocessors in 1994, the first generation IA-64 device known as Merced is not expected to be commercially available before the second half of 1999.

20. New entry into the relevant markets is also deterred by the minimum viable scale requirements for a modern semiconductor fabrication facility. The cost of developing, building and equipping such a facility is approximately $1.6 billion. An entrant could not expect to begin shipping revenue microprocessor products for at least four to five years after starting the construction of such a facility. A new entrant could avoid significant fixed costs in buildings or equipment by contracting with an existing microprocessor producer to provide manufacturing and development services, but even such "fabless" entry would require approximately six months and a commitment of approximately 30 staff to the manufacturing area at a cost of $200,000 per person per year, in addition to significant costs for foundry services.

21. A new entrant would also have to establish both product reputation and technical compatibility with a computer operating system and the applications software desired by a significant number of computer users. Buyers of computer systems and microprocessor components demand highly reliable products, and regard product reputation to be an essential purchasing criterion. Consumers also demand computer systems and microprocessor components that are capable of running the computer operating systems and applications software programs that are desired by computer end-users. Accordingly, a new entrant must attract support from software

developers, who are generally reluctant to devote development resources to an unproven microprocessor product for which there is no demonstrated demand. The need simultaneously to secure a large number of users in order to make the product attractive to software developers and to secure the efforts of software developers in order to make the product attractive to users is often referred to as "network effects." The importance of these network effects is illustrated by Intel's recent success in obtaining commitments from many computer manufacturers and software vendors to build computers and write software for Intel's new 64-bit Merced microprocessor, even though the product will not be available for more than a year.

22. In order to enter the market for Windows NT-compatible microprocessors or the market for general-purpose microprocessors, any viable new microprocessor product must be compatible with the Windows NT operating system. Two other microprocessor architectures once enjoyed Windows NT support, but Windows NT support for those rival architectures was recently discontinued because of low system volumes. Any new entrant would likely need a very large volume of system sales in order to succeed in obtaining Windows NT support for the new microprocessor architecture.

F. EFFECTS OF THE PROPOSED TRANSACTION ON COMPETITION

23. Unless remedied, the proposed acquisition by Intel of Digital's semiconductor business and operations, including the facilities and assets used for microprocessor manufacturing, and of Digital's semiconductor sales and marketing organization, is likely to create uncertainty regarding the future competitive viability of Alpha and thereby maintain and enhance Intel's market power and thereby increase price and reduce quality and innovation in each of the relevant markets described above in paragraphs 11-14, for reasons that include, but are not limited to, the following:

a. By making it less likely that Digital would maintain the sales force to continue "merchant market" sales of Alpha microprocessors and other products to other OEMs, it would reduce competition between Intel and Digital for such sales; and

b. Putting Digital's supply of Alpha solely in the hands of Intel would give Intel the opportunity to delay production of Alpha microprocessors, impede the development of new generations of

Alpha microprocessors, and otherwise undermine the competitiveness of Alpha.

G. VIOLATIONS CHARGED

24. The agreement between Digital and Intel, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed transaction through which Intel Corporation ("Intel") is to acquire certain assets of Digital Equipment Corporation ("Digital"), including the semiconductor fabrication facility at which Digital manufactures its Alpha family of microprocessors; and Digital having represented to the Commission its plans to continue developing and promoting Alpha microprocessors despite the sale of the microprocessor facility; and Digital having licensed Samsung Electronics Co., Ltd. to develop, manufacture and sell Alpha microprocessors and having entered into a Memorandum of Understanding with Advanced Micro Devices, Inc., that contemplates a comparable license; and it now appearing that Digital, sometimes referred to as the "respondent," is willing to enter into an agreement containing an order in order to confirm its future plans for Alpha and to provide for other relief, and respondent having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that 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, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, makes the following jurisdictional findings and enters the following order:

1. Respondent Digital is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 111 Powdermill Road, Maynard, Massachusetts.

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*" or "*Digital*" means Digital Equipment Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Digital Equipment Corporation and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Intel*" means Intel Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2200 Mission College Boulevard, Santa Clara, California.

C. "*AMD*" means Advanced Micro Devices, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One AMD Place, P.O. Box 3453, Sunnyvale, California.

D. "*IBM*" means International Business Machines, Inc., a corporation organized, existing, and doing business under and by

virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 New Orchard Road, Armonk, New York.

E. "*Samsung*" means Samsung Electronics Co., Ltd., a Korean corporation with offices located at San #24, Nongaeo-Lee, Kiheung-Eup, Yonginn-Si, Kyungki-Do, Korea.

F. "*Digital's Alpha RISC Architecture*" means the architecture as defined by the current edition, or previous edition, of Digital's Alpha AXP Architecture Reference Manual, published by or on behalf of Digital.

G. "*Digital Alpha Implementation*" means a microprocessor implementation of Digital's Alpha RISC Architecture designed by or for Digital. For purposes of illustration only and without limiting the foregoing, each of the following implementations constitutes a distinct and separate Digital Alpha Implementation: EV4, EV5, EV6, EV67, EV68, EV7.

H. "*Alpha Device*" means a 64-bit microprocessor that implements the same design and circuitry as, and is equivalent in form, fit and function to, a Digital Alpha Implementation, and that 1) conforms to Digital's Alpha RISC Architecture, 2) executes Digital's Alpha instruction set and 3) meets appropriate Digital quality and branding criteria.

I. "*Device Specifications*" means the product specifications for a Digital Alpha RISC Architecture implementation from and after EV56 (*e.g.*, EV56, EV6, EV67, EV68, EV7, etc.), as set forth in the Device Data Sheet and the Device Quality and Reliability Data Sheet to be provided by Digital as amended from time to time, which define the specific functional, performance, electrical, timing, mechanical, environmental, reliability, and other requirements of the Digital Device and which may refer to, and thereby incorporate, other specifications, including without limitation, logic or other design and/or layout specifications.

J. "*Digital Device*" means a semiconductor integrated circuit device meeting the applicable Device Specification and embodying the applicable specific logic design of Digital's Alpha RISC Architecture implementation for EV56, EV6 and for any Future Alpha Implementation as designed and manufactured by or on behalf of Digital.

K. "*Future Alpha Implementation*" means a semiconductor integrated circuit device meeting the applicable Device Specification

and embodying the applicable specific logic design of a Digital Alpha RISC Architecture implementation beyond EV56 and EV6 (*e.g.*, EV67, EV68, EV7, etc.) as designed and manufactured by or on behalf of Digital.

L. "*AMD Device*" means a 64-bit microprocessor designed by or for AMD that 1) conforms to Digital's Alpha RISC Architecture, 2) executes Digital's Alpha instruction set and 3) meets appropriate Digital quality and branding criteria.

M. "*AMD Derivative*" means a 64-bit microprocessor derived from an Alpha Device or AMD Device, that incorporates a modification or improvement designed by or for AMD and 1) conforms to Digital's Alpha RISC Architecture, 2) executes Digital's Alpha instruction set and 3) meets appropriate Digital quality and branding criteria.

N. "*AMD Licensed Products*" means integrated circuits designed by or for AMD including, but not limited to Alpha Devices, AMD Devices and AMD Derivatives. AMD Licensed Products shall exclude SPARC, PA RISC, POWER PC and MIPS families of microprocessors.

O. "*AMD 64-bit Microprocessor*" means an AMD Licensed Product that is a 64-bit microprocessor.

P. "*Samsung Device*" means a fully qualified, packaged and tested semiconductor integrated circuit, that 1) is based upon and conforms to and incorporates Digital's Alpha RISC Architecture, 2) embodies a specific logic design provided to Samsung by Digital corresponding to the Digital Device, including updates by Digital thereto, and 3) conforms to the Device Specification, Branding Standard and Product Qualification Procedures.

Q. "*Samsung Alpha Architecture Device*" means a microprocessor manufactured and designed by or on behalf of Samsung and that 1) conforms to Digital's Alpha RISC Architecture, as specified in Digital's Alpha Architecture Reference Manual, as revised from time to time by Digital, 2) executes Digital's Alpha instruction set, and 3) conforms to the Branding Standard and Product Qualification Procedures.

R. "*Samsung Derivative*" means a semiconductor integrated circuit device embodying the design of Digital's EV56 or EV6 Alpha RISC Architecture implementation (or any Future Alpha Implementation licensed to Samsung) as the case may be, including

updates made thereto by Digital and updates made thereto by Samsung to a Samsung Device, and with such additions, deletions, modifications, improvements and redesigns made by Samsung to a Samsung Device including, but not limited to, design package, testing or die size changes, as result in a final device having any of the following changes (but no other changes) to a Samsung Device:

(i) Change in die size due to mask size change and/or due to employing any CMOS process technology;

(ii) Modification, reduction, addition, or replacement of SRAM cell;

(iii) Change or redesign of cache memory architecture, including necessary implementation to change I/O interfaces; .

(iv) Change to form, fit or function of the EV56 or the EV6 Device Specification other than changes or modifications to the EV6 or EV56 "core," which, for purposes of this subsection shall be defined to mean the Samsung Device, excluding the I/O pad ring and caches; and/or

(v) Any change to the Alpha RISC Architecture, or any change not included in (i), (ii), (iii) or (iv) above, to the Device Specification, Product Qualification Procedures or the form, fit or function of the EV56 or EV6 Device Specification, in either case, which has been specifically approved by Digital in its sole discretion, in accordance with the provisions of Section 3.3 (b)(ii) of the Samsung License Agreement referred to in paragraph III.A. of this order.

S. "*Alpha Microprocessor Technology*" means the information, materials, and technology relating to any Digital Alpha Implementation and associated Alpha architectural specification including, but not limited to, layout database and schematics, test programs and vectors, models, design data simulation results, all HAL, PAL, and BIOS codes, design documentation and customer product documentation, and including all updates.

T. "*Software Products*" means Digital commercial software products necessary to generate or optimize binary code for Digital Alpha Implementations.

U. "*CAD Tools*" means Digital CAD Tools, including all updates, applicable to the design, development and manufacture of Digital Alpha Implementations.

V. "*Software Tools*" means Digital software tools as to which Digital has the right to grant a license, including all updates, used to generate or optimize binary code for Digital Alpha Implementations.

W. "*Digital Technology*" means Alpha Microprocessor Technology, Software Products (in both source and object code form), Software Tools (in both source and object code form), FX!32 Software (in both source and object code form) and CAD Tools (in both source and object code form).

X. "*Digital Intellectual Property Rights*" with regard to paragraph II of this order means all patents, patent applications, copyrights, mask works, know-how and trade secrets owned by Digital covering 1) Digital Alpha Implementation, 2) Digital's Alpha RISC Architecture or 3) Digital Technology; and, with regard to paragraph III of this order, "Digital Intellectual Property Rights" has the same meaning as set forth in Section 1.16 of the Samsung License Agreement referred to in paragraph III.A. of this order, covering 1) Digital Alpha Implementation, 2) Digital's Alpha RISC Architecture or 3) Digital Technology.

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

Z. "*Intel/Digital Settlement*" means all transactions and agreements contemplated by, or necessary to implement, the Settlement Agreement Between Digital Equipment Corporation and Intel Corporation, dated October 26, 1997.

AA. "*FX!32 Software*" shall mean the Digital software known as FX!32 for runtime emulation and background binary translation of x86 binaries to native Alpha code and associated documentation, including updates, meaning all corrections, bug fixes, modifications, and enhancements to the FX!32 Software, in both object or source code form, made by or for Digital.

II.

It is further ordered, That:

A. Respondent shall grant a license, by the date this order becomes final, to Advanced Micro Devices, Inc. ("AMD"), or to a licensee that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission and is consistent with the framework of the Memorandum of Understanding entered into between Digital and AMD, dated March 30, 1998 (the "MOU"), which provides, *inter alia*:

1. Under Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license, without the right to sublicense (except as otherwise provided herein) to design, develop, manufacture and have manufactured, and to market, distribute and sell worldwide AMD Licensed Products

2. Under Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license, without the right to sublicense (except as otherwise provided herein), to use, modify, copy, and create derivative works of the Alpha Microprocessor Technology for the purpose of and to the extent required to enable AMD's exercise of the licenses to be granted pursuant to paragraph II.A.1. of this order;

3. The right to grant sublicenses (without the right to grant further sublicenses) to no more than two third parties (as agreed to by Digital and AMD in the MOU) under rights granted to AMD in paragraph II.A.1. above, to manufacture, use and sell AMD 64-bit Microprocessors;

4. The right to provide Infrastructure Partners technology designed or developed by AMD, even if such technology incorporates certain Digital trade secrets or know-how contained in the Alpha Microprocessor Technology, and to grant sublicenses (without the right to grant further sublicenses) such third parties under such technology to make, have made, use or sell products (other than AMD 64-bit Microprocessors) based upon or incorporating such technology. "Infrastructure Partners" shall mean (subject to the terms of the MOU) chipset vendors, BIOS vendors, independent software vendors and other companies in the business of designing and selling products designed to operate with AMD Licensed Products;

5. Under Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license (without the right to sublicense) to use the CAD Tools, in object code form, and CAD Tool Documentation, for the sole purpose of assisting AMD internally in the design, development and manufacture of AMD Licensed Products and to make copies of the CAD Tool Documentation solely to the extent necessary to enable AMD to implement the terms of internal use licenses. Digital shall also grant AMD a non-exclusive, non-transferable license (without the right to sublicense) to one copy of the source code for each licensed CAD Tool for evaluation purposes only;

6. Under Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license (without the right to sublicense)

to use internally the Software Products, in object code form, for the sole purpose of assisting AMD in the design, development and manufacture of Alpha Devices, AMD Devices and AMD Derivatives and in the generation and optimization of binary code for Alpha Devices, AMD Devices and AMD Derivatives;

7. Under Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license (without the right to sublicense) to modify, copy and create derivative works of the Software Tools, in object code and source code form, for internal use only, for the sole purpose of the generation and optimization of software code for Alpha Devices, AMD Devices and AMD Derivatives. AMD shall have the further right to provide and sublicense the Software Tools and modified versions thereof, in object code form, to independent software vendors ("ISVs") for internal use only, for the sole purpose of generating and optimizing the ISVs' own binary code for operation on a computer system having an Alpha Device, AMD Device or AMD Derivative as a central processing unit. AMD and such ISVs will not have the right to market, distribute or sell any Software Tools, and shall not use the Software Tools to develop, market, distribute or sell a product similar to the Software Tools. Digital will also grant AMD a non-exclusive, non-transferable, perpetual license (without the right to sublicense) to one copy of the source code for each licensed Software Tool for evaluation purposes only;

8. Under Digital Intellectual Property Rights, (i) a non-exclusive, non-transferable, perpetual license (without the right to sublicense) to modify, copy and create derivative works of FX!32 Software, in object code and source code form, for internal use only, and (ii) a non-exclusive, non-transferable, perpetual license to reproduce and distribute FX!32 Software, in object code form, either directly or through AMD's authorized distribution channels in conjunction with sales to third parties of Alpha branded products. Digital FX!32 Software Updates shall be furnished by Digital to AMD on a royalty-free basis. Any modification, enhancements or adaptations to FX!32 Software developed by AMD shall be furnished by AMD to Digital under a non-exclusive, perpetual, transferable, royalty-free license, with the right to sublicense in object code or source code form; and

9. Under Digital Intellectual Property Rights, the right to modify or extend Digital's Alpha RISC Architecture, without approval from

Digital, and to produce AMD Devices and AMD Derivatives implemented in accordance with such modified or extended architecture, if Digital fails to establish and implement a roadmap that advances the performance, as measured by speed, of then-current SPECint and/or then-current SPECfp, as appropriate, of the highest Alpha microprocessor by at least 25 percent every three years.

B. Digital shall agree, if requested by the licensee, to submit all disputes of any license agreement described in paragraph II.A. of this order to binding arbitration. Respondent agrees to provide the Commission with ten (10) days notice of an intention to terminate any license agreement described in paragraph II.A. of this order. Other than the above limitations, nothing in this paragraph shall limit Digital's rights to seek redress for any breach of the license agreement described in paragraph II.A. of this order.

C. A purpose of paragraph II of this order is to establish the Commission approved licensee as an independent provider of Alpha Devices in order to promote the Alpha Architecture and Alpha Devices as a viable and competitive microprocessor and to remedy the lessening of competition resulting from the effects of the Intel/Digital Settlement, as alleged in the Commission's complaint. Another purpose of paragraph II of this order is to establish the licensee as an independent provider of innovation in Alpha Device design while maintaining the ability of computer systems based on Alpha Devices supplied by Digital and computer systems based on Alpha Devices supplied by the licensee to run the same software and use the same non-microprocessor components.

D. A condition of approval by the Commission of the licensee shall be the submission by the proposed licensee to the Commission of an acceptable business plan demonstrating that the licensee will use the Alpha Microprocessor Technology to develop, manufacture, market and sell a viable and competitive Alpha Device free of all direct or indirect continuing relationships with Intel in the manufacture or sale of Alpha Devices.

E. A condition of approval by the Commission of the license shall be the submission by Digital to the Commission of an acceptable business plan demonstrating the manner in which Digital shall support the licensee's efforts as required by paragraph II of this order.

F. On reasonable notice to Digital from the licensee, Digital shall provide technical assistance and know-how related to such assistance

to the licensee with respect to the manufacture of, and the provision of technical and engineering support for, all Alpha Devices to be manufactured or sold by the licensee. Such technical assistance shall include, without limitation, consultation with knowledgeable employees of Digital and training at the facilities of Digital. Digital may charge the reasonable costs incurred in providing such technical assistance, including reimbursement (commensurate with the salary and benefits of Digital personnel involved) for the time plus expenses of Digital personnel providing the technical assistance. Digital shall continue to provide such technical assistance until AMD is satisfied that it is capable of producing, and of developing for production, commercially saleable Alpha Devices; provided, however, Digital shall not be required to continue providing such technical assistance and training for more than two (2) years after the date on which the license required by paragraph II.A. of this order is approved by the Commission.

G. Until expiration of the technical assistance obligations of paragraph II.F. of this order, respondent shall take such actions as are necessary to maintain the viability and marketability of the Alpha Microprocessor Technology and Digital's Alpha RISC Architecture and to prevent the destruction, removal, wasting, deterioration, or impairment of any of these intellectual property assets.

III.

It is further ordered, That:

A. Respondent shall grant a license, by the date this order becomes final, to Samsung Electronics Co., Ltd. ("Samsung"), or a licensee that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission and is consistent with the framework of the License Agreement Between Digital and Samsung, dated June 5, 1996, the Supplemental License Agreement entered into between Digital and Samsung, dated April 4, 1998 (the "License Agreement") and the Alpha Marketing and Technology License Agreement entered into between Digital and Samsung, dated April 4, 1998 (the "Marketing Agreement"), which provide, *inter alia*:

1. Under applicable Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license, without the right

to sublicense, to design, develop, and manufacture, and market, distribute and sell worldwide Samsung Devices and Samsung Alpha Architecture Devices;

2. The right to receive from Digital the product technology package as set forth in the License Agreement and Digital know-how (specified in the License Agreement) necessary for the design of Samsung Devices; such technology package may be used by Samsung to design, develop and manufacture Samsung Alpha Architecture Devices and Samsung Derivatives under the terms of the License Agreement;

3. The right to have a third party design a portion of the Samsung Alpha Architecture Device, provided that the third party design is undertaken for and on behalf of Samsung in accordance with the terms and conditions set forth in Section 4 of the License Agreement;

4. Under applicable Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license (without the right to sublicense) to use the CAD Tools, in object code form, and related documentation, for the sole purpose of assisting Samsung internally in the design, development and manufacture of Samsung Devices, Samsung Alpha Architecture Devices, Samsung Derivatives and Other Integrated Circuits in accordance with the terms and conditions set forth in Section 5 of the License Agreement, and to make copies of such documentation solely to the extent necessary to enable Samsung to implement the terms of such internal use licenses; and

5. Under applicable Digital Intellectual Property Rights, the right to reproduce and distribute FX!32 Software, in object code form (including any improvements and derivatives thereto made by Digital) for use with Alpha branded products.

B. Digital shall agree, if requested by the licensee, to submit all disputes of any license agreement described in paragraph III.A. of this order to binding arbitration. Respondent agrees to provide the Commission with ten (10) days notice of an intention to terminate any license agreement described in paragraph III.A. of this order. Other than the above limitations, nothing in this paragraph shall limit Digital's rights to seek redress for any breach of the license agreement described in paragraph III.A. of this order.

C. Digital shall enter into an agreement whereby it shall grant the licensee the non-exclusive right to market and sell the licensee's Alpha Devices under Digital's "AlphaPowered" trademark.

D. Digital shall procure Alpha Devices from the licensee in accordance with Section 8 of the Marketing Agreement.

E. A purpose of paragraph III of this order is to establish the licensee as an independent provider of Alpha Devices in order to promote the Alpha Architecture and Alpha Devices as a viable and competitive microprocessor and to remedy the lessening of competition resulting from the effects of the Intel/Digital Settlement, as alleged in the Commission's complaint. Another purpose of paragraph III of this order is to establish the licensee as an independent provider of innovation in Alpha Device design while maintaining the ability of computer systems based on Alpha Devices supplied by Digital and computer systems based on Alpha Devices supplied by the licensee to run the same software and use the same non-microprocessor components.

F. A condition of approval by the Commission of the licensee shall be the submission by the proposed licensee to the Commission of an acceptable business plan demonstrating that the licensee will use the Alpha Microprocessor Technology to develop, manufacture, market and sell as a viable and competitive Alpha Device free of all direct or indirect continuing relationships with Intel in the manufacture or sale of Alpha Devices.

G. A condition of approval by the Commission of the license shall be the submission by Digital to the Commission of an acceptable business plan demonstrating the manner in which Digital shall support the licensee's efforts as required by paragraph III of this order.

H. Digital shall provide the licensee consulting services and training as described in Section 2.1(c) of the License Agreement.

I. Until expiration of the technical assistance obligations of paragraph III.H. of this order, respondent shall take such actions as are necessary to maintain the viability and marketability of the Alpha Microprocessor Technology and Digital's Alpha RISC Architecture and to prevent the destruction, removal, wasting, deterioration, or impairment of any of these intellectual property assets.

IV.

It is further ordered, That within six months after the date this order becomes final, Digital shall, subject to the prior approval of the Commission, enter into an agreement with IBM or some other company, whereby Digital will work with IBM or such other

company to evaluate it as a foundry and provide IBM or such other company a report setting forth the steps necessary to become a qualified supplier of Digital Devices, Alpha Devices, and Digital Alpha Implementations to Digital under Digital's quality, performance and production criteria within six (6) months after the date the Commission approves such agreement; provided, however, if Digital demonstrates to the Commission that the agreement is not necessary to achieve this purpose, then Digital need not submit any agreement pursuant to this paragraph IV.

V.

It is further ordered, That respondent shall comply with all requirements of any licenses or agreements entered pursuant to this order, and such licenses or agreements are incorporated by reference into this order and made a part hereof. Any failure by respondent to comply with the requirements of such licenses or agreements shall constitute a failure to comply with this order.

VI.

It is further ordered, That:

At any time after respondent has signed the agreement containing consent order in this matter, the Commission may appoint an Interim Trustee to monitor respondent's performance of its responsibilities as required by this order and by any license or agreement implementing this order, including, but not limited to, any license agreement between Digital and any licensee, as provided in paragraphs II and III of this order. Within ten (10) days after acceptance by the Commission for public comment of the agreement containing consent order, respondent shall submit the name and qualifications of and contract with a person to serve as Interim Trustee.

1. The Interim Trustee shall have the power and authority to monitor respondent's compliance with the terms of this order and with the terms and compliance with any other agreement implementing this order, including, but not limited to, any license agreement provided in paragraphs II and III. The Interim Trustee may be the same trustee appointed pursuant to paragraph VII.A. of this order.

2. Respondent's agreement with the Interim Trustee shall confer on the Interim Trustee all the rights and powers necessary to permit

the Interim Trustee to monitor respondent's compliance with the terms of this order and any other agreement implementing this order, including, but not limited to, any license agreement as provided in paragraphs II and III.

3. The Interim Trustee shall serve until the licensees approved pursuant to paragraphs II and III of this order have received all the technology and assistance provided for in those paragraphs. In no event, however, shall the Interim Trustee serve for more than two (2) years from the date this order becomes final.

4. The Interim Trustee shall have full and complete access to respondent's personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of any product or technology covered by this order, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of any product covered by this order. Respondent shall take no action to interfere with or impede the Interim Trustee's ability to monitor respondent's compliance with paragraphs II and III of this order or any other agreement implementing this order, including, but not limited to, any license agreement as provided in paragraphs II and III in this order.

5. The Interim Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

6. Respondent shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages,

claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.

7. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee.

8. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this order and any other agreement implementing this order, including, but not limited to, any license agreement as provided in paragraphs II and III of this order.

9. The Interim Trustee shall evaluate reports submitted to it or the Commission by Digital. The Interim Trustee shall report in writing concerning compliance by respondent with the provisions of paragraphs II and III of this order to the Commission every three (3) months from the date respondent signs the agreement containing consent order until the term of the Interim Trustee expires, as provided above. Such reports shall include at least the following:

a. Whether respondent has executed the licenses and agreements required under paragraphs II and III of this order;

b. Whether respondent has given the Interim Trustee access to records as required by paragraph VI.4. of this order;

c. Whether licensees have issued any sublicenses under paragraphs II and III of this order; the names, addresses, and phone numbers of any such sublicensee; and the purpose and terms under which these persons have been given sublicenses;

d. Whether and the degree to which Digital has provided the technical assistance and know-how to licensees as required under paragraphs II.F. and III.H. of this order;

e. Whether Digital has refused to allow any licensee to sublicense any person;

f. Whether licensees are making any good faith efforts to develop or sell any of the products covered by licenses under paragraphs II and III of this order, and, to the extent such sales have been made, the gross sales levels; and

g. The progress of Digital and any licensee in implementing their Commission-approved business plans and the extent to which the agreement is satisfying paragraphs II.D. and E. and III.F. and G. of this order.

VII.

It is further ordered, That:

A. If Digital has not executed the licenses and agreements, and received the Commission's approval for such licenses and agreements, required by paragraphs II and III of this order, then the Commission may appoint a trustee to grant the licenses or enter into agreements consistent with the terms set forth in paragraphs II and III of this order. The trustee shall have all rights and powers necessary to permit the trustee to enter into the licenses and agreements so as to expeditiously accomplish the remedial purposes of this order. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Digital shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute, for any failure by any of the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph VII.A. of this order, Digital shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, who shall be a person with experience and expertise in acquisitions and licenses.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to enter into the licenses and agreements required by paragraphs II and III of this order in order to accomplish the remedial purposes of this order.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission (and, in the case of a court-appointed trustee, of the court), transfers to the trustee all rights and powers necessary to permit the trustee to enter into the licenses and agreements required by paragraphs II and III of this order so as to expeditiously accomplish the remedial purposes of this order.

4. The trustee shall have twelve (12) months from the date the trust agreement is approved by the Commission to accomplish the license required by this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of license or believes that license can be achieved within a reasonable time, the license period may be extended by the Commission (or, in the case of a court-appointed trustee, by the court); provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Alpha Devices or Digital, or to any other relevant information, as the trustee may request. Digital shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the license. Any delays in licensing caused by the respondent shall extend the time for licensing under this paragraph VII in an amount equal to the delay, as determined by the Commission (or, in the case of a court-appointed trustee, by the court).

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the absolute and unconditional obligation of Digital to license at no minimum price; provided, however, that the trustee shall not negotiate any price or terms with AMD less favorable to respondent than those set forth in the MOU referred to in paragraph II of this order. The license shall be made in the manner, and to the licensee or licensees, as set out in paragraphs II and III of this order; provided, however, if the trustee receives bona fide offers from more than one licensee, and if the Commission approves more than one such licensee, then the trustee shall license to the entity or entities selected by Digital from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Digital, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of Digital, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The

trustee shall account for all monies derived from the license and all expenses incurred. After approval by the Commission (and, in the case of a court-appointed trustee, by the court) of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Digital and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement (based on sales price) contingent on the trustee's accomplishing the license required by this order.

8. Digital shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph VII.A. of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Alpha Microprocessor Technology.

12. The trustee shall report in writing to Digital and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the license.

VIII.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every thirty (30) days thereafter until respondent has granted the licenses and agreements required by the provisions of paragraphs II, III and IV of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with paragraphs II, III and IV of this

order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II, III and IV of the order, including a description of all substantive contacts or negotiations for the license and the identity of all parties that have contacted respondent or that have been contacted by respondent.

IX.

It is further ordered, That one (1) year from the date this order becomes final, annually for the next six (6) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the licenses and agreements required by paragraphs II, III, and IV of this order.

X.

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, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in respondent that may affect compliance obligations arising out of the order.

XI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondent shall permit any duly authorized representatives of the Commission:

A. During office hours and in the presence of counsel, access to facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five (5) days notice to respondent, and without restraint or interference, to interview officers, employees, or agents of respondent.

XII.

It is further ordered, That this order shall terminate on June 16, 2005.

IN THE MATTER OF

FASTLINE PUBLICATIONS, INC., ET AL.

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

Docket C-3819. Complaint, July 28, 1998--Decision, July 28, 1998

This consent order prohibits, among other things, the two corporations from restricting, regulating, or interfering with the advertising of prices or other terms or conditions of the sale for farm equipment or parts; from encouraging or assisting in any boycott or refusal to deal with the media regarding the advertising of prices, terms or conditions of sale for farm equipment or parts; and from agreeing or combining with any other person to prohibit, restrict or interfere with the advertising of prices, terms or conditions of sale for farm equipment or parts.

Participants

For the Commission: *Nicholas Franczyk, Evan Siegel, C. Steven Baker, William Baer, David Meyer,* and *Jonathan Baker.*

For the respondents: *John S. Reed, Reed, Weitkamp, Shell, Cox & Vice*, Buckner, KY. and *Ronald C. Smith*, *Stewart & Irwin*, Indianapolis, IN.

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 Fastline Publications, Inc. ("Fastline"), and Mid-America Equipment Retailers Association ("Mid-America"), hereinafter sometimes referred to as respondents, have violated and are violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

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

A. "*Fastline*" means Fastline Publications, Inc., its directors, officers, employees, agents and representatives, predecessors,

successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Fastline, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*Kentucky Retailers Association*" means the Kentucky Farm and Power Equipment Retailers Association, its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by the Kentucky Retailers Association, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. "*Mid-America*" means the Mid-America Equipment Retailers Association, its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Mid-America, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

D. "*Person*" means any natural person, corporate entity, partnership, association, joint venture, government entity, trust, or other entity.

PAR. 2.A. Fastline is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at 4900 Fox Run Road, Buckner, Kentucky.

B. Fastline is engaged in the business of publishing and publishes, among other things, picture buying guides for new and used farm equipment under the name "Fastline." Farm equipment advertised in Fastline ranges from lawn mowers to heavy duty farm equipment such as tractors, plows, planters, cotton pickers, and combines. Fastline currently publishes 20 monthly editions of its farm equipment buying guides, serving 41 states. Thirteen editions are state-specific editions (*e.g.*, "Fastline Kentucky Farm Edition"); and seven are regional editions (*e.g.*, "Fastline Southeast Farm Edition" (covering Georgia, Florida, and Alabama)). Approximately 20,000 copies of each edition are distributed free of charge each month. Farm equipment dealers view the "Fastline Kentucky Farm Edition" as a key vehicle for advertising to farmers in Kentucky. Fastline's principal source of revenue is its advertisers who pay from a few hundred dollars per month per edition for a half page, black and white

advertisement, to more than a thousand dollars per month per edition for a two-page, full color advertisement.

PAR. 3.A. Mid-America is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana. Its principal office and place of business are located at 9800 Association Court, Indianapolis, Indiana. Mid-America was formed in 1992 through the merger of the Indiana Implement Dealers Association, Inc., and the Kentucky Retailers Association. At the time of the merger, the members of the Indiana Implement Dealers Association and the Kentucky Retailers Association became members of Mid-America.

B. Mid-America is a trade association organized in substantial part to represent the interests of its members. Mid-America has approximately 500 members, constituting approximately 90% of the farm equipment dealers in Indiana and Kentucky. Mid-America engages in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, Mid-America is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

C. Most of Mid-America's members are farm equipment dealers engaged in the advertising, offering for sale, and sale of agri-business, outdoor power, farm, industrial and construction equipment and products or services in Indiana and Kentucky. Except to the extent that competition has been restrained as alleged herein, Mid-America's members have been and are now in competition among themselves and with other farm equipment dealers.

PAR. 4. The acts and practices of the respondents, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5.A. The Kentucky Retailers Association and members of the Kentucky Retailers Association have combined or conspired between and among themselves to restrain trade in the advertising, offering for sale, and sale of new farm equipment, by agreeing to cancel or agreeing to threaten to cancel advertising in the "Fastline Kentucky Farm Edition" in retaliation for Fastline publishing prices for new farm equipment.

B. The Kentucky Retailers Association, Fastline, and members of the Kentucky Retailers Association have combined or conspired between and among themselves to restrain trade in the advertising, offering for sale, and sale of new farm equipment, by agreeing not to advertise prices for new farm equipment in the "Fastline Kentucky Farm Edition."

C. Mid-America, Fastline, and members of Mid-America have combined or conspired between and among themselves to restrain trade in the advertising, offering for sale, and sale of new farm equipment, by agreeing not to advertise prices for new farm equipment in the "Fastline Kentucky Farm Edition."

PAR. 6. The Kentucky Retailers Association, members of the Kentucky Retailers Association, Mid-America, members of Mid-America, and Fastline have engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

A. In or about February 1991, the Kentucky Retailers Association and at least some of the Kentucky Retailers Association's members withdrew or otherwise canceled, or urged other members to withdraw or otherwise cancel, advertisements in the "Fastline Kentucky Farm Edition" in retaliation for Fastline publishing advertisements that included prices for new equipment;

B. In or about February 1992: (1) the Kentucky Retailers Association and at least some member of the Kentucky Retailers Association threatened to withdraw or otherwise cancel advertisements in the "Fastline Kentucky Farm Edition" if Fastline continued to publish advertisements that included prices for new equipment; and (2) as a result, Fastline, the Kentucky Retailers Association, and the members of the Kentucky Retailers Association agreed not to advertise prices for new farm equipment in the "Fastline Kentucky Farm Edition"; and

C. In or about June 1993: (1) Mid-America and members of Mid-America urged Fastline to abstain from publishing prices for new equipment and parts in all Fastline farm equipment buying guides; and (2) as a result, Fastline, Mid-America, and the members of Mid-America agreed not to advertise prices for new farm equipment in the "Fastline Kentucky Farm Edition."

PAR. 7. The acts and practices of the respondents, as described in paragraphs five and six, have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to deprive consumers of the benefits of competition in one or more of the following ways, among others:

A. By reducing and restraining price competition among farm equipment dealers for new farm equipment;

B. By depriving consumers of truthful and nondeceptive price information concerning farm equipment dealers' products; and

C. By depriving consumers of the benefits of competition among farm equipment dealers in the advertising, offering for sale, and sale of new farm equipment.

PAR. 8. The aforesaid acts and practices of the respondents are to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts and practices of the respondents, as herein alleged, are continuing and will continue or recur in the absence of the relief requested.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents

have violated the said Act, and that 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 no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Fastline Publications, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at 4900 Fox Run Road, Buckner, Kentucky.

2. Respondent Mid-America Equipment Retailers Association is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 9800 Association Court, Indianapolis, Indiana.

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

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

ORDER

I.

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

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

B. "*Mid-America*" means Mid-America Equipment Retailers Association, its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Mid-America, and the respective

directors, officers, employees, agents and representatives, successors, and assigns of each.

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

D. "*Fastline Farm*" means the Fastline buying guide for new and used farm equipment and parts. "Fastline Farm Edition" means each separate edition (*e.g.*, "Fastline Kentucky Farm Edition") of Fastline Farm.

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

II.

It is further ordered, That Mid-America, directly or indirectly, or through any corporate or other device, in or in connection with its activities as a trade association, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, shall forthwith cease and desist from:

A. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the advertising of prices or other terms or conditions of sale for farm equipment or parts by any person.

B. Carrying out, participating in, inducing, suggesting, urging, encouraging, or assisting in any boycott or threatened boycott of, or concerted refusal to deal with, any newspaper, periodical, publication, television station, radio station or other medium (including, but not limited to, the internet) regarding the advertising of prices or other terms or conditions of sale for farm equipment or parts.

III.

It is further ordered, That Fastline, directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, shall forthwith cease and desist from agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination with any other person to prohibit, restrict, regulate, impede, or interfere with the advertising of prices or other terms or conditions of sale for farm equipment or parts by any person.

Provided, however, that nothing contained in this order shall prohibit Fastline from formulating, adopting, disseminating to its

advertisers, and enforcing reasonable guidelines with respect to representations that Fastline reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

IV.

It is further ordered, That Mid-America:

A. Within sixty (60) days after the date this order becomes final, amend its by-laws to incorporate by reference paragraph II of this order, and distribute by first-class mail a copy of the amended by-laws to each of its members;

B. Within thirty (30) days after the date this order becomes final, distribute a copy of the complaint and order in this matter to each of its current officers and directors, and to each other agent, representative, or employee of Mid-America whose activities are affected by this order, or who have responsibilities with respect to the subject matter of this order;

C. Within thirty (30) days after the date this order becomes final, distribute by-first class mail a copy of the complaint and order in this matter to each of its members;

D. For a period of five (5) years after the date this order becomes final, and within thirty (30) days of the date the person assumes such position, distribute a copy of the complaint and order in this matter to each new officer and director of Mid-America, and to each other agent, representative, or employee of Mid-America whose activities are affected by this order, or who have responsibilities with respect to the subject matter of this order; and

E. For a period of five (5) years after the date this order becomes final, provide each new member with a copy of the complaint and order in this matter, and the amended by-laws, within thirty (30) days of the new member's admission to Mid-America.

V.

It is further ordered, That Fastline shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of the complaint and order in this matter to each of its current officers and directors, and to each other agent, representative, or employee of Fastline whose activities are affected

by this order, or who have responsibilities with respect to the subject matter of this order;

B. For a period of five (5) years after the date this order becomes final, and within thirty (30) days of the date the person assumes such position, distribute a copy of the complaint and order in this matter to each new officer and director of Fastline, and to each other agent, representative, or employee of Fastline whose activities are affected by this order, or who have responsibilities with respect to the subject matter of this order;

C. Within thirty (30) days after the date this order becomes final publish, in a clear and conspicuous manner, a copy of the NOTICE in the Attachment to this order in the next scheduled issue of each Fastline Farm Edition; and

D. For a period of five (5) years after the date this order becomes final publish, in a clear and conspicuous manner, a copy of the NOTICE in the Attachment to this order in the February issue of each Fastline Farm Edition, or in the next issue of each Fastline Farm Edition in the event no Fastline Farm Edition is published in February.

VI.

It is further ordered, That each respondent shall file a verified written report with the Commission within sixty (60) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which the respondent has complied with and is complying with this order.

VII.

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

VIII.

It is further ordered, That each respondent shall, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, permit duly authorized Commission representatives:

A. Access during respondent's office hours, in the presence of counsel, to inspect any facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in respondent's possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to respondent's reasonable convenience, to interview respondent, and officers, directors, employees, agents, or other representatives of respondent, who may have counsel present, regarding such matters.

IX.

It is further ordered, That this order will terminate on July 28, 2018.

ATTACHMENT TO CONSENT ORDER TO CEASE AND DESIST

IMPORTANT NOTICE REGARDING PRICE ADVERTISING IN FASTLINE

As a result of discussions with the Federal Trade Commission, Fastline Publications, Inc., has entered into an order prohibiting it from agreeing, attempting to agree, or taking any action in furtherance of any agreement with any other person, including, but not limited to, any other person who advertises in Fastline, to prohibit, restrict, regulate, impede, or interfere with the advertising of prices or other terms or conditions of sale for farm equipment or parts by any person. The order is for settlement purposes only and does not constitute an admission of a violation by Fastline. Copies of the order can be obtained by contacting Fastline.

IN THE MATTER OF

BOGDANA CORPORATION, ET AL.

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

Docket C-3820. Complaint, July 28, 1998--Decision, July 28, 1998

This consent order prohibits, among other things, the California-based company and its officers from making efficacy, performance, or safety claims for any food, drug or dietary supplement, unless they possess competent and reliable scientific evidence that substantiates the claims. In addition, the consent order prohibits the respondents from producing or disseminating any advertisement that misrepresents that it is not a paid advertisement, or that misrepresents that the testimonials and endorsements in their advertisements reflect the typical experiences of consumers who use their products.

Participants

For the Commission: *Lisa Kopchik* and *Jeff Bloom.*

For the respondents: *Karen Weaver* and *Rakesh M. Amin, Weaver & Amin*, Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Bogdana Corporation, a corporation, and Joseph L. Gruber and Bogda Gruber, individually and as officers of Bogdana Corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Bogdana Corporation is a California corporation with its principal office or place of business at 8929 Wilshire Boulevard, Third Floor, Beverly Hills, California.

2. Respondent Joseph L. Gruber is an officer of Bogdana Corporation. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Bogdana Corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Bogdana Corporation.

3. Respondent Bogda Gruber is an officer of Bogdana Corporation. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of Bogdana Corporation, including the acts or practices alleged in this complaint. Her principal office or place of business is the same as that of Bogdana Corporation.

4. Respondents Bogdana Corporation, Joseph L. Gruber and Bogda Gruber have advertised, labeled, offered for sale, sold and distributed products to the public, including Cholestaway wafers and capsules, and Flora Source. Cholestaway is a "food" and/or "drug," and Flora Source is a "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. 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.

CHOLESTAWAY

6. Respondents have disseminated or have caused to be disseminated advertisements and labeling for Cholestaway, including but not necessarily limited to the attached Exhibits A through E. These advertisements and labeling contain the following statements:

A. Consumer One: "My cholesterol level was 230 and now it's 179. That's great."
Consumer Two: "My cholesterol at this point is down more than a hundred points."
Consumer Three: "My cholesterol was 220. After three months, my cholesterol went down to 190."
Host One: "Just what is it that lowered these people's cholesterol levels so dramatically? This is it. (He puts two Cholestaway tablets in his hand) A new, completely safe scientifically proven method that is as simple as chewing two flavorful wafers with every meal. It is called Cholestaway. (Graphic: 'Guarantees to Lower Your Blood Cholesterol Level') It is not a prescription drug, not a chemical, but a simple all natural dietary supplement that guarantees to lower your blood cholesterol level or your money back. That is right. It guarantees to lower your cholesterol." (Exhibit A, Cholestaway Television Infomercial 2, p. 1).

. . . .

Host One: "This is a cross-section of an artery. When there is too much cholesterol present in the bloodstream, it begins building up fatty deposits on the artery wall narrowing the opening, sort of like rust builds up on an old water pipe. When this opening becomes clogged, the blood flow to the heart is interrupted, causing a heart attack." (Exhibit A, p. 3).

. . . .

Host One: "With all natural Cholestaway, you get proven results without drugs, and without side effects. Studies were done at several prestigious research institutes on the effects of adding dietary calcium and magnesium, the ingredients found in Cholestaway, to the diet. Although not every study was created to determine the effect on blood serum cholesterol, it was noted that cholesterol levels were reduced, and in one study, by as much as 25%. One study even measured a weight loss, while another reported no loss at all.
(Graphic: "PROVEN TO LOWER BLOOD CHOLESTEROL BY SCIENTIFIC RESEARCH STUDIES.")
It was concluded, however, that, taken in sufficient dosages, these dietary supplements will lower cholesterol levels. The results by users, while anecdotal, is [sic] proof positive." (Exhibit A, p. 4).

. . . .

(A bottle of Cholestaway is shown on a table next to the "Physician's Desk Reference." Host Two picks up the bottle and holds it.)
Host Two: "And that is the beauty of Cholestaway. It lets you eat like you normally would. Of course, when I say normal, I don't mean pizza every night, or ice cream and cake with every meal. What you normally eat." (Exhibit A, pp. 4, 5).

. . . .

Host One: "Now, I would like to introduce you to the man who discovered Cholestaway, Dr. DeLamar Gibbons, former Director of Clinical Research for the Saturday Evening Post, and author of several books on cholesterol and diets."

. . . .

Gibbons: "This is what I did. I ate a pound, I weighed it out, I had little scales, and I weighed out a pound of Kentucky Fried Chicken. I didn't peel the skin off or anything -- as fat as I could. And I took the same amount of Cholestaway that this inmate was taking. And for 60 days in a row, I ate a pound of Kentucky Fried Chicken."
Host Two: "You ate a pound of Kentucky Fried Chicken for sixty days?"
Gibbons: "Every day."
Host Two: "Every day?"
Gibbons: "Every day. And at the end of the sixty days, I checked, and my cholesterol had dropped remarkably. And my blood fat had gone down. And to my surprise, I had lost 25 pounds." (Exhibit A, p. 8).

. . . .

Consumer Five: "I've been on Cholestaway for about two months now. And in the process of getting my cholesterol tested, my cholesterol has come down. At this point, my cholesterol is down over a hundred points. The pluses to this have been that I can eat almost whatever I want, within reason, eggs, corned beef sandwich for lunch occasionally, and I'm still showing improvement, plus I've lost weight."
(Graphic: "The results of using Cholestaway will vary from individual to individual.")
(Graphic: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur.") (Exhibit A, p. 10).

. . . .

Dr. Dalton: "Dr. Gibbons and I were working together in the state correctional system in Virginia. And I was under the care of some physicians who were taking care of my health. I had a diabetic condition, which seemed to get out of hand. And my triglycerides as well as my cholesterol went so high, that it was very threatening. As a matter of fact, the triglycerides should only be around 200 as the cholesterol should. And my triglycerides were over 1600, and the cholesterol was over 500.

. . . .

Dr. Dalton: So we started on Cholestaway. And within several weeks, my chemistry concerning the triglycerides and cholesterol had dropped to near normal. By one month, they were both within normal range. And it was one of the best things that had ever happened to me."
(Graphic: "The results of using Cholestaway will vary from individual to individual.") (Exhibit A, p. 13).

. . . .

Consumer Three: "Yes, I had a side effect, an unusual side effect and a happy one. I lost 30 pounds."
Host Two: "You lost 30 pounds."
Dr. Dalton: "That's interesting Barbara, because I had the same experience. I lost 50 pounds over the past five years."
(Graphic: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur.")
Host Two: "Fifty pounds?"
Consumer Three: "That's wonderful."
Dr. Dalton: "Exactly."
Host Two: "Just what in Cholestaway causes one to lose the weight?"
Dr. Dalton: "Again, as Dr. Gibbons explains, it's the calcium combining with the fat in food and it simply never goes into the system. It's a very simple, but very effective mechanism." (Exhibit A, pp. 14, 15).

. . . .

Gibbons: "Cholestaway is perfectly safe for high blood pressure. In fact, there have been studies in the last year or two employing the ingredients of Cholestaway to treat high blood pressure. Some people with high blood pressure are found to be low on their calcium. And Cholestaway is an excellent source of calcium. And it would probably be very favorable to people with high blood pressure." (Exhibit A, p. 18).

. . . .

Gibbons: "They put cholesterol in a machine that's like a cream separator. And it's the high density that stays in the milk part, and the low density that comes out of the cream part. The low density is thought to be the bad one and the high density is felt to be the good one. The ratio of one to the other is currently regarded as important. The Cholestaway seems to be getting rid of primarily the low density cholesterol and improving the ratio."

. . . .

Host Two: "Yes, there is one major side effect while on Cholestaway. You will probably lose weight." (Exhibit A, p. 19).

B. Anderson: "Hello ladies and gentlemen. This is your host Robert Anderson and we're on 'Let's Talk About Health.' We have a very interesting guest today...[A] lot of you would probably picture a body where you were trim and in shape and then you might say to yourself: "Well, but in order to achieve that I'd really have to starve myself and I enjoy eating food so much, I enjoy eating a pizza and sitting down to Kentucky Fried Chicken, and I just couldn't give up that entirely. These are foods that really help me to get through tough experiences and a tough work week looking forward to this now."

But, I got news for you. That's possible now. It's possible to sit down and have your pizza and eat it, too. And have your cake and eat it too. Because Dr. Gibbons has come up with a product that really is a combination of nutrients. They're in the form of very tasty wafers and when you take these wafers during your meal, very little fat gets into the body. And we call that product Cholestaway. Dr. Gibbons has given it that name, because really when you take that product, you don't have to be a prophet to predict that if you're not getting very much fat into your body, what would result would be a lower, a much lower level of cholesterol." (Exhibit B, Cholestaway Radio Infomercial #24, pp. 1, 2).

. . . .

Gibbons: "And so for two months I took the 12 Cholestaway tablets that this inmate was taking and I ate a pound of Kentucky Fried Chicken every day. The skin, the bones, the grease -- all of it."
Anderson: "How much weight did you gain?"
Gibbons: "I lost 25 pounds."
Anderson: "...[H]ere we have a product that's a combination of nutrients that, when taken in the form of these tasty wafers, and I've tried it, then very little fat gets into the body. Some fat does get into the body, though, isn't that true?"
Gibbons: "Small amounts, sure."
Anderson: "Very small amounts, and of course we need small amounts of fat so that's important to have some fat in our body."
Gibbons: "Of course. But you don't have to go on a Spartan diet to achieve weight loss and reduction of the fat in your blood and your body."
Anderson: "So it's conceivable with these Cholestaway wafers that are taken during each meal, people can eat pretty much what they like in the way of fattening foods and they could still lose weight."
Gibbons: "Right. I'm kind of a pig. I like pizza, I like lasagna."
Anderson: "Well, let's take pizza for example. My wife and I, every Friday night, we like to sit down and have a pizza. Let's take the most caloric type of pizza, let's say pizza smothered with pepperoni and sausage and you have, now, how much Cholestaway would you take with something like that?"
Gibbons: "I would ordinarily take maybe four tablets."

. . . .

Anderson: "O.K. But what kind of, back to that pizza because I think we've got everybody listening to what would happen to that pizza, or ice cream, or anything like that. What would happen to the fat in that pizza as it came into the stomach when, as Cholestaway was taken? What would happen to it?"
Gibbons: "It would go right through you."

Anderson: "It would actually become part of the stools and it would be eliminated then."
Gibbons: "That's correct." (Exhibit B, pp. 3-5).

. . . .

Gibbons: "... it will combine with the fat in your diet and it will make it so it will not dissolve in water and can't be absorbed. It does the same thing with Cholesterol. It combines with it. One molecule of Cholestaway will bind two molecules of fat or two molecules of cholesterol."
Anderson: "So basically as a result of taking the wafers, it's conceivable that not only weight loss will occur, but also cholesterol levels within the body will go down which is extremely important when one considers heart problems and hardening of the arteries and all of those negative health problems that so many people have. Am I correct in that?"
Gibbons: "I've used it on a great number of patients."
Anderson: "Now, what has been the result as far as using Cholestaway on them? Giving them Cholestaway, what has happened to their cholesterol levels?"
Gibbons: "Cholesterol falls, and also the blood fat or triglycerides fall...." (Exhibit B, pp. 5, 6).

. . . .

Anderson: "...[Y]ou take two of these tasty wafers which are a combination of nutrients and what they do is they prevent fat from getting into the body, so... you can enjoy a tasty meal that has a lot of fat in it, not get very much fat, if any, into your body and then also in addition to losing weight, not getting fat into the body, cholesterol levels go down as well." (Exhibit B, p. 7).

. . . .

Anderson: If we take Cholestaway on a steady basis, we may actually, not may, we will lose weight. I've been taking it more or less experimentally on myself and I've lost weight and I haven't really been trying. In fact, I've been making an effort to offset the product by eating more fat than I'd usually eat and ironically I've actually lost weight." (Exhibit B, p. 9).

. . . .

Gibbons: "My experience has been that it has a great deal more effect on those with a very high cholesterol than the ones borderline. And those with very high cholesterol are people who are re-absorbing their cholesterol excessively. So the higher the cholesterol initially, the better it appears to be working." (Exhibit B, p. 11).

C. "Simple and safe, just two small vanilla flavored wafers with each meal reduce the amount of fat absorbed from the diet."

"CHOLESTAWAY is both safe and effective. Because it greatly lowers the amount of fat absorbed from the diet, many individuals may lose 4 - 9 pounds a month."

. . . .

"...CHOLESTAWAY reduces the body's cholesterol pool." (Exhibit C, Bogdana Catalog).

D. "... reduces the amount of fat absorbed from the diet."

. . . .

"Because it greatly lowers the amount of fat absorbed from the diet, many individuals may lose four-to-nine pounds a month."

. . . .

"...**CHOLESTAWAY** reduces the body's cholesterol pool." (Exhibit D, Bogdana Internet Advertisement, August 22, 1996, p. 2).

E. **Bogdana CHOLESTAWAY** ❤
Dr. DeLamar Gibbons, M.D.

. . . .

Safe and effective
May help lower levels of cholesterol and triglycerides
Many individuals may lose 4 to 9 pounds a month
(Exhibit E, Cholestaway Label).

7. Through the use of the trade name "Cholestaway," and through the means described in paragraph six, respondents have represented, expressly or by implication, that:

A. Cholestaway significantly lowers serum cholesterol levels.
B. Cholestaway significantly lowers serum cholesterol levels without changes in diet.
C. Cholestaway significantly lowers serum cholesterol levels and causes significant weight loss even if users eat foods high in fat, including fried chicken and pizza.
D. Cholestaway substantially reduces or eliminates the body's absorption of dietary fat.
E. Cholestaway lowers low density lipoprotein cholesterol and improves the high density lipoprotein cholesterol to low density lipoprotein cholesterol ratio.
F. Cholestaway is effective in the treatment of hardening of the arteries and heart disease.
G. Cholestaway causes significant weight loss.
H. Cholestaway causes significant weight loss without changes in diet.
I. Cholestaway significantly reduces blood triglyceride levels.
J. Cholestaway significantly reduces elevated blood pressure.
K. Testimonials from consumers appearing in the advertisements for Cholestaway reflect the typical or ordinary experience of members of the public who use the product.

8. Through the use of the trade name "Cholestaway," and through the means described in paragraph six, respondents have represented,

expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. Through the means described in paragraph six, respondents have represented, expressly or by implication, that:

A. Scientific studies prove that Cholestaway significantly lowers serum cholesterol levels.
B. Scientific studies prove that Cholestaway significantly reduces elevated blood pressure.

11. In truth and in fact:

A. Scientific studies do not prove that Cholestaway significantly lowers serum cholesterol levels.
B. Scientific studies do not prove that Cholestaway significantly reduces elevated blood pressure.

Therefore, the representations set forth in paragraph ten were, and are, false or misleading.

FLORA SOURCE

12. Respondents have disseminated or have caused to be disseminated advertisements for Flora Source, including but not necessarily limited to the attached Exhibits F and G. These advertisements contain the following statements:

A. [Announcer's Voice:] "The Bogdana Corporation is proud to present 'Let's Talk About Health' with your host, Robert Anderson. He'll talk about all aspects of health -- physical, mental, emotional and spiritual. Now here's your host, Robert Anderson."
Robert W. Anderson: "This is host Robert Anderson.... We have an interesting show today. We have Dr. Scott, Scott Gregory with us and we, he's been on our show before. And he's an expert in diseases that affect the immune system where people have a weak immune system, they may have HIV-positive or full-blown AIDS or diseases, for example, like multiple sclerosis or chronic fatigue, that is the Epstein-Barr Syndrome, which is often accompanied by candida, that is yeast infection." (Exhibit F, Flora Source Radio Infomercial #23, p. 1).

. . . .

Anderson: "Now, of course, what really impresses me about Dr. Scott is that, uh, Dr. Scott Gregory is that he has really had a lot, a high degree of success rate with HIV-positive and some cases full-blown AIDS. Actually turning them around and making them HIV, causing them to become HIV-negative through his protocol. And he's had a remarkable, almost lightning-speed effect on people with chronic fatigue and I wish I had met him several years ago and fortunately I got well by using Bogdana. (Exhibit F, p. 5).

. . . .

Anderson: "But I wish that I had Flora Source at a time, because I think my achieving wellness and getting rid of chronic fatigue perhaps would have accelerated. Could you tell us something about Flora Source doctor?"

Dr. Gregory: "Yes, yes, it's a culture, it's many cultures actually. It's bio-active. It replaces the natural intestinal flora. In approximately, oh I'd say at least 90 to 98 percent of all individuals that are immunosuppressed, they have definitely digestive dysfunction of some kind, malabsorption. So in other words, it's bad enough to be sick, but the worst end of the scenario is that you're suffering also from malnutrition, because the body is not manufacturing what it needs to heal. So the Flora Source in its process of adding to it these special nutrients that allow the flora in the digestive tract to function normally actually assist in the healing process by, for example, increasing more B vitamins, actually helping the body to manufacture more B vitamins, 'cause that's one thing the digestive flora does [sic].

Another thing the Flora Source does is it helps rid the body of different microorganisms that would in fact endanger, in the sense that they're pathogenic. So it has the principle of detoxification. I believe that the Flora Source in terms of my protocol would probably fit in all four categories. Kill whatever it is that's in the digestive tract. Detoxify the digestive tract.

And then it has, of course, the Flora Source has the ability to help the immune system work better also. It's been known that specific types of cultures do enhance the immune response. So it's a very good product. I've gotten very good results with it, with immunosuppressive disorders and I do add it as an adjunct. I [inaudible] most of my patients who are immunosuppressed need this product to get their digestive tract in proper function so that they can process these different microorganisms naturally and allow the body to detoxify them."

. . . .

Anderson: "Of course, so many doctors don't tell us that when they give us prescription drugs that those prescription drugs are antibiotics, that they kill off the good bacteria as well as the bad bacteria. And although we may feel relief from symptoms we're suffering from at the moment, down the line three, four, five years later we develop, we could develop illnesses such as chronic fatigue or other immunosuppressed diseases. So it's important to reestablish the positive bacteria colonies within the body.

And I've also found out that one of the, of course the bacteria in that particular item, the product called Flora Source that is very interesting is the B. Laterosporus bacteria that should be in people's intestine but often is not because of prescription drugs. And from the way I understand it is that that kills candida or yeast within the body and of course that's how a lot of our problems with immunosuppressed or

weak immune systems start is the good bacteria is no longer there as a result of being killed off by the prescription drugs. And candida or "yeast infection" which is -- yeast is a living organism -- it's allowed to run rampant through our body and cause a lot of problems. And also another interesting bacteria is in there, and that is a bacteria that is responsible for the metabolism and assisting in the metabolism of carbohydrates, sugar starches and without it could mean that people might gain weight."

. . . .

B. [Large Print Heading in Catalog] "FLORA SOURCE"
[Large and Bold Print Sub-Heading, slightly smaller than the Heading] "**Scientific Health Enhancement Effects Of: Bacillus Laterosporus - Bacillus Subtilis - Lactobacillus Sporogenes**"

[Smaller print in main body of text] "The classic use of antibiotics and chemotherapeutics seems to have reached limitations, in light of the chronic and persistent infections that plague mankind.

Flora Source is a pro-biotic or special class of bacteria, consisting of Bacillus Laterosporus, Bacillus Subtilis and Lactobacillus Sporogenes.

Bacillus Laterosporus is a friendly, non-lactic-acid producing bacteria, and is found in the human intestines in very small quantities, but will aid in creating an intestinal environment that is conducive to rapid colonization of any beneficial flora.

Bacillus Laterosporus has been clinically tested and found to be safe and effective, both topically and as intestinal flora. Taken internally, this product has shown positive results in relieving many of the gastrointestinal symptoms related to candida. Improvements in symptoms, such as food sensitivities, constipation, diarrhea, abdominal pain, bloating and gas."

. . . .

Lactobacillous Sporogenes: The rapid colonization enables it to control the growth of infectious organisms in the intestines much more rapidly than do the non-spore-producing Lactobacilli by reducing the amount of bile salt in the gut. Also an intestinal aid for: putrefication, auto-intoxication, dyspepsia, anorexia, vomiting, flatulence, green stools, white diarrhea (Pseudocholera infantum)." (Exhibit G, Bogdana Catalog).

13. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that:

A. Flora Source replaces the natural intestinal flora that are lost due to illness, prescription drugs or antibiotics, thereby reducing the risk of developing illnesses such as chronic fatigue syndrome (Epstein-Barr syndrome) and other immunosuppression diseases, including AIDS.
B. Flora Source improves the body's absorption of nutrients, including B vitamins.

C. Flora Source enhances the body's immune response and is effective in the treatment of immunosuppression diseases, including AIDS.
D. Flora Source prevents weight gain.
E. Flora Source is effective in the prevention or treatment of anorexia.
F. Flora Source is effective in the prevention or treatment of gastrointestinal disorders and symptoms including food sensitivities, constipation, diarrhea, dyspepsia, abdominal pain, bloating and gas.

14. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made.

15. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made. Therefore, the representation set forth in paragraph fourteen was, and is, false or misleading.

DECEPTIVE FORMAT

16. Through the means described in paragraphs six and twelve, respondents have represented, expressly or by implication, that certain of their advertisements for Cholestaway and Flora Source, including but not necessarily limited to Cholestaway Radio Infomercial #24 (Exhibit B) and Flora Source Radio Infomercial #23 (Exhibit F), are independent radio programs and are not paid commercial advertisements.

17. In truth and in fact, the advertisements for Cholestaway and Flora Source referred to in paragraph sixteen are paid commercial advertisements and not independent radio programs. Therefore, the representation set forth in paragraph sixteen was, and is, false or misleading.

18. The acts and practices of respondents 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

EXHIBIT A

"Transcript of Cholestaway Television Infomercial #2"

Graphic (with voiceover):

The following is a paid program brought to you by Television Marketing Group and contains testimonials from consumers relating their personal experiences using Cholestaway to reduce their cholesterol levels. These testimonials are personal accounts and have not been scientifically recorded. Although some users have also experienced a weight loss using Cholestaway, it is not intended as a weight loss product. Remember the results of taking Cholestaway will vary from individual to individual.

UNIDENTIFIED WOMAN #1:	My cholesterol level was 230 and now its 179. That's great.
UNIDENTIFIED MAN:	My cholesterol at this point is down more than a hundred points.
UNIDENTIFIED WOMAN #2:	My cholesterol was 220. After three months, my cholesterol went down to 190.
MR. MACHADO:	*(Holding bottle of Cholestaway)*
	Just what is it that lowered these people's cholesterol levels so dramatically? This is it.
	(Puts two Cholestaway tablets in his hand)
	A new, completely safe scientifically proven method that is as simple as chewing two flavorful wafers with every meal. It is called Cholestaway.
	(Graphics reading "NOT A DRUG," "NOT A CHEMICAL," "ALL NATURAL DIETARY SUPPLEMENT" and "GUARANTEES TO LOWER YOUR BLOOD CHOLESTEROL LEVEL" are shown to correspond with script.)
	It is not a prescription drug, not a chemical, but a simple all natural dietary supplement that guarantees to lower your blood cholesterol level or your money back. That is right. It guarantees to lower your cholesterol.
	("Mario Machado/Television & Radio Commentator" shown at bottom of screen as he introduces himself.)

EXHIBIT A

Hello. I am Mario Machado. And welcome to our show. Here to help me tell you more about this revolutionary new breakthrough in controlling your cholesterol is a good friend of mine, Roni Margolis-Liddy.

(Roni Margolis-Liddy is shown and bottom of screen reads "Roni Margolis-Liddy.)

Hi, Roni.

MS. LIDDY: Hi, Mario.

The three people you saw at the beginning of our program had, like more than 65 million Americans, a higher than normal blood cholesterol. In fact, there is a good chance that you have a high cholesterol level yourself.

Now I said that they had high cholesterol. But thanks to Cholestaway, their cholesterol levels have returned to an acceptable level. And just what is acceptable? Let's take a look.

A chart labeled "Cholesterol Levels" across the top is shown with subheadings: "Acceptable under 200." "Borderline 200 to 259" and High Above 260." A graph line rises as she continues to speak.

The National Cholesterol Education Program regards cholesterol levels under 200 as acceptable. Readings of 200 to 239 are considered borderline. And those of 240 and above are considered high.

Mario Machado writes the words "CHOLESTEROL" on a green board.

MR. MACHADO: Now, first of all, let me explain that cholesterol has been getting a bad rap. You see, cholesterol, a wax-like substance processed in the liver, is essential to life. The human body needs cholesterol to manufacture cells, membranes, nerve tissues, hormones, and bile acids to digest food.

It is when there is too much cholesterol in our system that the trouble begins.

EXHIBIT A

Mario Machado writes "240" on the board.

If you have a blood cholesterol level of over 240, you are probably a good candidate for a heart attack. Here is why:

(Mario Machado draws a circle to represent an artery. He then colors in the circle to represent fatty deposits building-up.)

This is a cross-section of an artery. When there is too much cholesterol present in the bloodstream, it begins building up fatty deposits on the artery wall narrowing the opening, sort of like rust builds up on an old water pipe. When this opening becomes clogged, the blood flow to the heart is interrupted, causing a heart attack.

MS. LIDDY: But heart disease isn't the only symptom linked to high cholesterol. It can cause visual problems, forgetfulness, leg cramps, and difficulty in hearing, just to name a few.

MR. MACHADO: Now the real trick is to get rid of all of this excess cholesterol. To do this, most doctors prescribe drugs. But these can cause a variety of side effects that sometimes can be just as dangerous as having high cholesterol.

MS. LIDDY: *(Opens up a copy of the Physician's Desk Reference as she speaks)*

Here is what the Physician's Desk Reference, a well-respected journal within the medical profession, says about the side effects of one of the more popular drugs prescribed for controlling high blood cholesterol:

> "Caution: Can cause liver dysfunction, hypertension, ulcers, skin diseases, insomnia, thyroid abnormalities, vomiting, anorexia, cataracts, seizures," and on and on and on and on.

(Studies from the Laboratory of Biochemical Genetics and Metabolism, Rockefeller University, New York; the Arterioscleroses Research Group, St. Vincent's Hospital, Montclair, New Jersey; the Department of Internal Medicine, University of Texas; and the Digestive Disease

EXHIBIT A

Center, Veterans Administration Medical Center, Houston, Texas are shown as Mr. Machado speaks.)

MR. MACHADO: With all natural Cholestaway, you get proven results without drugs, and without side effects. Studies were done at several prestigious research institutes on the effects of adding dietary calcium and magnesium, the ingredients found in Cholestaway, to the diet. Although not every study was created to determine the effect on blood serum cholesterol, it was noted that cholesterol levels were reduced, and in one study, by as much as 25%. One study even measured a weight loss, while another reported no loss at all.

(The words "PROVEN TO LOWER BLOOD CHOLESTEROL BY SCIENTIFIC RESEARCH STUDIES are shown on the screen.)

It was concluded, however, that, taken in sufficient dosages, these dietary supplements will lower cholesterol levels. The results by users, while anecdotal, is proof positive.

MS. LIDDY: Let's be honest. There is a simple, easy way to help lower your cholesterol. And that is by eating a proper diet. But just how many of us have the will power to stay on a fat-free diet? I know I don't. We all have good intentions. But because of our job, lack of time, too much work, whatever, we just cannot always eat correctly.

And just what is considered a high-cholesterol diet? Well, fats, of course, like butter, oils, cheese, pork, rich gravies, shell fish, whole milk, cream -- all of the good stuff.

(The words "BUTTER," "OILS," "CHEESE," "PORK," "GRAVY," "SHELLFISH," and "WHOLE MILK" are shown on the screen as she mentions them.)

(A bottle of Cholestaway is shown on a table next to the PDR. She picks up the bottle and holds it.)

And that is the beauty of Cholestaway. It lets you eat like you normally would. Of course, when I say normal, I don't

EXHIBIT A

mean pizza every night, or ice cream and cake with every meal. What you normally eat. You simply take two Cholestaway wafers with each meal. They are vanilla flavored, and they actually taste good. And your blood cholesterol is lowered, guaranteed. It is that simple.

("Calcium carbonate and magnesium are generally recommended as safe by the FDA" is shown in small letters at the bottom of the screen.)

It is not only effective, it is all natural. That is what I especially like about it. It is not a drug. In fact, Cholestaway is actually good for you. It contains calcium and magnesium, both important to your health.

("This is a paid commercial" is shown at the bottom of the screen when she says the word "magnesium.")

JIM CHAPEL:
(Testimonial)

I've had a problem with my cholesterol for the past 10 years. It was up to 278 two months ago. I tried everything. I tried niacin. I tried getting my diet down to five percent fat -- nothing seemed to work. I saw Cholestaway on television, and I tried it and in two months it went from 278 to 258. I was very happy about it.

(As he speaks the words "The results of using Cholestaway will vary from individual to individual" appears at the bottom of the screen.)

FEMALE ANNOUNCER:

If you are one of the over 65 million Americans who suffer from high blood cholesterol, you will be happy to know that there is a remarkable breakthrough discovery that can lower your cholesterol level without drugs. It is called Cholestaway.

(Scene fades and the woman appears in a garden holding a bottle of Cholestaway.)

Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back. That is right. It's guaranteed.

But don't just take our word for it.

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(She holds up a study. At the bottom of the screen, in small letters, the words "All products have possible, but remote side effects. See product literature.")

Studies have proven Cholestaway's effectiveness in lowering cholesterol.

(She picks up the bottle, opens it and takes out two wafers.)

Just two flavorful wafers with every meal can lower your cholesterol count almost immediately. It is that simple. And it is completely safe.

(The words "Calcium carbonate and magnesium are generally recognized as safe by the FDA" appear at the bottom of screen in small letters.)

So if you are concerned about cholesterol, call the number on the screen, and order Cholestaway now.

(On the screen, as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [CA + tax]. Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway, P.O. Box 803377, Dallas, TX, 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Pick up the phone and call the number on the screen now.

ROSLYN GERNSTADT: (Testimonial)

I went for an annual check-up and had a blood test done, and found that my cholesterol was at 274. And they suggested that I start medication, if I don't do something about changing it. And I refused that. So in hearing about

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Cholestaway. I started taking it. and found that I dropped down to 208. which I think is fantastic.

(At bottom of picture you can read: "The Results of Using Cholestaway may vary from individual to individual.")

FEMALE ANNOUNCER: Now, if you don't know if you have a high cholesterol level or not, have a pencil and paper handy, because later in the program we will give you a little quiz to see if you are at risk.

MR. MACHADO: Now, I would like to introduce you to the man who discovered Cholestaway, Dr. DeLamar Gibbons, former Director of Clinical Research for the Saturday Evening Post, and author of several books on cholesterol and diets. Thank you for joining us, sir. Tell us about the genesis of the product. How did it come about? And I hear that it had something to do with prisons.

DR. GIBBONS: At the time that I discovered Cholestaway, I was the medical director for a state prison in Virginia. And I had under my care an individual that I thought, the vessels under his skin all stood out. And I could even trace some of the nerves in his skin. I had never seen an individual look like this. He had good muscles, and he was obviously quite healthy.

I thought maybe he is on one of those special diets that many of the prisoners put themselves on. I went to the mess hall to watch him eat. And gosh, he gobbled up his tray, and half of his neighbor's. It wasn't the diet.

So I said pull his medical record for me. And interestingly enough, he had had thyroid cancer. And in taking his thyroid out, they took his parathyroid glands out.

MR. MACHADO: And that causes what?

DR. GIBBONS: It upsets --

MR. MACHADO: A voracious appetite?

DR. GIBBONS: No. It has to do with calcium metabolism. And to correct

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this problem, he was taking a crude form of Cholestaway. And my first love was chemistry. I thought, ah, I know why he looks so peculiar. He isn't able to absorb any of the fat in his diet. He is fat starved. This is interesting. As I thought about it, I decided that I would try it on myself.

MR. MACHADO: You were going to be your own guinea pig?

DR. GIBBONS: This is what I did. I ate a pound, I weighed it out, I had little scales, and I weighed out a pound of Kentucky Fried Chicken. I didn't peel the skin off or anything -- as fat as I could. And I took the same amount of Cholestaway that this inmate was taking. And for sixty days in a row, I ate a pound of Kentucky Fried Chicken.

MS. LIDDY: You ate a pound of Kentucky Fried Chicken for sixty days?

DR. GIBBONS: Every day.

MS. LIDDY: Every day?

DR. GIBBONS: Every day. And at the end of the sixty days, I checked, and my cholesterol had dropped remarkably. And my blood fat had gone down. And to my surprise, I had lost 25 pounds.

MS. LIDDY: You lost weight?

DR. GIBBONS: I lost 25 pounds. The beautiful thing about Cholestaway is it's all natural and it's even good for you. It isn't a drug. It isn't a medicine. What it is is the natural minerals from hard water.

MR. MACHADO: And what does that do to the system?

DR. GIBBONS: *(A chart with the stomach, liver and intestines is shown. Cholic acid is labeled in the liver and little arrows show the process that Dr. Gibbons describes. When he mentioned Cholestaway by name, the word "Cholestaway" appears on the chart.)*

Our livers process cholesterol, which is then excreted in the bile in the form of cholic acid. As the bile enters the intestine, the soluble cholic acid looks like food to the

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intestines and it's absorbed into the bloodstream. The absorbed cholic acid is carried back to the liver and is excreted in the bile and then reabsorbed again from the intestine. Cholestaway interrupts this cycle by combining with the cholic acid to form an insoluble residue that can't be reabsorbed.

MR. MACHADO: That's incredible.

DR. GIBBONS: It robs you of fat calories and with it it takes excess cholesterol.

MR. MACHADO: Two a day per meal?

DR. GIBBONS: With each meal. And you know, I like pizza. And if I'm going to have pizza I maybe take two or three extras.

(A pizza is shown and someone with a bottle of Cholestaway putting three wafers in the palm of the hand.)

MR. MACHADO: But the general regimen that you are stating is that you take two tablets per meal for how long a period of time?

DR. GIBBONS: Well, as long as you need it. It isn't going to hurt you. It's good for you.

MR. MACHADO: I want to thank you for being with us Dr. Gibbons, and for sharing your knowledge and also sharing Cholestaway with us. Thank you. We'll see you again later in the program. Stay tuned. We'll be right back with some satisfied users who each have an incredible success story to tell us.

("This is a paid commercial" at bottom of screen.)

MS. LIDDY: Thank you.

DR. GIBBONS: Thank you.

FEMALE ANNOUNCER: O.K. Do you have a paper and pencil handy? Here are five questions, the answers to which will tell you if you're at risk of having a high cholesterol level. Number 1: Does anyone in your family have high cholesterol? Number 2: Do you smoke? Number 3: Do you have a stressful job or

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do you often find yourself under a lot of pressure? Number 4: Do you eat a lot of foods high in fat? And Number 5: Do you seldom exercise?

(A chart, with the same five questions is shown on the screen. As the announcer reads each question, a check is put in the box before each question.)

(Announcer is shown holding a bottle of Cholestaway)

Now, if you answered 'yes' to any three of these questions, you're at risk of having a high cholesterol level and it would be a good idea to have it checked. Remember, high levels can lead to all kinds of health problems. But as you've seen, all natural Cholestaway is a safe and easy way to keep it under control.

STEVEN BRODY: (Testimonial)

I've been on Cholestaway for about two months now. And in the process of getting my cholesterol tested, my cholesterol has come down. At this point, my cholesterol is down over a hundred points. The pluses to this have been that I can eat almost whatever I want, within reason, eggs, corned beef sandwich for lunch occasionally, and I'm still showing improvement, plus I've lost weight.

(As he talks "The results of using Cholestaway will vary from individual to individual" appears. As he says "I'm still showing improvement" the following statement appears at the bottom of the screen: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur.")

FEMALE ANNOUNCER #1:

If you're one of the over 65 million Americans who suffer high blood cholesterol, you'll be happy to know there's a remarkable breakthrough discovery that can lower you cholesterol level without drugs. It's called Cholestaway.

(A bottle of Cholestaway is shown. She picks up the bottle.)

Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

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That's right. It's guaranteed. But don't just take our word for it.

(She holds up a study. "All products have possible but remote side effects. See product literature." appears in small letters at the bottom of the screen.)

Studies have proven Cholestaway's effectiveness in lowering cholesterol. And just how does Cholestaway work? Let's take a look.

(A chart with the stomach, liver and intestines is shown. Cholic acid is labeled in the liver and little arrows show the process that announcer describes. When she mentions Cholestaway by name, the word "Cholestaway" appears on the chart.)

Our liver processes cholesterol, which is excreted in the bile in the form of cholic acid. As the cholic acid enters the intestines, it looks like food to your body and it's absorbed into the bloodstream. The absorbed cholic acid is carried back to the liver and is excreted in the bile and reabsorbed through the intestines again and again. Cholestaway interrupts this cycle by combining with the cholic acid to form an insoluble residue that can't be reabsorbed.

(Announcer is seated on a table in a room. She picks up the bottle and pours them into her hand.)

Just two flavorful wafers with every meal can lower you cholesterol count almost immediately. It's that simple. And it's completely safe. So if you're concerned about cholesterol call the number on the screen and order Cholesterol now.

("Calcium carbonate and magnesium are generally recognized as safe by the FDA" appears at the bottom of the screen when she says "completely safe.")

(On the screen, as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [CA +

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tax.] Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway. P.O. 803377 Dallas, TX. 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Pick up the phone and call the number on the screen now.

CAMILLA ROSENDE-LOPEZ: (Testimonial)

My cholesterol, it was very, very high. I diet Everything that they say that is bad, I do not eat it. I exercise every day and even then, my cholesterol does not went down. Now one day, I was changing channels when I saw [the advertisement] on Cholestaway and I decided to try it. I did and from 286 to 235, very slowly, very surely, it works on me.

(As she speaks "The results of using Cholestaway will vary from individual to individual" appears at the bottom of the picture.)

FEMALE ANNOUNCER #2:

If you order Cholestaway right now, you'll have the opportunity to purchase CholesTrak.

(Holds up box of CholesTrak and removes device from box. At bottom of screen "Manufactured by ChemTrak, the leader in home test medical products.")

CholesTrak is a unique home testing device that allows you to check your cholesterol level, quickly, easily and accurately right in the comfort of your own home. This same device is often used by doctors on their patients.

("97% ACCURATE" appears on the screen when she says "97% accurate.")

And it's 97% accurate when used as directed.

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(Picture of the CholesTrak box appears. To the left "$19 Value Only $12.95. Under the box to the left "One time use only.")

A $19.00 value -- we're offering it to you for only $12.95. Now with CholesTrak you can see exactly how much your cholesterol level has dropped using Cholestaway.

MS. LIDDY: This is Dr. Fred Dalton. Dr. Dalton is a recognized forensic psychiatrist, and has had several papers published on the subject. Welcome, Doctor.

DR. DALTON: Thank you.

MS. LIDDY: I understand that your story has something to do with Dr. Gibbons, something about him saving your life.

DR. DALTON: Dr. Gibbons and I were working together in the state correctional system in Virginia. And I was under the care of some physicians who were taking care of my health. I had a diabetic condition, which seemed to get out of hand. And my triglycerides as well as my cholesterol went so high, that it was very threatening. As a matter of fact, the triglycerides should only be around 200 as the cholesterol should. And my triglycerides were over 1600, and the cholesterol was over 500. My doctors had warned me, and they had put me on different types of medications. I had side effects to them, and it was a very unhappy situation.

And in talking with my friend, Dr. Gibbons, he suggested let's give it a try. So we started on Cholestaway. And within several weeks, my chemistry concerning the triglycerides and cholesterol had dropped to near normal. By one month, they were both within normal range. And it was one of the best things that had ever happened to me.

(As he speaks the words "The results of using Cholestaway will vary from individual to individual" appear at the bottom of the screen in small letters.)

MR. MACHADO: I am sure your doctor was just as surprised if not more than you.

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DR. DALTON:	Interestingly enough, several of the physicians who were caring for me at that time, and I still have those physicians, are taking Cholestaway themselves.
MR. MACHADO:	How about side effects, did you experience any?
DR. DALTON:	None whatsoever. However, as I mentioned, from the medications which were prescription only and which doctors frequently prescribe for hypercholesterolemia, there were numerous side effects. And unfortunately, I was a victim of that.
MR. MACHADO:	Thank you for sharing your story with us, Doctor.
MS. LIDDY:	This is Barbara Egyude. Hello, Barbara.
MS. EGYUDE:	Hello.
MS. LIDDY:	I heard that you have an unusual story to tell us concerning Cholestaway.
MS. EGYUDE:	Yes, I had a side effect, an unusual side effect and a happy one. I lost 30 pounds.
MS. LIDDY:	You lost 30 pounds.
DR. DALTON:	That's interesting Barbara, because I had the same experience. I lost 50 pounds over the past five years. *("If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur" appears at the bottom of the screen in small letters.)*
MS. LIDDY:	Fifty pounds?
MS. EGYUDE:	That's wonderful.
DR. DALTON:	Exactly.
MS. LIDDY:	Just what in Cholestaway causes one to lose the weight?

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DR. DALTON:	Again, as Dr. Gibbons explains, it's the calcium combining with the fat in food and it simply never goes into the system. It's a very simple, but very effective mechanism.
MS. LIDDY:	It sounds very effective.
DR. DALTON:	It is.
MS. LIDDY:	Remember, Cholestaway is not a weight-loss program. Any weight loss you experience is merely a side effect.
MS. EGYUDE:	And may I say a very nice side effect.
MS. LIDDY:	Yes, I agree.
	("This is a paid commercial" appears at the bottom of the screen in small letters.)
MS. LIDDY:	Thank you all for joining us, and sharing your experiences with our viewers. Thank you.
REGINE JOHNSON: (Testimonial)	I had a very high cholesterol count. And my physician had recommended -- she was going to put me on medication. And someone told me about Cholestaway. And I have been taking it, and my cholesterol level is down to its normal level, and I have lost quite a bit of weight as a bonus to that.
	("The results of using Cholestaway will vary from individual to individual" appears at the bottom of the screen in small letters.)
FEMALE ANNOUNCER #1:	If you're one of the over 65 million Americans who suffer from high blood cholesterol, you'll be happy to know there's a remarkable breakthrough discovery that can lower your cholesterol level without drugs. It's called Cholestaway.
	(A bottle of Cholestaway is shown. She picks up the bottle.)
	Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

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That's right. It's guaranteed. But don't just take our word for it.

(She holds up a study. "All products have possible but remote side effects. See product literature." appears at the bottom of the screen.)

Studies have proven Cholestaway's effectiveness in lowering cholesterol.

(Announcer is seated on a table in a room. She picks up the bottle and pours them into her hand.)

Just two flavorful wafers with every meal can lower your cholesterol count almost immediately. It's that simply. And it's completely safe. So if you're concerned about cholesterol call the number on the screen and order Cholestaway now.

("Calcium carbonate and magnesium are generally recognized as safe by the FDA" appears at the bottom of the screen when she says "completely safe.")

(On the screen, as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [CA + tax.] Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway, P.O. 803377 Dallas, TX. 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Pick up the phone and call the number on the screen now.

EARDIE ANDERSON: I was told that I had high cholesterol. And I was told about Cholestaway. And I started to take it. And after I guess

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about four months or so. I went to my doctor, and I was told that my cholesterol had gone really down. Because at first it was 286, and it went -- she didn't tell me how much it went down. But she told me it was good, that it went all the way down: That is what I was told. And I was very glad.

FEMALE ANNOUNCER #2: If you order Cholestaway right now, you'll have the opportunity to purchase CholesTrak.

(Holds up box of CholesTrak and removes device from box. At bottom of screen "Manufactured by ChemTrak, the leader in home test medical products.")

CholesTrak is a unique home testing device that allows you to check your cholesterol level, quickly, easily and accurately right in the comfort of your own home. This same device is often used by doctors on their patients.

("97% ACCURATE" appears on the screen when she says "97% accurate.")

And it's 97% accurate when used as directed.

(Picture of the CholesTrak box appears. To the left "$19 Value Only $12.95. Under the box to the left "One time use only.")

A $19.00 value -- we're offering it to you for only $12.95. Now with CholesTrak you can see exactly how much your cholesterol level has dropped using Cholestaway.

MR. MACHADO: Rejoining us is Dr. Gibbons to help with this question and answer segment of our show. We recently went out onto the streets to get some of the most often-asked questions pertaining to cholesterol and Cholestaway, and let's listen in.

QUESTION: How can I find out what my cholesterol level is?

DR. GIBBONS: The simplest way is to go to your doctor, and have a physical check-up, and have your blood tested. A very quick and accurate way is to use the CholesTrak kit. It

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	allows you to check your cholesterol level right in the comfort of your own home. Simply and easily
MR. MACHADO:	Let's go see who this person is.
QUESTION:	I have a teenage daughter that has high cholesterol. Can she take Cholestaway?
DR. GIBBONS:	Cholestaway is safe for all ages. It is a perfectly natural preparation. And there is no problem giving it to children. if they have high cholesterol. There has been a lot of interest lately on children I would say in families that have a history of high cholesterol. It is important to check the children. Because some teenagers and some in their early twenties are dying of heart attacks.
QUESTION:	My father has high blood pressure and high cholesterol. Can he take Cholestaway?
MR. MACHADO:	That is a good question. In fact. I do have high blood pressure. A lot of people do. A lot of my friends do.
DR. GIBBONS:	Cholestaway is perfectly safe for high blood pressure. In fact. there have been studies in the last year or two employing the ingredients of Cholestaway to treat high blood pressure. Some people with high blood pressure are found to be low on their calcium. And Cholestaway is an excellent source of calcium. And it would probably be very favorable to people with high blood pressure.
QUESTION:	How long can you stay on Cholestaway?
DR. GIBBONS:	Indefinitely. It isn't a medicine. It is a food supplement. It is natural. You don't get too much of it. As I mentioned. it has calcium in it. Women should be taking Cholestaway anyway to keep their bones hard. So you can take it indefinitely.
MS. LIDDY:	So it would help in osteoporosis. perhaps?
DR. GIBBONS:	Definitely.
MS. LIDDY:	I'm curious. Doctor. What are these margarine companies

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talking about when they refer to, good cholesterol?

DR. GIBBONS: They put cholesterol in a machine that's like a cream separator. And it's the high density that stays in the milk part, and the low density that comes out of the cream part. The low density is thought to be the bad one and the high density is felt to be the good one. The ratio of the one to the other is currently regarded as important. The Cholestaway seems to be getting rid of primarily the low density cholesterol and improving the ratio.

QUESTION: What if you have an ulcer, or if you had an ulcer, could you still take Cholestaway?

DR. GIBBONS: It is actually a good idea to take Cholestaway. It is an excellent antacid among other things. And ulcer patients will get considerable relief when they take the Cholestaway. Some people have told me that they took it as an antacid. But it is definitely safe for people with ulcers.

MR. MACHADO: We have time for one more question. So let's listen here.

QUESTION: Are there any side effects from Cholestaway?

MS. LIDDY: I'll answer that one. Yes, there is one major side effect while on Cholestaway. You will probably lose weight.

(The following statement appears at the bottom of the screen in small letters: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur."

MR. MACHADO: Now, the results of using Cholestaway varies with every individual. Your experience with Cholestaway might differ from what we've heard here today. I'd like to thank our incredible guest Dr. DeLamar Gibbons, the discoverer of this extraordinary cholesterol-reducing product, Cholestaway, for being on our program today. Remember, you can order Cholestaway right now by calling the 800-number no the screen.

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("This is a paid commercial" appears on the screen.)

MADELINE WALSH: (Testimonial)

I originally had a cholesterol problem of 278 and now it has dropped down to 238.

("The results of using Cholestaway will vary from individual to individual" appears at bottom of screen in small letters.)

FEMALE ANNOUNCER #1:

If you are one of the over 65 million Americans who suffer from high blood cholesterol, you will be happy to know that there is a remarkable breakthrough discovery that can lower your cholesterol level without drugs. It is called Cholestaway.

(Scene fades and the woman appears in a garden holding a bottle of Cholestaway.)

Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back. That is right. It's guaranteed.

But don't just take our word for it.

(She holds up a study. At bottom of screen, the words "All products have remote side effects. See product literature.")

Studies have proven Cholestaway's effectiveness in lowering cholesterol.

(She picks up the bottle, opens it and takes out two wafers.)

Just two flavorful wafers with every meal can lower your cholesterol count almost immediately. It is that simple. And it is completely safe.

(The words "Calcium carbonate and magnesium are generally recognized as safe by the F.D.A.")

So if you are concerned about cholesterol, call the number on the screen, and order Cholestaway now.

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(On the screen as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [CA + tax]. Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway, P.O. Box 803377, Dallas, TX, 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Start your way on the road to a longer, healthier life. Pick up the phone and call the number on the screen now.

TOM CAMP: (Testimonial)

Cholestaway has made a big difference in my life. Nowadays, there's a tremendous consciousness about fat intake. All the doctors speak about it, all the commercials, your labels, and many people are concerned about fat intake. And I find it's a very practical and convenient way to keep your fat intake down by using the Cholestaway product.

("The results of using Cholestaway will vary from individual to individual.")

Graphic (with voiceover):

The preceding program contained testimonials from consumers relating their personal experiences using Cholestaway to reduce their cholesterol levels. These testimonials are personal accounts and have not been scientifically recorded. Although some users have also experienced a weight loss using Cholestaway, it is not intended as a weight loss product. Remember, the results of taking Cholestaway will vary from individual to individual.

(TMG appears on the screen with music. Under TMG is a line and under the line the words "Television Marketing Group, Inc. A Division of Western International Media.")

(The preceding was a paid program brought to you by Television Marketing Group.)

EXHIBIT B

EXHIBIT B

Transcript of Cholestaway Radio Informercial #24

The Bogdana Corporation is proud to present "Let's Talk about Health" with your host, Robert Anderson. He'll talk about all aspects of health -- physical, mental, emotional and spiritual. Now here's your host, Robert Anderson.

Robert Anderson:

Hello ladies and gentlemen. This is your Host Robert Anderson and we're on "Let's Talk about Health." We have a very interesting guest today and I hope everybody out there today is taping this recording because I think this is going to be the answer to a lot of people's prayers. I know it is for me and we're going to be interviewing today Dr. Gibbons. And Dr. Gibbons has invented a new product and I think it's going to be a product that everybody out there is going to want to get their hands on and going to want to try because it's a revolutionary product. There's never been anything like it before. And before we start with Dr. Gibbons, I like to begin each show with a quote, and the quote is as follows, and that is "What the mind of man can conceive, the mind of man can achieve." And it might sound a little bit arrogant and maybe we might like to soften that quote a little bit and recommend that everybody out their develop good mental images and good pictures within their own mind's eyes as to what goals they want to achieve in life because before you accomplish anything in life you really have to have a picture of what it is that you want and the clearer it is, the clearer the picture is, the more able that we are to really achieve our goals. So it's very important that we maintain a very clear definition, a very clear picture of what goals we want to achieve in life. And furthermore, getting back to our interview today, just imagine thinking of your mind's eye and pictures within your mind, imagine what you would like to appear like. What kind of body would you like to have? If you could just sit back and think for a moment and see if you can imagine, see if you can visualize what type of body you would like to have. And then I think a lot of you would probably picture a body where you were trim and in shape and then you might say to yourself: "Well, but in order to achieve that I'd really have to starve myself and I enjoy eating food so much, I enjoy eating a pizza and sitting down to Kentucky Fried Chicken, and I just couldn't give up that entirely. These are foods that really help me to get through tough experiences and a tough work week looking forward to this now. But I got news for you. That's possible now. It's possible to sit down and have your pizza and eat it, too. And have your cake and eat it too. Because Dr. Gibbons has come up with a product that really is a combination of nutrients. They're in the form of very tasty wafers and when you take these wafers during your meal, very little fat gets into the body. And we call that product Cholestaway. Dr. Gibbons has given it that name, because really when you take that product, you don't have to be a prophet to

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predict that if you're not getting very much fat into your body, what would result would be a lower, a much lower level of cholesterol. But, you know, why should I talk on because I'd like to let Dr. Gibbons explain his product, Cholestaway, that the Bogdana Corporation has adopted and so with that said, let me introduce Dr. Gibbons. Dr. Gibbons, welcome to the show. Dr. Gibbons, how are you today?

Dr. Gibbons:

Thank you. I think I would like to start by giving a little story on how I came to discover Cholestaway.

Robert Anderson:

Well, that's what we'd like to do too. Tell us something about the history of Cholestaway because I think it has an interesting history. Tell us how you came across that product and invented it.

Dr. Gibbons:

A few years ago I was research director for the Saturday Evening Post magazine and I also, at that time, I also was working part time in the state prison as a prison doctor. And one of the inmates had a very peculiar appearance. He was muscular and healthy, but had an almost eerie appearance, the veins on his arms stood out in a manner that I had never seen. And his skin was very thin. I could even see some of the nerves in it. And I wondered, "Why is this individual so different?" Uh, perhaps, he's on a special diet. Many of the inmates proclaim themselves to be followers of Islam and get a special diet of seeds and nuts and fruits. Well, maybe this fellow was on some kind of special diet. So I went to the mess hall to watch him eat and he ate taters and gravy and bread and muffins. Everything else everyone else ate. In fact, he ate half his neighbor's tray as well as his own. Diet was not the answer.

Robert Anderson:

(Laughing) . . . quite an appetite for someone that thin.

Dr. Gibbons:

Diet was not the answer. You know, he was eating what everyone else ate. So, I asked the aids to pull his medical jacket and I went through it and this individual had had thyroid cancer. And in the surgery to take out his cancerous thyroid, they had taken out his parathyroid gland as well. And to compensate for this, he was given a crude form of

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Cholestaway in very large doses. And my background, my first love was chemistry before I went into medicine. I knew immediately what was happening. The Cholestaway was binding the fat in his diet so he couldn't absorb it. And I could see through his transparent skin because he didn't have the little layer of fat that people normally have under the skin.

Robert Anderson:

A lot of bodybuilders would like that type of vascularity.

Dr. Gibbons:

(Laughing). Uh, this prompted me to think, well, if it does that for him, why don't I try it? And so for two months I took the 12 Cholestaway tablets that this inmate was taking and I ate a pound of Kentucky Fried Chicken every day. The skin, the bones, the grease -- all of it.

Robert Anderson:

How much weight did you gain?

Dr. Gibbons:

I lost 25 pounds. (Laughing)

Robert Anderson:

Good Lord. And you know, Doctor, you're so calm about it, but to me I want to scream this from the roof tops. I mean here we have a product that's a combination of nutrients that, when taken in the form of these tasty wafers, and I've tried it, then very little fat gets into the body. Some fat does get into the body, though, isn't that true?

Dr. Gibbons:

Small amounts, sure.

Robert Anderson:

Very small amounts, and of course we need small amounts of fat so that's important to have some fat in our body.

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Dr. Gibbons:

Of course. But you don't have to go on a Spartan diet to achieve weight loss and reduction of the fat in your blood and your body.

Robert Anderson:

So it's conceivable with these Cholestaway wafers that are taken during each meal, people can eat pretty much what they like in the way of fattening foods and they could still lose weight.

Dr. Gibbons:

Right. I'm kind of a pig. I like pizza, I like lasagna.

Robert Anderson:

Well, let's take pizza for example. My wife and I, every Friday night, we like to sit down and have a pizza. Let's take the most caloric type of pizza, let's say pizza smothered with pepperoni and sausage and you have, now, how much Cholestaway would you take with something like that?

Dr. Gibbons:

I would ordinarily take maybe four tablets.

Robert Anderson:

O.K.

Dr. Gibbons:

But you know if I were having a breakfast of cereal and fruit I wouldn't take any. You know, if there's no fat in the meal then I don't take any.

Robert Anderson:

O.K. But what kind of, back to that pizza because it think we've got everybody listening to what would happen to that pizza, or ice cream, or anything like that. What would happen to the fat in that pizza as it came into the stomach when, as Cholestaway was taken. What would happen to it?

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Dr. Gibbons:

It would go right through you.

Dr. Anderson:

It would actually become part of the stools and it would be eliminated then.

Dr. Gibbons:

That's correct. Let me tell you a little bit about how Cholestaway works. If you've ever taken a bath in hard water, . . .

Robert Anderson:

Okay.

Dr. Gibbons:

Okay? The mineral in the water combines with the oils with your skin and are pastes around the bath tub -- a bath tub ring. What Cholestaway is, is the same minerals that's in the water and it will combine with the fat in your diet and it will make it so it will not dissolve in water and can't be absorbed. It does the same thing with cholesterol. It combines with it. One molecule of Cholestaway will bind two molecules of fat or two molecules of cholesterol.

Robert Anderson:

So basically as a result of taking the wafers, it's conceivable that not only weight loss will occur, but also cholesterol levels within the body will go down which is extremely important when one considers heart problems and hardening of the arteries and all of those negative health problems that so many people have. Am I correct in that?

Dr. Gibbons:

I've used it on a great number of patients.

Robert Anderson:

Now, what has been the result as far as using Cholestaway on them? Giving them Cholestaway, what has happened to their cholesterol levels?

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Dr. Gibbons:

Cholesterol falls, and also the blood fat or triglycerides fall, uh, about the time I was taking the Cholestaway for eating the Kentucky Fried Chicken, the state forensic psychiatrist, the doctor who decides whether someone's crazy enough to avoid the electric chair, etc. uh, was a close friend. And he come in one day just perspiring and anxious and he says, "Dee, I've just come from the University. My cholesterol is 450 my triglycerides are 1600. Normal in them's both below 200 and statistically I've got 5 months to live.

Robert Anderson:

My goodness.

Dr. Gibbons:

What would you do? And I kind of pathetically laughed. I said, gosh, you come to me and I'm just an old country doctor. And you come from the University. They didn't tell you what to do? Well, they told me to change my diet, but I'm diabetic. So I discussed with him this inmate, Shifflin. And I said, you know, he just doesn't absorb any fat and his cholesterol is down about 67 and his blood fat is down about 56, uh, I think if I were in your position I'd take this Cholestaway. And he said, "I think that's sound reasoning. I'm going to do it." And in three weeds his blood fats, the triglycerides, dropped from 1600 down to 600.

Robert Anderson:

In three weeks?

Dr. Gibbons:

In three weeks. His cholesterol come from 450 down to 300.

Robert Anderson:

That's really amazing.

Dr. Gibbons:

It was mind boggling.

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Robert Anderson:

That's really amazing. Well, for everybody out there, for anybody that might have just tuned in, we're talking with Dr. Gibbons, he's the inventor of a product that the Bogdana Corporation has adopted and it's called Cholestaway. And there are two, generally, the idea is that you take two of these tasty wafers which are a combination of nutrients and what they do is they prevent fat from getting into the body, so theoretically, more than theoretically, you can enjoy a tasty meal that has a lot of fat in it, not get very much fat, if any, into your body and then also in addition to losing weight, not getting fat into the body, cholesterol levels go down as well. But the cost is $29.95. And of course, the Bogdana products that many of you are interested in. Most people start with the nutritional formula, uh, the nutritional formula is revolutionary – and we like revolutionary products at the Bogdana Corporation. Our nutritional formula is revolutionary and it's the only formula in the world that has energy within the formula. It's a liquid formula, it has energy within it, the energy is held within the formula somehow as a result of the trace minerals holding the energy in the formula, and the energy causes a lot of good things to happen. The first thing that happens is that the energy, when gotten into the body at a cellular level, causes detoxification to occur. Causes the natural ability to detoxify to come back to excellent working order. So it's really your body that ends up cleaning itself out and not the product detoxifying you. And we have also in the formula, it's probably the most complete formula in the world nutritionally. It has 150 nutrients all broken down to microscopic size and all those nutrients are in perfect balance so there's no chance of bio-chemical imbalances resulting from the formula as is possible with people applying the mega-vitamin therapy to themselves. We have three bottles, we have three different sizes. We have a $29 one-month supply, a $55 two-month supply, and a $79 three-month supply. And of course we have skin care products which many of you know about also that are quite unusual, having energy within them and micronutrition far different from what you pick up in the drugstore where you can't even read the labels because of all the chemical in those skin-care products. In our skin-care products you read the label, you'll see vitamin A and vitamin E, all broken down to microscopic size and having energy within them. But if you want to buy a nutritional formula or any of our skin-care products or "Fuel One" or any of our fine products call 1-800-52-HEALTH. That's 1-800-524-3258. And let's get back to Dr. Gibbons, the inventor of Cholestaway because we at Bogdana feel that he has an amazing scientific discovery here. One that can have a lot of implications for people's health and social life as well and more importantly, I think it's going to enable all of us to sit down and have whatever we like to eat, within reason of course, and still lose weight and keep fat out of the body. And back to Dr. Gibbons, Dr. Gibbons, let's continue with this discovery that you made. Can you tell us something about, the, uh, about what happens in respect to the cholesterol, or to the, in regards to the physiology of cholesterol. What happens to you ordinarily, scientifically when we get cholesterol into our body and it goes down the digestive tract and how also does Cholestaway, the two wafers that people take, how does that come into play in regard to that product?

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Dr. Gibbons:

There's a great deal of misunderstanding about cholesterol. Even among doctors. If you're familiar with candle wax, it's made of cholesterol. And you can't get it to dissolve in water, you can eat all the wax you want and it will go right through you. And you can't get it to dissolve in water. Cholesterol begins in the hormones. The core molecule that male and female hormones are built on, the core molecule that cortisone and its related hormones are built on, the chassis, so to speak, is cholesterol. So cholesterol is essential for your health. Your body makes it as it produces these hormones. Well, you just can't keep making, making, making them, you've got to get rid of them. As they pass through the liver, the liver takes the excess and chops off the little branches to the molecule that identify it as male hormone or female hormone or progesterone. It takes off the branches and leaves the core cholesterol. Cholesterol is chemically an alcohol and the liver burns the cholesterol alcohol group to change it to an acid group. This is the same process that say, hard cider turns to vinegar. The alcohol becomes acid. This makes the cholesterol very soluble and we don't call it cholesterol now we call it cholic acid. The liver puts the cholic acid into the intestine and the poor dumb intestine thinks it's a food fat and absorbs it. Sends it back to the liver, the liver says, this is not good, puts it back in the bile, and 95% is recycled every, continuously. And some people are very efficient at recycling the cholic acid and it makes an enormous amount of cholesterol in the blood as this is being reabsorbed. When we give Cholestaway it combines with this cholic acid in the intestine and makes it so it can't be dissolved in water any more and it carries it on through you. There are other products available cholistyramine or Questran does a similar action but not as effective. And the beauty of this thing is that it doesn't work in your liver, it doesn't work in your blood, it doesn't work in your blood stream, it actually works outside of you body by being, in your intestine.

Robert Anderson:

You know, also I think that one thing that might interest people, too, of course, there are so many people who are on drugs that have, and of course drugs have side-effects and in some cases they could be dangerous. There are drugs out there that do cause cholesterol to become lower but then one has to deal with side-effects, potential side-effects that could be harmful to the body and also those drugs on the market today, those prescription drugs that are sold in an effort to lower cholesterol level within people whose levels are dangerously high. Those drugs don't in any way cause people to lose weight or in any way enable them to sit down and have that pizza or that Kentucky Fried Chicken that you experimented with. But with all kidding aside, of course, we at Bogdana, we like to advocate that everyone get into a healthy diet and eat fruits and vegetables and do that. What I see, as far as this product is concerned, is that if you do cheat, if you do cheat, if you do go out there on time and sit down and have something that you really enjoy and perhaps for that particular moment or short period of time that we lose our health consciousness, if we do get into that, if we go to a wedding or something like that, we

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don't have to feel that we're doing a tremendous amount of harm to our body and we might have the peace of mind knowing that we won't be affected in the area of weight gain. In fact, just the opposite may happen. If we take Cholestaway on a steady basis, we may actually, not may, we will lose weight. I've been taking it more or less experimentally on myself and I've lost weight and I haven't really been trying. In fact, I've been making an effort to offset the product by eating more fat than I'd usually eat and ironically I've actually lost weight. So, I see the product is working and I'm really delighted that we have it. And ordinarily, it would sell for, retail for $29.95. The nutritional formulas, most of you key into the first time, they retail for $29 for a one-month supply, $55 for a two-month supply, and $79 for a three-month supply and we have an introductory skin-care kit that's $39.94 and then we have also, that consists of all six of our skin-care products. And we also have a large collection discounted now from $296 down to $239. But once again, if anyone would like to order any of our fine products give us a call at 1-800-52-HEALTH. Think of 1-800-52 weeks of good health, H-E-A-L-T-H or 1-800-524-3258. Well, Dr. Gibbons, back to this product, I think that we're going have lot of people wanting to get Cholestaway from us, and one experiment that you made in an effort to really test this product before it was sold to the public was an experiment that you had gone through with ten women. Can you tell us about that?

Dr. Gibbons:

First, I'd like to correct one thing. I did not invent Cholestaway. I didn't invent hard water.

Robert Anderson:

(Laughing.) Okay.

Dr. Gibbons:

It is the minerals in hard water and I discovered that they have these beneficial effects on people. Uh, the experiment you referred to uh, I also work part-time at Fort Benjamin Harrison. And I was taking care of military dependents, and I selected ten women who'd had their gallbladders out. That told me that they were probably people who absorbed fat excessively from their diets and most gall stones are made from cholic acid or cholesterol. So I took these ten women, they were all overweight and concerned about it, and put them on six Cholestaway equivalents each day. And they all lost from three to nine pounds a month on it. (Laughing)

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Robert Anderson:

Well, that's really impressive. And Doctor, before we go on, I think there might be a lot of people asking the question "Well, how do you take 'Cholestaway'." Do you take it, do you take these two wafers, and they happen to be tasty by the way, I have a compulsion to eat them as a snack at this point, I've got to restrain myself. But, do you take them during the meal if you're having a high-fat meal or even one that's moderately consisting of fat? Do you take them during the meal or prior to the meal or how are they taken?

Dr. Gibbons:

I recommend that they be, they're pleasant to eat, chewed right with the meal so that they mix with you food and they can't work on the fat if they don't get in contact with it. But if you take it right with the food and it gets mixed in your food. But I might also point out that this is an excellent supplement. It is rich in calcium and particularly women should be taken calcium supplements any way. And this would answer that need also. But, I recommend that it be eaten with the meal . . . so it's mixed with the food.

Robert Anderson:

How many wafers would one take during a typical meal?

Dr. Gibbons:

Two.

Robert Anderson:

Two. And then, I understood also, you were telling me before the show, that if it's an especially fattening meal, like sitting down and having a few slices of pizza or having, as you said before, Kentucky Fried Chicken or any of those high-fat meals, you would take more wafers, more than two wafers . . .

Dr. Gibbons:

That's correct. I'd maybe take four if I was having lasagna or pizza.

Robert Anderson:

Now, how would it affect also, how would it affect someone who did not have a tremendously-high cholesterol level as opposed to the effect it might have on someone, for example, that you mentioned before, who might have a cholesterol level way up there in the 3 or 4 hundreds.

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Dr. Gibbons:

My experience has been that it has a great deal more effect on those with a very high cholesterol than the ones borderline. And those with very high cholesterol are people who are re-absorbing their cholesterol excessively. So the higher the cholesterol initially, the better it appears to be working.

Robert Anderson:

Uh-huh. Okay. I think it has a lot of implications, Cholestaway, and what I think most people are going to be interested in is not getting fat into the body. That it has an extremely significant effect on fat entering the body. Basically, one could sit down to a fattening meal and get very little fat into the body and, of course, that is a tremendous health implication because a lot of people view obesity as disease. There are so many diseases that are more frequently found in obese people. And of course obesity can be severely affected in everyone just by taking these two wafers and people, of course, one of the joys of it, is that people need not go on a Spartan diet in order to lose weight. You can simply take these two wafers during a meal and lose weight. And of course during an extremely high-fat meal Dr. Gibbons has recommended four wafers. But the other health implications have a lot to do with lowering cholesterol. There's been frequent results in people with high cholesterol going down to a cholesterol level that's well within the range of normalcy. So once again, if anyone would like to order any of our fine products give us a call at 1-800-52-HEALTH. Dr. Gibbons, it's been a pleasure. And Doctor, from all of us, including my listening audience, thank you from the bottom of hearts for coming up with this wonderful invention, Dr. Gibbons.

Dr. Gibbons:

Thank you.

Robert Anderson:

And everybody out there this has been Robert Anderson on "Let's Talk about Health." Good health to everybody.

(Music plays.)

Announcer:

To obtain further information or to order the Bogdana products call: 1-800-52-HEALTH. That's 1-800-524-3258.

EXHIBIT C

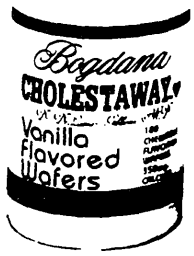
EXHIBIT C

CHOLESTAWAY was developed by Dr. DeLamar Gibbons, M.D., former Director of Clinical Research for the Saturday Evening Post and author of several books on cholesterol and diets.

CHOLESTAWAY is a natural magnesium/ calcium carbonate mineral formula in a delightfully palatable form. Simple and safe, just two small vanilla flavored wafers with each meal reduce the amount of fat absorbed from the diet.

CHOLESTAWAY is both safe and effective. Because it greatly lowers the amount of fat absorbed from the diet, many individuals may lose 4-9 pounds a month.

CHOLESTAWAY is not a drug. Unlike drugs which lower cholesterol it doesn't affect the blood or organs and has no side effects.



HOW CHOLESTAWAY WORKS

Our liver produces cholesterol in the breakdown and excretion of hormones that is excreted in the bile in the form of cholic acid. As the bile enters the intestine, the soluble cholic acid looks like food to the intestine and is absorbed into the blood stream. As the absorbed cholic acid is carried to the liver, it is excreted in the bile - only to be absorbed again and again from the intestine.

CHOLESTAWAY interrupts this vicious cycle of excretion-reabsorption-reexcretion of cholesterol by combining with the cholic acid to form an insoluble soap that cannot be reabsorbed. This is excreted in the stool. In this manner, CHOLESTAWAY reduces the body's cholesterol pool.

EXHIBIT D

EXHIBIT D

[redacted]

CHOLESTAWAY

[redacted]

Simple and safe, just two small vanilla-flavored wafers with each meal reduces the amount of fat absorbed from the diet.

[redacted]

CHOLESTAWAY is a natural magnesium/calcium carbonate mineral formula in a delightfully palatable form.

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[redacted]

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CHOLESTAWAY is also available in capsule form, with no sweeteners or binders.

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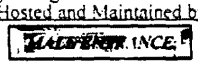

EXHIBIT D

[redacted] This product is carefully formulated, requiring many steps to completion, to retain maximum values. The results are a product that provides a spectrum of nutrients important to the body's cells, blood supply, glandular system and major organs, all designed for optimum results.

The ingredients in the Bogdana Nutritional formula are from natural sources, with no chemical additives or preservatives and no artificial colors or sweeteners. There are no toxic fillers or extenders such as would reduce the quality for added profits. Our method of formulation facilitates several factors which can help you with your health and aiding longer life:

- Easier assimilation which is better transformation of nutrients into living healthy tissue.
- Metabolism or a process of chemical exchange that aids in the purification and development of new healthier cells.

An essential key to the body's maximum performance is its ability to cope with the stresses associated with our everyday exposure to the environment. For example, food additives, water additives, and our exposure to various forms of drugs, chemicals, electric fields, and negative living conditions can all take their toll. Proper nutrition can help offset these negative and potentially harmful conditions.

High power magnification can reveal that when the blood supply has attained the best nutritional balance and is in contact with cells that an exchange is made. Substances pass through the cell membrane, flush through the nucleus of the cell and a "cleaning up" process takes place. Dark or grayish material is eliminated from the cell, which may contain aging pigments, and the cell can become livelier. When a split occurs we can find two younger healthy cells emerging.

A magnetic resonance has been incorporated in this product and helps the body in finding appropriate "targets."

This product can help the body achieve an effective and healthful nutritional balance. This of couse can assist in your achieving homeostasis or better balance in your life.

We consider the Bogdana products to be in a class by themselves, and know of no other formulations like these products in existence on the face of the earth. This is why the Bogdana Corporation offers with total confidence 100% money back guarantee on your first order if you are not totally satisfied.

The Bogdana Nutritional Formula helps revitalize and replenish certain essential nutrients. The continued use of the product can help provide you with added energy and vitality.

Why not try it for yourself?

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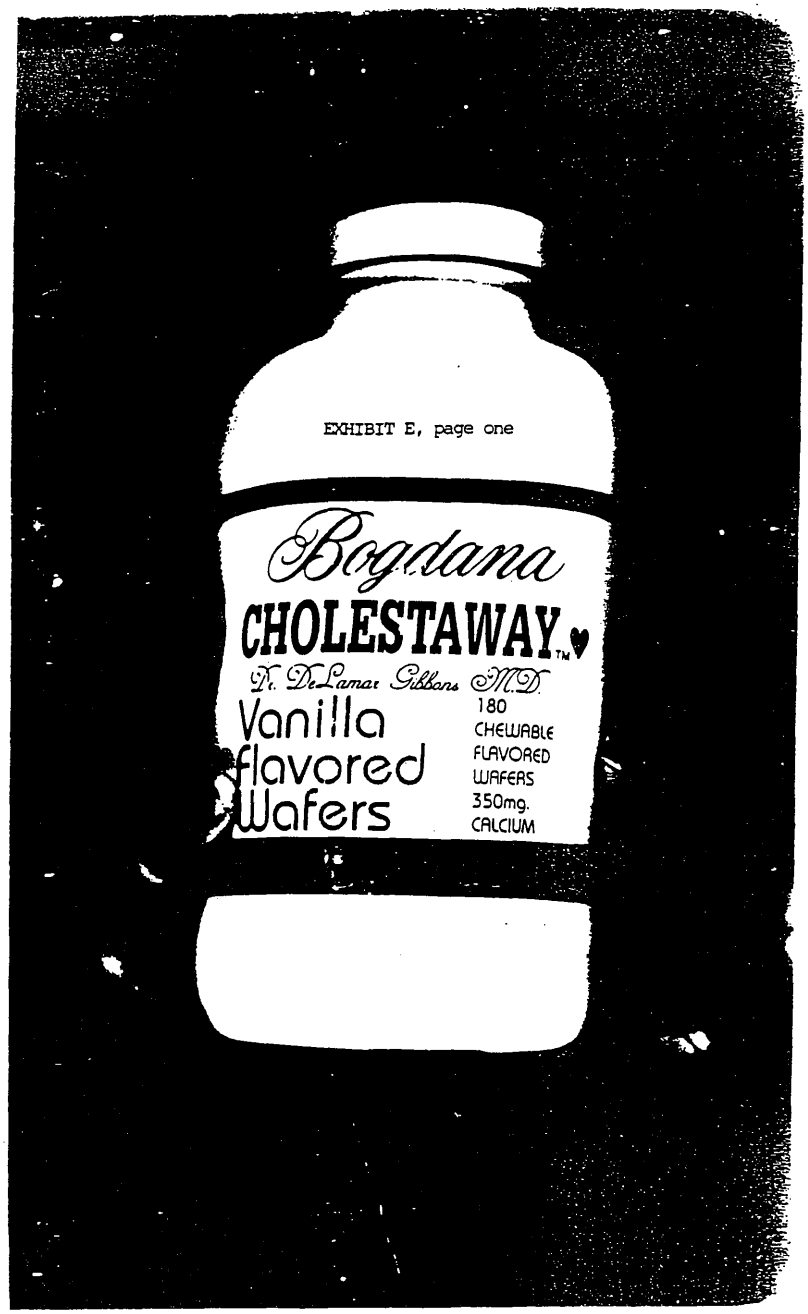
EXHIBIT E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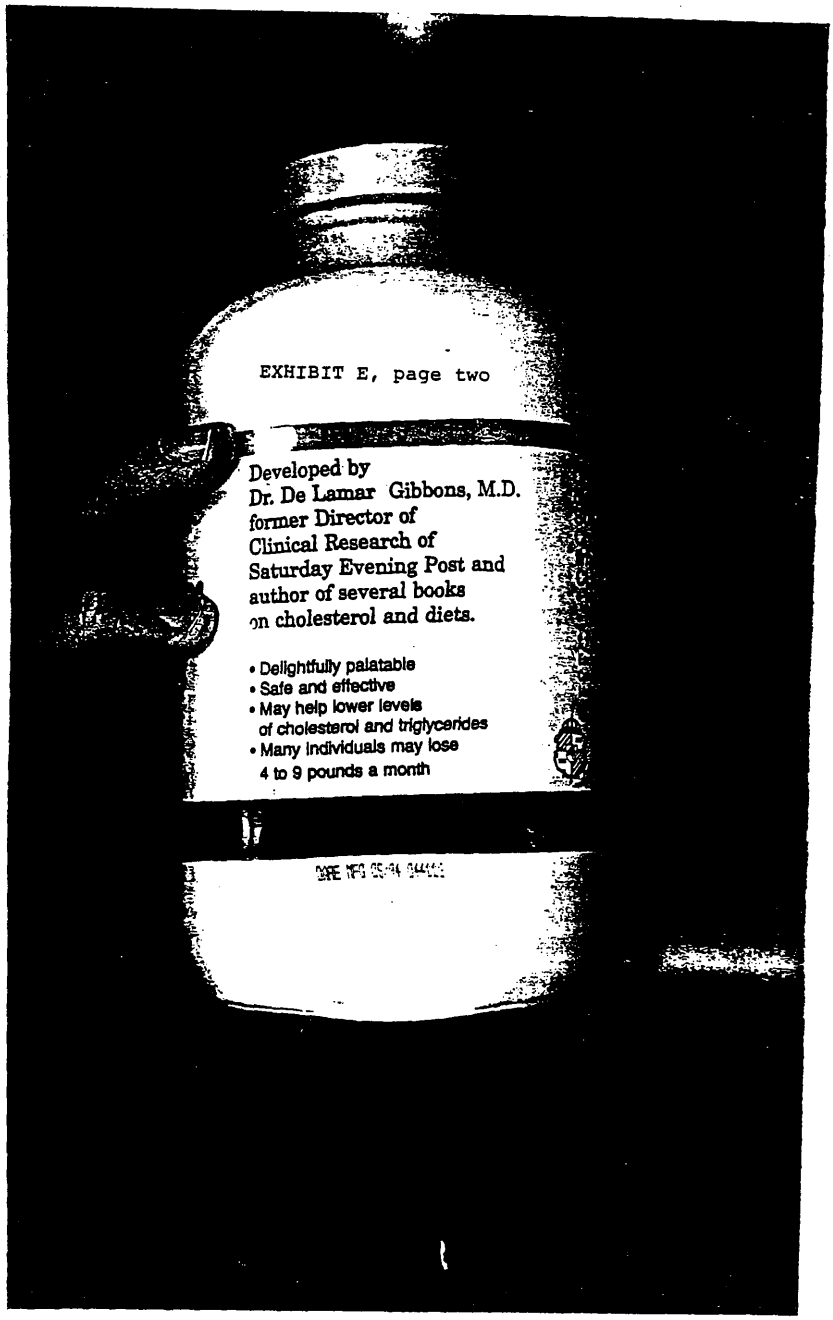
Bogdana
CHOLESTAWAY™
Dr. DeLamar Gibbons M.D.
Vanilla
flavored
Wafers
180
CHEWABLE
FLAVORED
WAFERS
350mg.
CALCIUM

EXHIBIT E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Developed by
Dr. De Lamar Gibbons, M.D.
former Director of
Clinical Research of
Saturday Evening Post and
author of several books
on cholesterol and diets.
• Delightfully palatable
• Safe and effective
• May help lower levels
of cholesterol and triglycerides
• Many individuals may lose
4 to 9 pounds a month

EXHIBIT F

EXHIBIT F

Transcript of Flora Source Radio Informercial #23

The Bogdana Corporation is proud to present "Let's Talk about Health" with your host, Robert Anderson. He'll talk about all aspects of health -- physical, mental, emotional and spiritual. Now here's your host, Robert Anderson.

Robert Anderson:

This is host Robert Anderson. I like to think about this as a comprehensive health show in which we talk about all levels of health -- the physical, mental, spiritual and emotional. We have an interesting show today. We have Dr. Scott, Scott Gregory with us and we, he's been on our show before. And he's an expert in diseases that affect the immune system where people have a weak immune system, they may have HIV-positive or full-blown AIDS or diseases, for example, like multiple sclerosis or chronic fatigue, that is the Epstein-Barr Syndrome, which is often accompanied by candida, that is yeast infection. There are so many, degenerative diseases or immuno-suppressed diseases that people have today. And it's becoming the scourge of our time, so I don't think there, there's anybody out there in the listening audience that does not know someone who doesn't have one of these diseases today. And it's uh, it's not really the norm. It's such an anomaly of man's history for so many people to be affected at the same time. So we're going to discuss with Dr. Scott Gregory who is an expert on immune diseases and disorders of the immune system and we're also going to start our show with a quote and the quote is: "I was not born this way and there is no reason this condition cannot change. Everything in the universe is in constant change and I am part of this universe." And this really is from Dr. Scott Gregory's book "A Holistic Protocol for the Immune System." It's just been published. And it's a very interesting book. And he, the entire theme of the book is has to do with the immune system and how to use natural pathways in health in order to achieve a strong immune system. And of course, that's extremely important in these times, there as so many people out there with diseases and one of the best things that we can do is prevention. And we have to really keep the immune system strong. And, kind of like also one of the excerpts from Dr. Scott Gregory's book that I just mentioned, having to do with his view point and also the view point of many doctor's who are into natural pathways to health and more or less their basic premise is as follows. And this is from Dr. Gregory's book: "Man's body is endowed with an enormous capability to adapt itself to abnormal, adverse conditions, but this capacity is limited when health-destroying conditions continue unchecked for long periods of time. Various disturbances in the functions of the organs and glands begin to manifest themselves. These may be in the form of fever, repeated colds and infections, tonsillitis, and enlarged liver, increased blood pressure, skin eruptions. In most cases, these are protective measures initiated by the organism in its effort to protect itself against the existing

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abnormal conditions. Ignored or suppressed by drugs, such.symptoms may get progressively worse or change their nature and ultimately result in chronic, pathological and degenerative changes. It is becoming increasingly evident that the present-day medical approach with drugs treating isolated symptoms in unable to solve the problem of the catastrophic increase of degenerative diseases: AIDS, cancer, cardiovascular disorders, arthritis, diabetes, etc." And that's what we at Bogdana are concerned about also. We're concerned about prevention. We're concerned about getting poisons out of the body because certainly so much research has been done to the toxins that are within the body that man has never had to cope with to the extent that it's coping with today. Where actually our own natural ability to detoxify is breaking down in just about everybody because we have an overload of poisons in our body. Every breath we take has a measure of carbon monoxide within it, not to mention all of the other poisons that we breathe in: lead and well also the amalgam from our teeth, artificial colorings from food. But we're concerned about the about the same thing that Dr. Gregory is concerned about, and that is to keep a strong immune system, and we at the Bogdana Corporation, we have an unusual revolutionary product called the Bogdana Nutritional Formula. And we have three sizes: we have a $29 one-month supply, we have a $55 two-month supply, a $79 three-month supply and as with all of our products we have a money-back guarantee for the first purchase. Give us a call at 1-800-52-HEALTH. Just think of fifty-two weeks of good health. 1-800-52-HEALTH. H-E-A-L-T-H or 1-800-524-3258. That's 1-800-524-3258. And with that said, Dr. Gregory, welcome to the show today.

Dr. Gregory:

Thank you. Thank you.

Robert Anderson:

And congratulations on your new book. It's a wonderful book and held me spellbound as I read it. And it set forth so many interesting ideas as to how people might achieve health and a strong immune system and you take into account so many important factors. And I think the big question that a lot of people would like to know is: Why are so many people immuno-suppressed? Why do so, they so many people have a weak immune system? In fat I suffered from that myself. I had the worst case of chronic fatigue, that is Epstein-Barr that my doctor had ever seen and thank God I came in contact with the Bogdana formulas because today I'm well. It took quite a while though and the formula caused me to detoxify and a lot of poisons came out of my body and the nice thing was with Bogdana, the energy causes the body to clean itself out. It's not really the product that cleans one out. But why are, why are so many people suffering from immuno-suppressed diseases today, Doctor?

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Dr. Gregory:

Well, as you as you touched on earlier the most harmful elements today, that we come into contact with on a daily basis are drugs of all kinds, legal and illegal, the body doesn't really know the difference, alcohol, excessive dietary fats, refined sugars, contaminated foods and water, excesses of all kind whether it be food, drugs, excessive worry, anger, fear, the emotions, and those with strong immune system seem to keep it that way through proper nutrition, regular exercise, preventive practices and wholesome lifestyles. These factors all are inter-dependent and one influences and complements the other.

Robert Anderson:

I'll say that what I found fascinating in your book is, because it's often not acknowledged by the orthodox approach to healing, and that is the chapter that you have called, entitled "The Mind Is a Powerful Healer" and you go into our emotions and health and how there is so much evidence that emotions and physical well-being are connected. And I think that, on a simple level, we can prove this. I mean, I remember one time when I was in college going to an exam I hadn't prepared for and getting sick while driving in the car on the way to the exam. And on a basic level that's an example of how emotions or fear cause physical illness. And I don't think there's any reason to doubt it. Although in the past it sounded like hocus pocus, I think people are accepting the idea that their emotions are so important, play an important part in the physical well-being. And in this chapter you go into how discouragement, despair, hopelessness, fear, worry, anxiety, doubt, feeling, feelings of rejection, feelings of isolation, hurt, sorrow, sadness, anger, lack of confidence, panic, all of these contribute to a weak immune system. And that, of course, is not the only cause of people feeling sick or acquiring a weak immune system that is, that gets into a state where people are catching everything whether it's having one allergy after another or catching one cold after another. But you also go into the idea of how we can control our emotions and how we can more or less screen what comes into our mind and change our negative thoughts to positive. And it's important because you very clearly let us know in this book, in this chapter "The Mind Is a Powerful Healer," how important it is to keep our emotions, our feelings of, uh, our optimistic feelings in check or in line with good health and I'd like to have you, sir, just make your own comment about "The Mind Is a Powerful Healer" and go into that chapter for a moment.

Dr. Gregory:

Yes, thank you again. The, the chapter is devoted to these affirmations, in dealing with the chronically ill for a good many years -- over, over 20 years. Especially

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individuals that are immuno-suppressed. I found that that element, the element of the mind was, for the most part, neglected. and I talked to a close associate and I said "You know, I'm not getting the kind of results I should be. I feel that, that you know, I should be getting 90-100% total recovery rate and I'm not and I don't quite understand the missing element. And he mentioned "Well, there are other reasons people get sick. The emotional, the spiritual, the mental. And I thought "yes" I need to address those, I need to empower my patients, and I need to allow that positive, those positive cues to come forth, especially affirmations. So I, in this latest fifth edition of "The Holistic Protocol" I realized that I needed to put this chapter in on the mind and have some powerful affirmations that have helped, when I've been, myself in states of discouragement and despair. And what go me to the point where I could lift up above it and they were very powerful in my process so I included them in this book and in this chapter.

Robert Anderson:

Uh-huh. Well, one of the, before the show you were telling me an interesting example. You were talking about the mind, the body, health, and you were talking about the emotions and you were mentioning a very interesting example that to me is absolute proof that our emotions have such an effect on the physical well-being. Having to do with something you have read about a witch doctor. Can you tell us about that?

Dr. Gregory:

Yes. Dr. Rossi, who has undertaken a new science, which he called psychobiology and he wrote a book and he determined that, and he did a lot of studies, in some parts of Africa he found that a shaman witch doctor would take a bone, and he'd point it at an individual and say "Die" and the person would succumb. They would actually go into you know, would actually die. And what seemed to be going on was that he would paralyze the sympathetic and the parasympathetic nervous system and, in other words, just by saying it and by the power of a witch doctor, and maybe not too much different from today's modern time where some, you know, people want to have control will tell an individual that they're going to die, because you know they have this disease or that disease and it imprints in their mind the fear and they actually succumb to death.

Robert Anderson:

Yes, it certainly have proved that our internalized sentences and what we believe is important to our physical well-being. But one of the things that I can't ignore and of course, having gotten healed from my own immuno-suppressed diseased, chronic immune deficiency syndrome, or chronic fatigue that is Epstein-Barr, and

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having gotten healed only through natural approaches after going through so many orthodox protocols of treatment for that disease, having it for several years and only ultimately only becoming cured as a result of Bogdana, I really, I find it, I can't ignore really the idea that recently I read, for example, that there are very few cases of polio in the world and this was set forth, this idea was set forth in print in one of the orthodox medical magazines. And so it makes me feel that perhaps some of the artificial or prescription drug-type protocols that maybe they're valid after all. What would you, uh, what comment can you make about that particular excerpt. I wish I had the magazine available. But I'm sure a lot of people have read articles like that. What comment might you make about that?

Dr. Gregory:

Well, polio, as we know it, and as we were told, was controlled and cured using the polio vaccine. But Louis Pasteur on his deathbed said, "I made a terrible mistake. The disease is nothing and the terrain is all." And I think that probably the theory of immunology, as it is a theory, was basically just a theory and so, consequently, as we mentioned the mind is powerful and believe is powerful and we all believe and we all know that polio was cured by a vaccine. But the real truth was that polio was not. That what happened was that we're seeing a lot of increases in polio but in order to confound or confuse the issue because, because of the vaccine people's thinking is kind of in the realm of it's cured. We changed the name or the establishment changed the name to aseptic meningitis, which has exactly the same symptomology. It's the same disease. So we have an increase in aseptic meningitis which is basically polio. But we can't say, you now, it's polio, because we all know that we know it. So we call it aseptic meningitis and people are thinking that we have new diseases. And on and on with, for example, AIDS. To change and confuse the issue we call it HIV, HDLV-3, and HIV-1 and 2 and on and on and on. And so consequently, we change names when we don't understand anything and when we want to validate what may not necessarily be true.

Robert Anderson:

Now, of course, what what really impresses me about Dr. Scott is that, uh, Dr. Scott Gregory is that he has really had a lot, a high degree of success rate with HIV-positive and some cases full-blown AIDS. Actually turning them around and making them HIV, causing them to become HIV-negative through his protocol. And he's had a remarkable, almost lightening-speed effect on people with chronic fatigue and I wish I had met him several years ago and fortunately I got well by using Bogdana. But his protocol is very interesting and really works quite well. And he's also got a book out, by the way, in addition to the book we mentioned, the book that we're now discussing is his most recent book, that's recently been published "A Holistic Protocol for the Immune System" by Dr.

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Scott Gregory who's with us right now. But he's also got other books that are remarkable too. "They Conquered AIDS -- True Life Adventures" and in that book he sets forth his protocol and also talks about some of his success treatments with AIDS people. And, of course, everything that he does is all natural. He's not a believer in prescription drugs, and could you tell us, Doctor, since we don't have a lot of time, can you tell us more or less what you're general treatment principles are, you protocol for treating immuno-suppressed diseases, such as I had chronic fatigue or other people have the HIV-positive. What is your outline for your general treatment principles?

Dr. Gregory:

Yes. It was developed over the years. And I found that this was the most effective means. First eliminating the pathogens by utilizing non-toxic germicides. That would be considered Stage 1.

Robert Anderson:

So first is getting the poisons out of the body.

Dr. Gregory:

Yes.

Robert Anderson:

Detoxifying.

Dr. Gregory:

No, actually the first is, is using natural germicides to, to, uh, yes, get the poisons out of the body. But . . .

Robert Anderson:

By natural germicides what you, what do you mean by that, Doctor?

Dr. Gregory:

Well, natural germicides are types of products . . .

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Robert Anderson:

Like aloe vera, herbs like that?

Dr. Gregory:

Well, that comes under, yes. Actually, the first phase, eliminating the pathogens by utilizing non-toxic germicides is really not the detox. That's Stage 2. It could be generalized as more or less killing whatever it is you have. So these different . . .

Mr. Anderson:

Killing the parasites, killing the viruses . . .

Dr. Gregory:

Yes, getting rid of the parasites, getting rid of the Epstein-Barr. Killing it, neutralizing it. Then the next stage is the detox stage. That stage is detoxification. And that involves different types of approaches to detoxification. We basically can detox our bodies through our lungs, through our respiration, through our skin, the skin being the largest organ in the body, and through different components that neutralize toxicity, different types of natural products. Then the third phase is energizing the body, and the Bogdana Corporation makes some great products that will allow the body to do what it does best and that's basically heal. And so that's the nourishment stage. That's the giving the body the energy to heal. And then the fourth stage is the repair stage. And often times the holistic health practitioner or provider will get the patient symptom free, but then does not increase the immune response, does not energize the body, give the body's immune system what it needs to work again and these different illnesses come back. So the fourth stage is just as important as the first stage. So again it's a four-stage process, basically very simplistically put: kill it, detoxify it, get it out of the body, increase the energy, and then rebuild the immune system.

Mr. Anderson:

That's interesting. Of course many of you might have heard our first show several months ago with Dr. Gregory and he was very instrumental in bringing our most recent product that we have as part of our product line to the Bogdana Corporation, and that is a product called Flora Source which is a wonderful product. And although I achieved wellness and got back on the road to health as a result of utilizing the Bogdana Nutritional Formulas along with the skin care products, they more or less work hand in glove or as a team, the internal and the

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external. But I wish that I had Flora Source at a time, because I think my achieving wellness and getting rid of chronic fatigue perhaps would have accelerated. Could you tell us something about Flora Source Doctor?

Dr. Gregory:

Yes, yes, it's a culture, it's many cultures actually. It's bio-active. It replaces the natural intestinal flora. In approximately, oh I'd say at least 90 to 98% of all individuals that are immunosuppressed, they have definitely digestive disfunction of some kind, malabsorption. So in other words, it's bad enough to be sick, but the worst end of the scenario is that you're suffering also from malnutrition, because the body is not manufacturing what it needs to heal. So the Flora Source in its process of adding to it these special nutrients that allow the flora in the digestive tract to function normally actually assist in the healing process by, for example, increasing more B vitamins, actually helping the body to manufacture more B vitamins, 'cause that's one thing the digestive flora does. Another thing the Flora Source does is it helps rid the body of different microorganisms that would in fact endanger, in the sense that they're pathogenic. So it has the principle of detoxification. I believe that the Flora Source in terms of my protocol would probably fit in in all four categories. Kill whatever it is that's in the digestive tract. Detoxify the digestive tract. And then it has, of course, the Flora Source has the ability to help the immune system work better also. It's been known that specific types of cultures do enhance the immune response. So it's a very good product. I've gotten very good results with it, with immunosuppressive disorders and I do add it as an adjunct. I [inaudible] most of my patients who are immunosuppressed need this product to get their digestive tract in proper function so that they can process these different microorganisms naturally and allow the body to detoxify them.

Mr. Anderson:

We thank you for bringing Flora Source to the Bogdana Corporation. For those of you who are interested in buying Flora Source it retails for $29.95 and basically from what I understand is that one needs to just take about one bottle of the Flora Source, it comes in powder form, and it's a combination of the good bacteria that are found in the intestines of people who have never been exposed to prescription drugs. And that's important. Of course, so many doctors don't tell us that when they give us prescription drugs that those prescription drugs are antibiotics, that they kill off the good bacteria as well as the bad bacteria. And although we may feel relief from symptoms we're suffering from at the moment, down the line three, four, five years, later we develop, we could develop ailments or sicknesses such as chronic fatigue or other immunosuppressed diseases. So it's important to reestablish the positive bacteria colonies within the body. And I've also found out

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that one of the, of course the bacteria in that particular item, the product called Flora Source that is very interesting is the B. Laterosporus bacteria that should be in people's intestine but often is not because of prescription drugs. And from the way I understand it is that that kills candida or yeast within the body and of course that's how a lot of our problems with immunosuppressed or weak immune systems start is the good bacteria is no longer there as a result of being killed off by the prescription drugs. And candida or yeast infection which is -- yeast is a living organism -- it's allowed to run rampant through our body and cause a lot of problems. And also another interesting bacteria is in there, and that is bacteria that is responsible for the metabolism and assisting in the metabolism of carbohydrates, sugar starches and without it could mean that people might gain weight. So if anyone would like to order any of our fine products, whether if the Flora Source or the Bogdana Nutritional Formulas or the skin care products, uh, give us a call at 1-800-52-HEALTH. That go fifty-two weeks of good health. 1-800-52-HEALTH. H-E-A-L-T-H or 1-800-524-3258. That's 1-800-524-3258. Uh, what, uh since we were talking about candida, there are so many people out there with yeast infections, with candida or candida, one of the interesting comments that you made before, we were talking before the show, is you mentioned something about a woman who had a yeast infection for many years. Can you tell us that story doctor?

Dr. Gregory:

Yes, it was a friend of mine, and I was assisting her and we were working with the protocol and she was getting great results. Possibly, almost totally free, but still some lingering on times, sir. Candida is one of those illnesses that has many symptoms and she would think that she would be over it and then it would come creeping back. And we got some Flora Source and she got on it and now she totally is symptom free. And it's been that way for a good long time, and I believe that there's no or very little candida now in her body. And she's so grateful that she was able to conquer, subjugate this illness.

Mr. Anderson:

Doctor, I know that a lot of people are interested in what you have to say and we're talking to Dr. Scott Gregory and he's an expert in immunosuppressed diseases, weak immune systems. And he believes in people being healed through natural approaches. He does not believe in prescription drugs. He believes in treating people with all the natural remedies available, good nutrition, exercise, more or less doing a lot of different things for the health that are all pointed towards one thing and that's getting healthy and establishing a strong immune system and that's what Bogdana is all about, too. But Doctor, I know a lot of people would like to do two things, they would like to contact you your book and

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buy your book perhaps, and they would also perhaps like to speak with you and have a consultation with you about their health problems. First of all could you give is the number of your book.

Dr. Gregory:

Yes, thank you, it's 1-800-247-6553.

Mr. Anderson:

Okay. Can you repeat that once again? Ladies and gentlemen get your pens and write down this number.

Dr. Gregory:

1-800-247-6553.

Robert Anderson:

Okay, that's to buy any of the doctor's books and for consultations?

Dr. Gregory:

That telephone number is 310-459-2680.

Robert Anderson:

And once again please.

Dr. Gregory:

Area code 310-459-2680.

Robert Anderson:

Well thank you for being on the show, Doctor. For all of you out there in our listening audience this has been Robert Anderson. We're on "Let's Talk about Health" and good health to everyone.

[music]

Voice over:

To obtain further information or to order the Bogdana products all 1-800-52-HEALTH. That's 1-800-524.3258.

EXHIBIT G

EXHIBIT G

Flora Source

Scientific Health Enhancement Effects Of:

Bacillus Laterosporus • Bacillus Subtilis • Lactobacillus Sporogenes

The classic use of antibiotics and chemotherapeutics seems to have reached limitations, in light of the chronic and persistent infections that plague mankind.

Flora Source is a pro-biotic or special class of bacteria, consisting of Bacillus Laterosporus, Bacillus Subtilis and Lactobacillus Sporogenes.

Bacillus Laterosporus is a friendly, non-lactic-acid producing bacteria, and is found in the human intestines in very small quantities, but will aid in creating an intestinal environment that is conducive to rapid colonization of any beneficial flora.

Bacillus Laterosporus has been clinically tested and found to be safe and effective, both topically and as intestinal flora. Taken internally, this product has shown positive results in relieving many of the gastrointestinal symptoms related to candida. Improvements in symptoms, such as: food sensitivities, constipation, diarrhea, abdominal pain, bloating and gas. Diminished body odors and bad breath were also noted.

Bacillus Subtilis can be found in various cavities of a healthy body, including those cavities covered with mucous membranes. When the spores of B. Subtilis reach the intestinal tract, germination takes place to produce vegetative cells, which discharge and liberate enzymes into the intestines. The spores of B. Subtilis are resistant to antibiotics such as aureomycin, tetracycline, chloramphenical, nystatin, sulfamides, etc.; B. Subtilis grows and produces spores in the intestinal tract even when those antibiotics are present.

Lactobacillous Sporogenes: The rapid colonization enables it to control the growth of infectious organisms in the intestines much more rapidly than do the non-spore-producing Lactobacilli by reducing the amount of bile salt in the gut. Also an intestinal aid for: putrefication, auto-intoxication, dyspepsia, anorexia, vomiting, flatulence, green stools, white diarrhea (Pseudocholera infantum).

INTR NG

Oxyg

Oxygen is vita
nutritional defic
more susceptible to
OO2 is a high pote
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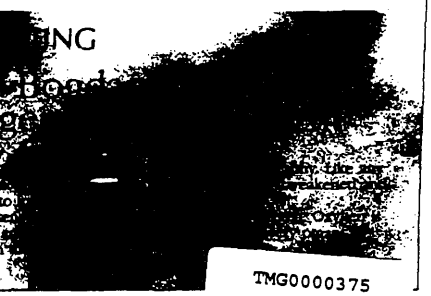

TMG0000375

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 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 the respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the draft 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 or that the facts, as alleged in the complaint, other than jurisdictional facts, are true; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the 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, 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 Bogdana Corporation is a California corporation with its principal office or place of business at 8929 Wilshire Boulevard, Third Floor, Beverly Hills, California.

2. Respondent Joseph L. Gruber is an officer of Bogdana Corporation. Individually or in concert with others, he formulates, directs or controls the policies, acts, or practices of Bogdana Corporation. His principal office or place of business is the same as that of Bogdana Corporation.

3. Respondent Bogda Gruber is an officer of Bogdana Corporation. Individually or in concert with others, she formulates, directs or controls the policies, acts, or practices of Bogdana Corporation. Her principal office or place of business is the same as that of Bogdana Corporation.

ORDER

DEFINITIONS

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

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

2. Unless otherwise specified, "*respondents*" shall mean Bogdana Corporation, a corporation, its successors and assigns and its officers; Joseph L. Gruber and Bogda Gruber, individually and as officers of the corporation; and each of the above's agents, representatives and employees.

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

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Cholestaway or any other food, dietary supplement or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That such product significantly lowers or has any other effect on serum cholesterol levels, with or without changes in diet;

B. That such product significantly lowers serum cholesterol levels or causes significant weight loss even if users eat foods high in fat, including fried chicken and pizza;

C. That such product substantially reduces or eliminates or has any other effect on the body's absorption of dietary fat;

D. That such product lowers low density lipoprotein cholesterol or improves the high density lipoprotein cholesterol to low density lipoprotein cholesterol ratio;

E. That such product is effective in the treatment of hardening of the arteries or heart disease;

F. That such product causes significant weight loss or has any other effect on weight, with or without changes in diet;

G. That such product significantly reduces or has any other effect on blood triglyceride levels;

H. That such product significantly reduces or has any other effect on blood pressure levels;

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Flora Source or any other food, dietary supplement or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That such product replaces the natural intestinal flora that are lost due to illness, prescription drugs or antibiotics;

B. That such product reduces the risk of developing any illness, including but not limited to chronic fatigue syndrome (Epstein-Barr syndrome), AIDS, or any other immunosuppression disease;

C. That such product improves the body's absorption of nutrients, including B vitamins;

D. That such product enhances the body's immune response or is effective in the treatment of immunosuppression diseases, including AIDS;

E. That such product prevents weight gain;

F. That such product is effective in the prevention or treatment of anorexia; or

G. That such product is effective in the prevention or treatment of gastrointestinal disorders or symptoms including food sensitivities, constipation, diarrhea, dyspepsia, abdominal pain, bloating or gas;

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, concerning the product's efficacy, performance, safety or benefits, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Cholestaway or any substantially similar product in or affecting commerce, shall not use the name "Cholestaway" or any other name that represents, expressly or by implication, that the product will lower serum cholesterol levels, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

V.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study or research.

VI.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or
2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

VII.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product in or affecting commerce, shall not create, produce, sell or disseminate:

A. Any advertisement that misrepresents, expressly or by implication, that it is not a paid advertisement;

B. Any television commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, clearly and prominently, and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the advertisement and immediately before each

presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number, e-mail address or mailing address for viewers to contact for further information or to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein; or

C. Any radio commercial or other radio advertisement five (5) minutes in length or longer that does not broadcast, clearly and audibly, within the first thirty (30) seconds of the advertisement and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE LISTENING TO IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the presentation of a telephone number, e-mail address or mailing address for listeners to contact for further information or to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the announcement of the disclosure provided herein.

VIII.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IX.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

X.

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

A. All advertisements and promotional materials containing the representation;

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

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

XI.

It is further ordered, That respondent Bogdana Corporation, and its successors and assigns, and respondents Joseph L. Gruber and Bogda Gruber shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

XII.

It is further ordered, That respondent Bogdana Corporation and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect

compliance obligations arising under this order, including but not limited to a dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XIII.

It is further ordered, That respondents Joseph L. Gruber and Bogda Gruber, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his or her current business or employment, or of his or her affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his or her duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XIV.

It is further ordered, That respondent Bogdana Corporation, and its successors and assigns, and respondents Joseph L. Gruber and Bogda Gruber shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XV.

This order will terminate on July 28, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order,

whichever comes later; provided, however, that the filing of such a complaint will not effect the duration of:

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

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

IN THE MATTER OF

WESTERN DIRECT MARKETING GROUP, INC., ET AL.

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

Docket C-3821. Complaint, July 28, 1998--Decision, July 28, 1998

This consent order prohibits, among other things, the two California-based advertising agencies, that created and produced infomercials for Cholestaway, from making efficacy, performance, or safety claims for any food, drug or dietary supplement, unless they possess competent and reliable scientific evidence that substantiates the claims. The consent order also prohibits the respondents from representing that any advertisement is something other than a paid advertisement and requires disclosures during the infomercials that they are advertisements. In addition, the consent order prohibits claims that the testimonials and endorsements are typical of the experiences of consumers who use the products, unless the claims are substantiated.

Participants

For the Commission: *Lisa Kopchik* and *Jeff Bloom.*

For the respondents: *Charles Chernofsky, Chernofsky & deNoyelles*, New York, NY.

COMPLAINT

The Federal Trade Commission, having reason to believe that Western Direct Marketing Group, Inc. and Western International Media Corporation, corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. At relevant times herein, respondent Western Direct Marketing Group, Inc. was known as Television Marketing Group, Inc., a California corporation with its principal office or place of business at 8544 Sunset Boulevard, Los Angeles, California.

2. Respondent Western International Media Corporation is a California corporation with its principal office or place of business at 8544 Sunset Boulevard, Los Angeles, California.

3. Respondents, at all times relevant to this complaint, were advertising agencies of Bogdana Corporation, and prepared and

disseminated advertisements to promote the sale of Cholestaway wafers and capsules. Cholestaway is a product subject to the provisions of Sections 12 and 15 of the Federal Trade Commission Act.

4. 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.

5. Respondents have disseminated or have caused to be disseminated television advertisements for Cholestaway, including but not necessarily limited to the attached Exhibit A. This advertisement contains the following statements:

Consumer One: "My cholesterol level was 230 and now it's 179. That's great."
Consumer Two: "My cholesterol at this point is down more than a hundred points."
Consumer Three: "My cholesterol was 220. After three months, my cholesterol went down to 190."
Host One: "Just what is it that lowered these people's cholesterol levels so dramatically? This is it. (He puts two Cholestaway tablets in his hand) A new, completely safe scientifically proven method that is as simple as chewing two flavorful wafers with every meal. It is called Cholestaway. (Graphic: 'Guarantees to Lower Your Blood Cholesterol Level') It is not a prescription drug, not a chemical, but a simple all natural dietary supplement that guarantees to lower your blood cholesterol level or your money back. That is right. It guarantees to lower your cholesterol." (Exhibit A, Cholestaway Television Infomercial 2, p. 1).

. . . .

Host One: "This is a cross-section of an artery. When there is too much cholesterol present in the bloodstream, it begins building up fatty deposits on the artery wall narrowing the opening, sort of like rust builds up on an old water pipe. When this opening becomes clogged, the blood flow to the heart is interrupted, causing a heart attack." (Exhibit A, p. 3).

. . . .

Host One: "With all natural Cholestaway, you get proven results without drugs, and without side effects. Studies were done at several prestigious research institutes on the effects of adding dietary calcium and magnesium, the ingredients found in Cholestaway, to the diet. Although not every study was created to determine the effect on blood serum cholesterol, it was noted that cholesterol levels were reduced, and in one study, by as much as 25%. One study even measured a weight loss, while another reported no loss at all.
(Graphic: "PROVEN TO LOWER BLOOD CHOLESTEROL BY SCIENTIFIC RESEARCH STUDIES.")
It was concluded, however, that, taken in sufficient dosages, these dietary supplements will lower cholesterol levels. The results by users, while anecdotal, is [sic] proof positive." (Exhibit A, p. 4).

. . . .

(A bottle of Cholestaway is shown on a table next to the "Physician's Desk Reference." Host Two picks up the bottle and holds it.)
Host Two: "And that is the beauty of Cholestaway. It lets you eat like you normally would. Of course, when I say normal, I don't mean pizza every night, or ice cream and cake with every meal. What you normally eat." (Exhibit A, pp. 4, 5).

. . . .

Host Three: "Studies have proven Cholestaway's effectiveness in lowering cholesterol. Just two flavorful wafers with every meal can lower your cholesterol count almost immediately. It is that simple. And it is completely safe." (Exhibit A, p. 6).

. . . .

Consumer Four: "I went for an annual check-up and had a blood test done, and found that my cholesterol was at 274. And they suggested that I start medication, if I don't do something about changing it. And I refused that. So in hearing about Cholestaway, I started taking it, and found that I dropped down to 208, which I think is fantastic."
(Graphic: "The Results of Using Cholestaway may vary from individual to individual.") (Exhibit A, pp. 6,7).

. . . .

Host One: "Now, I would like to introduce you to the man who discovered Cholestaway, Dr. DeLamar Gibbons, former Director of Clinical Research for the Saturday Evening Post, and author of several books on cholesterol and diets."

. . . .

Gibbons: "This is what I did. I ate a pound, I weighed it out, I had little scales, and I weighed out a pound of Kentucky Fried Chicken. I didn't peel the skin off or anything -- as fat as I could. And I took the same amount of Cholestaway that this inmate was taking. And for 60 days in a row, I ate a pound of Kentucky Fried Chicken."
Host Two: "You ate a pound of Kentucky Fried Chicken for sixty days?"
Gibbons: "Every day."
Host Two: "Every day?"
Gibbons: "Every day. And at the end of the sixty days, I checked, and my cholesterol had dropped remarkably. And my blood fat had gone down. And to my surprise, I had lost 25 pounds." (Exhibit A, p. 8).

. . . .

Consumer Five: "I've been on Cholestaway for about two months now. And in the process of getting my cholesterol tested, my cholesterol has come down. At this point, my cholesterol is down over a hundred points. The pluses to this have been that I can eat almost whatever I want, within reason, eggs, corned beef sandwich for lunch occasionally, and I'm still showing improvement, plus I've lost weight."
(Graphic: "The results of using Cholestaway will vary from individual to individual.")
(Graphic: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur.") (Exhibit A, p. 10).

. . . .

Dr. Dalton: "Dr. Gibbons and I were working together in the state correctional system in Virginia. And I was under the care of some physicians who were taking care of my health. I had a diabetic condition, which seemed to get out of hand. And my triglycerides as well as my cholesterol went so high, that it was very threatening. As a matter of fact, the triglycerides should only be around 200 as the cholesterol should. And my triglycerides were over 1600, and the cholesterol was over 500.

. . . .

Dr. Dalton: So we started on Cholestaway. And within several weeks, my chemistry concerning the triglycerides and cholesterol had dropped to near normal. By one month, they were both within normal range. And it was one of the best things that had ever happened to me."
(Graphic: "The results of using Cholestaway will vary from individual to individual.") (Exhibit A, p. 13).

. . . .

Consumer Three: "Yes, I had a side effect, an unusual side effect and a happy one. I lost 30 pounds."
Host Two: "You lost 30 pounds."
Dr. Dalton: "That's interesting Barbara, because I had the same experience. I lost 50 pounds over the past five years."
(Graphic: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur.")
Host Two: "Fifty pounds?"
Consumer Three: "That's wonderful."
Dr. Dalton: "Exactly."
Host Two: "Just what in Cholestaway causes one to lose the weight?"
Dr. Dalton: "Again, as Dr. Gibbons explains, it's the calcium combining with the fat in food and it simply never goes into the system. It's a very simple, but very effective mechanism." (Exhibit A, pp. 14, 15).

. . . .

Gibbons: "Cholestaway is perfectly safe for high blood pressure. In fact, there have been studies in the last year or two employing the ingredients of Cholestaway to treat high blood pressure. Some people with high blood pressure are found to be low on their calcium. And Cholestaway is an excellent source of calcium. And it would probably be very favorable to people with high blood pressure." (Exhibit A, p. 18).

. . . .

Gibbons: "They put cholesterol in a machine that's like a cream separator. And it's the high density that stays in the milk part, and the low density that comes out of the cream part. The low density is thought to be the bad one and the high density is felt to be the good one. The ratio of one to the other is currently regarded as important. The Cholestaway seems to be getting rid of primarily the low density cholesterol and improving the ratio."

. . . .

Host Two: "Yes, there is one major side effect while on Cholestaway. You will probably lose weight." (Exhibit A, p. 19).

6. Through the use of the trade name "Cholestaway," and through the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. Cholestaway significantly lowers serum cholesterol levels.
B. Cholestaway significantly lowers serum cholesterol levels without changes in diet.
C. Cholestaway significantly lowers serum cholesterol levels and causes significant weight loss even if users eat foods high in fat, including fried chicken and pizza.
D. Cholestaway substantially reduces or eliminates the body's absorption of dietary fat.
E. Cholestaway lowers low density lipoprotein cholesterol and improves the high density lipoprotein cholesterol to low density lipoprotein cholesterol ratio.
F. Cholestaway is effective in the treatment of hardening of the arteries and heart disease.
G. Cholestaway causes significant weight loss.
H. Cholestaway causes significant weight loss without changes in diet.
I. Cholestaway significantly reduces blood triglyceride levels.
J. Cholestaway significantly reduces elevated blood pressure.
K. Testimonials from consumers appearing in the advertisements for Cholestaway reflect the typical or ordinary experience of members of the public who use the product.

7. Through the use of the trade name "Cholestaway," and through the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made.

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

9. Through the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. Scientific studies prove that Cholestaway significantly lowers serum cholesterol levels.
B. Scientific studies prove that Cholestaway significantly reduces elevated blood pressure.

10. In truth and in fact:

A. Scientific studies do not prove that Cholestaway significantly lowers serum cholesterol levels.
B. Scientific studies do not prove that Cholestaway significantly reduces elevated blood pressure.

Therefore, the representations set forth in paragraph nine were, and are, false or misleading.

11. Respondents knew or should have known that the representations set forth in paragraphs seven and nine were, and are, false or misleading.

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

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"Transcript of Cholestaway Television Infomercial #2"

Graphic (with voiceover):

The following is a paid program brought to you by Television Marketing Group and contains testimonials from consumers relating their personal experiences using Cholestaway to reduce their cholesterol levels. These testimonials are personal accounts and have not been scientifically recorded. Although some users have also experienced a weight loss using Cholestaway, it is not intended as a weight loss product. Remember the results of taking Cholestaway will vary from individual to individual.

UNIDENTIFIED WOMAN #1: My cholesterol level was 230 and now its 179. That's great.

UNIDENTIFIED MAN: My cholesterol at this point is down more than a hundred points.

UNIDENTIFIED WOMAN #2: My cholesterol was 220. After three months, my cholesterol went down to 190.

MR. MACHADO: *(Holding bottle of Cholestaway)*

Just what is it that lowered these people's cholesterol levels so dramatically? This is it.

(Puts two Cholestaway tablets in his hand)

A new, completely safe scientifically proven method that is as simple as chewing two flavorful wafers with every meal. It is called Cholestaway.

(Graphics reading "NOT A DRUG," "NOT A CHEMICAL," "ALL NATURAL DIETARY SUPPLEMENT" and "GUARANTEES TO LOWER YOUR BLOOD CHOLESTEROL LEVEL" are shown to correspond with script.)

It is not a prescription drug, not a chemical, but a simple all natural dietary supplement that guarantees to lower your blood cholesterol level or your money back. That is right. It guarantees to lower your cholesterol.

("Mario Machado Television & Radio Commentator"

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Hello. I am Mario Machado. And welcome to our show. Here to help me tell you more about this revolutionary new breakthrough in controlling your cholesterol is a good friend of mine, Roni Margolis-Liddy.

(Roni Margolis-Liddy is shown and bottom of screen reads "Roni Margolis-Liddy.)

Hi, Roni.

MS. LIDDY: Hi, Mario.

The three people you saw at the beginning of our program had, like more than 65 million Americans, a higher than normal blood cholesterol. In fact, there is a good chance that you have a high cholesterol level yourself.

Now I said that they had high cholesterol. But thanks to Cholestaway, their cholesterol levels have returned to an acceptable level. And just what is acceptable? Let's take a look.

A chart labeled "Cholesterol Levels" across the top is shown with subheadings: "Acceptable under 200," "Borderline 200 to 259" and High Above 260." A graph line rises as she continues to speak.

The National Cholesterol Education Program regards cholesterol levels under 200 as acceptable. Readings of 200 to 239 are considered borderline. And those of 240 and above are considered high.

Mario Machado writes the words "CHOLESTEROL" on a green board.

MR. MACHADO: Now, first of all, let me explain that cholesterol has been getting a bad rap. You see, cholesterol, a wax-like substance processed in the liver, is essential to life. The human body needs cholesterol to manufacture cells, membranes, nerve tissues, hormones, and bile acids to digest food.

It is when there is too much cholesterol in our system that the trouble begins.

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Mario Machado writes "240" on the board.

If you have a blood cholesterol level of over 240, you are probably a good candidate for a heart attack. Here is why:

(Mario Machado draws a circle to represent an artery. He then colors in the circle to represent fatty deposits building-up.)

This is a cross-section of an artery. When there is too much cholesterol present in the bloodstream, it begins building up fatty deposits on the artery wall narrowing the opening, sort of like rust builds up on an old water pipe. When this opening becomes clogged, the blood flow to the heart is interrupted, causing a heart attack.

MS. LIDDY: But heart disease isn't the only symptom linked to high cholesterol. It can cause visual problems, forgetfulness, leg cramps, and difficulty in hearing, just to name a few.

MR. MACHADO: Now the real trick is to get rid of all of this excess cholesterol. To do this, most doctors prescribe drugs. But these can cause a variety of side effects that sometimes can be just as dangerous as having high cholesterol.

MS. LIDDY: *(Opens up a copy of the Physician's Desk Reference as she speaks)*

Here is what the Physician's Desk Reference, a well-respected journal within the medical profession, says about the side effects of one of the more popular drugs prescribed for controlling high blood cholesterol:

> "Caution: Can cause liver dysfunction, hypertension, ulcers, skin diseases, insomnia, thyroid abnormalities, vomiting, anorexia, cataracts, seizures," and on and on and on and on.

(Studies from the Laboratory of Biochemical Genetics and Metabolism, Rockefeller University, New York; the Arterioscleroses Research Group, St. Vincent's Hospital, Montclair, New Jersey; the Department of Internal Medicine, University of Texas; and the Digestive Disease

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Center, Veterans Administration Medical Center, Houston, Texas are shown as Mr. Machado speaks.)

MR. MACHADO: With all natural Cholestaway, you get proven results without drugs, and without side effects. Studies were done at several prestigious research institutes on the effects of adding dietary calcium and magnesium, the ingredients found in Cholestaway, to the diet. Although not every study was created to determine the effect on blood serum cholesterol, it was noted that cholesterol levels were reduced, and in one study, by as much as 25%. One study even measured a weight loss, while another reported no loss at all.

(The words "PROVEN TO LOWER BLOOD CHOLESTEROL BY SCIENTIFIC RESEARCH STUDIES are shown on the screen.)

It was concluded, however, that, taken in sufficient dosages, these dietary supplements will lower cholesterol levels. The results by users, while anecdotal, is proof positive.

MS. LIDDY: Let's be honest. There is a simple, easy way to help lower your cholesterol. And that is by eating a proper diet. But just how many of us have the will power to stay on a fat-free diet? I know I don't. We all have good intentions. But because of our job, lack of time, too much work, whatever, we just cannot always eat correctly.

And just what is considered a high-cholesterol diet? Well, fats, of course, like butter, oils, cheese, pork, rich gravies, shell fish, whole milk, cream – all of the good stuff.

(The words 'BUTTER," "OILS," "CHEESE," "PORK," "GRAVY," "SHELLFISH," and "WHOLE MILK" are shown on the screen as she mentions them.)

(A bottle of Cholestaway is shown on a table next to the PDR. She picks up the bottle and holds it.)

And that is the beauty of Cholestaway. It lets you eat like you normally would. Of course, when I say normal, I don't

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mean pizza every night, or ice cream and cake with every meal. What you normally eat. You simply take two Cholestaway wafers with each meal. They are vanilla flavored, and they actually taste good. And your blood cholesterol is lowered, guaranteed. It is that simple.

("Calcium carbonate and magnesium are generally recommended as safe by the FDA" is shown in small letters at the bottom of the screen.)

It is not only effective, it is all natural. That is what I especially like about it. It is not a drug. In fact, Cholestaway is actually good for you. It contains calcium and magnesium, both important to your health.

("This is a paid commercial" is shown at the bottom of the screen when she says the word "magnesium.")

JIM CHAPEL: (Testimonial)

I've had a problem with my cholesterol for the past 10 years. It was up to 278 two months ago. I tried everything. I tried niacin. I tried getting my diet down to five percent fat -- nothing seemed to work. I saw Cholestaway on television, and I tried it and in two months it went from 278 to 258. I was very happy about it.

(As he speaks the words "The results of using Cholestaway will vary from individual to individual" appears at the bottom of the screen.)

FEMALE ANNOUNCER:

If you are one of the over 65 million Americans who suffer from high blood cholesterol, you will be happy to know that there is a remarkable breakthrough discovery that can lower your cholesterol level without drugs. It is called Cholestaway.

(Scene fades and the woman appears in a garden holding a bottle of Cholestaway.)

Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back. That is right. It's guaranteed.

But don't just take our word for it.

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(She holds up a study. At the bottom of the screen, in small letters, the words "All products have possible, but remote side effects. See product literature.")

Studies have proven Cholestaway's effectiveness in lowering cholesterol.

(She picks up the bottle, opens it and takes out two wafers.)

Just two flavorful wafers with every meal can lower your cholesterol count almost immediately. It is that simple. And it is completely safe.

(The words "Calcium carbonate and magnesium are generally recognized as safe by the FDA" appear at the bottom of screen in small letters.)

So if you are concerned about cholesterol, call the number on the screen, and order Cholestaway now.

(On the screen, as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [CA + tax]. Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway, P.O. Box 803377, Dallas, TX, 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Pick up the phone and call the number on the screen now.

ROSLYN GERNSTADT: (Testimonial)

I went for an annual check-up and had a blood test done, and found that my cholesterol was at 274. And they suggested that I start medication, if I don't do something about changing it. And I refused that. So in hearing about

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Cholestaway, I started taking it. and found that I dropped down to 208, which I think is fantastic.

(At bottom of picture you can read: "The Results of Using Cholestaway may vary from individual to individual.")

FEMALE ANNOUNCER: Now, if you don't know if you have a high cholesterol level or not, have a pencil and paper handy, because later in the program we will give you a little quiz to see if you are at risk.

MR. MACHADO: Now, I would like to introduce you to the man who discovered Cholestaway, Dr. DeLamar Gibbons, former Director of Clinical Research for the Saturday Evening Post, and author of several books on cholesterol and diets. Thank you for joining us, sir. Tell us about the genesis of the product. How did it come about? And I hear that it had something to do with prisons.

DR. GIBBONS: At the time that I discovered Cholestaway, I was the medical director for a state prison in Virginia. And I had under my care an individual that I thought, the vessels under his skin all stood out. And I could even trace some of the nerves in his skin. I had never seen an individual look like this. He had good muscles, and he was obviously quite healthy.

I thought maybe he is on one of those special diets that many of the prisoners put themselves on. I went to the mess hall to watch him eat. And gosh, he gobbled up his tray, and half of his neighbor's. It wasn't the diet.

So I said pull his medical record for me. And interestingly enough, he had had thyroid cancer. And in taking his thyroid out, they took his parathyroid glands out.

MR. MACHADO: And that causes what?

DR. GIBBONS: It upsets --

MR. MACHADO: A voracious appetite?

DR. GIBBONS: No. It has to do with calcium metabolism. And to correct

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this problem. he was taking a crude form of Cholestaway. And my first love was chemistry. I thought. ah. I know why he looks so peculiar. He isn't able to absorb any of the fat in his diet. He is fat starved. This is interesting. As I thought about it. I decided that I would try it on myself.

MR. MACHADO: You were going to be your own guinea pig?

DR. GIBBONS: This is what I did. I ate a pound, I weighed it out. I had little scales, and I weighed out a pound of Kentucky Fried Chicken. I didn't peel the skin off or anything -- as fat as I could. And I took the same amount of Cholestaway that this inmate was taking. And for sixty days in a row, I ate a pound of Kentucky Fried Chicken.

MS. LIDDY: You ate a pound of Kentucky Fried Chicken for sixty days?

DR. GIBBONS: Every day.

MS. LIDDY: Every day?

DR. GIBBONS: Every day. And at the end of the sixty days, I checked, and my cholesterol had dropped remarkably. And my blood fat had gone down. And to my surprise, I had lost 25 pounds.

MS. LIDDY: You lost weight?

DR. GIBBONS: I lost 25 pounds. The beautiful thing about Cholestaway is it's all natural and it's even good for you. It isn't a drug. It isn't a medicine. What it is is the natural minerals from hard water.

MR. MACHADO: And what does that do to the system?

DR. GIBBONS: *(A chart with the stomach. liver and intestines is shown. Cholic acid is labeled in the liver and little arrows show the process that Dr. Gibbons describes. When he mentioned Cholestaway by name. the word "Cholestaway" appears on the chart.)*

Our livers process cholesterol. which is then excreted in the bile in the form of cholic acid. As the bile enters the intestine. the soluble cholic acid looks like food to the

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intestines and it's absorbed into the bloodstream. The absorbed cholic acid is carried back to the liver and is excreted in the bile and then reabsorbed again from the intestine. Cholestaway interrupts this cycle by combining with the cholic acid to form an insoluble residue that can't be reabsorbed.

MR. MACHADO: That's incredible.

DR. GIBBONS: It robs you of fat calories and with it it takes excess cholesterol.

MR. MACHADO: Two a day per meal?

DR. GIBBONS: With each meal. And you know, I like pizza. And if I'm going to have pizza I maybe take two or three extras.

(A pizza is shown and someone with a bottle of Cholestaway putting three wafers in the palm of the hand.)

MR. MACHADO: But the general regimen that you are stating is that you take two tablets per meal for how long a period of time?

DR. GIBBONS: Well, as long as you need it. It isn't going to hurt you. It's good for you.

MR. MACHADO: I want to thank you for being with us Dr. Gibbons, and for sharing your knowledge and also sharing Cholestaway with us. Thank you. We'll see you again later in the program. Stay tuned. We'll be right back with some satisfied users who each have an incredible success story to tell us.

("This is a paid commercial" at bottom of screen.)

MS. LIDDY: Thank you.

DR. GIBBONS: Thank you.

FEMALE ANNOUNCER: O.K. Do you have a paper and pencil handy? Here are five questions, the answers to which will tell you if you're at risk of having a high cholesterol level. Number 1: Does anyone in your family have high cholesterol? Number 2: Do you smoke? Number 3: Do you have a stressful job or

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do you often find yourself under a lot of pressure? Number 4: Do you eat a lot of foods high in fat? And Number 5: Do you seldom exercise?

(A chart, with the same five questions is shown on the screen. As the announcer reads each question, a check is put in the box before each question.)

(Announcer is shown holding a bottle of Cholestaway)

Now, if you answered 'yes' to any three of these questions, you're at risk of having a high cholesterol level and it would be a good idea to have it checked. Remember, high levels can lead to all kinds of health problems. But as you've seen, all natural Cholestaway is a safe and easy way to keep it under control.

STEVEN BRODY: (Testimonial)

I've been on Cholestaway for about two months now. And in the process of getting my cholesterol tested, my cholesterol has come down. At this point, my cholesterol is down over a hundred points. The pluses to this have been that I can eat almost whatever I want, within reason, eggs, corned beef sandwich for lunch occasionally, and I'm still showing improvement, plus I've lost weight.

(As he talks "The results of using Cholestaway will vary from individual to individual" appears. As he says "I'm still showing improvement" the following statement appears at the bottom of the screen: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur.")

FEMALE ANNOUNCER #1:

If you're one of the over 65 million Americans who suffer high blood cholesterol, you'll be happy to know there's a remarkable breakthrough discovery that can lower you cholesterol level without drugs. It's called Cholestaway.

(A bottle of Cholestaway is shown. She picks up the bottle.)

Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

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That's right. It's guaranteed. But don't just take our word for it.

(She holds up a study. "All products have possible but remote side effects. See product literature." appears in small letters at the bottom of the screen.)

Studies have proven Cholestaway's effectiveness in lowering cholesterol. And just how does Cholestaway work? Let's take a look.

(A chart with the stomach, liver and intestines is shown. Cholic acid is labeled in the liver and little arrows show the process that announcer describes. When she mentions Cholestaway by name, the word "Cholestaway" appears on the chart.)

Our liver processes cholesterol, which is excreted in the bile in the form of cholic acid. As the cholic acid enters the intestines, it looks like food to your body and it's absorbed into the bloodstream. The absorbed cholic acid is carried back to the liver and is excreted in the bile and reabsorbed through the intestines again and again. Cholestaway interrupts this cycle by combining with the cholic acid to form an insoluble residue that can't be reabsorbed.

(Announcer is seated on a table in a room. She picks up the bottle and pours them into her hand.)

Just two flavorful wafers with every meal can lower you cholesterol count almost immediately. It's that simple. And it's completely safe. So if you're concerned about cholesterol call the number on the screen and order Cholesterol now.

("Calcium carbonate and magnesium are generally recognized as safe by the FDA" appears at the bottom of the screen when she says "completely safe.")

(On the screen, as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [C.A ÷

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tax.] Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway, P.O. 803377 Dallas. TX. 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Pick up the phone and call the number on the screen now.

CAMILLA ROSENDE-LOPEZ: (Testimonial)

My cholesterol, it was very, very high. I diet. Everything that they say that is bad, I do not eat it. I exercise every day and even then, my cholesterol does not went down. Now one day, I was changing channels when I saw [the advertisement] on Cholestaway and I decided to try it. I did and from 286 to 235, very slowly, very surely, it works on me.

(As she speaks "The results of using Cholestaway will vary from individual to individual" appears at the bottom of the picture.)

FEMALE ANNOUNCER #2:

If you order Cholestaway right now, you'll have the opportunity to purchase CholesTrak.

(Holds up box of CholesTrak and removes device from box. At bottom of screen "Manufactured by ChemTrak, the leader in home test medical products.")

CholesTrak is a unique home testing device that allows you to check your cholesterol level, quickly, easily and accurately right in the comfort of your own home. This same device is often used by doctors on their patients.

("97% ACCURATE" appears on the screen when she says "97% accurate.")

And it's 97% accurate when used as directed.

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(Picture of the CholesTrak box appears. To the left "$19 Value Only $12.95. Under the box to the left "One time use only.")

A $19.00 value -- we're offering it to you for only $12.95. Now with CholesTrak you can see exactly how much your cholesterol level has dropped using Cholestaway.

MS. LIDDY: This is Dr. Fred Dalton. Dr. Dalton is a recognized forensic psychiatrist, and has had several papers published on the subject. Welcome, Doctor.

DR. DALTON: Thank you.

MS. LIDDY: I understand that your story has something to do with Dr. Gibbons, something about him saving your life.

DR. DALTON: Dr. Gibbons and I were working together in the state correctional system in Virginia. And I was under the care of some physicians who were taking care of my health. I had a diabetic condition, which seemed to get out of hand. And my triglycerides as well as my cholesterol went so high, that it was very threatening. As a matter of fact, the triglycerides should only be around 200 as the cholesterol should. And my triglycerides were over 1600, and the cholesterol was over 500. My doctors had warned me, and they had put me on different types of medications. I had side effects to them, and it was a very unhappy situation.

And in talking with my friend, Dr. Gibbons, he suggested let's give it a try. So we started on Cholestaway. And within several weeks, my chemistry concerning the triglycerides and cholesterol had dropped to near normal. By one month, they were both within normal range. And it was one of the best things that had ever happened to me.

(As he speaks the words "The results of using Cholestaway will vary from individual to individual" appear at the bottom of the screen in small letters.)

MR. MACHADO: I am sure your doctor was just as surprised if not more than you.

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DR. DALTON:	Interestingly enough, several of the physicians who were caring for me at that time, and I still have those physicians, are taking Cholestaway themselves.
MR. MACHADO:	How about side effects, did you experience any?
DR. DALTON:	None whatsoever. However, as I mentioned, from the medications which were prescription only and which doctors frequently prescribe for hypercholesterolemia, there were numerous side effects. And unfortunately, I was a victim of that.
MR. MACHADO:	Thank you for sharing your story with us, Doctor.
MS. LIDDY:	This is Barbara Egyude. Hello, Barbara.
MS. EGYUDE:	Hello.
MS. LIDDY:	I heard that you have an unusual story to tell us concerning Cholestaway.
MS. EGYUDE:	Yes, I had a side effect, an unusual side effect and a happy one. I lost 30 pounds.
MS. LIDDY:	You lost 30 pounds.
DR. DALTON:	That's interesting Barbara, because I had the same experience. I lost 50 pounds over the past five years. *("If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur" appears at the bottom of the screen in small letters.)*
MS. LIDDY:	Fifty pounds?
MS. EGYUDE:	That's wonderful.
DR. DALTON:	Exactly.
MS. LIDDY:	Just what in Cholestaway causes one to lose the weight?

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DR. DALTON:	Again. as Dr. Gibbons explains. it's the calcium combining with the fat in food and it simply never goes into the system. It's a very simple. but very effective mechanism.
MS. LIDDY:	It sounds very effective.
DR. DALTON:	It is.
MS. LIDDY:	Remember, Cholestaway is not a weight-loss program. Any weight loss you experience is merely a side effect.
MS. EGYUDE:	And may I say a very nice side effect.
MS. LIDDY:	Yes, I agree.
	("This is a paid commercial" appears at the bottom of the screen in small letters.)
MS. LIDDY:	Thank you all for joining us, and sharing your experiences with our viewers. Thank you.
REGINE JOHNSON: (Testimonial)	I had a very high cholesterol count. And my physician had recommended -- she was going to put me on medication. And someone told me about Cholestaway. And I have been taking it, and my cholesterol level is down to its normal level, and I have lost quite a bit of weight as a bonus to that.
	("The results of using Cholestaway will vary from individual to individual" appears at the bottom of the screen in small letters.)
FEMALE ANNOUNCER #1:	If you're one of the over 65 million Americans who suffer from high blood cholesterol, you'll be happy to know there's a remarkable breakthrough discovery that can lower your cholesterol level without drugs. It's called Cholestaway.
	(A bottle of Cholestaway is shown. She picks up the bottle.)
	Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

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That's right. It's guaranteed. But don't just take our word for it.

(She holds up a study. "All products have possible but remote side effects. See product literature." appears at the bottom of the screen.)

Studies have proven Cholestaway's effectiveness in lowering cholesterol.

(Announcer is seated on a table in a room. She picks up the bottle and pours them into her hand.)

Just two flavorful wafers with every meal can lower your cholesterol count almost immediately. It's that simply. And it's completely safe. So if you're concerned about cholesterol call the number on the screen and order Cholestaway now.

("Calcium carbonate and magnesium are generally recognized as safe by the FDA" appears at the bottom of the screen when she says "completely safe.")

(On the screen, as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [CA + tax.] Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway, P.O. 803377 Dallas, TX, 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Pick up the phone and call the number on the screen now.

EARDIE ANDERSON: I was told that I had high cholesterol. And I was told about Cholestaway. And I started to take it. And after I guess

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about four months or so. I went to my doctor. and I was told that my cholesterol had gone really down. Because at first it was 286. and it went – she didn't tell me how much it went down. But she told me it was good, that it went all the way down: That is what I was told. And I was very glad.

FEMALE ANNOUNCER #2: If you order Cholestaway right now. you'll have the opportunity to purchase CholesTrak.

(Holds up box of CholesTrak and removes device from box. At bottom of screen "Manufactured by ChemTrak, the leader in home test medical products.")

CholesTrak is a unique home testing device that allows you to check your cholesterol level, quickly, easily and accurately right in the comfort of your own home. This same device is often used by doctors on their patients.

("97% ACCURATE" appears on the screen when she says "97% accurate.")

And it's 97% accurate when used as directed.

(Picture of the CholesTrak box appears. To the left "$19 Value Only $12.95. Under the box to the left "One time use only.")

A $19.00 value – we're offering it to you for only $12.95. Now with CholesTrak you can see exactly how much your cholesterol level has dropped using Cholestaway.

MR. MACHADO: Rejoining us is Dr. Gibbons to help with this question and answer segment of our show. We recently went out onto the streets to get some of the most often-asked questions pertaining to cholesterol and Cholestaway, and let's listen in.

QUESTION: How can I find out what my cholesterol level is?

DR. GIBBONS: The simplest way is to go to your doctor, and have a physical check-up. and have your blood tested. A very quick and accurate way is to use the CholesTrak kit. It

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	allows you to check your cholesterol level right in the comfort of your own home. Simply and easily.
MR. MACHADO:	Let's go see who this person is.
QUESTION:	I have a teenage daughter that has high cholesterol. Can she take Cholestaway?
DR. GIBBONS:	Cholestaway is safe for all ages. It is a perfectly natural preparation. And there is no problem giving it to children, if they have high cholesterol. There has been a lot of interest lately on children I would say in families that have a history of high cholesterol. It is important to check the children. Because some teenagers and some in their early twenties are dying of heart attacks.
QUESTION:	My father has high blood pressure and high cholesterol. Can he take Cholestaway?
MR. MACHADO:	That is a good question. In fact, I do have high blood pressure. A lot of people do. A lot of my friends do.
DR. GIBBONS:	Cholestaway is perfectly safe for high blood pressure. In fact, there have been studies in the last year or two employing the ingredients of Cholestaway to treat high blood pressure. Some people with high blood pressure are found to be low on their calcium. And Cholestaway is an excellent source of calcium. And it would probably be very favorable to people with high blood pressure.
QUESTION:	How long can you stay on Cholestaway?
DR. GIBBONS:	Indefinitely. It isn't a medicine. It is a food supplement. It is natural. You don't get too much of it. As I mentioned, it has calcium in it. Women should be taking Cholestaway anyway to keep their bones hard. So you can take it indefinitely.
MS. LIDDY:	So it would help in osteoporosis, perhaps?
DR. GIBBONS:	Definitely.
MS. LIDDY:	I'm curious, Doctor. What are these margarine companies

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talking about when they refer to. good cholesterol?

DR. GIBBONS: They put cholesterol in a machine that's like a cream separator. And it's the high density that stays in the milk part, and the low density that comes out of the cream part. The low density is thought to be the bad one and the high density is felt to be the good one. The ratio of the one to the other is currently regarded as important. The Cholestaway seems to be getting rid of primarily the low density cholesterol and improving the ratio.

QUESTION: What if you have an ulcer, or if you had an ulcer, could you still take Cholestaway?

DR. GIBBONS: It is actually a good idea to take Cholestaway. It is an excellent antacid among other things. And ulcer patients will get considerable relief when they take the Cholestaway. Some people have told me that they took it as an antacid. But it is definitely safe for people with ulcers.

MR. MACHADO: We have time for one more question. So let's listen here.

QUESTION: Are there any side effects from Cholestaway?

MS. LIDDY: I'll answer that one. Yes, there is one major side effect while on Cholestaway. You will probably lose weight.

(The following statement appears at the bottom of the screen in small letters: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur."

MR. MACHADO: Now, the results of using Cholestaway varies with every individual. Your experience with Cholestaway might differ from what we've heard here today. I'd like to thank our incredible guest Dr. DeLamar Gibbons, the discoverer of this extraordinary cholesterol-reducing product, Cholestaway, for being on our program today. Remember, you can order Cholestaway right now by calling the 800-number no the screen.

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("This is a paid commercial" appears on the screen.)

MADELINE WALSH: (Testimonial)

I originally had a cholesterol problem of 278 and now it has dropped down to 238.

("The results of using Cholestaway will vary from individual to individual" appears at bottom of screen in small letters.)

FEMALE ANNOUNCER #1:

If you are one of the over 65 million Americans who suffer from high blood cholesterol, you will be happy to know that there is a remarkable breakthrough discovery that can lower your cholesterol level without drugs. It is called Cholestaway.

(Scene fades and the woman appears in a garden holding a bottle of Cholestaway.)

Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back. That is right. It's guaranteed.

But don't just take our word for it.

(She holds up a study. At bottom of screen, the words "All products have remote side effects. See product literature.")

Studies have proven Cholestaway's effectiveness in lowering cholesterol.

(She picks up the bottle, opens it and takes out two wafers.)

Just two flavorful wafers with every meal can lower your cholesterol count almost immediately. It is that simple. And it is completely safe.

(The words "Calcium carbonate and magnesium are generally recognized as safe by the FDA.")

So if you are concerned about cholesterol, call the number on the screen, and order Cholestaway now.

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(On the screen, as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [CA + tax]. Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway, P.O. Box 803377, Dallas, TX, 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Start your way on the road to a longer, healthier life. Pick up the phone and call the number on the screen now.

TOM CAMP: (Testimonial)

Cholestaway has made a big difference in my life. Nowadays, there's a tremendous consciousness about fat intake. All the doctors speak about it, all the commercials, your labels, and many people are concerned about fat intake. And I find it's a very practical and convenient way to keep your fat intake down by using the Cholestaway product.

("The results of using Cholestaway will vary from individual to individual.")

Graphic (with voiceover):

The preceding program contained testimonials from consumers relating their personal experiences using Cholestaway to reduce their cholesterol levels. These testimonials are personal accounts and have not been scientifically recorded. Although some users have also experienced a weight loss using Cholestaway, it is not intended as a weight loss product. Remember, the results of taking Cholestaway will vary from individual to individual.

(TMG appears on the screen with music. Under TMG is a line and under the line the words "Television Marketing Group, Inc. A Division of Western International Media.")

(The preceding was a paid program brought to you by Television Marketing Group.)

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 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 the respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the draft 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 or that the facts, as alleged in the complaint, other than jurisdictional facts, are true; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the 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, 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. At relevant times herein, respondent Western Direct Marketing Group, Inc. was known as Television Marketing Group, Inc., a California corporation with its principal office or place of business at 8544 Sunset Boulevard, Los Angeles, California.

2. Respondent Western International Media Corporation is a California corporation with its principal office or place of business at 8544 Sunset Boulevard, Los Angeles, California.

ORDER

DEFINITIONS

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

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise

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

2. Unless otherwise specified, "*respondents*" shall mean Western Direct Marketing Group, Inc. and Western International Media Corporation, corporations, their successors and assigns and their officers, and each of the above's agents, representatives and employees.

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

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Cholestaway or any other food, dietary supplement or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That such product significantly lowers or has any other effect on serum cholesterol levels, with or without changes in diet;
B. That such product significantly lowers serum cholesterol levels or causes significant weight loss even if users eat foods high in fat, including fried chicken and pizza;
C. That such product substantially reduces or eliminates or has any other effect on the body's absorption of dietary fat;
D. That such product lowers low density lipoprotein cholesterol or improves the high density lipoprotein cholesterol to low density lipoprotein cholesterol ratio;
E. That such product is effective in the treatment of hardening of the arteries or heart disease;
F. That such product causes significant weight loss or has any other effect on weight, with or without changes in diet;
G. That such product significantly reduces or has any other effect on blood triglyceride levels; or
H. That such product significantly reduces or has any other effect on blood pressure levels,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Cholestaway or any substantially similar product in or affecting commerce, shall not use the name "Cholestaway" or any other name that represents, expressly or by implication, that the product will lower serum cholesterol levels, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study or research.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or
2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

V.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VI.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VII.

It is further ordered, That respondents Western Direct Marketing Group and Western International Media Corporation, and their successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;
B. All materials that were relied upon in disseminating the representation; and
C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other

communications with consumers or with governmental or consumer protection organizations.

VIII.

It is further ordered, That respondents Western Direct Marketing Group and Western International Media Corporation and their successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

IX.

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

X.

It is further ordered, That respondents Western Direct Marketing Group and Western International Media Corporation and their

successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XI.

This order will terminate on July 28, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not effect the duration of:

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

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

IN THE MATTER OF

INSTITUTIONAL PHARMACY NETWORK, ET AL.

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

Docket C-3822. Complaint, Aug. 11, 1998–Decision, Aug. 11, 1998

This consent order prohibits, among other things, the respondents, who are providers of institutional pharmacy services in Oregon, from entering into, maintaining, or enforcing any agreement with any pharmacy concerning fees or fixing, raising, stabilizing, maintaining, or tampering with any fees.

Participants

For the Commission: *Randall Marks, Steven Levy, Michael McNeely, William Baer,* and *Jonathan Baker.*

For the respondents: *Douglas Ross* and *Pat Morris*, in-house counsel, Portland, OR.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Institutional Pharmacy Network; Evergreen Pharmaceutical, Inc.; NCS Healthcare of Oregon, Inc.; NCS Healthcare of Washington, Inc.; United Professional Companies, Inc.; and White, Mack and Wart, Inc., hereinafter sometimes referred to as respondents, have violated and are violating the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

1. Respondent Institutional Pharmacy Network ("IPN") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 1300 SW 5th Avenue, Suite 2300, Portland, Oregon.

2. Respondent Evergreen Pharmaceutical, Inc. ("Evergreen"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington with its office and principal place of business located at 12220 113th Avenue, NE, Kirkland, Washington.

3. Respondent NCS Healthcare of Oregon, Inc. ("NCS of Oregon"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its office and principal place of business located at 2725 Columbia Blvd., Portland, Oregon.

4. Respondent NCS Healthcare of Washington, Inc. ("NCS of Washington"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio with its office and principal place of business located at 13035 Gateway Drive, Seattle, Washington.

5. Respondent United Professional Companies, Inc. ("UPC"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 3724 West Wisconsin Avenue, Milwaukee, Wisconsin.

6. Respondent White, Mack & Wart, Inc., doing business as ProPac Pharmacy ("ProPac"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 11620 NE Ainsworth Circle, Portland, Oregon.

7. IPAC Pharmacy ("IPAC") was a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon. On or about July 31, 1996, after the occurrence of the events alleged in paragraphs 18-20, respondent NCS of Oregon purchased the pharmacy business of IPAC.

8. Clinical Health Systems ("Clinical") was a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington. On or about November 1, 1996, after the occurrence of the events alleged in paragraphs 18-20, respondent NCS of Washington purchased the pharmacy business of Clinical.

9. The respondents named in paragraphs two through six herein (sometimes referred to as "institutional pharmacy respondents") provide institutional pharmacy services in Oregon.

10. Clinical, Evergreen, IPAC, ProPac, and UPC formed IPN and have been its only members.

11. The institutional pharmacy respondents are engaged in the business of providing pharmacy services to institutional care facilities, such as nursing homes. Institutional pharmacies provide

specialized services, including providing medications in single dose packages, maintaining an "emergency box" at the client facility with drugs for use in emergency situations, and providing consulting and quality assurance services to institutional care facilities.

12. IPN engages in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, IPN is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

13. The general business practices of IPN and its members, including those practices herein alleged, are in or affect "commerce" within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

14. Except to the extent that IPN and its members have restrained competition as alleged herein, IPN's members have been, and are now, in competition among themselves and with other providers of institutional pharmacy services in Oregon. Absent agreements among competing pharmacies on the price and other terms on which they will provide services to third-party payers, competing pharmacies decide individually whether, and at what price, to enter into contracts with such payers.

15. The State of Oregon created the Oregon Health Plan ("OHP") in 1994 to provide health care to Medicaid recipients and other needy Oregonians. Under OHP, the state contracts with Fully Capitated Health Plans ("Plans"), which are managed care organizations that receive a fixed payment to care for OHP patients. The Plans in turn contract with providers, including hospitals, physicians, retail pharmacies, and institutional pharmacies. OHP covers about half of all institutional care patients in Oregon.

16. IPN neither provides new or efficient services, nor enables its members to provide new or efficient services. Moreover, IPN members do not share risk. Instead, IPN provides a vehicle for its members to reach collective decisions on the prices that the institutional pharmacies will seek from the Plans.

17. The institutional pharmacy members of IPN have agreed among themselves, and IPN has acted as a combination of those institutional pharmacies, and has combined with them, to engage in collective negotiations over price and other terms with the Plans and thereby to fix the fees they charge the Plans. In so doing, IPN and its institutional pharmacy members have fixed, stabilized, or increased

the price of institutional pharmacy services and otherwise restrained competition among institutional pharmacies in Oregon.

18. The institutional pharmacy members of IPN together provide pharmacy services for approximately 80 percent of the patients that receive institutional pharmacy services in Oregon. Their purpose in agreeing to negotiate collectively has been to maximize their resulting leverage in bargaining over reimbursement rates with the Plans. Indeed, even before forming IPN, they saw "an advantage to negotiate from strength for reimbursement" because they recognized that competition among themselves would drive down reimbursement rates.

19. IPN has contracted with three Plans. Pursuant to each of those contracts, each Plan pays IPN members a higher rate than it pays institutional pharmacies that are not IPN members and that did not negotiate collectively with that Plan.

20. IPN also attempted to contract with at least four other Plans. Clinical, Evergreen, IPAC, ProPac, and UPC agreed that, before conducting individual negotiations, each member would give IPN time to attempt to negotiate a contract. Pursuant to this agreement, the pharmacies negotiated separately with three of the Plans only after IPN failed to reach an agreement on behalf of the group. IPN also negotiated with a fourth Plan that is by far the largest purchaser of institutional pharmacy services for OHP patients. Although this Plan sought to deal with Clinical, Evergreen, IPAC, ProPac, and UPC individually, the pharmacies largely refused to respond and instead approached the Plan as a group. After months of attempting to negotiate individually with the institutional pharmacy members of IPN, and under pressure to implement pharmacy arrangements for institutional care patients under OHP, the Plan began negotiating with IPN. As a result of these negotiations, the Plan agreed to pay higher rates to IPN members than it had agreed to pay other institutional pharmacies.

21. Respondents' actions as alleged herein have had and have the purpose, tendency, and capacity, among other effects:

a. To restrain competition among pharmacies providing institutional pharmacy services in Oregon;

b. To fix or increase the prices that the Plans pay for institutional pharmacy services to OHP patients in Oregon; and

c. To deprive the State of Oregon, the Plans, nursing homes and other long-term care facilities, and OHP beneficiaries of the benefits of competition among providers of institutional pharmacy services in Oregon.

22. The combinations or agreements and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Institutional Pharmacy Network; Evergreen Pharmaceutical, Inc.; NCS Healthcare of Oregon, Inc.; NCS Healthcare of Washington, Inc.; United Professional Companies, Inc.; and White, Mack and Wart, Inc., hereinafter sometimes referred to as the respondents, and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Acts, 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, now in further conformity with

the procedure described 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 Institutional Pharmacy Network is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 1300 SW 5th Avenue, Suite 2300, Portland, Oregon.

2. Respondent Evergreen Pharmaceutical, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington with its office and principal place of business located at 12220 113th Avenue, NE, Kirkland, Washington.

3. Respondent NCS Healthcare of Oregon, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its office and principal place of business located at 2725 Columbia Blvd., Portland Oregon.

4. Respondent NCS Healthcare of Washington, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio with its office and principal place of business located at 13035 Gateway Drive, Seattle, Washington.

5. Respondent United Professional Companies, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 3724 West Wisconsin Avenue, Milwaukee, Wisconsin.

6. Respondent White, Mack and Wart, Inc. (doing business as Propac Pharmacy), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 11620 NE Ainsworth Circle, Portland, Oregon.

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

A. Respondent *Institutional Pharmacy Network ("IPN")* means Institutional Pharmacy Network; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by IPN; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. Respondent *Evergreen Pharmaceutical, Inc.*, means Evergreen Pharmaceutical, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by Evergreen Pharmaceutical, Inc.; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. Respondent *NCS Healthcare of Oregon, Inc.*, means NCS Healthcare of Oregon, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by NCS Healthcare of Oregon; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

D. Respondent *NCS Healthcare of Washington, Inc.*, means NCS Healthcare of Washington, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by NCS Healthcare of Washington; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

E. Respondent *United Professional Companies, Inc.*, means United Professional Companies, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by United Professional Companies, Inc.; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

F. Respondent *White, Mack and Wart, Inc.*, means White, Mack and Wart, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by White, Mack and Wart, Inc.; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

G. "*Third-party payer*" means any person or entity that reimburses for, purchases, or pays for all or any part of the health care services provided to any other person, and includes, but is not limited to: health insurance companies; managed care organizations; Fully Capitated Health Care Plans under the Oregon Health Program; pharmacy benefit managers; prepaid hospital, medical, or other health service plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs.

H. "*Oregon Health Plan*" means the plan created by the State of Oregon in 1994 to provide health care to Medicaid recipients and other needy Oregonians.

I. "*Qualified risk-sharing joint arrangement*" means an arrangement to provide services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of pharmacy providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all pharmacy providers participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of services to payers at a capitated rate; (b) the provision of services for a predetermined percentage of premium or revenue from payers; (c) the use of significant financial incentives (*e.g.*, substantial withholds) for its participating providers, as a group, to achieve specified cost-containment goals; or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by different types of providers offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors.

J. "*Qualified clinically-integrated joint arrangement*" means an arrangement to provide services in which (1) the arrangement does

not restrict the ability, or facilitate the refusal, of pharmacy providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all pharmacy providers participating in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the providers participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement.

K. "*Subcontract*" means an agreement between two pharmacies that one will fulfill the contractual obligations of the other to provide pharmacy goods and services to the patients of an institutional care facility or third-party payer at a particular facility, when (1) the contracting pharmacy cannot reasonably fulfill its contract obligations at that facility or (2) a respondent is operating in its capacity as a network including that facility if, at the time of the agreement, that facility had a pre-existing contract with another pharmacy.

II.

It is further ordered, That each respondent, in connection with the provision of institutional pharmacy goods and services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist, directly or indirectly, or through any corporate or other device, from entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, facilitating, attempting to facilitate, ratifying, or attempting to ratify any agreement with any pharmacy either (1) concerning fees or (2) setting, fixing, raising, stabilizing, establishing, maintaining, adjusting, or tampering with any fees.

Provided that nothing in this order shall be construed to prohibit any respondent from:

(1) Entering into any agreement or engaging in conduct that is reasonably necessary to form, facilitate, manage, operate, or participate in:

(a) A qualified risk-sharing joint arrangement; or

(b) A qualified clinically integrated joint arrangement, if the respondent has provided the prior notification(s) as required by this

paragraph (b). Such prior notification must be filed with the Secretary of the Commission at least thirty (30) days prior to forming, facilitating, managing, operating, participating in, or taking any action, other than planning, in furtherance of any joint arrangement requiring such notice ("first waiting period"), and shall include for such arrangement the identity of each participant; the location or area of operation; a copy of the agreement and any supporting organizational documents; a description of its purpose or function; a description of the nature and extent of the integration expected to be achieved, and the anticipated resulting efficiencies; an explanation of the relationship of any agreement on reimbursement to furthering the integration and achieving the expected efficiencies; and a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from such agreement(s). If, within the first waiting period, a representative of the Commission makes a written request for additional information, respondent shall not form, facilitate, manage, operate, participate in, or take any action, other than planning, in furtherance of such joint arrangement until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition.

(2) Agreeing on the terms by which that respondent will provide pharmacy goods or services:

(a) With a prescription benefit manager or other third-party payer that is acting on behalf of an employer or other purchaser of pharmacy goods and services and (i) that is neither owned by nor operates any pharmacies providing institutional pharmacy services, or (ii) that owns or operates a pharmacy providing institutional pharmacy services as long as respondent notifies the Commission in writing at least forty-five (45) days prior to such agreement.

(b) To an institutional care facility that is acting as a purchaser of pharmacy goods or services, even if the facility also owns a pharmacy.

(c) With another pharmacy pursuant to a subcontract.

(3) Agreeing on the terms by which respondent will purchase pharmacy goods or services in its capacity as an institutional care facility.

(4) Contracting to operate or manage a pharmacy.

III.

It is further ordered, That each respondent shall:

A. Within thirty (30) days after the date on which this order becomes final, cause the distribution by first-class mail of this order and the complaint to (1) each of its corporate officers, directors, and managers, and the officers, directors, and managers with responsibility for operating pharmacies in the states of Oregon and Washington, and (2) each Fully Capitated Health Plan under the Oregon Health Plan;

B. For a period of two (2) years after the date this order becomes final, distribute by first-class mail a copy of this order and the complaint to each new member of IPN and each of respondent's corporate officers, directors, and managers, and officers, directors, and managers with responsibility for operating pharmacies in the states of Oregon and Washington, within (30) days of the member's admission or the election, appointment, or employment of the officer, director, or manager;

C. File a verified written report within sixty (60) days after the date this order becomes final setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, setting forth in detail the manner and form in which it has complied and is complying with paragraphs II and III of this order;

D. Notify the Commission at least thirty (30) days prior to (1) the respondent's dissolution, assignment, or sale resulting in the emergence of a successor corporation, or (2) the creation or dissolution of subsidiaries that may affect compliance obligations arising out of the order or any other change that may affect compliance obligations arising out of the order; and

E. For the purpose of determining or securing compliance with this order, permit any duly authorized representative of the Commission: (1) access, during office hours and in the presence of

counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of a respondent relating to any matters contained in this order; and (2) upon five days' notice to the respondent, and without restraint or interference from it, to interview its officers, directors, or employees.

IV.

It is further ordered, That this order will terminate on August 11, 2018.

IN THE MATTER OF

COLUMBIA/HCA HEALTHCARE, 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-3472. Consent Order, Nov. 19, 1993–Modifying Order, Aug. 14, 1998

This order reopens a 1993 consent order – that prohibited the respondents from acquiring any acute care hospital in Osceola County, Florida, without prior Commission approval – and this order modifies paragraph IV of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), the respondent named in the consent order issued by the Commission on November 19, 1993, in Docket No. C-3472 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, 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" or "Statement").[1] Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph IV, which currently requires Columbia/HCA to seek the prior approval of the Commission to acquire or to permit to be acquired certain acute care hospitals. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons discussed below, the

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

Commission has determined to set aside the prior approval requirement in paragraph IV, and substitute a prior notice provision for it.

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. Prior Approval Policy Statement at 2. 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." *Id.*

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." *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." *Id.* at 4. 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. *Id.*

The complaint in Docket No. C-3472 ("complaint") alleged that Columbia/HCA's acquisition of Galen Health Care, Inc. ("Galen"), would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the market for the sale and production of acute care hospitals in Osceola County, Florida.

The complaint alleged that the acquisition would eliminate actual competition between Columbia/HCA and Galen in the relevant markets; significantly increase the already high level of concentration in the relevant markets; enhance the likelihood of collusion or interdependent coordination between or among the firms in the relevant markets; and deny free and open competition based on price, quality and service in the provision of acute care inpatient hospital services in the relevant markets. The Order required Columbia/HCA to divest Kissimmee Memorial Hospital, which Columbia/HCA did.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. There is no evidence in the record that rebuts that presumption, *i.e.*, Columbia/HCA acquired Galen, and there is nothing to suggest a credible risk that Columbia/HCA will seek to acquire Kissimmee Memorial Hospital. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to eliminate the prior approval requirement and substitute a prior notice provision for it.

Prior notification is appropriate for acquisitions in the relevant market because the record evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The relevant market is local, and the acquisition price of an acute care hospital, or a portion thereof, could fall below the size-of-transaction threshold in the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement and the respondent's request, the Commission has determined to modify paragraph IV of the Order to substitute a prior notification requirement for the existing prior approval requirement.

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

It is further ordered, That paragraph IV of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IV.

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

A. Acquire any acute care hospital in Osceola County, Florida; or

B. Permit any acute care hospital it operates in Osceola County, Florida to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in Osceola County, Florida.

Provided, however, that no acquisition shall be subject to this paragraph IV of this order if the fair market value of (or, for) the acute care hospital or part thereof to be acquired does not exceed one million dollars ($1,000,000).

The prior notifications required by this paragraph IV 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 respondent and not of any other party to the transaction. Respondent shall provide the 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, respondent shall not consummate the transaction until thirty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph 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.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA") filed a Petition pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement") to Reopen and Modify the Orders in Docket Nos. C-3472, C-3505, C-3538, C-3544 and D.9256. By that Petition, Columbia/HCA requests that the prior approval requirements in the Orders be deleted and, as an alternative, that the Orders be modified to require prior notification of potentially anticompetitive transactions below the Hart-Scott-Rodino ("HSR") Act threshold. Upon consideration of this matter, the Commission decided to grant Columbia/HCA's Petition to delete the prior approval provisions in the Orders and replace them with prior notification provisions upon the terms set forth below.

The Commission's 1995 Prior Approval Policy Statement provides that, "as a general matter, [future] Commission orders . . . will not include prior approval or prior notification requirements." If "a Petition is filed to reopen and modify an order, pursuant to the [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." But the Statement also directs that the terms of any prior notification requirement be considered "on a case-by-case basis" in light of the characteristics of particular markets, market participants and other relevant factors. Significantly, the Commission "*reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances.*" *See* Prior Approval Policy Statement, 60 Fed. Reg. 29745, 39746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241(emphasis added).

The Commission, exercising its equitable power, has substituted prior notification for prior approval provisions in the relevant Orders.

In doing so the Commission will require Columbia to provide thirty (30) days advance notice of any proposed merger or acquisition transaction as defined in the Orders ("first waiting period"). If during this first waiting period the Commission requests further information concerning a proposed transaction, Columbia shall not take any action, other than planning, in furtherance of such a transaction until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. This second waiting period is consistent with several cases where the Commission believed it was necessary to protect the public interest from a credible risk that the defendant would once again engage in anticompetitive transactions. *See* MD Physicians of SW Louisiana, FTC File No. 941 0095; Mesa County Physicians Independent Practice Association, Docket No. D.9284.

In this case, first and foremost, there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act, commonly referred to as the HSR Act. Indeed, the complaints in each of these matters involved transactions that if filed individually would have fallen below the reporting threshold of the HSR Act. Second, Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders. Indeed, on July 30, 1998 the Commission imposed a $2.5 million civil penalty upon Columbia/HCA for its violation of Commission orders by: (1) failing to divest in a timely manner two Utah Hospitals and its joint venture interest in South Seminole Hospital in Florida; and (2) violating a related Hold Separate Agreement governing assets it acquired in Utah as a result of its merger with Healthtrust Inc. *See* FTC File No. 961 0013. Given this history, it is both prudent and consistent with our policy to require additional review time.

For these reasons, we voted to grant Columbia's Petition to Reopen the Orders in Docket Numbers C-3472, C-3505, C-3538, C-3544 and D.9256, and Modify the Orders to delete the prior approval provisions, but also asked that they be replaced with prior notice provisions that have a thirty (30) day second waiting period.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

Application of our Prior Approval Policy Statement has led the Commission to replace the prior approval provision in each of these five orders with a requirement that Columbia/HCA provide us with prior notification of certain acquisitions. Supplanting prior approval is the correct result: there is no credible risk in any of these cases that Columbia/HCA will attempt the same or approximately the same transaction that triggered the Commission's original enforcement concern, and there is nothing to rebut the presumption in each case that setting aside the prior approval requirement is in the public interest. Moreover, replacing prior approval with prior notification is warranted, since each of these matters involves a credible risk that Columbia/HCA could make anticompetitive acquisitions that fall below Hart-Scott-Rodino thresholds.

Nevertheless, I have dissented because the Commission here has imposed the wrong prior notification requirement for the wrong reasons. In a long line of order modifications pursuant to the Prior Approval Policy Statement, the Commission has been consistent in either simply vacating the prior approval clause or replacing it with a prior notification mechanism that comprises a 30-day initial period and a 20-day second period. In the present matters, however, the Commission has chosen to lengthen the second period in each of these orders to 30 days. I disagree with the decision to impose on Columbia/HCA a greater burden than other respondents have borne, and to do so for reasons that appear to smack of retribution.

I have searched these five orders in vain for any basis for treating Columbia/HCA differently from the many previous respondents that have asked the Commission to set aside or modify a prior approval requirement. The orders summarily announce the length of the notification periods but do not themselves venture any explanation for the disparate treatment accorded Columbia/HCA. Such an obvious departure from consistent agency practice without any explanation could be judged arbitrary and capricious. Perhaps in an effort to save these orders from just such a condemnation, my fellow Commissioners have offered a statement to rationalize what they have done.[1] With all due respect, I find their statement unpersuasive.

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[1] Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson in the Matter of Columbia/HCA Healthcare Corp., Docket Nos. C-3472, C-3505, C-3538, C-3544 and 9256.

My colleagues quote the Prior Approval Policy Statement to the effect that the Commission "reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances."[2] The quoted passage plainly announces that the Commission has not forsworn its power to prescribe prior approval or prior notification requirements in appropriate circumstances. It is not a declaration that the Commission is liberated from every agency's obligation to treat parties before it fairly and evenhandedly. With the clearly disparate treatment of Columbia/HCA, however, the latter message is what observers are likely to take from the Commission's action.[3]

The penultimate paragraph of the majority's statement may disclose what motivated the Commission to impose a 30-day second period on Columbia/HCA. I agree with my colleagues that "there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act..."[4] But this observation establishes merely that the Commission should retain a prior notification requirement. It by no means furnishes a basis for treating Columbia/HCA more harshly than other respondents.

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[2] *Id.* at 1.

[3] My colleagues' attempted analogy to collusion cases in the health care industry also fails to supply the missing justification for lengthening the second period in the present cases to 30 days. The Commission's recent consent agreements in M.D. Physicians of Southwest Louisiana, Inc. (File No. 941 0095) and Mesa County Physicians Independent Practice Association, Inc. (Docket No. 9284) contained 30-day second notification periods. In those cases, however, the Commission found it necessary to reserve enough time to satisfy itself that newly-constituted horizontal arrangements among physicians would not lead to a return to the collusion that those cases targeted. I do not know how those two cases, arising from substantial evidence of collusive behavior, supply the Commission with a reason to increase the time it will spend scrutinizing some hospital merger that Columbia/HCA might undertake in, say, Augusta, Charlotte County, or Salt Lake City -- hospital markets with which the Commission is already thoroughly familiar and thus should need less time for review. In addition, although the skeletal nature of the initial notification in M.D. Physicians and Mesa County Physicians might counsel in favor of lengthening the second period to 30 days, no such consideration is present here: any initial notification provided by Columbia/HCA should contain the level of detail that one normally encounters in an acquiring firm's Hart-Scott-Rodino filing.

In a case that involves not only collusion but also merger issues -- and thus is more analogous than M.D. Physicians or Mesa County Physicians to the present matter -- the Commission has just announced acceptance of a proposed order that requires only a 20-day second notification period. Commonwealth Land Title Insurance Company (File No. 981 0127). I do not understand how my colleagues can square the relief in Commonwealth with what they have done to Columbia/HCA.

[4] Statement of Chairman Pitofsky and Commissioners Anthony and Thompson at 2.

This paragraph then arrives at the nub of my colleagues' argument: ". . . Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders."[5] After referencing the civil penalty that Columbia/HCA paid for violating certain divestiture obligations under two of these orders, they conclude: "Given this history, it is both prudent and consistent with our policy to require additional review time."[6] This conclusion is a *non sequitur*.

There is no question that Columbia/HCA recently paid a $2.5 million civil penalty for alleged order violations. Although my colleagues evidently found that penalty acceptable, I questioned whether it was sufficient in light of Columbia/HCA's "prolonged and pronounced disregard for the requirements of two Commission divestiture orders and the Utah Hold Separate Agreement."[7] I continue to believe that Columbia/HCA committed serious infractions and deserved a civil penalty even larger than what we obtained. But the civil penalty case was our opportunity to levy sanctions for Columbia/HCA's order violations, and that opportunity is gone. I do not see what bearing that misconduct has on the entirely unrelated question of how much time we need to review future acquisitions. If the Commission has based its decision to lengthen the second waiting period on its reaction to respondent's previous behavior, then I would suggest that such a decision is not only arbitrary but punitive. The public may find this perception inescapable.

I am also troubled by another aspect of the majority's decision to extend the second period to 30 days. Each of our newly-modified orders ends with a proviso exempting transactions subject to Hart-Scott-Rodino from the order's prior notification requirement. In other words, an acquisition large enough to be reportable under Hart-Scott-Rodino will be subject to the 20-day second waiting period prescribed by that statute,[8] but a covered acquisition too small to meet Hart-Scott-Rodino thresholds will be subject to the 30-day

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[5] *Id.*

[6] *Id.*

[7] Statement of Commissioner Orson Swindle in Columbia/HCA Healthcare Corporation, File No. 961 0013 (available at http://www.ftc.gov/os/9807/9610013.os.htm).

[8] Moreover, for a cash tender offer, the Hart-Scott-Rodino second waiting period is reduced to 10 days. 15 U.S.C. 18a(e)(2).

second period mandated by the Commission's orders. The practical effect of this action is to place an entire class of smaller acquisitions under a greater burden than is borne by larger acquisitions. Although smaller acquisitions, of course, sometimes may be more problematic than large acquisitions from an antitrust point of view, I do not believe this justifies imposing a greater burden on smaller transactions.

I return to whether punishment of Columbia/HCA underlies (or will be perceived to underlie) the Commission's decision. If it does not, then the Commission should explain either why Columbia/HCA alone has earned a 30-day second period -- a result that on its face looks arbitrary and capricious -- or whether it is moving toward imposing a 30-day second period in all future cases. No one has sought to announce a new 30-day period of general applicability, and so it boils down to how the Commission treats this particular respondent. Because Columbia/HCA's prior order violations have no demonstrable bearing on the appropriate length of the second waiting period, I dissent from the Commission's unjustified handling of this respondent.

IN THE MATTER OF

COLUMBIA/HCA HEALTHCARE CORP., 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-3505. Consent Order, July 5, 1994–Modifying Order, Aug. 14, 1998

This order reopens a 1994 consent order – that prohibited the respondents from acquiring any acute care hospital in the Augusta-Aiken area, without prior Commission approval – and this order modifies paragraph IV of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), the respondent named in the consent order issued by the Commission on July 5, 1994, in Docket No. C-3505 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, 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" or "Statement").[1] Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph IV, which currently requires Columbia/HCA to seek the prior approval of the Commission to acquire or to permit to be acquired certain acute care hospitals. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons discussed below, the Commission has determined to set aside the prior approval requirement in paragraph IV, and substitute a prior notice provision for it.

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

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. Prior Approval Policy Statement at 2. 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." *Id.*

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." *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." *Id.* at 4. 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. *Id.*

The complaint in this matter ("complaint") alleged that Columbia's acquisition of 100% of the voting stock of Hospital Corporation of America ("HCA") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the market for the sale and production of acute care hospital services and any narrower group therein in the Augusta-Aiken market.

The complaint alleged that the acquisition would eliminate actual competition between Columbia and HCA in the relevant markets; significantly increase the already high level of concentration in the relevant market; eliminate HCA hospitals as substantial independent competitive forces in the relevant market; enhance the likelihood of collusion or interdependent coordination between or among the firms in the relevant markets; and deny free and open competition based on price, quality and service in the provision of acute care hospital services in the relevant market. The Order required Columbia/HCA to divest Aiken Regional Medical Center, which Columbia/HCA did.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. There is no evidence in the record that rebuts that presumption, *i.e.*, Columbia acquired HCA, and there is nothing to suggest a credible risk that Columbia/HCA will seek to acquire Aiken Regional Medical Center. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to eliminate the prior approval requirement and substitute a prior notice provision for it.

Prior notification is appropriate for acquisitions in the relevant market because the record evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The relevant market is local, and the acquisition price of an acute care hospital, or a portion thereof, could fall below the size-of-transaction threshold in the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement and the respondent's request, the Commission has determined to modify paragraph IV of the Order to substitute a prior notification requirement for the existing prior approval requirement.

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

It is further ordered, That paragraph IV of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, no respondent shall, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any acute care hospital in Augusta-Aiken; or

B. Permit any acute care hospital it operates in Augusta-Aiken to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in Augusta-Aiken.

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

The prior notifications required by this paragraph IV 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 respondent and not of any other party to the transaction. Respondent shall provide the 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, respondent shall not consummate the transaction until thirty days after substantially complying with such request for additional information. Early termination of the waiting periods in

this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph 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.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA") filed a Petition pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement") to Reopen and Modify the Orders in Docket Nos. C-3472, C-3505, C-3538, C-3544 and D.9256. By that Petition, Columbia/HCA requests that the prior approval requirements in the Orders be deleted and, as an alternative, that the Orders be modified to require prior notification of potentially anticompetitive transactions below the Hart-Scott-Rodino ("HSR") Act threshold. Upon consideration of this matter, the Commission decided to grant Columbia/HCA's Petition to delete the prior approval provisions in the Orders and replace them with prior notification provisions upon the terms set forth below.

The Commission's 1995 Prior Approval Policy Statement provides that, "as a general matter, [future] Commission orders . . . will not include prior approval or prior notification requirements." If "a Petition is filed to reopen and modify an order, pursuant to the [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." But the Statement also directs that the terms of any prior notification requirement be considered "on a case-by-case basis" in light of the characteristics of particular markets, market participants and other relevant factors. Significantly, the Commission "*reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances.*" *See* Prior Approval Policy Statement,

60 Fed. Reg. 29745, 39746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241(emphasis added).

The Commission, exercising its equitable power, has substituted prior notification for prior approval provisions in the relevant Orders. In doing so the Commission will require Columbia to provide thirty (30) days advance notice of any proposed merger or acquisition transaction as defined in the Orders ("first waiting period"). If during this first waiting period the Commission requests further information concerning a proposed transaction, Columbia shall not take any action, other than planning, in furtherance of such a transaction until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. This second waiting period is consistent with several cases where the Commission believed it was necessary to protect the public interest from a credible risk that the defendant would once again engage in anticompetitive transactions. *See* MD Physicians of SW Louisiana, FTC File No. 941 0095; Mesa County Physicians Independent Practice Association, Docket No. D.9284.

In this case, first and foremost, there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act, commonly referred to as the HSR Act. Indeed, the complaints in each of these matters involved transactions that if filed individually would have fallen below the reporting threshold of the HSR Act. Second, Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders. Indeed, on July 30, 1998 the Commission imposed a $2.5 million civil penalty upon Columbia/HCA for its violation of Commission orders by: (1) failing to divest in a timely manner two Utah Hospitals and its joint venture interest in South Seminole Hospital in Florida; and (2) violating a related Hold Separate Agreement governing assets it acquired in Utah as a result of its merger with Healthtrust Inc. *See* FTC File No. 961 0013. Given this history, it is both prudent and consistent with our policy to require additional review time.

For these reasons, we voted to grant Columbia's Petition to Reopen the Orders in Docket Numbers C-3472, C-3505, C-3538, C-3544 and D.9256, and Modify the Orders to delete the prior

approval provisions, but also asked that they be replaced with prior notice provisions that have a thirty (30) day second waiting period.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

Application of our Prior Approval Policy Statement has led the Commission to replace the prior approval provision in each of these five orders with a requirement that Columbia/HCA provide us with prior notification of certain acquisitions. Supplanting prior approval is the correct result: there is no credible risk in any of these cases that Columbia/HCA will attempt the same or approximately the same transaction that triggered the Commission's original enforcement concern, and there is nothing to rebut the presumption in each case that setting aside the prior approval requirement is in the public interest. Moreover, replacing prior approval with prior notification is warranted, since each of these matters involves a credible risk that Columbia/HCA could make anticompetitive acquisitions that fall below Hart-Scott-Rodino thresholds.

Nevertheless, I have dissented because the Commission here has imposed the wrong prior notification requirement for the wrong reasons. In a long line of order modifications pursuant to the Prior Approval Policy Statement, the Commission has been consistent in either simply vacating the prior approval clause or replacing it with a prior notification mechanism that comprises a 30-day initial period and a 20-day second period. In the present matters, however, the Commission has chosen to lengthen the second period in each of these orders to 30 days. I disagree with the decision to impose on Columbia/HCA a greater burden than other respondents have borne, and to do so for reasons that appear to smack of retribution.

I have searched these five orders in vain for any basis for treating Columbia/HCA differently from the many previous respondents that have asked the Commission to set aside or modify a prior approval requirement. The orders summarily announce the length of the notification periods but do not themselves venture any explanation for the disparate treatment accorded Columbia/HCA. Such an obvious departure from consistent agency practice without any explanation could be judged arbitrary and capricious. Perhaps in an effort to save these orders from just such a condemnation, my fellow Commission-

ers have offered a statement to rationalize what they have done.[1] With all due respect, I find their statement unpersuasive.

My colleagues quote the Prior Approval Policy Statement to the effect that the Commission "reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances."[2] The quoted passage plainly announces that the Commission has not forsworn its power to prescribe prior approval or prior notification requirements in appropriate circumstances. It is not a declaration that the Commission is liberated from every agency's obligation to treat parties before it fairly and evenhandedly. With the clearly disparate treatment of Columbia/HCA, however, the latter message is what observers are likely to take from the Commission's action.[3]

The penultimate paragraph of the majority's statement may disclose what motivated the Commission to impose a 30-day second period on Columbia/HCA. I agree with my colleagues that "there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton

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[1] Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson in the Matter of Columbia/HCA Healthcare Corp., Docket Nos. C-3472, C-3505, C-3538, C-3544 and 9256.

[2] *Id.* at 1.

[3] My colleagues' attempted analogy to collusion cases in the health care industry also fails to supply the missing justification for lengthening the second period in the present cases to 30 days. The Commission's recent consent agreements in M.D. Physicians of Southwest Louisiana, Inc. (File No. 941 0095) and Mesa County Physicians Independent Practice Association, Inc. (Docket No. 9284) contained 30-day second notification periods. In those cases, however, the Commission found it necessary to reserve enough time to satisfy itself that newly-constituted horizontal arrangements among physicians would not lead to a return to the collusion that those cases targeted. I do not know how those two cases, arising from substantial evidence of collusive behavior, supply the Commission with a reason to increase the time it will spend scrutinizing some hospital merger that Columbia/HCA might undertake in, say, Augusta, Charlotte County, or Salt Lake City -- hospital markets with which the Commission is already thoroughly familiar and thus should need less time for review. In addition, although the skeletal nature of the initial notification in M.D. Physicians and Mesa County Physicians might counsel in favor of lengthening the second period to 30 days, no such consideration is present here: any initial notification provided by Columbia/HCA should contain the level of detail that one normally encounters in an acquiring firm's Hart-Scott-Rodino filing.

In a case that involves not only collusion but also merger issues -- and thus is more analogous than M.D. Physicians or Mesa County Physicians to the present matter -- the Commission has just announced acceptance of a proposed order that requires only a 20-day second notification period. Commonwealth Land Title Insurance Company (File No. 981 0127). I do not understand how my colleagues can square the relief in Commonwealth with what they have done to Columbia/HCA.

Act . . ."[4] But this observation establishes merely that the Commission should retain a prior notification requirement. It by no means furnishes a basis for treating Columbia/HCA more harshly than other respondents.

This paragraph then arrives at the nub of my colleagues' argument: ". . . Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders."[5] After referencing the civil penalty that Columbia/HCA paid for violating certain divestiture obligations under two of these orders, they conclude: "Given this history, it is both prudent and consistent with our policy to require additional review time."[6] This conclusion is a *non sequitur*.

There is no question that Columbia/HCA recently paid a $2.5 million civil penalty for alleged order violations. Although my colleagues evidently found that penalty acceptable, I questioned whether it was sufficient in light of Columbia/HCA's "prolonged and pronounced disregard for the requirements of two Commission divestiture orders and the Utah Hold Separate Agreement."[7] I continue to believe that Columbia/HCA committed serious infractions and deserved a civil penalty even larger than what we obtained. But the civil penalty case was our opportunity to levy sanctions for Columbia/HCA's order violations, and that opportunity is gone. I do not see what bearing that misconduct has on the entirely unrelated question of how much time we need to review future acquisitions. If the Commission has based its decision to lengthen the second waiting period on its reaction to respondent's previous behavior, then I would suggest that such a decision is not only arbitrary but punitive. The public may find this perception inescapable.

I am also troubled by another aspect of the majority's decision to extend the second period to 30 days. Each of our newly-modified orders ends with a proviso exempting transactions subject to Hart-Scott-Rodino from the order's prior notification requirement. In other words, an acquisition large enough to be reportable under

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4 Statement of Chairman Pitofsky and Commissioners Anthony and Thompson at 2.

5 *Id.*

6 *Id.*

7 Statement of Commissioner Orson Swindle in Columbia/HCA Healthcare Corporation, File No. 961 0013 (available at http://www.ftc.gov/os/9807/9610013.os.htm).

Hart-Scott-Rodino will be subject to the 20-day second waiting period prescribed by that statute,[8] but a covered acquisition too small to meet Hart-Scott-Rodino thresholds will be subject to the 30-day second period mandated by the Commission's orders. The practical effect of this action is to place an entire class of smaller acquisitions under a greater burden than is borne by larger acquisitions. Although smaller acquisitions, of course, sometimes may be more problematic than large acquisitions from an antitrust point of view, I do not believe this justifies imposing a greater burden on smaller transactions.

I return to whether punishment of Columbia/HCA underlies (or will be perceived to underlie) the Commission's decision. If it does not, then the Commission should explain either why Columbia/HCA alone has earned a 30-day second period -- a result that on its face looks arbitrary and capricious -- or whether it is moving toward imposing a 30-day second period in all future cases. No one has sought to announce a new 30-day period of general applicability, and so it boils down to how the Commission treats this particular respondent. Because Columbia/HCA's prior order violations have no demonstrable bearing on the appropriate length of the second waiting period, I dissent from the Commission's unjustified handling of this respondent.

[8] Moreover, for a cash tender offer, the Hart-Scott-Rodino second waiting period is reduced to 10 days. 15 U.S.C. 18a(e)(2).

IN THE MATTER OF

HEALTHTRUST, INC. - THE HOSPITAL COMPANY

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-3538. Consent Order, Oct. 20, 1994–Modifying Order, Aug. 14, 1998

This order reopens a 1994 consent order – that prohibited the respondent from acquiring any acute care hospital, medical or surgical diagnostic or treatment service or facility in the Utah counties of Weber, Davis, and Salt Lake, without prior Commission approval – and this order modifies paragraph IV of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), as successor to Healthtrust, Inc. - The Hospital Company ("Healthtrust"), the successor respondent in the consent order issued by the Commission on October 20, 1994, in Docket No. C-3538 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, 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" or "Statement").[1] Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph IV, which currently requires Healthtrust, Columbia/HCA's predecessor, to seek the prior approval of the Commission to acquire or to permit to be acquired certain acute care hospitals. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons discussed

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

below, the Commission has determined to set aside the prior approval provision and substitute a prior notice provision for it.

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. Prior Approval Policy Statement at 2. 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." *Id.*

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." *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." *Id.* at 4. 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. *Id.*

The complaint in this matter ("complaint") alleged that Healthtrust's acquisition of Holy Cross Health System Corporation ("Holy Cross") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the provision of acute care hospital services in the relevant market.

The complaint alleged that the acquisition would eliminate actual competition between Healthtrust and Holy Cross in the relevant market; increase the already high level of concentration in the relevant market; eliminate Holy Cross hospitals as substantial independent competitive forces in the relevant markets; enhance the likelihood of collusion or interdependent coordination between or among the firms in the relevant market; and deny free and open competition based on price, quality and service in the provision of acute care hospital services in the relevant markets. The Order required Healthtrust to divest Holy Cross Hospital, which Healthtrust did.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. There is no evidence in the record that rebuts that presumption, *i.e.*, Healthtrust acquired Holy Cross Hospital, and there is nothing to suggest a credible risk that Columbia/HCA, the successor respondent, will seek to acquire Holy Cross Hospital. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to eliminate the prior approval requirement and substitute a prior notice provision for it.

Prior notification is appropriate for acquisitions in the relevant market because the record evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The relevant market is local, and the acquisition price of an acute care hospital, or a portion thereof, could fall below the size-of-transaction threshold in the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement and the respondent's request, the Commission has determined to modify

paragraph IV of the Order to substitute a prior notification requirement for the existing prior approval requirement.

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

It is further ordered, That paragraph IV of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent 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 person presently engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital in the Three-County Area;

B. Acquire any assets used, or previously used, in the Three-County Area (and still suitable for use) for operating an acute care hospital from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital in the Three-County Area;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any acute care hospital, or any part thereof, in the Three-County Area including, but not limited to, a lease of or management contract for any such acute care hospital;

D. Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of any acute care hospital in the Three-County Area; or

E. Permit any acute care hospital it operates in the Three-County Area to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in the Three-County Area.

Provided, however, that such prior notification shall not be required for:

1. The establishment of a new hospital service or facility (other than as a replacement for a hospital service or facility, not operated by respondent, in the Three-County Area, pursuant to an agreement or understanding between respondent and the person operating the replaced service or facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the acute care hospital or part thereof to be acquired does not exceed one million dollars ($1,000,000); or

3. The acquisition of products or services in the ordinary course of business.

The prior notifications required by this paragraph IV 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 respondent and not of any other party to the transaction. Respondent shall provide the 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, respondent shall not consummate the transaction until thirty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph 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.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA") filed a Petition pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement") to Reopen and Modify the Orders in Docket Nos. C-3472, C-3505, C-3538, C-3544 and D.9256. By that Petition, Columbia/HCA requests that the prior approval requirements in the Orders be deleted and, as an alternative, that the Orders be modified to require prior notification of potentially anticompetitive transactions below the Hart-Scott-Rodino ("HSR") Act threshold. Upon consideration of this matter, the Commission decided to grant Columbia/HCA's Petition to delete the prior approval provisions in the Orders and replace them with prior notification provisions upon the terms set forth below.

The Commission's 1995 Prior Approval Policy Statement provides that, "as a general matter, [future] Commission orders . . . will not include prior approval or prior notification requirements." If "a Petition is filed to reopen and modify an order, pursuant to the [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." But the Statement also directs that the terms of any prior notification requirement be considered "on a case-by-case basis" in light of the characteristics of particular markets, market participants and other relevant factors. Significantly, the Commission "*reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances.*" *See* Prior Approval Policy Statement, 60 Fed. Reg. 29745, 39746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241 (emphasis added).

The Commission, exercising its equitable power, has substituted prior notification for prior approval provisions in the relevant Orders. In doing so the Commission will require Columbia to provide thirty (30) days advance notice of any proposed merger or acquisition transaction as defined in the Orders ("first waiting period"). If during this first waiting period the Commission requests further information concerning a proposed transaction, Columbia shall not take any

action, other than planning, in furtherance of such a transaction until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. This second waiting period is consistent with several cases where the Commission believed it was necessary to protect the public interest from a credible risk that the defendant would once again engage in anticompetitive transactions. *See* MD Physicians of SW Louisiana, FTC File No. 941 0095; Mesa County Physicians Independent Practice Association, Docket No. D.9284.

In this case, first and foremost, there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act, commonly referred to as the HSR Act. Indeed, the complaints in each of these matters involved transactions that if filed individually would have fallen below the reporting threshold of the HSR Act. Second, Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders. Indeed, on July 30, 1998 the Commission imposed a $2.5 million civil penalty upon Columbia/HCA for its violation of Commission orders by: (1) failing to divest in a timely manner two Utah Hospitals and its joint venture interest in South Seminole Hospital in Florida; and (2) violating a related Hold Separate Agreement governing assets it acquired in Utah as a result of its merger with Healthtrust Inc. *See* FTC File No. 961 0013. Given this history, it is both prudent and consistent with our policy to require additional review time.

For these reasons, we voted to grant Columbia's Petition to Reopen the Orders in Docket Numbers C-3472, C-3505, C-3538, C-3544 and D.9256, and Modify the Orders to delete the prior approval provisions, but also asked that they be replaced with prior notice provisions that have a thirty (30) day second waiting period.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

Application of our Prior Approval Policy Statement has led the Commission to replace the prior approval provision in each of these five orders with a requirement that Columbia/HCA provide us with prior notification of certain acquisitions. Supplanting prior approval is the correct result: there is no credible risk in any of these cases that

Columbia/HCA will attempt the same or approximately the same transaction that triggered the Commission's original enforcement concern, and there is nothing to rebut the presumption in each case that setting aside the prior approval requirement is in the public interest. Moreover, replacing prior approval with prior notification is warranted, since each of these matters involves a credible risk that Columbia/HCA could make anticompetitive acquisitions that fall below Hart-Scott-Rodino thresholds.

Nevertheless, I have dissented because the Commission here has imposed the wrong prior notification requirement for the wrong reasons. In a long line of order modifications pursuant to the Prior Approval Policy Statement, the Commission has been consistent in either simply vacating the prior approval clause or replacing it with a prior notification mechanism that comprises a 30-day initial period and a 20-day second period. In the present matters, however, the Commission has chosen to lengthen the second period in each of these orders to 30 days. I disagree with the decision to impose on Columbia/HCA a greater burden than other respondents have borne, and to do so for reasons that appear to smack of retribution.

I have searched these five orders in vain for any basis for treating Columbia/HCA differently from the many previous respondents that have asked the Commission to set aside or modify a prior approval requirement. The orders summarily announce the length of the notification periods but do not themselves venture any explanation for the disparate treatment accorded Columbia/HCA. Such an obvious departure from consistent agency practice without any explanation could be judged arbitrary and capricious. Perhaps in an effort to save these orders from just such a condemnation, my fellow Commissioners have offered a statement to rationalize what they have done.[1] With all due respect, I find their statement unpersuasive.

My colleagues quote the Prior Approval Policy Statement to the effect that the Commission "reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited

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[1] Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson in the Matter of Columbia/HCA Healthcare Corp., Docket Nos. C-3472, C-3505, C-3538, C-3544 and 9256.

circumstances."[2] The quoted passage plainly announces that the Commission has not forsworn its power to prescribe prior approval or prior notification requirements in appropriate circumstances. It is not a declaration that the Commission is liberated from every agency's obligation to treat parties before it fairly and evenhandedly. With the clearly disparate treatment of Columbia/HCA, however, the latter message is what observers are likely to take from the Commission's action.[3]

The penultimate paragraph of the majority's statement may disclose what motivated the Commission to impose a 30-day second period on Columbia/HCA. I agree with my colleagues that "there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act . . ."[4] But this observation establishes merely that the Commission should retain a prior notification requirement. It by no means furnishes a basis for treating Columbia/HCA more harshly than other respondents.

This paragraph then arrives at the nub of my colleagues' argument: ". . . Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission

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[2] *Id.* at 1.

[3] My colleagues' attempted analogy to collusion cases in the health care industry also fails to supply the missing justification for lengthening the second period in the present cases to 30 days. The Commission's recent consent agreements in M.D. Physicians of Southwest Louisiana, Inc. (File No. 941 0095) and Mesa County Physicians Independent Practice Association, Inc. (Docket No. 9284) contained 30-day second notification periods. In those cases, however, the Commission found it necessary to reserve enough time to satisfy itself that newly-constituted horizontal arrangements among physicians would not lead to a return to the collusion that those cases targeted. I do not know how those two cases, arising from substantial evidence of collusive behavior, supply the Commission with a reason to increase the time it will spend scrutinizing some hospital merger that Columbia/HCA might undertake in, say, Augusta, Charlotte County, or Salt Lake City -- hospital markets with which the Commission is already thoroughly familiar and thus should need less time for review. In addition, although the skeletal nature of the initial notification in M.D. Physicians and Mesa County Physicians might counsel in favor of lengthening the second period to 30 days, no such consideration is present here: any initial notification provided by Columbia/HCA should contain the level of detail that one normally encounters in an acquiring firm's Hart-Scott-Rodino filing.

In a case that involves not only collusion but also merger issues -- and thus is more analogous than M.D. Physicians or Mesa County Physicians to the present matter -- the Commission has just announced acceptance of a proposed order that requires only a 20-day second notification period. Commonwealth Land Title Insurance Company (File No. 981 0127). I do not understand how my colleagues can square the relief in Commonwealth with what they have done to Columbia/HCA.

[4] Statement of Chairman Pitofsky and Commissioners Anthony and Thompson at 2.

orders."[5] After referencing the civil penalty that Columbia/HCA paid for violating certain divestiture obligations under two of these orders, they conclude: "Given this history, it is both prudent and consistent with our policy to require additional review time."[6] This conclusion is a *non sequitur*.

There is no question that Columbia/HCA recently paid a $2.5 million civil penalty for alleged order violations. Although my colleagues evidently found that penalty acceptable, I questioned whether it was sufficient in light of Columbia/HCA's "prolonged and pronounced disregard for the requirements of two Commission divestiture orders and the Utah Hold Separate Agreement."[7] I continue to believe that Columbia/HCA committed serious infractions and deserved a civil penalty even larger than what we obtained. But the civil penalty case was our opportunity to levy sanctions for Columbia/HCA's order violations, and that opportunity is gone. I do not see what bearing that misconduct has on the entirely unrelated question of how much time we need to review future acquisitions. If the Commission has based its decision to lengthen the second waiting period on its reaction to respondent's previous behavior, then I would suggest that such a decision is not only arbitrary but punitive. The public may find this perception inescapable.

I am also troubled by another aspect of the majority's decision to extend the second period to 30 days. Each of our newly-modified orders ends with a proviso exempting transactions subject to Hart-Scott-Rodino from the order's prior notification requirement. In other words, an acquisition large enough to be reportable under Hart-Scott-Rodino will be subject to the 20-day second waiting period prescribed by that statute,[8] but a covered acquisition too small to meet Hart-Scott-Rodino thresholds will be subject to the 30-day second period mandated by the Commission's orders. The practical effect of this action is to place an entire class of smaller acquisitions under a greater burden than is borne by larger acquisitions. Although

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[5] *Id.*

[6] *Id.*

[7] Statement of Commissioner Orson Swindle in Columbia/HCA Healthcare Corporation, File No. 961 0013 (available at http://www.ftc.gov/os/9807/9610013.os.htm).

[8] Moreover, for a cash tender offer, the Hart-Scott- Rodino second waiting period is reduced to 10 days. 15 U.S.C. 18a(e)(2).

smaller acquisitions, of course, sometimes may be more problematic than large acquisitions from an antitrust point of view, I do not believe this justifies imposing a greater burden on smaller transactions.

I return to whether punishment of Columbia/HCA underlies (or will be perceived to underlie) the Commission's decision. If it does not, then the Commission should explain either why Columbia/HCA alone has earned a 30-day second period -- a result that on its face looks arbitrary and capricious -- or whether it is moving toward imposing a 30-day second period in all future cases. No one has sought to announce a new 30-day period of general applicability, and so it boils down to how the Commission treats this particular respondent. Because Columbia/HCA's prior order violations have no demonstrable bearing on the appropriate length of the second waiting period, I dissent from the Commission's unjustified handling of this respondent.

IN THE MATTER OF

COLUMBIA/HCA HEALTHCARE CORP.

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-3544. Consent Order, Dec. 6, 1994–Modifying Order, Aug. 14, 1998

This order reopens a 1994 consent order – that prohibited the respondent from acquiring an interest worth more than $1 million in any outpatient surgical services facility in Anchorage, Alaska, and from selling an interest in such an entity, without prior Commission approval – and this order modifies paragraph IV of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), the respondent named in the consent order issued by the Commission on December 6, 1994 in Docket No. C-3544 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, 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" or "Statement").[1] Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph IV, which currently requires Columbia/HCA, among other things, to seek the prior approval of the Commission to acquire or to permit to be acquired certain outpatient surgery facilities. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

discussed below, the Commission has determined to reopen and modify the order to set aside the prior approval requirement and substitute a prior notice provision for it.

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. Prior Approval Policy Statement at 2. 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." *Id.*

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." *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." *Id.* at 4. 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. *Id.*

The complaint in this matter ("complaint") alleged that Columbia/HCA's acquisition of some of Medical Care America, Inc. ("MCA"), would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the market for outpatient surgery services in the Municipality of Anchorage, Alaska.

The complaint alleged that the acquisition would eliminate actual competition between Columbia/HCA and MCA in the relevant market; increase the already high level of concentration in the market; eliminate MCA's surgery facility as a substantial independent competitive force in the relevant market; enhance the likelihood of collusion or interdependent coordination between or among the firms in the relevant market; and deny free and open competition based on price, quality and service in the provision of outpatient surgery services in the relevant market. The Order required Columbia/HCA to divest Alaska Surgery Center, which Columbia/HCA did.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. There is no evidence in the record that rebuts that presumption, *i.e.*, Columbia/HCA acquired MCA, and there is nothing to suggest a credible risk that Columbia/HCA will seek to acquire the Alaska Surgery Center. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to eliminate the prior approval requirement and substitute a prior notice provision for it.

Prior notification is appropriate for acquisitions in the relevant market because the record evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The relevant market is local, and the acquisition price of an outpatient surgery facility, or a portion thereof, could fall below the size-of-transaction threshold in the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement and the respondent's request, the Commission has determined to modify paragraph IV of the Order to substitute a prior notification requirement for the existing prior approval requirement.

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

It is further ordered, That, paragraph IV of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent 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 person presently engaged in, or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

B. Acquire any assets used, or previously used, in the Municipality of Anchorage, Alaska (and still suitable for use) for operating an outpatient surgery facility from any person presently engaged in or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any outpatient surgery facility, or any part thereof, in the Municipality of Anchorage, Alaska, including, but not limited to, a lease of or management contract for any such outpatient surgery facility;

D. Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of any outpatient surgery facility in the Municipality of Anchorage, Alaska; or

E. Permit any outpatient surgery facility it operates in the Municipality of Anchorage, Alaska to be acquired by any person that operates, or will operate immediately following such acquisition, any other outpatient surgery facility in the Municipality of Anchorage, Alaska.

Provided, however, that such prior notification shall not be required for:

1. The establishment of a new outpatient surgery service or facility (other than as a replacement for an outpatient surgery service

or facility, not operated by respondent, in the Municipality of Anchorage, Alaska, pursuant to an agreement or understanding between respondent and the person operating the replaced service or facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the outpatient surgery facility or part thereof to be acquired does not exceed one million dollars ($1,000,000); or

3. The acquisition of products or services in the ordinary course of business.

The prior notifications required by this paragraph IV 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 respondent and not of any other party to the transaction. Respondent shall provide the 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, respondent shall not consummate the transaction until thirty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph 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.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA") filed a Petition pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement") to Reopen and Modify the Orders in Docket Nos. C-3472, C-3505, C-3538, C-3544 and D.9256. By that Petition, Columbia/HCA requests that the prior approval requirements in the Orders be deleted and, as an alternative, that the Orders be modified to require prior notification of potentially anticompetitive transactions below the Hart-Scott-Rodino ("HSR") Act threshold. Upon consideration of this matter, the Commission decided to grant Columbia/HCA's Petition to delete the prior approval provisions in the Orders and replace them with prior notification provisions upon the terms set forth below.

The Commission's 1995 Prior Approval Policy Statement provides that, "as a general matter, [future] Commission orders . . . will not include prior approval or prior notification requirements." If "a Petition is filed to reopen and modify an order, pursuant to the [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." But the Statement also directs that the terms of any prior notification requirement be considered "on a case-by-case basis" in light of the characteristics of particular markets, market participants and other relevant factors. Significantly, the Commission "*reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances.*" *See* Prior Approval Policy Statement, 60 Fed. Reg. 29745, 39746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241(emphasis added).

The Commission, exercising its equitable power, has substituted prior notification for prior approval provisions in the relevant Orders. In doing so the Commission will require Columbia to provide thirty (30) days advance notice of any proposed merger or acquisition transaction as defined in the Orders ("first waiting period"). If during this first waiting period the Commission requests further information concerning a proposed transaction, Columbia shall not take any

action, other than planning, in furtherance of such a transaction until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. This second waiting period is consistent with several cases where the Commission believed it was necessary to protect the public interest from a credible risk that the defendant would once again engage in anticompetitive transactions. *See* MD Physicians of SW Louisiana, FTC File No. 941 0095; Mesa County Physicians Independent Practice Association, Docket No. D.9284.

In this case, first and foremost, there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act, commonly referred to as the HSR Act. Indeed, the complaints in each of these matters involved transactions that if filed individually would have fallen below the reporting threshold of the HSR Act. Second, Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders. Indeed, on July 30, 1998 the Commission imposed a $2.5 million civil penalty upon Columbia/HCA for its violation of Commission orders by: (1) failing to divest in a timely manner two Utah Hospitals and its joint venture interest in South Seminole Hospital in Florida; and (2) violating a related Hold Separate Agreement governing assets it acquired in Utah as a result of its merger with Healthtrust Inc. *See* FTC File No. 961 0013. Given this history, it is both prudent and consistent with our policy to require additional review time.

For these reasons, we voted to grant Columbia's Petition to Reopen the Orders in Docket Numbers C-3472, C-3505, C-3538, C-3544 and D.9256, and Modify the Orders to delete the prior approval provisions, but also asked that they be replaced with prior notice provisions that have a thirty (30) day second waiting period.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

Application of our Prior Approval Policy Statement has led the Commission to replace the prior approval provision in each of these five orders with a requirement that Columbia/HCA provide us with prior notification of certain acquisitions. Supplanting prior approval is the correct result: there is no credible risk in any of these cases that

Columbia/HCA will attempt the same or approximately the same transaction that triggered the Commission's original enforcement concern, and there is nothing to rebut the presumption in each case that setting aside the prior approval requirement is in the public interest. Moreover, replacing prior approval with prior notification is warranted, since each of these matters involves a credible risk that Columbia/HCA could make anticompetitive acquisitions that fall below Hart-Scott-Rodino thresholds.

Nevertheless, I have dissented because the Commission here has imposed the wrong prior notification requirement for the wrong reasons. In a long line of order modifications pursuant to the Prior Approval Policy Statement, the Commission has been consistent in either simply vacating the prior approval clause or replacing it with a prior notification mechanism that comprises a 30-day initial period and a 20-day second period. In the present matters, however, the Commission has chosen to lengthen the second period in each of these orders to 30 days. I disagree with the decision to impose on Columbia/HCA a greater burden than other respondents have borne, and to do so for reasons that appear to smack of retribution.

I have searched these five orders in vain for any basis for treating Columbia/HCA differently from the many previous respondents that have asked the Commission to set aside or modify a prior approval requirement. The orders summarily announce the length of the notification periods but do not themselves venture any explanation for the disparate treatment accorded Columbia/HCA. Such an obvious departure from consistent agency practice without any explanation could be judged arbitrary and capricious. Perhaps in an effort to save these orders from just such a condemnation, my fellow Commissioners have offered a statement to rationalize what they have done.[1] With all due respect, I find their statement unpersuasive.

My colleagues quote the Prior Approval Policy Statement to the effect that the Commission "reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances."[2] The quoted passage plainly announces that the Commission has not forsworn its power to prescribe prior approval

[1] Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson in the Matter of Columbia/HCA Healthcare Corp., Docket Nos. C-3472, C-3505, C-3538, C-3544 and 9256.

[2] *Id.* at 1.

or prior notification requirements in appropriate circumstances. It is not a declaration that the Commission is liberated from every agency's obligation to treat parties before it fairly and evenhandedly. With the clearly disparate treatment of Columbia/HCA, however, the latter message is what observers are likely to take from the Commission's action.[3]

The penultimate paragraph of the majority's statement may disclose what motivated the Commission to impose a 30-day second period on Columbia/HCA. I agree with my colleagues that "there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act . . ."[4] But this observation establishes merely that the Commission should retain a prior notification requirement. It by no means furnishes a basis for treating Columbia/HCA more harshly than other respondents.

This paragraph then arrives at the nub of my colleagues' argument: ". . . Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders."[5] After referencing the civil penalty that Columbia/HCA paid for violating certain divestiture obligations under two of these orders, they conclude: "Given this history, it is both prudent and consistent

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[3] My colleagues' attempted analogy to collusion cases in the health care industry also fails to supply the missing justification for lengthening the second period in the present cases to 30 days. The Commission's recent consent agreements in M.D. Physicians of Southwest Louisiana, Inc. (File No. 941 0095) and Mesa County Physicians Independent Practice Association, Inc. (Docket No. 9284) contained 30-day second notification periods. In those cases, however, the Commission found it necessary to reserve enough time to satisfy itself that newly-constituted horizontal arrangements among physicians would not lead to a return to the collusion that those cases targeted. I do not know how those two cases, arising from substantial evidence of collusive behavior, supply the Commission with a reason to increase the time it will spend scrutinizing some hospital merger that Columbia/HCA might undertake in, say, Augusta, Charlotte County, or Salt Lake City -- hospital markets with which the Commission is already thoroughly familiar and thus should need less time for review. In addition, although the skeletal nature of the initial notification in M.D. Physicians and Mesa County Physicians might counsel in favor of lengthening the second period to 30 days, no such consideration is present here: any initial notification provided by Columbia/HCA should contain the level of detail that one normally encounters in an acquiring firm's Hart-Scott-Rodino filing.

In a case that involves not only collusion but also merger issues -- and thus is more analogous than M.D. Physicians or Mesa County Physicians to the present matter -- the Commission has just announced acceptance of a proposed order that requires only a 20-day second notification period. Commonwealth Land Title Insurance Company (File No. 981 0127). I do not understand how my colleagues can square the relief in Commonwealth with what they have done to Columbia/HCA.

[4] Statement of Chairman Pitofsky and Commissioners Anthony and Thompson at 2.

[5] *Id.*

with our policy to require additional review time."[6] This conclusion is a *non sequitur*.

There is no question that Columbia/HCA recently paid a $2.5 million civil penalty for alleged order violations. Although my colleagues evidently found that penalty acceptable, I questioned whether it was sufficient in light of Columbia/HCA's "prolonged and pronounced disregard for the requirements of two Commission divestiture orders and the Utah Hold Separate Agreement."[7] I continue to believe that Columbia/HCA committed serious infractions and deserved a civil penalty even larger than what we obtained. But the civil penalty case was our opportunity to levy sanctions for Columbia/HCA's order violations, and that opportunity is gone. I do not see what bearing that misconduct has on the entirely unrelated question of how much time we need to review future acquisitions. If the Commission has based its decision to lengthen the second waiting period on its reaction to respondent's previous behavior, then I would suggest that such a decision is not only arbitrary but punitive. The public may find this perception inescapable.

I am also troubled by another aspect of the majority's decision to extend the second period to 30 days. Each of our newly-modified orders ends with a proviso exempting transactions subject to Hart-Scott-Rodino from the order's prior notification requirement. In other words, an acquisition large enough to be reportable under Hart-Scott-Rodino will be subject to the 20-day second waiting period prescribed by that statute,[8] but a covered acquisition too small to meet Hart-Scott-Rodino thresholds will be subject to the 30-day second period mandated by the Commission's orders. The practical effect of this action is to place an entire class of smaller acquisitions under a greater burden than is borne by larger acquisitions. Although smaller acquisitions, of course, sometimes may be more problematic than large acquisitions from an antitrust point of view, I do not believe this justifies imposing a greater burden on smaller transactions.

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[6] *Id.*

[7] Statement of Commissioner Orson Swindle in Columbia/HCA Healthcare Corporation, File No. 961 0013 (available at http://www.ftc.gov/os/9807/9610013.os.htm).

[8] Moreover, for a cash tender offer, the Hart-Scott- Rodino second waiting period is reduced to 10 days. 15 U.S.C. 18a(e)(2).

I return to whether punishment of Columbia/HCA underlies (or will be perceived to underlie) the Commission's decision. If it does not, then the Commission should explain either why Columbia/HCA alone has earned a 30-day second period -- a result that on its face looks arbitrary and capricious -- or whether it is moving toward imposing a 30-day second period in all future cases. No one has sought to announce a new 30-day period of general applicability, and so it boils down to how the Commission treats this particular respondent. Because Columbia/HCA's prior order violations have no demonstrable bearing on the appropriate length of the second waiting period, I dissent from the Commission's unjustified handling of this respondent.

IN THE MATTER OF

COLUMBIA/HCA HEALTHCARE CORP.

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

Docket 9256. Consent Order, May 5, 1994–Modifying Order, Aug. 14, 1998

This order reopens a 1994 consent order – that prohibited the respondent from consummating any partial or total merger of a Columbia hospital in the Charlotte County, Florida area with any other acute care hospital in the area, without prior Commission approval – and this order modifies paragraph II of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), the respondent named in the consent order issued by the Commission on May 5, 1994, in Docket No. 9256 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, 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" or "Statement").[1] Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph II, which currently requires Columbia/HCA to seek the prior approval of the Commission to acquire or to permit to be acquired certain acute care hospitals. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons discussed below, the Commission has

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

determined to reopen and modify the Order to set aside the prior approval provision and to substitute a prior notice provision for it.

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. Prior Approval Policy Statement at 2. 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." *Id.*

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." *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." *Id.* at 4. 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. *Id.*

The complaint in this matter ("complaint") alleged that Columbia's acquisition of Medical Center Hospital ("MCH") in Punta Gorda, Florida, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the provision of acute-care inpatient hospital services in eastern Charlotte County, Florida, and certain adjacent areas of Sarasota and DeSoto Counties in Florida.

The complaint alleged that the acquisition would eliminate actual competition between Columbia and MCH in the relevant market; increase the already high level of concentration in the relevant market eliminate MCH hospital as a substantial independent competitive force in the relevant market; enhance the likelihood of collusion or interdependent coordination between or among the firms in the relevant market; and deny free and open competition based on price, quality and service in the provision of acute-care inpatient hospital services in the relevant market.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. There is no evidence in the record to rebut that presumption, *i.e.,* Columbia acquired MCH. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to eliminate the prior approval requirement and substitute a prior notice provision for it.

Prior notification is appropriate for acquisitions in the relevant market because the record evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The relevant market is local, and the acquisition price of an acute care hospital, or a portion thereof, could fall below the size-of-transaction threshold in the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement and the respondent's request, the Commission has determined to modify paragraph II of the Order to substitute a prior notification requirement for the existing prior approval requirement.

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

It is further ordered, That paragraph II of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

II.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without prior notification of the Commission:

A. Acquire any acute care hospital in the Charlotte County area; or

B. Permit any acute care hospital it operates in the Charlotte County area to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in the Charlotte County area.

Provided, however, that such prior notification shall not be required for:

(1) The establishment of a new hospital service or facility (other than as a replacement for a hospital service or facility, not operated by Columbia, in the Charlotte County area, pursuant to an agreement or understanding between Columbia and the person operating the replaced service or facility); or

(2) Any transaction subject to this paragraph II of this order if the fair market value of (or, in case of a purchase acquisition, the consideration to be paid for) the hospital, part thereof or interest therein to be acquired does not exceed one million dollars ($1,000,000).

The prior notifications required by this paragraph II 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 respondent and not of any other party to the transaction. Respondent shall provide the 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, respondent shall not consummate the transaction until thirty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph 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.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA") filed a Petition pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement") to Reopen and Modify the Orders in Docket Nos. C-3472, C-3505, C-3538, C-3544 and D.9256. By that Petition, Columbia/HCA requests that the prior approval requirements in the Orders be deleted and, as an alternative, that the Orders be modified to require prior notification of potentially anticompetitive transactions below the Hart-Scott-Rodino ("HSR") Act threshold. Upon consideration of this matter, the Commission decided to grant Columbia/HCA's Petition to delete the prior approval provisions in the Orders and replace them with prior notification provisions upon the terms set forth below.

The Commission's 1995 Prior Approval Policy Statement provides that, "as a general matter, [future] Commission orders . . . will not include prior approval or prior notification requirements." If "a Petition is filed to reopen and modify an order, pursuant to the [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." But the Statement also directs that the terms of any prior notification requirement be considered "on a case-by-case basis" in light of the characteristics of particular markets, market participants and other relevant factors. Significantly, the Commission "*reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances.*" *See* Prior Approval Policy Statement, 60 Fed. Reg. 29745, 39746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241(emphasis added).

The Commission, exercising its equitable power, has substituted prior notification for prior approval provisions in the relevant Orders. In doing so the Commission will require Columbia to provide thirty (30) days advance notice of any proposed merger or acquisition transaction as defined in the Orders ("first waiting period"). If during this first waiting period the Commission requests further information concerning a proposed transaction, Columbia shall not take any action, other than planning, in furtherance of such a transaction until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. This second waiting period is consistent with several cases where the Commission believed it was necessary to protect the public interest from a credible risk that the defendant would once again engage in anticompetitive transactions. *See* MD Physicians of SW Louisiana, FTC File No. 941 0095; Mesa County Physicians Independent Practice Association, Docket No. D.9284.

In this case, first and foremost, there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act, commonly referred to as the HSR Act. Indeed, the complaints in each of these matters involved transactions that if filed individually would have fallen below the reporting threshold of the HSR Act. Second, Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders. Indeed, on July 30, 1998 the Commission imposed a $2.5 million civil penalty upon Columbia/HCA for its violation of Commission orders by: (1) failing

to divest in a timely manner two Utah Hospitals and its joint venture interest in South Seminole Hospital in Florida; and (2) violating a related Hold Separate Agreement governing assets it acquired in Utah as a result of its merger with Healthtrust Inc. *See* FTC File No. 961 0013. Given this history, it is both prudent and consistent with our policy to require additional review time.

For these reasons, we voted to grant Columbia's Petition to Reopen the Orders in Docket Numbers C-3472, C-3505, C-3538, C-3544 and D.9256, and Modify the Orders to delete the prior approval provisions, but also asked that they be replaced with prior notice provisions that have a thirty (30) day second waiting period.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

Application of our Prior Approval Policy Statement has led the Commission to replace the prior approval provision in each of these five orders with a requirement that Columbia/HCA provide us with prior notification of certain acquisitions. Supplanting prior approval is the correct result: there is no credible risk in any of these cases that Columbia/HCA will attempt the same or approximately the same transaction that triggered the Commission's original enforcement concern, and there is nothing to rebut the presumption in each case that setting aside the prior approval requirement is in the public interest. Moreover, replacing prior approval with prior notification is warranted, since each of these matters involves a credible risk that Columbia/HCA could make anticompetitive acquisitions that fall below Hart-Scott-Rodino thresholds.

Nevertheless, I have dissented because the Commission here has imposed the wrong prior notification requirement for the wrong reasons. In a long line of order modifications pursuant to the Prior Approval Policy Statement, the Commission has been consistent in either simply vacating the prior approval clause or replacing it with a prior notification mechanism that comprises a 30-day initial period and a 20-day second period. In the present matters, however, the Commission has chosen to lengthen the second period in each of these orders to 30 days. I disagree with the decision to impose on Columbia/HCA a greater burden than other respondents have borne, and to do so for reasons that appear to smack of retribution.

I have searched these five orders in vain for any basis for treating Columbia/HCA differently from the many previous respondents that

have asked the Commission to set aside or modify a prior approval requirement. The orders summarily announce the length of the notification periods but do not themselves venture any explanation for the disparate treatment accorded Columbia/HCA. Such an obvious departure from consistent agency practice without any explanation could be judged arbitrary and capricious. Perhaps in an effort to save these orders from just such a condemnation, my fellow Commissioners have offered a statement to rationalize what they have done.[1] With all due respect, I find their statement unpersuasive.

My colleagues quote the Prior Approval Policy Statement to the effect that the Commission "reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances."[2] The quoted passage plainly announces that the Commission has not forsworn its power to prescribe prior approval or prior notification requirements in appropriate circumstances. It is not a declaration that the Commission is liberated from every agency's obligation to treat parties before it fairly and evenhandedly. With the clearly disparate treatment of Columbia/HCA, however, the latter message is what observers are likely to take from the Commission's action.[3]

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[1] Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson in the Matter of Columbia/HCA Healthcare Corp., Docket Nos. C-3472, C-3505, C-3538, C-3544 and 9256.

[2] *Id.* at 1.

[3] My colleagues' attempted analogy to collusion cases in the health care industry also fails to supply the missing justification for lengthening the second period in the present cases to 30 days. The Commission's recent consent agreements in M.D. Physicians of Southwest Louisiana, Inc. (File No. 941 0095) and Mesa County Physicians Independent Practice Association, Inc. (Docket No. 9284) contained 30-day second notification periods. In those cases, however, the Commission found it necessary to reserve enough time to satisfy itself that newly-constituted horizontal arrangements among physicians would not lead to a return to the collusion that those cases targeted. I do not know how those two cases, arising from substantial evidence of collusive behavior, supply the Commission with a reason to increase the time it will spend scrutinizing some hospital merger that Columbia/HCA might undertake in, say, Augusta, Charlotte County, or Salt Lake City -- hospital markets with which the Commission is already thoroughly familiar and thus should need less time for review. In addition, although the skeletal nature of the initial notification in M.D. Physicians and Mesa County Physicians might counsel in favor of lengthening the second period to 30 days, no such consideration is present here: any initial notification provided by Columbia/HCA should contain the level of detail that one normally encounters in an acquiring firm's Hart-Scott-Rodino filing.

In a case that involves not only collusion but also merger issues -- and thus is more analogous than M.D. Physicians or Mesa County Physicians to the present matter -- the Commission has just announced acceptance of a proposed order that requires only a 20-day second notification period. Commonwealth Land Title Insurance Company (File No. 981 0127). I do not understand how my colleagues can square the relief in Commonwealth with what they have done to Columbia/HCA.

The penultimate paragraph of the majority's statement may disclose what motivated the Commission to impose a 30-day second period on Columbia/HCA. I agree with my colleagues that "there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act...."[4] But this observation establishes merely that the Commission should retain a prior notification requirement. It by no means furnishes a basis for treating Columbia/HCA more harshly than other respondents.

This paragraph then arrives at the nub of my colleagues' argument: "... Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders."[5] After referencing the civil penalty that Columbia/HCA paid for violating certain divestiture obligations under two of these orders, they conclude: "Given this history, it is both prudent and consistent with our policy to require additional review time."[6] This conclusion is a *non sequitur*.

There is no question that Columbia/HCA recently paid a $2.5 million civil penalty for alleged order violations. Although my colleagues evidently found that penalty acceptable, I questioned whether it was sufficient in light of Columbia/HCA's "prolonged and pronounced disregard for the requirements of two Commission divestiture orders and the Utah Hold Separate Agreement."[7] I continue to believe that Columbia/HCA committed serious infractions and deserved a civil penalty even larger than what we obtained. But the civil penalty case was our opportunity to levy sanctions for Columbia/HCA's order violations, and that opportunity is gone. I do not see what bearing that misconduct has on the entirely unrelated question of how much time we need to review future acquisitions. If the Commission has based its decision to lengthen the second waiting period on its reaction to respondent's previous behavior, then I would suggest that such a decision is not only

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[4] Statement of Chairman Pitofsky and Commissioners Anthony and Thompson at 2.

[5] *Id.*

[6] *Id.*

[7] Statement of Commissioner Orson Swindle in Columbia/HCA Healthcare Corporation, File No. 961 0013 (available at http://www.ftc.gov/os/9807/9610013.os.htm).

arbitrary but punitive. The public may find this perception inescapable.

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I return to whether punishment of Columbia/HCA underlies (or will be perceived to underlie) the Commission's decision. If it does not, then the Commission should explain either why Columbia/HCA alone has earned a 30-day second period -- a result that on its face looks arbitrary and capricious -- or whether it is moving toward imposing a 30-day second period in all future cases. No one has sought to announce a new 30-day period of general applicability, and so it boils down to how the Commission treats this particular respondent. Because Columbia/HCA's prior order violations have no demonstrable bearing on the appropriate length of the second waiting period, I dissent from the Commission's unjustified handling of this respondent.

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[8] Moreover, for a cash tender offer, the Hart-Scott- Rodino second waiting period is reduced to 10 days. 15 U.S.C. 18a(e)(2).

IN THE MATTER OF

HONEYWELL INC.

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

Docket C-3823. Complaint, Aug. 17, 1998–Decision, Aug. 17, 1998

This consent order, among other things, prohibits the Minnesota-based manufacturer of air purifiers from making certain claims regarding the benefits, performance, or efficacy of its air purifiers, filters, or any other air cleaning product which is normally used for personal, family, or household purposes, unless at the time of making the claims it possesses and relies upon competent and reliable scientific evidence.

Participants

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

For the respondent: *Pamela Deese, Robins, Kaplan, Miller & Ciresi*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Honeywell Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Honeywell Inc. is a Delaware corporation with its principal office or place of business at Honeywell Plaza, Minneapolis, MN.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed air treatment products to the public, including "Honeywell Air Purifiers" and the "enviracaire® True HEPA filter" used in its air purifiers. These "HEPA" (high-efficiency particulate air) filters have a particle removal efficiency rating of 99.97 percent for particles of 0.3 micron diameter. Honeywell Air Purifiers and enviracaire® True HEPA filters are "devices," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. Respondent has disseminated or has caused to be disseminated advertisements for Honeywell Air Purifiers, including but not necessarily limited to the attached Exhibits A through I. These advertisements contain the following statements and depictions:

A. **"There are some places a wash cloth just can't clean.**
Even squeaky clean on the outside, your kids are still exposed to mold spores, dust mite allergens - even bacteria and viruses. They're in the air inside your home. But you can help protect your children with a Honeywell Air Purifier. Our exclusive enviracaire® True HEPA filter can remove 99.97% of these impurities .... And while you're keeping their ears clean, we'll help do the same for their lungs." (Exhibit A).

B. **"Don't your children's lungs deserve as much care?**
Think of all you do to keep their clothes clean. Now consider this. No matter how good a housekeeper you are, your children are exposed to mold spores, dust mite allergens - even bacteria and viruses. They're in the air inside your home. But you can help protect your children with a Honeywell Air Purifier. Our exclusive enviracaire® True HEPA filter can remove 99.97% of these impurities .... And while you're washing their clothes, we'll be washing their air." (Exhibit B).

C. "There are some places a washcloth just can't reach. Like her lungs. The filter in a Honeywell Air Purifier removes nearly all impurities from the air."
[A super "99.97%" appears on the screen and dissipates like dust]
"Honeywell. A home's not clean without it."
[Super: "Honeywell. A Home's Not Clean Without It."] (Exhibit C).

D. "While you're busy cleaning everything in sight, we could be taking care of what you can't see. The filter in a Honeywell Air Purifier removes nearly all impurities from the air."
[A super "99.97%" appears on the screen and dissipates like dust]
"Honeywell. A home's not clean without it."
[Super: "Honeywell. A Home's Not Clean Without It."] (Exhibit D).

E. "You do the laundry, we'll clean the really tough spot. The filter in a Honeywell Air Purifier removes nearly all impurities from the air."
[A super "99.97%" appears on the screen and dissipates like dust]
"Honeywell. A home's not clean without it."
[Super: "Honeywell. A Home's Not Clean Without It."] (Exhibit E).

F. "Hard as you try, there's some dirt you just can't shake. To remove nearly all impurities from the air,
[A super "99.97%" appears on the screen and dissipates like dust] you need the filter in a Honeywell Air Purifier. Honeywell. A home's not clean without it."
[Super: "Honeywell. A Home's Not Clean Without It."] (Exhibit F).

G. "Ideal for allergy and asthma sufferers. **Exclusive Patented 360 degree Airflow**. Efficiently scrubs the room free of air pollutants." (Exhibit G).

H. "***How to Select the Right Size enviracaire® Portable Air Cleaner***

....

6 to 7 ACH: Changing the air in a room six to seven times per hour will yield a 70 percent reduction in contaminant levels, resulting in noticeable relief from many allergy symptoms and seasonal respiratory problems. Expect excellent air quality improvement.

8-Plus ACH: Changing the air in a room eight or more times per hour yields a dramatic 85 percent reduction in contaminant levels, resulting in noticeable symptom relief from severe allergies, asthma and other chronic respiratory problems. Expect superior air quality improvement.

....

How can you tell that it's working?

Allergy sufferers should notice a decrease in symptoms such as coughing, sneezing and wheezing, and should be able to sleep better." (Exhibit H).

I. "Honeywell air cleaners provide proven relief of allergy symptoms." (Exhibit I).

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

A. The filter in a Honeywell Air Purifier removes 99.97% of mold spores, dust mite allergens, bacteria and viruses from the air that people breathe under household living conditions.

B. The filter in a Honeywell Air Purifier removes nearly all or 99.97% of impurities from the air that people breathe under household living conditions.

C. Consumers who use a Honeywell Air Purifier that changes the air in a room six or more times per hour will experience noticeable symptom relief from allergies and other respiratory problems.

D. Honeywell Air Purifiers provide proven relief from allergy symptoms.

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

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. The 99.97% figure refers to the filter's expected efficiency in removing

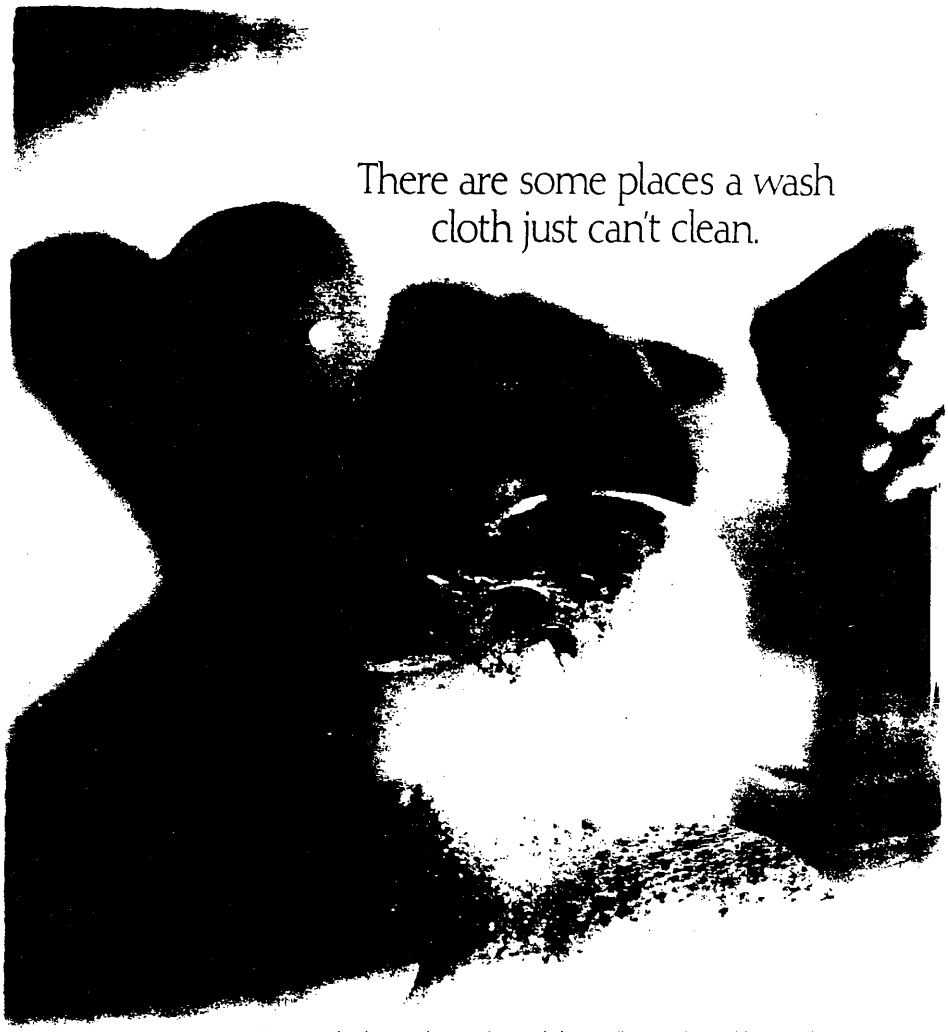
particles that actually pass through the filter. While the filter's efficiency is a factor in assessing the effectiveness of an air purifier in particulate removal, this figure overstates the actual effectiveness of the air purifier in removing pollutants from the air in a user's environment. The actual effectiveness of an air purifier depends on a variety of factors including, the amount of air that the air purifier processes, the nature of the pollutant, and the rate at which the pollutant is being introduced into the environment.

Additionally, there is no guarantee that an individual who suffers from allergies or other respiratory problems will derive a discernible reduction in symptoms through the use of these or other air purifiers. Whether individuals will derive such relief depends on many variables, including the source and severity of their allergies, whether the allergens at issue tend to remain airborne, the rate at which the allergens are emitted into their homes or offices, and other environmental factors.

Therefore, the representation set forth in paragraph six was, and is, false or misleading.

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

EXHIBIT A



Even squeaky clean on the outside, your kids are still exposed to mold spores, dust mite allergens – even bacteria and viruses. They're in the air inside your home. But you can help protect your children with a Honeywell Air Purifier. Our exclusive enviracaire® True HEPA filter can remove 99.97% of these impurities – something vacuum cleaners and furnace filters can't do. So call 1-800-332-1110 for more information and a store near you. And while you're keeping their ears clean, we'll help do the same for their lungs.

Honeywell

AMERICAN LUNG ASSOCIATION.

Partners in indoor air quality education.

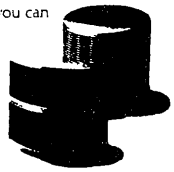


EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT C

Television Advertisement: "Bath"

There are some places a washcloth just can't reach. Like her lungs. The filter in a Honeywell air Purifier removes nearly all impurities from the air.

[SUPER: 99.97%]

Honeywell. A home's not clean without it.

[SUPER: Honeywell. A Home's Not Clean Without It.]

EXHIBIT D

Television Advertisement: "Vacuum"

While you're busy cleaning everything in sight, we could be taking care of what you can't see. The filter in a Honeywell Air Purifier removes nearly all impurities from the air.

[SUPER: 99.97%]

Honeywell. A home's not clean without it.

[SUPER: Honeywell. A Home's Not Clean Without It.]

EXHIBIT E

Television Advertisement: "Washing Machine"

You do the laundry, we'll clean the really tough spot. The filter in a Honeywell Air Purifier removes nearly all impurities from the air.

[SUPER: 99.97%]

Honeywell. A home's not clean without it.

[SUPER: Honeywell. A Home's Not Clean Without It.]

EXHIBIT F

Television Advertisement: "Shaking Rug"

Hard as you try, there's some dirt you just can't shake. To remove nearly all impurities from the air,

[SUPER: 99.97%]

you need the filter in a Honeywell Air Purifier. Honeywell. A home's not clean without it.

[SUPER: Honeywell. A Home's Not Clean Without It.]

Honeywell

The Air Cleaner most recommended by physicians*. Ideal for allergy and asthma sufferers.

enviracaire®
Portable air cleaners

*(Williams & Wilkins Survey, October 1993)

Exclusive, Patented 360° Airflow

Efficiently scrubs the room free of air pollutants.

TRUE HEPA FILTER 99.97% EFFICIENT

CLASS II MEDICAL DEVICE
(Registration No. K872359)

EXHIBIT G

CONFIDENTIAL
HO01139

Questions & Answers

What is a HEPA filter?

True HEPA (High Efficiency Particulate Air) filters are any "extended surface", dry-type filters having a minimum particle capture efficiency of 99.97 percent for all particle sizes. They are recognized as the most efficient media for removing sub-micron size particles from the air.

What is a HEPA filter made of?

The filtering material, or media, is made of very thin glass fibers. The glass fibers are made into paper, much the same way cellulose or wood fibers are used to make paper. In thickness and texture, the HEPA media is very similar to blotter paper. Air cannot get through the dense glass paper very easily, so a very large area of paper must be used to permit filtering of a significant volume of air. To get a large area of media into the filter, it is pleated, creating an "extended surface." For example, an enviracaire® True HEPA Filter measuring 2 feet by 2 feet can contain as much as 132 square feet of filter media for maximum cleaning efficiency.

How does a HEPA filter work?

Basically, as particles pass through the densely packed glass fibers of the paper media, they literally run into one of the fibers and stick to it by mutual attraction. On a large scale, it would be like trying to blow a grain of sand through a stack of hay.

What are "HEPA-type" filters?

"HEPA type" filters may look like True HEPA filters and be made the same way. Even the paper media is made of the same glass fibers. But, the number and density of the fibers is reduced so that more allergens and pollutant particles get through. "HEPA type" filters are available in many different efficiencies, the best being only about 95 percent effective. This is below the minimum efficiency required to be a True HEPA filter.

How can you tell that it's working?

Allergy sufferers should notice a decrease in symptoms such as coughing, sneezing and wheezing, and should be able to sleep better. Even the nonallergenic person should see a reduction in minor respiratory and eye problems.

After a period of use, trapped pollutants should be observable in the air filter. *Note:* A True HEPA filter requires no cleaning or maintenance to maintain its efficiency (three to five years).

What happens to bacteria and viruses caught in the filter?

As living things, bacteria and viruses cannot survive without water. Most that are captured when airborne have been riding on a particle containing some moisture. Once caught in the filter, this moisture quickly evaporates and they die.

EXHIBIT H-1

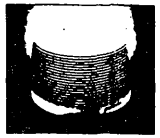
All enviracaire® Portable Air Cleaners *Feature*

- True HEPA filters that remove 99.97 percent of the most common allergens and pollutants
- Polyester based, activated carbon prefilters
- Pull-360 degree intake/output air flow direction
- Attractive, contemporary design
- Safe, quiet and ozone free operation
- UL listed

Model 10500

2-Speed

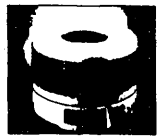
- Completely recirculates and cleans the air in a 9' by 12' room six times an hour
- Filtration Rate: up to 5,000 cubic feet per hour at high speed
- Portable and lightweight at just 10 lbs.
- Measures 9.5" high by 11.5" in diameter
- Power requirements: 120 volts, 200 watts AC
- One-year limited warranty



Model 11520

2-Speed

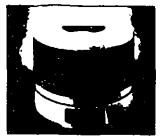
- Completely recirculates and cleans the air in a 12' by 14' room six times an hour
- Filtration Rate: up to 9,000 cubic feet per hour at high speed
- Portable and lightweight at just 11.5 lbs.
- Measures 10" high by 16" in diameter
- Power requirements: 120 volts, 275 watts AC
- Two year limited warranty



Model 12520

3-Speed

- Completely recirculates and cleans the air in a 16' by 20' room six times an hour
- Filtration Rate: up to 15,000 cubic feet per hour at high speed
- Portable and lightweight at just 14.5 lbs.
- Measures 12" high by 16" in diameter
- Power requirements: 120 volts, 325 watts AC
- Two year limited warranty



Model 13520

3-Speed

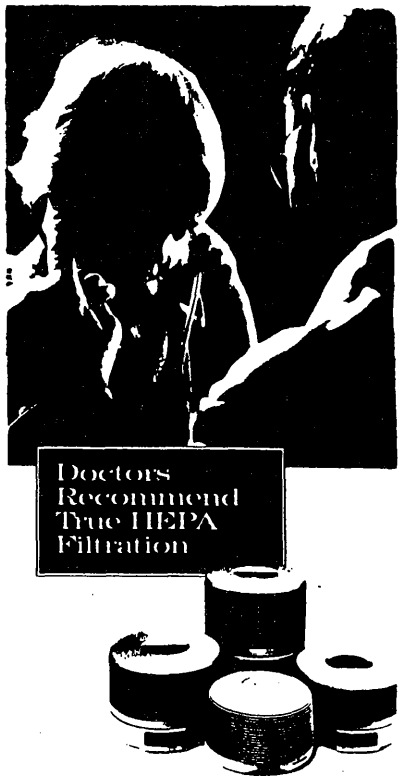
- Completely recirculates and cleans the air in a 20' by 22' room six times an hour
- Filtration Rate, up to 20,000 cubic feet per hour at high speed
- Portable and lightweight at just 15.5 lbs.
- Measures 14" high by 16" in diameter
- Power requirements: 120 volts, 350 watts AC
- Two year limited warranty

Honeywell

enviracaire®

Honeywell Environmental Air Control Inc

1 800 332 1110



Honeywell

enviracaire

† AMERICAN LUNG ASSOCIATION

Problem:

Medical experts estimate that almost 50 million people in the U.S. suffer from respiratory problems such as asthma, hay fever, acute or chronic bronchitis or other aggravating complications.

Moreover, as U.S. builders have increasingly practiced "airtight" home and office construction to save energy, even more people's health has suffered from reduced ventilation and higher concentrations of indoor air pollutants. Today, doctors recognize a link between poor ventilation and higher health risks.

It's impossible to conceive of any indoor space that does not contain several types of common indoor air pollutants, such as:

Pollens and mold spores	General room dust
Animal hair and dander	Tobacco smoke and odors
Dust mite allergens	Asbestos fibers
Bacteria and viruses	Soot, exhaust and fumes
Harmful fibers	

Dust mite *Asbestos* *Pollen* *Bacteria*

Solution:

Doctors agree that removal of contaminants from indoor air and limiting their concentrations through air filtration can significantly reduce symptoms such as coughing, sneezing and wheezing to promote more restful sleep.

Recommendation:

Physicians recommend using True HEPA filtration, the air cleaning technology that removes almost every trace — 99.97 percent — of the most common allergens and indoor air pollutants.*

*Ritter Research, 1995

EXHIBIT H-2

CONFIDENTIAL
HO01112

What is a True HEPA Filter?

HEPA, an acronym for High Efficiency Particulate Air, is an air cleaning technology first developed during the early days of atomic research to clean the air of radioactive particles that might escape and present a health hazard to researchers.

Today, HEPA filters are commonly used in medical laboratories and commercial applications where totally clean air environments are required for human health and safety. Enviracaire® Portable Air Cleaners bring this technology to the home and office.

True HEPA filtration is recognized as the most efficient cleaning media, capable of removing sub-micron size particles from the air (at least 99.97 percent at 0.3 micron size). What's a micron? A micron is one millionth of a meter. For comparison, a human hair is 75 to 100 microns in diameter; the period at the end of this sentence is 500 microns across.

Dust and particles larger than 10 microns are filtered out of the air by the upper respiratory tracts (nose and throat), and little gets to the lungs. But it's the smaller particles that you can't see that reach the lungs and cause problems. Particles close to 0.3 microns are used in the testing of True HEPA filters because this size most easily enters the respiratory system and places the greatest burden on your body's defense system.

By eliminating and controlling the level of dust and other particles, enviracaire® Portable Air Cleaners, using True HEPA filtration, can help restore and maintain healthy air quality in the household or office.

The Clear Choice of Physicians*

- ***94% of Physicians surveyed consider true HEPA filtration to be the most effective.***
- ***73% of Physicians surveyed recommend air cleaners to their patients as part of their treatment for respiratory problems.***
- ***71% of Physicians (#2 above) recommend a brand of air cleaners.***
- ***89% of the Physicians (#3 above) recommend Honeywell/Enviracaire® by name.***

*National Market Research Survey
"Portable Room Air Cleaners Physician Preference Study"
Ritter Research, Inc. 1995
Survey data available upon request

How to Measure Air Cleaning Capacity

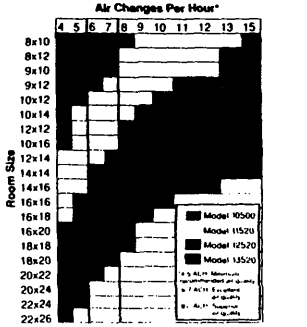
Indoor air must be constantly recirculated by an air cleaner in order to effectively reduce concentrations of airborne contamination. Air cleaner capacity is measured in Air Changes per Hour (ACH). For air cleaners of equivalent efficiency, higher ACH ratings yield higher levels of air quality improvement.

How to Select the Right Size enviracaire® Portable Air Cleaner

4 to 5 ACH: Research has demonstrated that recirculating or changing the air in a room four to five times per hour with a high efficiency True HEPA filter will cut airborne contaminants in half (50 percent), resulting in good air quality improvement. This is the minimum recommended air circulation for allergy sufferers.

6 to 7 ACH: Changing the air in a room six to seven times per hour will yield a 70 percent reduction in contaminant levels, resulting in noticeable relief from many allergy symptoms and seasonal respiratory problems. Expect excellent air quality improvement.

8-Plus ACH: Changing the air in a room eight or more times per hour yields a dramatic 85 percent reduction in contaminant levels, resulting in noticeable symptom relief from severe allergies, asthma and other chronic respiratory problems. Expect superior air quality improvement.



How to use this chart: Select the air quality you desire. Then find the room size where the air cleaner will be used to determine the right model for your needs.

EXHIBIT I

Honeywell

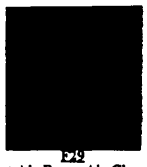
BACK FORWARD

Search ▶| Products ▶| Support ▶| Contact ▶| SiteMap ▶| Honeywell ▶|

Allergy Relief

Honeywell Air Cleaners

F50
Electronic Air Cleaner



F29
Portable Room Air Cleaner

Allergy Relief ▶

- Introduction ▶
- What Causes Allergies? ▶
- How Can you Treat Allergies? ▶
- How Air Cleaners can Help ▶
- Honeywell Air Cleaners: Product Pictures ▶
- How to Choose the Right Air Cleaner ▶

Honeywell air cleaners provide proven relief of allergy symptoms. We offer a complete line of air cleaners, designed to meet your needs and budget. Talk to your local Perfect Climate® dealer to find out how Honeywell air cleaners can help you breathe easier.

BACK FORWARD

| About | Products | Dealers | Tips | Allergy | More Info | Interactive | New | francais |

EXHIBIT I

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Honeywell Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Honeywell Plaza, in the City of Minneapolis, State of 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

DEFINITIONS

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

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

2. "*Air cleaning product*" shall mean any product, equipment or appliance designed or advertised to remove, treat, or reduce the level of any contaminant(s) in the air.

3. "*Indoor air contaminant(s)*" or "*contaminant(s)*" shall mean one or more of the following: mold spores, dust mite allergens, bacteria, viruses, or any other gaseous or particulate matter found in indoor air.

4. Unless otherwise specified, "*respondent*" shall mean Honeywell Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees.

5. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Honeywell Air Purifiers, enviracaire® True HEPA filters, or any other air cleaning product which is normally used for personal, family, or household purposes in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. About such product's ability to eliminate, remove, clear, or clean any quantity of indoor air contaminants under household living conditions,

B. That such product will perform under any set of conditions, including household living conditions,

unless at the time of making the representation(s) respondent possesses and relies upon competent and reliable scientific evidence that substantiates such representation(s) either by being related to those conditions or by having been extrapolated to those conditions by generally accepted procedures.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning product which is normally used for personal, family, or household purposes in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the performance, health or other benefits, or efficacy of such product, unless, at the time the 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 Honeywell Inc. and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

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

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

IV.

It is further ordered, That respondent Honeywell Inc. and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within forty-five (45) days after the date of service of this order, and to future personnel within forty-five (45) days after the person assumes such position or responsibilities.

V.

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

VI.

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

VII.

This order will terminate on August 17, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

IN THE MATTER OF

M.D. PHYSICIANS OF SOUTHWEST LOUISIANA, INC.

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

Docket C-3824. Complaint, Aug. 31, 1998–Decision, Aug. 31, 1998

This consent order prohibits, among other things, a group of Louisiana physicians from engaging in collective negotiations on behalf of its members or fixing prices in the future.

Participants

For the Commission: *Rendell Davis, David Pender, Robert Leibenluft, William Baer, Seth Sacher,* and *Jonathan Baker.*

For the respondent: *Frank Massengale, Massengale & DeBruhe,* New Orleans, LA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that M.D. Physicians of Southwest Louisiana, Inc. ("respondent MDP") has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent MDP is a business corporation organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal place of business in Lake Charles, Louisiana, the parish seat of Calcasieu Parish, Louisiana. Respondent MDP's address is P.O. Box 1832, Lake Charles, Louisiana.

PAR. 2. All of the members of respondent MDP are physicians practicing in and around Calcasieu Parish, Louisiana. Much of the population of Calcasieu Parish resides in Lake Charles, Louisiana, and surrounding communities, which include Sulphur, Moss Bluff, and Westlake, Louisiana ("Lake Charles area"). The population of the Lake Charles area is approximately 150,000. Most of the members of

respondent MDP, as well as most of the physicians practicing in Calcasieu Parish, practice in the Lake Charles area.

PAR. 3. During most of the time period during which the acts and practices described in paragraphs ten through fifteen below took place ("the relevant time period"), the members of respondent MDP constituted a majority of all physicians practicing in Calcasieu Parish, Louisiana. In certain physician specialties, the members of respondent MDP constituted all or most of the physician specialists practicing in Calcasieu Parish. More than 200 physicians have been members of respondent MDP since it was formed in 1987. During the relevant time period, respondent MDP has had as many as 165 members at one time.

PAR. 4. Respondent MDP exists in substantial part for the pecuniary benefit of its members. By virtue of its purposes and activities, respondent MDP is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

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

PAR. 6. Except to the extent that competition has been restrained as alleged herein, some or all of the members of respondent MDP have been, and are now, in competition among themselves and with other providers of physician services in Calcasieu Parish, Louisiana.

PAR. 7. Physicians often contract with health insurance firms and other third-party payers. Such contracts typically establish the terms and conditions under which the physicians will render services to the subscribers of the third-party payers, including terms and conditions of physician compensation and of cost containment. In many cases, physicians entering into such contracts agree to reductions in their compensation and to various cost containment procedures, including procedures for reviewing the utilization of medical resources by physicians and for dealing with physicians who have overutilized such resources. By lowering their costs in this manner, third-party payers are able to reduce the cost of medical care for their subscribers. The extensive use of such methods of lowering costs can be described as "managed care."

PAR. 8. Absent agreements among competing physicians on the terms upon which they will deal with third-party payers, competing physicians each decide individually whether to enter into contracts with third-party payers, and on the terms and conditions under which they are willing to enter into such contracts.

PAR. 9. In engaging in the acts and practices described in paragraphs ten through fifteen below, respondent MDP has acted as a combination of its members and has conspired with at least some of its members.

PAR. 10. Respondent MDP was formed in March 1987 as a vehicle for its members to deal concertedly with the impending entry, into Calcasieu Parish, Louisiana, of managed care. The members of respondent MDP agreed that respondent MDP would represent them in negotiations with third-party payers.

PAR. 11. Beginning in 1987, and continuing until at least 1994, respondent MDP conspired to fix the terms and conditions, including terms of financial compensation, under which its members deal with third-party payers and conspired to prevent or delay the entry into Calcasieu Parish, Louisiana, of managed care.

PAR. 12. Beginning in 1988, respondent MDP negotiated on behalf of its members with Blue Cross and Blue Shield of Louisiana ("Blue Cross") the terms and conditions of member participation in Blue Cross health insurance plans. In 1989, respondent MDP terminated those negotiations, when it failed to reach agreement with Blue Cross on the terms of physician compensation. Until 1994, when respondent MDP first learned that it was under investigation by the staff of the Commission, the members of respondent MDP uniformly refused to participate in any Blue Cross plan.

PAR. 13. Beginning in 1991, respondent MDP negotiated on behalf of its members with the Louisiana State Employees Group Benefits Program ("State Employees Program"), the health insurance plan for employees of the State of Louisiana, the terms and conditions of member participation in the State Employees Program. In 1993, those negotiations ended when respondent MDP and the State Employees Program failed to reach agreement on the terms of physician compensation. In 1994, the president of respondent MDP exhorted the members of respondent MDP not to deal with the State Employees Program, and none of the members did until 1995.

PAR. 14. Beginning in 1987 and continuing until at least 1994, respondent MDP conspired to refuse to deal with, and to fix the terms and conditions of dealing with, other third-party payers attempting to do business in Calcasieu Parish, Louisiana, including, but not limited to, Aetna Insurance Company and Healthcare Advantage, Inc.

PAR. 15. Respondent MDP functioned de facto as the exclusive representative of its members. Although respondent MDP did not contractually prevent its members from dealing with third-party payers directly, and although it issued statements that its members were free to deal with third-party payers directly, the members allowed MDP to function as their exclusive representative. Until 1994, when respondent MDP first learned that it was under investigation by the staff of the Commission, the members of respondent MDP dealt with third-party payers only through respondent MDP. Furthermore, the members of respondent MDP all refused to meet individually with, and listen to presentations by, representatives of some third-party payers. Respondent MDP facilitated the collective refusal of its members to deal directly with third-party payers when it repeatedly collected from, and disseminated to, its members information concerning the members' refusal to deal with third-party payers directly.

PAR. 16. The members of respondent MDP have not integrated their medical practices in any economically significant way, nor have they created any efficiencies that might justify the acts and practices described in paragraphs ten through fifteen.

PAR. 17. The purpose, tendency, effects, or capacity of respondent MDP's acts and practices as described in paragraphs ten through fifteen are and have been to restrain trade unreasonably and hinder competition in the provision of physician services in Calcasieu Parish, Louisiana, in the following ways, among others:

A. To restrain competition among physicians;
B. To deprive consumers of the benefits of competition among physicians;
C. To fix or increase the prices that consumers pay for physician services;
D. To fix the terms and conditions upon which physicians would deal with third-party payers, including terms of physician compensation, and thereby raising the price to consumers of medical insurance coverage issued by third-party payers; and

E. To deprive consumers of the benefits of managed care.

PAR. 18. The combination or conspiracy and the acts and practices of respondent MDP, as herein alleged, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation or the effects thereof, as herein alleged, will continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that 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 M.D. Physicians of Southwest Louisiana, Inc. is a business corporation organized, existing, and doing business under

and by virtue of the laws of the State of Louisiana, with its principal place of business located at P.O. Box 1832, Lake Charles, Louisiana.

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

ORDER

I.

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

A. "*MDP*" means M.D. Physicians of Southwest Louisiana, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates, controlled by MDP, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*Person*" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

C. "*Payer*" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Payer includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

D. "*Provider*" means any person that supplies health care services to any other person, including, but not limited to, physicians, hospitals, and clinics.

E. "*Reimbursement*" means any payment, whether cash or non-cash, or other benefit received for the provision of physician services.

F. "*Physician*" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

G. "*Participating physician*" means any physician (1) who is a stockholder, owner, or member of MDP; (2) who has agreed to

provide services through MDP; or (3) whose services have been offered to any payer through MDP.

H. "*Qualified risk-sharing joint arrangement*" means an arrangement to provide physician services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all physicians participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of physician services to payers at a capitated rate; (b) the provision of physician services for a predetermined percentage of premium or revenue from payers; (c) the use of significant financial incentives (*e.g.*, substantial withholds) for its participating physicians, as a group, to achieve specified cost-containment goals; or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors.

I. "*Qualified clinically-integrated joint arrangement*" means an arrangement to provide physician services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all physicians participating in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement.

II.

It is further ordered, That MDP, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding to:

1. Negotiate on behalf of any participating physicians with any payer or provider;
2. Deal, or refuse to deal, with any payer or provider; or
3. Determine any terms, conditions, or requirements upon which physicians deal with any payer or provider, including, but not limited to, terms of reimbursement.

B. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this order.

Provided that nothing in this order shall be construed to prohibit any agreement or conduct by MDP that is reasonably necessary to form, facilitate, manage, operate, or participate in:

(a) A qualified risk-sharing joint arrangement; or

(b) A qualified clinically integrated joint arrangement, if MDP has provided the prior notification(s) as required by this paragraph (b). Such prior notification must be filed with the Secretary of the Commission at least thirty (30) days prior to forming, facilitating, managing, operating, participating in, or taking any action, other than planning, in furtherance of any joint arrangement requiring such notice ("first waiting period"), and shall include for such arrangement the identity of each participant; the location or area of operation; a copy of the agreement and any supporting organizational documents; a description of its purpose or function; a description of the nature and extent of the integration expected to be achieved, and the anticipated resulting efficiencies; an explanation of the relationship of any agreement on reimbursement to furthering the integration and achieving the expected efficiencies; and a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from such agreement(s). If, within the first waiting period, a representative of the Commission makes a written request for additional information, MDP shall not form, facilitate, manage, operate, participate in, or take any action, other than planning, in furtherance of such joint arrangement until thirty (30) days after substantially complying with such request for

additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition.

III.

It is further ordered, That MDP shall:

A. Within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to:

1. Each person who, at any time since January 1, 1993, has been an officer, director, manager, employee, or participating physician in MDP, and

2. Each payer or provider who, at any time since January 1, 1993, has communicated any desire, willingness, or interest in contracting for physician services with MDP.

B. For a period of five (5) years after the date this order becomes final:

1. Distribute by first-class mail a copy of this order and the accompanying complaint to each new MDP stockholder, manager, employee, and participating physician within thirty (30) days of his or her initial stock purchase, appointment, employment, or participation, and

2. Annually publish in any official annual report or newsletter sent to all participating physicians, a copy of this order and the complaint with such prominence as is given to regularly featured articles.

IV.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, MDP shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order.

B. One (1) year from the date this order becomes final, annually for the next five (5) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, MDP shall file a verified written report with the Commission setting

forth in detail the manner and form in which it has complied and is complying with paragraphs II and III of this order.

V.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any recognizable privilege, MDP shall permit, upon written request, any duly authorized representative of the Commission:

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

B. Upon five (5) business days' notice to MDP and without restraint or interference from it, to interview officers, directors, or employees of MDP.

VII.

It is further ordered, That this order shall terminate on August 31, 2018.

IN THE MATTER OF

AUTOMOTIVE BREAKTHROUGH SCIENCES, INC., ET AL.

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

Docket 9275. Complaint, Sept. 27, 1995–Final Order, Sept. 9, 1998

This final order prohibits, among other things, two New York-based corporations and an officer, that manufactures, advertises and distributes automotive products and devices, from making any claims that the aftermarket brakes they sell are as effective as factory installed antilock braking systems and prohibits the respondents from using the term "ABS" in its advertising and marketing. In addition, the order requires the respondents to notify all distributors and purchasers of the Commission's findings, and requires them to possess competent and reliable scientific evidence to substantiate any future claims regarding the attributes, efficacy, safety or benefits of any braking system or device designed to be used in any motor vehicle.

Participants

For the Commission: *Janet Evans, Theodore Hoppock, Sydney Knight,* and *Susan Braman.*

For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission having reason to believe that Automotive Breakthrough Sciences, Inc., a corporation, ABS Tech Sciences, Inc., a corporation, and Richard Schops, individually and as an officer and director of said corporations ("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 Automotive Breakthrough Sciences, Inc., is a New York corporation, with its offices and principal place of business located at P.O. Box 474, Wheatley Heights, New York.

Respondent ABS Tech Sciences, Inc., is a New York corporation, with its offices and principal place of business located at P.O. Box 474, Wheatley Heights, New York.

Respondent Richard Schops is or was at relevant times herein an officer and director of the corporate respondents. Individually or in

concert with others, he formulates, directs, and controls the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His office and principal place of business is at P.O. Box 474, Wheatley Heights, New York.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold, and distributed certain after-market automotive products including A●B●S/Trax and A●B●S/ TRAX[2] (hereinafter collectively referred to as "A●B●S / Trax"), devices that are installed on a vehicle to improve its braking performance.

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 caused to be disseminated advertisements and promotional materials for A●B●S/ Trax, including but not necessarily limited to the advertisements and promotional materials attached hereto as Exhibits A, B, and C. These advertisements contain the following statements and depictions:

(a) **STOP SKIDDING AROUND. ADD A●B●S / TRAX™**
ANTI-LOCK BRAKING SAFETY TO YOUR CAR.

[Depiction of multivehicle highway crash scene.]

The Terrifying Panic Stop!

You're driving along and then suddenly. . . crisis.

Your reflexes take over! You slam on the brakes. Wheels lock, steering freezes, tires skid. Too often, especially on wet roads, what happens next is a spin-out and then. . . *impact.*

Even if it's never happened to you, you've certainly seen the result: Cars whirling into opposite lanes - doing 180^0 or even 360^0 spins - leaving those scary skid marks. . . or worse.

Every day, thousands of such accidents are avoidable.

A●B●S / TRAX Anti-Lock Braking Helps You Keep Control in an Emergency.

The A●B●S / TRAX Breakthrough Anti-Lock Braking System interacts with your existing brakes to help give you steering and braking control in an emergency stop.

More precisely, A●B●S / TRAX automatically regulates the flow of energy to your brakes to prevent wheels from locking. Tires retain traction with the road surface - so you can control-steer to a shorter, straighter, anti- skidding stop.

[Two photographs depicted. In photograph identified as Panic Brake Test A, a test vehicle is shown skidding sideways and knocking over orange cones used as lane markers. Below the photograph are the words "Without A●B●S / TRAX: wheels lock, car skids." In photograph identified as Panic Brake Test B, the test vehicle is shown centered between orange cones used as lane markers. Below the photograph are the words "With A●B●S / TRAX: steering, braking in control."]

A●B●S / TRAX Stops Your Car Up To 30% Shorter in an Emergency.

Simulation testing has shown that A●B●S / TRAX can shorten stopping distance up to three car lengths - approximately 30 feet - when aggressively decelerating from 60 to 0 MPH. (Stopping distances can vary substantially by weight of car and road conditions.)

[Chart depicts two columns. In the first column, entitled "STANDARD 1989 SEDAN WITHOUT A●B●S / TRAX," a sequential depiction shows a car stopping at the 30 ft. line, at an angle. In the second column entitled "STANDARD 1989 SEDAN A●B●S / TRAX INSTALLED," a car is shown stopping at the 5 ft. line.]

* * * *

Finally, Anti-Lock Safety at a Price You Can Safely Afford.

Until now, A.B.S. braking safety was available only on expensive new luxury cars.

The American technological genius of A●B●S / TRAX has revolutionized the safe-stopping security of A.B.S with a system that can be installed in most any car* you're driving now - at a fraction of the cost of new-car A.B.S systems.

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* Except Chevrolet Caprice Chevrolet LUV, Ford Taurus or quick-release braking systems.

Install Safety in Most Cars in Under 30 Minutes.

A●B●S / TRAX converts the conventional, existing hydraulic brakes of virtually any year, make, and model . . . to anti-lock braking.

* * * *

A●B●S / TRAX Insures You a Big Break on Your Auto Insurance.

Installing A●B●S / TRAX in your car qualifies you for your auto insurance carrier's A.B.S discount - as much as 10%. That 10% discount - year after year - means A●B●S / TRAX can eventually pay for itself 100%! (A certificate for carrier discount comes with A●B●S / TRAX; discounts vary.)

* * * *

Stop Skidding Around with Driving Safety.

The safety of anti-lock braking is no longer a luxury. Soon, A.B.S will likely become a mandatory car safety component, as common as seat belts. But why wait, when lives are at stake every day, at every panic stop? A●B●S / TRAX *Anti-Lock Braking is here - at a price you can live with.* [EXHIBIT A]

(b) **SKID HAPPENS** ™

[Depiction of universal road sign for slippery roadway]

STOP SKIDDING AROUND. ™

A●B●S / TRAX®

ANTI-LOCK BRAKING

* * * *

A●B●S / TRAX² ANTI-LOCK BRAKING BREAKS THE CYCLE OF THE SUDDEN-STOP SKID.

The A●B●S / TRAX² Breakthrough Anti-Lock Braking System interacts with your existing brakes to help give you steering and braking control in an emergency stop.

More precisely, A●B●S / TRAX² automatically absorbs hydraulic pressure "shocks" to your brakes. It functions as a hydraulic "shock absorber" to continuously control the degree of rotational wheel slip at one or more of the wheels during braking.

That means when you slam, A●B●S / TRAX² allocates the precise application of brake pressure at the master cylinder to inhibit wheels from over-reacting or locking. Tires retain traction with the road surface - so you can control- steer to a shorter, straighter, anti-skidding stop.

[Chart depicts two columns. In the first column entitled "STANDARD 1989 SEDAN WITHOUT A●B●S / TRAX," a sequential depiction shows a car stopping at the 30 ft. line, at an angle. In the second column entitled "STANDARD 1989 SEDAN A●B●S / TRAX INSTALLED," a car is shown stopping at the 5 ft. line.]

* * * *

A●B●S / TRAX² STOPS YOUR CAR SHORTER, SURER IN AN EMERGENCY.

Simulation testing has shown that A●B●S / TRAX² Anti-Lock Braking System can shorten crucial stopping distance when aggressively decelerating.

* * * *

FINALLY, ANTI-LOCK SAFETY AT A PRICE YOU CAN SAFELY AFFORD.

The concept of anti-lock braking systems (A●B●S) is not new.

A.B.S. brakes were originally designed by the aerospace industry to keep pilots from losing control during high-speed landings on short runways in bad weather.

European manufacturers introduced electronic A●B●S braking to the automotive industry - but made it available only on expensive new luxury cars, unavailable on cars not originally equipped.

Now, the American technological genius of A●B●S / TRAX² has revolutionized the safe-stopping security of A.B.S. with an all-mechanical system that can be installed inexpensively in any car you are currently driving.

[Two photographs depicted. In photograph identified as Panic Brake Test A, a test vehicle is shown skidding sideways and knocking over orange cones used as lane markers. Below the photograph are the words "Without A●B●S / TRAX: wheels lock, car skids." In photograph identified as Panic Brake Test B, the test vehicle is shown centered between orange cones used as lane markers. Below the photograph are the words "With A●B●S / TRAX: steering, braking in control."]

ALL-THE-TIME A●B●S FOR EVERYDAY, EVERY BRAKE SECURITY.

Because A●B●S / TRAX² is an all-mechanical system, it's active in your car full-time, at all four wheels.

While new-car, electronic A●B●S systems go into action only in an emergency, A●B●S / TRAX² *improves braking effectiveness every time you apply the brakes.*

* * * *

SOME INSURANCE CARRIERS OFFER A BREAK FOR ANTI-LOCK BRAKING.

Because of their safety value, anti-lock brakes (ABS) and airbags may qualify you for a discount on your insurance premium. Each carrier has a different position on the subject of allowance for ABS, but the feature generally results in a reduction of the collision, medical and liability portion of your policy. Such insurance discounts are competitive, so shop around for your best buy.

* * * *

STOP SKIDDING AROUND WITH DRIVING SAFETY.

The safety of anti-lock brakes is no longer a luxury item.

Soon, A●B●S will likely become a mandatory car safety component, as common as seat belts. But why wait, when lives are at stake every day, in every panic stop? A●B●S / TRAX^2 *Breakthrough Anti-Lock Braking is here today at a price you can live with.* [EXHIBIT B]

(c) **ABS Installation Certificate for Insurance Discount**

SEND TO YOUR INSURANCE CARRIER.

THIS IS TO CERTIFY THAT (Please Print) _____ HAS ADAPTED THE A●B●S / TRAX™ ANTI-LOCK BRAKING SYSTEM (ABS) TO THE VEHICLE BELOW. THE A●B●S / TRAX™ ANTI-LOCK SYSTEM IS IN COMPLIANCE WITH THE WHEEL SLIP BRAKE CONTROL SYSTEM ROAD TEST CODE - SAE J46, AND NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, (DOT) 49 CODE OF FEDERAL REGULATIONS CH. V. (10-1-87) EDITION 571-105 - SA "ANTI-LOCK SYSTEM."

* * * * [EXHIBIT C]

PAR. 5. Through the use of the trade names A●B●S / Trax and A●B●S / TRAX^2 and the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A, B, and C, respondents have represented, directly or by implication, that A●B●S / Trax is an antilock braking system.

PAR. 6. In truth and in fact, A●B●S / Trax is not an antilock braking system. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A, B, and C, respondents have represented, directly or by implication, that:

(a) A●B●S / Trax prevents or substantially reduces wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(b) Installation of A●B●S / Trax will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(c) A●B●S / Trax complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

(d) A●B●S / Trax complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

(e) Tests prove that A●B●S / Trax reduces stopping distances by up to 30 % when the vehicle's brakes are applied at a speed of 60 mph; and

(f) A●B●S / Trax provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems.

PAR. 8. In truth and in fact:

(a) A●B●S / Trax does not prevent or substantially reduce wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(b) Installation of A●B●S / Trax will not qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(c) A●B●S / Trax does not comply with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46 ("SAE J46"). SAE J46 sets forth a test procedure for evaluating the performance of antilock brake systems, but contains no performance standard. Moreover, A●B●S / Trax has not been subjected to the testing set forth in SAE J46;

(d) A●B●S / Trax does not comply with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration. The provision referred to establishes only a definition pertaining to antilock braking systems, and A●B●S / Trax does not meet that definition;

(e) Tests do not prove that A●B●S / Trax reduces stopping distances by up to 30 % when the vehicle's brakes are applied at a speed of 60 mph; and

(f) A●B●S / Trax does not provide antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems.

Therefore, the representations set forth in paragraph seven were, and are, false and misleading.

PAR. 9. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A, B, and C, respondents have represented, directly or by implication, that:

(a) In emergency stopping situations, a vehicle equipped with A●B●S / Trax will stop in a shorter distance than a vehicle that is not equipped with the device; and

(b) Installation of A●B●S / Trax will make operation of a vehicle safer than a vehicle that is not equipped with the device.

PAR. 10. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A, B, and C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five, seven, and nine, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time they made the representations set forth in paragraphs five, seven, and nine, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. 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

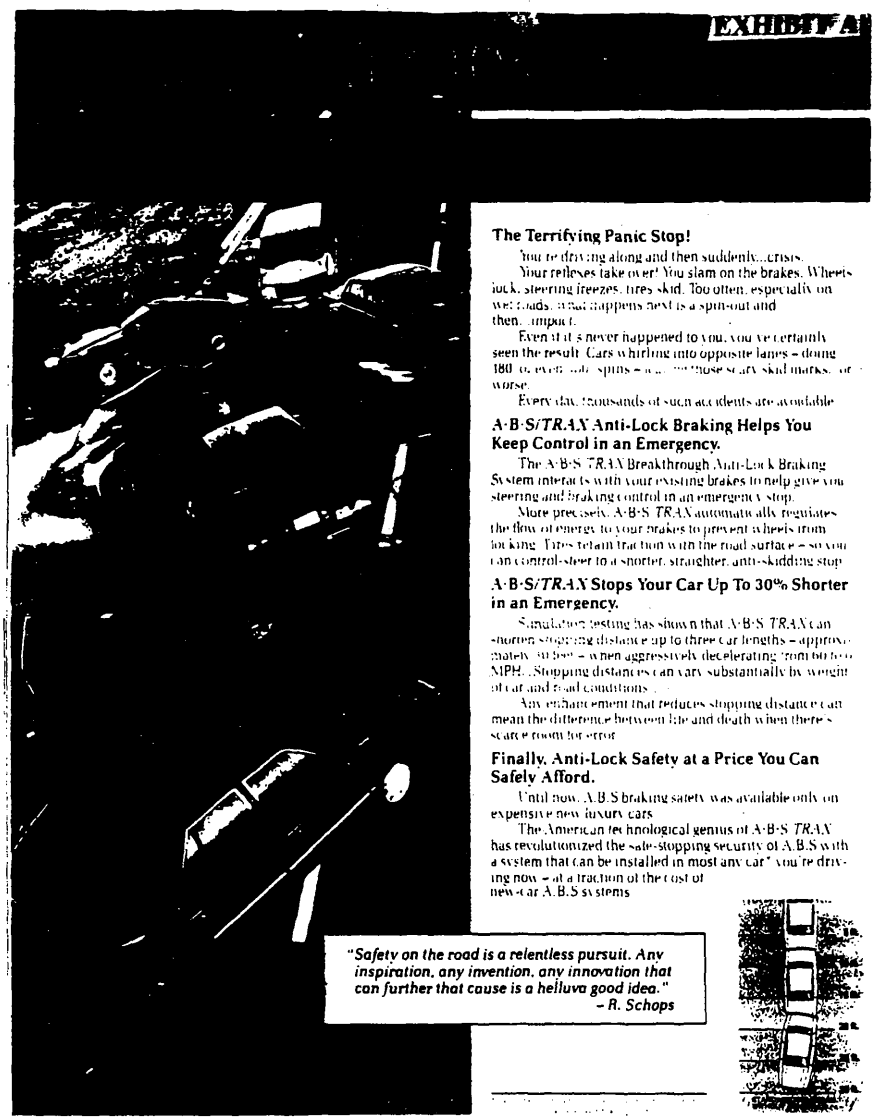


EXHIBIT A
The Terrifying Panic Stop!
You're driving along and then suddenly...crisis.
Your reflexes take over! You slam on the brakes. Wheels lock, steering freezes, tires skid. Too often, especially on wet roads, what happens next is a spin-out and then...impact.
Even if it's never happened to you, you've certainly seen the result. Cars whirling into opposite lanes – doing 180 or even 360 spins – and those scary skid marks...or worse.
Every day, thousands of such accidents are avoidable.
A·B·S/TRAX Anti-Lock Braking Helps You Keep Control in an Emergency.
The A·B·S TRAX Breakthrough Anti-Lock Braking System interacts with your existing brakes to help give you steering and braking control in an emergency stop.
More precisely, A·B·S TRAX automatically regulates the flow of energy to your brakes to prevent wheels from locking. Tires retain traction with the road surface – so you can control-steer to a shorter, straighter, anti-skidding stop.
A·B·S/TRAX Stops Your Car Up To 30% Shorter in an Emergency.
Simulation testing has shown that A·B·S TRAX can shorten stopping distance up to three car lengths – approximately 30 feet – when aggressively decelerating from 60 to 0 MPH. Stopping distances can vary substantially by weight of car and road conditions.
Any enhancement that reduces stopping distance can mean the difference between life and death when there's scarce room for error.
Finally, Anti-Lock Safety at a Price You Can Safely Afford.
Until now, A.B.S braking safety was available only on expensive new luxury cars.
The American technological genius of A·B·S TRAX has revolutionized the safe-stopping security of A.B.S with a system that can be installed in most any car you're driving now – at a fraction of the cost of new-car A.B.S systems.
"Safety on the road is a relentless pursuit. Any inspiration, any invention, any innovation that can further that cause is a helluva good idea."
– R. Schops

EXHIBIT A

Install Safety in Most Cars in Under 30 Minutes.

A·B·S *TRAX* converts the conventional, existing hydraulic brakes of virtually any year, make and model of domestic or foreign car to anti-lock braking. The installation can be completed by a qualified brake mechanic usually in under 30 minutes.

All-The-Time A.B.S for Everyday, Every-Brake Security.

A·B·S *TRAX* is an all-mechanical system, so it's active in your car full-time – unlike new car electronic A.B.S. systems which take effect only in an emergency. A·B·S *TRAX* *improves braking effectiveness every time you apply the brakes* – a safety difference you'll feel from the first moment you drive with it.

The everyday efficiency of A·B·S *TRAX* will also reduce the wear on your brakes, and can even double the life of

A·B·S/*TRAX* Tested Tough To Exceed D.O.T. Standards.

A·B·S *TRAX* has been put to the Department of Transportation (D.O.T.) National Highway Traffic Safety Administration test standards and is designed to operate with a safety factor of *more than 40% above* the maximum stopping levels of brake fluid pressure.

A·B·S/*TRAX* Won't Collide with Manufacturers' Warranties.

Most major auto manufacturers worldwide accept A·B·S *TRAX* technology as an aftermarket safety enhancement [illegible] on course with most cars' warranties. In fact, car companies are encouraging the use of A·B·S *TRAX* engineering as a response to the road safety imperative.

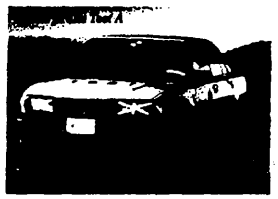
A·B·S/*TRAX* Safety for the Lifetime of Your Car.

A·B·S *TRAX* will help you drive safer throughout the lifetime of your vehicle – the A·B·S *TRAX* Limited Warranty is good for as long as you own your car. And if for any reason the product should malfunction, your car's conventional brakes will continue to perform normally.

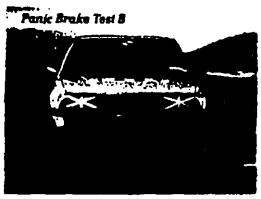
Stop Skidding Around with Driving Safety.

The safety of anti-lock braking is no longer a luxury. Soon A.B.S will likely *become a mandatory car safety component*, as common as seat belts. But why wait when lives are at stake every day, at every point stop? A·B·S *TRAX* *Anti-Lock Braking is here – at a price you can live with.*

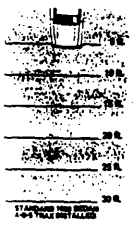
Call 516-777-7070 today for an authorized A·B·S/*TRAX* dealer/installer in your area.



Front A.B.S. *TRAX* wheels [illegible]



With A·B·S *TRAX* steering [illegible]

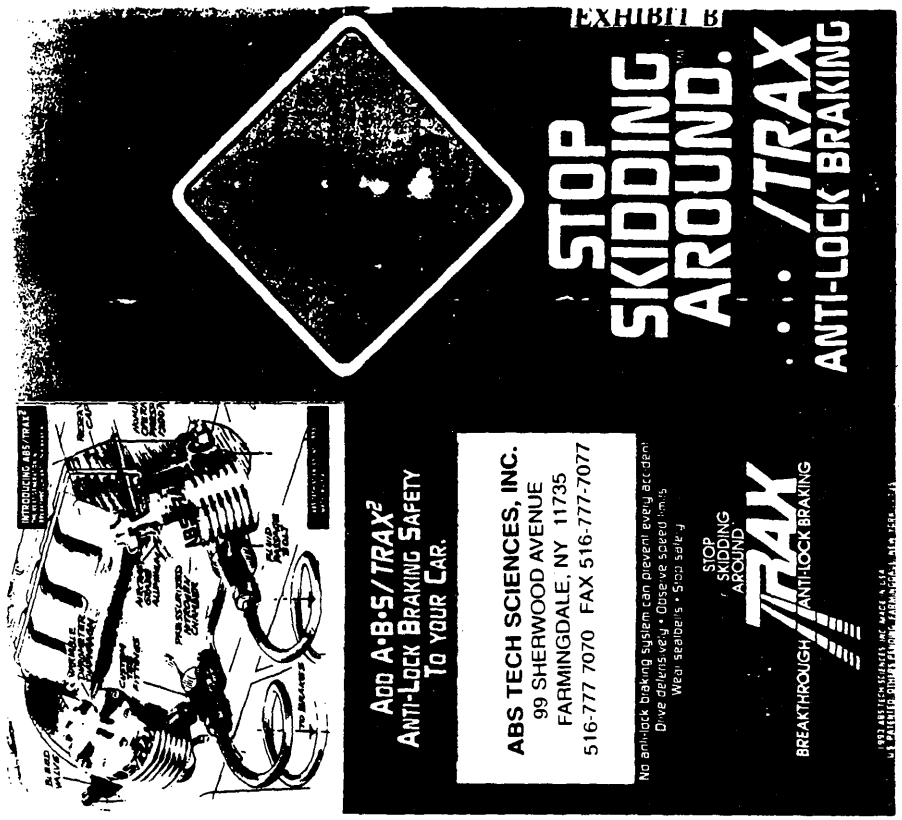


A·B·S/*TRAX* Insures You a Big Break on Your Auto Insurance.

Installing A·B·S *TRAX* in your car qualifies you for your auto insurance carrier's A.B.S. discount – as much as 10%. That 10% discount – year after year – means A·B·S *TRAX* can eventually pay for itself 100%.* A certificate for carrier discount comes with A·B·S *TRAX*. discounts vary.

*No anti-lock braking system can prevent every accident • Drive defensively • Observe speed limits • Wear seatbelts • Stop safely.

EXHIBIT B



SOME INSURANCE CARRIERS OFFER A BREAK FOR ANTI-LOCK BRAKING.

Because of their safety value, anti-lock brakes (ABS) and airbags may qualify you for a discount on your insurance premium. Each carrier has a different position on the subject of allowance for ABS, but the feature generally results in a reduction of the collision, medical and liability portion of your policy. Such insurance discounts are competitive, so shop around for your best buy.

A-B-S/TRAX² MEANS STOPPING SAFETY FOR THE LIFETIME OF YOUR CAR.

Lifetime is not a word used lightly here. The reason A-B-S/TRAX² anti-lock braking is important is because it might save lives. And the A-B-S/TRAX² limited warranty is good for as long as the purchaser owns the car. If for any reason the product should malfunction, your car's conventional brakes will continue to perform in their normal manner. Read the limited warranty that comes with product for a full explanation.

STOP SKIDDING AROUND WITH DRIVING SAFETY.

The safety of anti-lock brakes is no longer a luxury item. Soon, A-B-S will likely become a mandatory car safety component, as common as seat belts. But why wait, when lives are at stake every day, in every panic stop? A-B-S/TRAX² *Breakthrough Anti-Lock Braking is here today and at a price you can live with.*

on the road is a relentless pursuit. Any inspiration, any invention, any innovation that can further that cause

Richard Scarry

THE TERRIFYING PANIC STOP!

You're driving along and then suddenly crisis! Reflexes take over: you slam on the brakes, wheels lock, steering freezes, tires skid. Too often, and especially on wet roads, you lose control, spin-out and then ***impact.***

Every day, thousands of such accidents are avoidable. The key is keeping control of steering during a panic braking situation.

When drivers hit the brakes in an emergency, they lose control. The wheels lock and they are unable to steer the vehicle to a safe, straight, sure stop.

Even if it's never happened to you, you've certainly seen the result: cars whirling into opposite lanes – facing 180° or sometimes 360° spins–leaving those scary skid marks ... or worse.

A·B·S/*TRAX*^{2} ANTI-LOCK BRAKING BREAKS THE CYCLE OF THE SUDDEN-STOP SKID.

The A·B·S/*TRAX*^{2} Breakthrough Anti-Lock Braking System interfaces with your existing brakes to help give you steering and braking control in an emergency stop.

More precisely, A·B·S/*TRAX*^{2} automatically absorbs hydraulic pressure "shocks" to your brakes. It functions as a hydraulic "shock absorber" to continuously control the degree of rotational wheel slip of one or more of the wheels during braking.

That means when you slam, A·B·S/*TRAX*^{2} allocates the precise application of brake pressure at the master cylinder to inhibit wheels from over-reacting or locking. Tires retain traction with the road surface – so you can control-steer to a shorter, straighter, anti-skidding stop.

It's a safety improvement that benefits every driver. *In critical times, even expert professional drivers couldn't duplicate* A·B·S/*TRAX*^{2} *braking control.*

A·B·S/*TRAX*^{2} STOPS YOUR CAR SHORTER, SURER IN AN EMERGENCY.

Simulation testing has shown that the A·B·S/*TRAX*^{2} Anti-Lock Braking System can shorten crucial stopping distance when aggressively decelerating. Stopping efficiency is enhanced because the proactive A·B·S/*TRAX*^{2} mechanical system is pre-calibrated to account for your car's inertial braking dynamics.

Any advantage in shortening stopping distances can mean the difference between life and death when there's scarce room for error. Stopping distances can vary substantially by weight of car and road conditions, so always drive defensively.

FINALLY, ANTI-LOCK SAFETY AT A PRICE YOU CAN SAFELY AFFORD.

The concept of anti-lock braking systems (A·B·S) is not new.

A·B·S brakes were originally designed by the aerospace industry to keep pilots from losing control during high-speed landings on short runways in bad weather.

European manufacturers introduced electronic A·B·S braking to the automotive industry – but made it available only on expensive new luxury cars, unavailable on cars not originally equipped.

Now, the American technological genius of A·B·S/*TRAX*^{2} has revolutionized the safe-stopping security of A·B·S with an all-mechanical system that can be installed inexpensively in any car you are currently driving.

Without A·B·S/TRAX^2 *wheels lock, car skids*

With A·B·S/TRAX^2 *steering/braking in control*

ALL-THE-TIME A·B·S FOR EVERYDAY, EVERY BRAKE SECURITY.

Because A·B·S/*TRAX*^{2} is an all-mechanical system, it's active in your car full-time, at all four wheels.

While new-car, electronic A·B·S systems go into action only in an emergency, A·B·S/*TRAX*^{2} *improves braking effectiveness every time you apply the brakes.* You'll feel the safety difference from the first moment you drive with A·B·S/*TRAX*^{2}.

The everyday efficiency of A·B·S/*TRAX*^{2} will also extend – possibly double – the life of your brakes, and can even reduce tire wear.

INSTALLING A·B·S/*TRAX*^{2} ENHANCES EXISTING BRAKING CAPABILITY.

When installed by a qualified brake mechanic, A·B·S/*TRAX*^{2} converts the conventional brakes on any year, make, model vehicle, whether domestic or foreign, to a higher level of efficiency - performance. Anti-lock braking (ABS) is one of today's most important driving safety improvements and is now available for the vehicle you already own.

A·B·S/*TRAX*^{2} TESTED TOUGH ENOUGH TO EXCEED D.O.T. STANDARDS.

A·B·S/*TRAX*^{2} has been put to the Department of Transportation National Highway Traffic Safety Administration test standards and passed with high marks.

A·B·S/*TRAX*^{2} easily withstood the DOT minimum level of 3000 psi brake fluid pressure. And A·B·S/*TRAX*^{2} continued to function without failure up to 5000 psi – ***60% better*** than the government standard!

Such extraordinary safety ratings are winning A·B·S/*TRAX*^{2} rave reviews around the world. From European automotive enthusiasts, who are embracing A·B·S/*TRAX*^{2} braking technology for safety on their super highways. From the high-risk race track, where A·B·S/*TRAX*^{2} has performed with unprecedented success. And from nationwide police ambulance and fire departments, which are urging the use of the A·B·S/*TRAX*^{2} anti-lock braking product on their fleet vehicles.

A·B·S/*TRAX*^{2} WON'T COLLIDE WITH CAR MANUFACTURERS' WARRANTIES.

Major auto manufacturers around the world understand A·B·S/*TRAX*^{2} technology as an after-market enhancement. So, it's not on a collision course with any car's warranty. In fact, car companies are intrigued by A·B·S/*TRAX*^{2} anti-lock braking technology as an important breakthrough that responds to their own safety imperatives.

EXHIBIT C

STOP SKIDDING AROUND

ABS/TRAX

BREAKTHROUGH ANTI-LOCK BRAKING

ABS Installation Certificate for Insurance Discount

SEND TO YOUR INSURANCE CARRIER

THIS IS TO CERTIFY THAT (Please Print) _____

HAS ADAPTED THE A-B-STRAX™ ANTI-LOCK BRAKING SYSTEM (ABS) TO THE VEHICLE BELOW THE A-B-STRAX™ ANTI-LOCK SYSTEM IS IN COMPLIANCE WITH THE WHEEL SLIP BRAKE CONTROL SYSTEM ROAD TEST CODE SAE J46 AND NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (DOT) 49 CODE OF FEDERAL REGULATIONS CH V (10-1-87) EDITION 571-105 - SA "ANTI-LOCK SYSTEM"

THIS CERTIFICATE IS VALID ONLY WHEN ACCOMPANIED BY INVOICE OF PURCHASE, OR INVOICE OF VEHICLE HAVING THE A-B-STRAX™ ANTI-LOCK SYSTEM INSTALLED AND IS SUBJECT TO PURCHASER'S INSURANCE CARRIER POLICIES ON ANTI-LOCK BRAKING DISCOUNTS. A-B-STRAX™ MAKES NO CLAIMS OR REPRESENTATIONS THAT THE PURCHASER'S INSURANCE CARRIER HAS SUCH A DISCOUNT POLICY

BUYER'S SIGNATURE _____ VEHICLE YEAR/MAKE/MODEL _____

PRESENT MB EAGLE _____ VEHICLE IDENTIFICATION NUMBER (VIN) _____

D SANDERS _____ INSTALLATION DATE _____

REFER ALL INQUIRES TO
AUTOMOTIVE BREAKTHROUGH SCIENCES, INC.
P O BOX 1491, MELVILLE, NY 11747 1-800-4 SAFE STOP

00000070

EX. C

INITIAL DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE
MARCH 3, 1997

I. INTRODUCTION

The Commission issued the complaint in this case and two companion cases on September 27, 1995.

I issued a default judgment in one companion case (D. 9276) on October 16, 1996.

The complaint in this case charges that Automotive Breakthrough Sciences, Inc. ("ABSI"), ABS Tech Sciences, Inc. ("ABSTSI"), and Richard Schops, individually and as an officer and director of these corporations, have violated the Federal Trade Commission Act by representing, through use of the trade names A●B●S/Trax and A●B●S/Trax[2] and statements and depictions in advertisements and promotional materials, that A●B●S/Trax is an antilock braking system whereas, in truth and in fact, A●B●S/Trax is not an antilock braking system. The complaint also alleges that the following representations in respondents' advertising and promotional materials are not true and are, therefore, false and misleading:

(a) A●B●S/Trax prevents or substantially reduces wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(b) Installation of A●B●S/Trax will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(c) A●B●S/Trax complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

(d) A●B●S/Trax complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

(e) Tests prove that A●B●S/Trax reduces stopping distances by up to 30% when the vehicle's brakes are applied at a speed of 60 mph; and

(f) A●B●S/Trax provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems.

The complaint also alleges that respondents have falsely represented that:

(a) In emergency stopping situations, a vehicle equipped with A●B●S/Trax will stop in a shorter distance than a vehicle that is not equipped with the device; and

(b) Installation of A●B●S/Trax will make operation of a vehicle safer than a vehicle that is not equipped with the device.

Finally, the complaint alleges that respondents did not possess and rely upon a reasonable basis that substantiated the alleged representations described above.

On October 10, 1995, respondents filed an answer denying that they had violated the Federal Trade Commission Act as charged.

During the pretrial phase of this case, I issued two summary decisions. The first found that respondents' trade names, the advertising and promotional materials attached to the complaint, and a television ad disseminated by respondents made the alleged claims (Partial Summary Decision, issued May 22, 1996, clarified, May 28, 1996 (hereafter, "Partial Summary Decision (Ad Meaning)")). In the second, I found that respondents' representation that installation of their braking devices will qualify a vehicle for an automobile insurance discount in a significant proportion of cases is false and unsubstantiated (Partial Summary Decision, Oct. 16, 1996 (hereafter, "Partial Summary Decision (Insurance Discounts)")).

Trial in this proceeding was held between October 21, 1996 and December 4, 1996. The record was closed on December 9, 1996 and complaint counsel filed their proposed findings on January 8, 1997. Respondents did not file proposed findings which complied with Section 3.46 of the Rules of Practice. Instead, they filed an out-of-time post trial brief on January 15, 1997. I have nevertheless considered the arguments made in this brief.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and conclusions of law filed by the parties. I have adopted several proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not substantiated by the record or because they are irrelevant.

II. FINDINGS OF FACT

A. The Corporate Respondents' Business And Mr. Schops' Connection Therewith

1. Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc. are New York corporations, with their offices and principal place of business located at P.O. Box 474, Wheatley Heights, New York (Answer, pp. 2, 5).

2. Richard Schops resides in Melville, New York (Tr. 2301).[1] In 1991, he formed ABSI to sell a brake product that he named "ABS/Trax" (Tr. 2367, 2374). He served as the corporate CEO and operated ABSI on a day-to-day basis; only one other person was actively involved in corporate management (Tr. 2301, 2381, 2383). In addition to selecting the product name, Mr. Schops designed the product and corporate logo, and drafted everything in the ABSI ads--including magazine and television ads, brochures bearing his own name, Question and Answer brochures, product packaging, and an insurance discount certificate (Tr. 2374- 78). Mr. Schops is quoted in ABSI's advertising (CX-l, CX-2 (Complaint Exhibits A, B)). Mr. Schops recommended where the ads should be placed, and placed them (Tr. 2378). He designed distributor information and sent it to potential distributors, provided language describing ABSI and ABS/Trax for inclusion in the directory for the major aftermarket equipment trade show (the Special Equipment Manufacturers' Association ("SEMA") show, held annually in Las Vegas, Nevada), and attended SEMA shows on ABSI's behalf to promote ABS/Trax (Tr. 2378-79). In his capacity as ABSI's CEO, Mr. Schops signed agreements with distributors and corresponded with automobile companies and NHTSA (the National Highway Traffic Safety Administration) (Tr. 2379- 82; CX-72, CX-79-A-H, CX-30). He also communicated with suppliers and potential purchasers (Tr. 2384-87).

3. In 1992, after a dispute with his partner in ABSI, Mr. Schops formed Dynamics of Trucking and Transportation ("DTT") and

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[1] The following abbreviations are used in this decision:

F.: Finding number in this decision.
Tr.: Transcript of the proceeding.
CX: Commission exhibit.
RX: Respondents' exhibit.

started selling ABS/Trax through DTT, which made all the representations for ABS/Trax previously made by ABSI. Mr. Schops formulated and controlled the policies, acts and practices of DTT (Tr. 2387-88).

4. Later in 1992, Mr. Schops started selling ABS/Trax through ABSTSI, which also made all of the representations for the product previously made by ABSI. Mr. Schops is an officer and director of ABSTSI. He prepared a variety of advertising and promotional materials bearing the ABSTSI name, attended the SEMA show on ABSTSI's behalf, and signed agreements with product distributors (Tr. 2389-96). Individually or in concert with others he formulates, directs and controls the acts and practices of ABSTSI (Answer, p. 2; Tr. 2389-96).

5. At all times relevant to the complaint, the acts and practices of respondents alleged in the complaint have been in or affecting commerce (Answer ¶ 3; F. 9-11, *infra*).

B. The Claims Made By Respondents For ABS/Trax

6. The ABS/Trax device consists of a metal housing containing a resilient membrane. It is sold in sets of two, so that one may be attached to each of the two hydraulic brake lines of a motor vehicle. The device is a simple hydraulic accumulator, meaning that during heavy brake pedal application, the resilient membrane can expand to accept some brake fluid. When the pedal is released, the brake fluid is returned to the brake lines (Tr. 874; CX-32-M, -Z-24).

7. Respondents have sold various versions of the ABS/Trax device. The original 1991 product was supplied by the Marketex company, which also sold it under the name AccuBrake (Tr. 2422-23; compare CX-1 with CX 35-Z-17). In October 1991, ABSI ceased selling the Marketex product (CX-30-A,-B). In late 1991, respondents started selling a product produced by a Mr. Cardenas (Tr. 2425), which respondents claim to have "upgraded" over time (CX-32-L, -M; Tr. 80). Although the new product was produced by a different manufacturer and had a different shape and size, respondents continued to make all of the same advertising claims for the product (Tr. 2425-26; *see* CX-32-M). From 1993 through 1995, respondents marketed a version of the product under the name ABS/Trax^2, again with the same claims (CX-2, CX-62, CX-63-B, CX-64).

8. ABS/Trax systems were sold to consumers at a price of $459 to $499, and respondents' gross revenue from ABS/Trax sales was approximately $150,000 (CX-99-L (Response to Interrogatories 4a and 4c)). From January 1992 to January 1996, ABSTSI sold 7422 ABS/Trax systems, with revenues of $1,055,000 (Tr. 2441; CX-60-B, -E)

9. Complaint Exhibit A (CX-l) was disseminated in "Automobile Magazine" in October and November 1991, and in "Motor Trend" in December 1991. A print ad also appeared in the November 1991 issue of "Auto Week" (Respondents' Admission 1; CX-99-L (Response to Interrogatory 3)). CX-5, a television ad, ran twice on WNBC-TV, New York, New York, and 30 times on Long Island, New York cable television in October 1991 (CX-99-L (Response to Interrogatory 3); Respondents' Admissions 56-59).

10. In 1991, ABSI sponsored a booth at the SEMA show. SEMA is an association of automotive aftermarket manufacturers, distributors and outlets, and it holds the world's largest automotive aftermarket show, attended by manufacturers, distributors and dealers, every November in Las Vegas, Nevada (Tr. 108-09, 166-67). At this show, ABSI displayed banners and t-shirts and distributed thousands of brochures that repeated the claims made in the magazine ads (Tr. 2399). It also sent hundreds of letters to potential distributors describing the ABS/Trax device as an antilock brake system and repeating most of the claims made in the magazine ads (Tr. 2399).

11. In 1992, 1993 and 1994, respondents attended the SEMA shows to promote ABS/Trax; these SEMA promotions resulted in contracts with various groups to sell the product (Tr. 2400-02). Respondents also provided promotional materials, such as magazine ads, brochures and press releases (CX-2, CX-62, CX-63, CX-64, CX-66, CX-67, CX-68, CX-69), to persons interested in selling the product, including one major retailer (Montgomery Ward) that entered into an agreement to sell it (Tr. 2401-03). The last ad admitted into the record is dated April 1995 (CX-64).

12. ABSI's cost to advertise ABS/Trax in print and television media in 1991 was between $65,500 and $80,600 (CX-99-L). Mr. Schops estimated a total 1991 advertising cost of $100,000 (Tr. 2336). From 1992-1996, ABSTSI spent $17,885 on advertising and media, and $30,472 on SEMA and trade shows, for a total of $48,357 (CX-60-E, -F; Tr. 2401).

13. In my Partial Summary Decision (Ad Meaning), I found that respondents' trade names, the advertising and promotional materials attached to the complaint, and a television ad, CX-5, made the following claims.

A) ABS/Trax is an antilock brake system (Complaint ¶ 5) that complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration (Complaint ¶ 7d, "NHTSA compliance claim") and prevents or substantially reduces wheel lockup, skidding and loss of steering control in emergency stopping situations (Complaint ¶ 7a, "braking control benefits claim");

B) ABS/Trax complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46 (Complaint ¶ 7c, "SAE J46 claim");

C) ABS/Trax provides antilock braking system benefits, including wheel lockup control benefits, at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems (Complaint ¶ 7f, "OEM ABS equivalence claim");

D) ABS/Trax will, in an emergency stopping situation, stop a vehicle in a shorter distance than a vehicle that is not equipped with the device (Complaint ¶ 9a), and tests prove that ABS/Trax reduces stopping distances by up to 30% when the vehicle's brakes are applied at a speed of 60 mph (Complaint ¶ 7e) ("general and specific stopping distance claims"); Partial Summary Decision (Ad Meaning), at 17;

E) Installation of ABS/Trax will qualify a vehicle for an automobile insurance discount in a significant proportion of cases (Complaint ¶ 7b, "insurance discount claim");

F) Installation of ABS/Trax will make operation of a vehicle safer than a vehicle that is not equipped with the device (Complaint ¶ 9b, "comparative safety claim"); and

G) At the time they made the representations set forth in Complaint paragraphs five, seven, and nine, respondents possessed and relied upon a reasonable basis that substantiated such representations (Complaint ¶ 10).

14. Additional promotional materials admitted into evidence also make some or all of the advertising claims alleged in the complaint. CX-14-B, CX-15-B, CX-30-D, CX-31-D, CX-62, CX-63, CX-64, CX-

65, CX-70, CX-76, and CX-77 each identify the product by the trade name ABS/Trax, and thus, make the claim that the product is an antilock brake system. Additionally, many of these ads reinforce this claim by expressly identifying the product as providing "ABS braking safety" (CX-14-B), or as being an "anti-lock" or "ABS" system (*e.g.*, CX-15-B, CX-76-A, CX-30-D, CX-31-D, CX-62, CX-63-A (transmitting CX-63-B, containing this claim)).

15. CX-65 contains copy elements identical to CX-1, elements that I have found convey the braking control benefits, general and specific stopping distance, insurance discount, OEM ABS equivalence, and comparative safety claims. Compare CX-65 with CX-1.

16. CX-76 and CX-77 are "Question and Answer" sheets that expressly state that the ABS/Trax device provides "shorter stopping distances," and that "ABS/Trax has been found to reduce stopping distance up to 30% when aggressively decelerating from 60 to 0 mph." This language is substantially similar to that which I previously found conveyed the specific and general stopping distance claims. Additionally, these sheets contain language substantially similar to that which I previously found conveyed the insurance discount claim:

> Insurance companies save money when people have fewer accidents. That's why they support safety products like A.B.S. by publishing their own literature describing its benefits and by awarding A.B.S. discounts to policyholders. Installing A.B.S. Trax qualifies you for your carrier's A.B.S. discount. . . . While discounts vary, they can often total as much as 10% annually.

(CX-76, CX-77; *see* Partial Summary Decision (Ad Meaning), at 13). Thus, these ads, too, convey the insurance discount claim. *Id.* Additionally, by describing the product as a "safety" product, the Question and Answer sheets also expressly make the comparative safety claim.

17. CX-14-B also identifies the product as providing "retrofit ABS braking safety . . . to stop cars, trucks and motorcycles, shorter, straighter, safer," thus making in an express fashion both the general stopping distance and comparative safety claims. CX-31-D expressly states that the product provides "safety . . . benefits." CX-62 states that "ABS/Trax^2 shortens stopping distances," thus expressly making the general stopping distance claim. Additionally, it expressly conveys the comparative safety claim when it states that "ABS/Trax^2 . . . produc[es] enhanced response and a non-delayed, safer stop" and

makes the assertion that "[s]erious safety on the road is what ABS/Trax[2] makes available to all drivers." CX-63 states that "ABS/Trax shortens stopping distances," thus expressly making the general stopping distance claim. CX-64 expressly states that ABS/Trax[2] "stops cars shorter."

18. Finally, CX-70 is the ABS/Trax product package which, on the outside, expressly makes the braking control benefits and general shorter stopping distance claims when it states that the product "prevents wheels from over- reacting or locking (anti-lock). Tires retain traction to the road surface so the driver can control-steer the car to a shorter, straighter, surer stop." In addition, the packaging contains the language previously found to convey the NHTSA ABS compliance and SAE J46 claims (Partial Summary Decision (Ad Meaning), at 16-17).

19. Respondents intended to make many of the above claims. Mr. Schops knew that the abbreviation "ABS" stood for antilock brake system, and that from 1990 to 1996, auto manufacturers had used "ABS" to refer to antilock brake systems in new car ads widely disseminated to the public (Tr. 2403-04; Respondents' Admissions 67-68). He intended to claim that the ABS/Trax would substantially reduce lockup, skidding and loss of control; and that it complied with the NHTSA ABS definition and with SAE J46 (Tr. 2403- 06). He also intended to make the specific stopping distance claim (Tr. 2415).

C. Substantiation For Respondents' Ad Claims

1. Complaint Counsel's Expert Witnesses

20. Complaint counsel called three expert witnesses who testified about respondents' devices and their comparison with OEM antilock brakes.

a. John W. Kourik

21. John W. Kourik is a licensed professional engineer in the State of Missouri (Tr. 1083). He obtained a B.S. in Mechanical Engineering from Washington University in 1948 and was employed with Wagner Electric, a manufacturer of brake systems, from 1948 until his retirement in 1988. Positions he held at Wagner included Supervisor, Hydraulics Brake Products, Chief Engineer, Brake Products, and Director, Brake Engineering and Aftermarket Services (CX-84-A; Tr. 1073-75).

22. During his 40 years at Wagner, Mr. Kourik was involved in the design, construction and testing of brake assemblies, including construction of various types of hydraulic valves used in brake systems, and in the construction of air brake antilock systems (Tr. 1076, 1081- 82). He was substantially involved in the development of test protocols for Wagner's brakes, the supervision of road tests conducted at three facilities on a fleet of forty test vehicles, and the analysis of test results (Tr. 1076-82, 1089). His experience included testing the effectiveness of antilock systems (Tr. 1082).

23. Mr. Kourik was a long-term member of the Society of Automotive Engineers ("SAE"), an internationally based association of professionals who work on developing standards and recommended practices for the automotive and aircraft industries. Mr. Kourik was involved in the collection and analysis of test data as part of his involvement in SAE committees that developed a brake rating test procedure and a test protocol to evaluate brake linings, each of which was adopted by the SAE (Tr. 1087-88). In addition, Mr. Kourik was the first chairman of the Wheel Slip Brake Control Systems Subcommittee, which developed a SAE-approved test protocol, SAE-J46, designed to distinguish antilock systems from non-antilock systems and to enable an antilock manufacturer to fine-tune a system during the development process (Tr. 1090-91). Mr. Kourik also served as a member of the Brake Task Force of the Truck-Trailer Manufacturers Association (CX-84-A), in an effort to ensure compatibility of antilock systems on trailers with those on the tractors that hauled them. This twenty-year effort required the evaluation of antilock system test data (Tr. 1093).

24. During his career Mr. Kourik has reviewed hundreds of stopping distance tests and hundreds of wheel slip control tests, including wheel slip control tests on passenger cars (Tr. 1118-19). Mr. Kourik is an expert in the design and application of brake systems, their components, actuating systems and control systems, and in the analysis of brake system testing, including stopping distance and wheel slip control testing (Tr. 1094).

b. James G. Hague

25. James G. Hague is a project engineer working with NHTSA's Office of Defects Investigation ("ODI") at the Vehicle Research and Test Center ("VRTC"), which conducts investigatory testing to assist

in ODI's vehicle safety investigations (CX-92-A; Tr. 33-37). While in the military, Mr. Hague received training and had several years of experience with aircraft mechanics, including aircraft hydraulic and brake systems, which are similar to automotive hydraulic and brake systems. He continued to be responsible for aircraft maintenance in private employment for six years after leaving the military (Tr. 744-52). In 1979, Mr. Hague enrolled in Ohio State University ("OSU"). His university experience included course work in auto engineering and braking systems and extracurricular activities involving vehicle design and construction. In 1983, he received a B.S. in Mechanical Engineering from OSU (Tr. 752-56).

26. In 1983 Mr. Hague became a contract employee at NHTSA's VRTC in East Liberty, Ohio. VRTC conducts vehicle and vehicle component tests for NHTSA, including testing for ODI. Mr. Hague was a project or test engineer, providing technical expertise and support in the development of test protocols, test designs, the conduct and supervision of testing, and the deduction, analysis and presentation of the data (Tr. 761). His specific assignment included brake testing (Tr. 762). From 1984 through 1989, Mr. Hague held various positions, including service as a test engineer on hydraulic systems, as a test engineer on power industry equipment, and as president of a company that developed and marketed software for use by test engineers (CX-92; Tr. 764-68).

27. In 1989, Mr. Hague returned to VRTC as a contract employee. There, he provides technical expertise and support to VRTC in the development of test protocols, the conduct of testing, and the analysis and presentation of test data (Tr. 761, 769). His tests are investigatory, designed to determine whether there is a safety-related defect in an automotive system, and if so, what the consequences are. He is assigned most of the brake investigations that come to VRTC. In this position, he has conducted numerous tests of braking systems, and authored twenty-eight reports regarding the results of his investigations of vehicle systems (Tr. 771-83; CX-92-B, -C).

28. Mr. Hague's position requires expertise in passenger cars and light trucks and extensive knowledge of testing. Mr. Hague is an expert in passenger car and light truck systems, particularly brake systems, and in passenger car and light truck testing, particularly brake testing (Tr. 784).

c. John Hinch

29. John Hinch is Lead Engineer in the Office of Defects Investigation of NHTSA. He obtained a B.S. degree in Atmospheric and Oceanic Sciences from the College of Engineering at the University of Michigan. His course work in that program involved numerous engineering courses. Subsequently, he took masters level classes in general and mechanical engineering (CX-94; Tr. 1868-72).

30. From 1975 to 1978, Mr. Hinch was employed by NHTSA as a mechanical engineer, designing tests to evaluate the traction generating potential of tires, specifying control procedures and test instrumentation, analyzing the test data and preparing the reports (Tr. 1872-81). From 1978 to 1989 he was employed as an engineer at ENSCO, Inc., a research and development company, where he was responsible for testing of automotive systems and the interaction of automobiles with other systems. While at ENSCO, he served as lead engineer designing and constructing a test facility for the Federal Highway Administration. During his career at ENSCO, Mr. Hinch conducted over two hundred full-scale crash tests, calibrating equipment, processing the data after the test, and preparing or conducting final review of the project reports (Tr. 1882-89).

31. In 1989, Mr. Hinch returned to NHTSA as an engineer assisting the Chief of its Crash Avoidance Division. While in this position he designed tests to analyze what vehicle properties are associated with rollover crashes, and analyzed the resulting data (Tr. 1891-93). In 1992, he moved to ODI as a defect engineer, where he investigated alleged safety defects in school bus and heavy truck fleets, critically analyzing test data submitted by the fleet vehicle manufacturers to determine whether their data was competent and reliable, directing the conduct of tests to evaluate the validity of defect complaints, and writing detailed scientific reports to document the conclusions of investigations (Tr. 1894-96).

32. In 1994, Mr. Hinch was promoted to the position of Technical Assistant to the Director of ODI, where he provides support to the director on the technical issues raised in each of the two to three hundred investigations performed by ODI each year, supervises junior engineers in the development of scientifically sound investigation techniques and test protocols, and critically reviews test data submitted by manufacturers. Since 1995, he has been in charge of all testing conducted at VRTC, ensuring that such work is performed in

a competent manner; he also gives guidance to testing conducted at other locations such as the Aberdeen Proving Grounds, where seat-belt buckle testing is conducted (Tr. 1896-99).

33. Mr. Hinch has investigated and tested antilock brakes on school buses, has been involved in component testing on antilock brake systems, and has studied the traction generating potential of ABS-type controllers (Tr. 1902-03).

34. Mr. Hinch has written more than twenty different technical reports and papers, some of which have been published by the SAE (Tr. 1881-82). He is a member of the SAE and the National Safety Council, another professional society (Tr. 1882).

35. During his career, Mr. Hinch has been involved in the design and analysis of brake testing protocols. He has been responsible for the design of scientifically reliable test protocols to test various aspects of automobile performance, including braking performance, and is also responsible for the evaluation of such testing. Mr. Hinch is an expert in vehicle testing, vehicle test procedures and the analysis of data obtained from vehicle testing (Tr. 1900).

2. The Function of Automotive Brake Systems

36. The function of a motor vehicle's brake system is to slow or stop the vehicle. Hydraulic brake systems use an incompressible fluid to create pressure within a closed system of brake lines. When the driver pushes on the brake pedal, the brake lines transmit this pressure through the master cylinder to wheel cylinders or brake caliper pistons, which, in turn, apply force to the brake linings or pads (CX-102-Z-18; Tr. 786-89). This produces a brake torque at the axle which is transmitted to the tire/pavement interface (Tr. 789).

37. When the wheels slow down relative to the ground, slip is caused, generating horizontal tire-road forces. Wheel slip refers to the difference between the angular velocity of the free rolling wheel and the angular velocity of the braked wheel, divided by the angular velocity of the free rolling wheel, expressed as a percentage (CX-l03-B; Tr. 789-90, 1119-20). Stated more simply, wheel slip refers to the proportional amount of wheel/tire skidding relative to vehicle forward motion (CX-l02-J n.27). The amount of brake force developed at the tire/road interface is a function of the amount of wheel slip (CX-103-C; Tr. 789-90). As brake application is increased, the slip at each wheel increases, thus increasing the braking forces on the vehicle. When slip proceeds beyond 20%, however, brake force starts to fall

off subtly. More important, after 20% slippage, the ability of the tire/road contact spot to produce lateral force generation--necessary to make turns--falls precipitously (Tr. 790-91). An example of this is when a driver attempts to turn on clear ice: the vehicle will not turn, because there is severely limited lateral force generation capability (Tr. 791).

38. At 100% wheel slip, the wheels are locked and no longer rotating (Tr. 791). Wheel lockup occurs whenever the brake force generated at the road/tire interface exceeds the capacity of the pavement and the tire interface to produce that force. The friction, or "mu" of a road surface, referring to the ability of a given surface to produce a frictional force, is a factor in wheel lockup. Dry concrete is a high friction surface; ice is a very low friction surface. Vehicle speed is also a factor in lockup. However, wheel lockup can occur at any speed, and on a surface of any level of friction, if the driver applies sufficient force (Tr. 791-94; CX-l03-D, -E).

39. Certain risks are associated with wheel lockup. If front wheels lock first, braking force is diminished and the stopping distance is extended. Additionally, when the front wheels lock, there is no lateral force generation capability, and the driver in unable to steer. If rear wheels lock first, the vehicle typically spins out of control (Tr. 796).

3. The Operation of Antilock Brake Systems

40. Antilock brake systems are designed to maintain maneuverability and controllability during braking, under all operating conditions, by controlling wheel slip (CX-103-C, -D, CX-102-Z-22). NHTSA defines an antilock system as "a portion of a service brake system that automatically controls the degree of rotational wheel slip at one or more road wheels of the vehicle during braking" (CX-37-A; Tr. 1120).

41. The SAE publication "Antilock Brake System Review--SAE J2246" ("SAE J2246"), similarly defines an antilock brake system as "[a] device which automatically controls the level of slip in the direction of rotation of the wheel on one or more wheels during braking" (CX-l03-A). SAE publications are regarded as authoritative by experts in the braking field (Tr. 1125, 1909). Although the document where this definition appears does not include information about aftermarket devices, it is pertinent because it sets forth the

fundamentals of ABS and the development of ABS systems (CX-103-A, -B, -C).

42. In order to control the "degree" or "level" of wheel slip as set forth in the NHTSA and SAE definitions, an ABS system must have components to detect what the rotational wheel slip is, even before it needs to be controlled. Thus, it needs sensors at the road wheels or the drive train that measure the rate of rotation of the road wheels. It also needs a computational device that can measure any change in the rotation of the wheel over time and compute the wheel slip, so as to evaluate whether lockup is approaching. If so, the system must be able to send signals to an actuator or control device to reduce the line pressure at the wheel, reducing brake force so the wheel can continue rolling at a more appropriate speed (Tr. 800-01, 1120-21, 1750-55). These components are necessary because the only way to control a system is to know whether the system is generating error (*i.e.*, to know what level of slip exists, and whether it is excessive) and to be able to affect the processes to correct the system back to the desired point (*i.e.*, to be able to return slip to the required level) (Tr. 802). A system that can sense the rotation of a wheel at a given point in time, but cannot sense the vehicle's speed and does not know the wheel's immediate past history of wheel rotation, cannot function as an antilock system, because it will not be able to calculate changes in wheel slip, and thus control the degree to which wheel slip is allowed (Tr. 1121-22).

43. Brake engineers generally understand ABS to mean a portion of a service brake system that automatically controls the degree of rotational wheel slip during braking by: (1) sensing the rate of angular rotation of the wheels; (2) transmitting signals regarding the rate of wheel angular rotation to one or more devices which interpret those signals and generate responsive controlling output signals; and (3) transmitting those controlling signals to one or more devices which adjust brake actuating forces in response to those signals (CX-102-G, -I). This definition reflects the meaning of ABS as it has been generally understood among brake engineers since at least 1990 (Tr. 1123-25).

44. In 1995, NHTSA amended its definition of an antilock brake system to adopt the definition set forth in F. 43 (CX-102). The new regulation clarifies the definition (Tr. 1122, 157) but does not substantively change it (Tr. 156-58); compare F. 42 with F. 43 (elements

of this new definition are consistent with elements required to comply with the prior definition).

45. In SAE J2246, SAE identifies the components of an antilock brake system as: (a) sensors to determine the wheel speed and the vehicle speed; (b) control logic to process the sensors' signals and determine the desired regulation of the brake pressure; (c) a means to implement the control logic; and (d) a means to regulate the brake pressure as dictated by the control logic (CX-l03-L; Tr. 1126).

46. SAE states that, "in a typical application, variable reluctance sensors are used for wheel speed sensing. The vehicle speed is estimated from the wheel speeds, eliminating the need for a separate vehicle speed sensor. The control logic is implemented via microprocessor software in an electronic controller. . . . A wiring harness links the various sensors, the displays, the controller, the vehicle electric system, and the modulator. The brake pressure regulation is typically done with the modulator employing solenoids that close or open different fluid paths to build or decay the brake pressure at the wheels" (CX-l03-L; Tr. 1126).

47. Factory-installed ABS systems widely advertised to consumers by auto manufacturers consist of wheel sensors, electronic signaling mechanisms, ABS computers, and hydraulic modulators (Respondents' Admission 71). These systems control the degree of rotational wheel slip during braking by: (a) sensing the rate of angular rotation of the wheels; (b) transmitting signals regarding the rate of wheel angular rotation to one or more controlling devices which interpret those signals and generate responsive controlling output signals; and (c) transmitting those controlling signals to one or more modulators which adjust brake actuating forces in response to those signals (Respondents' Admission 69).

48. The ABS/Trax device does not sense the rate of rotation of the wheels and does not know what the degree of wheel slip is (Tr. 2434). The ABS/Trax and ABS/Trax^2 devices advertised by respondents do not control the degree of rotational wheel slip during braking by: (a) sensing the rate of angular rotation of the wheels; (b) transmitting signals regarding the rate of angular rotation to one or more controlling devices which interpret those signals and generate responsive controlling output signals; and (c) transmitting those controlling signals to one or more modulators which adjust brake actuating forces in response to those signals (Respondents' Admission 70).

49. The ABS/Trax device is an accumulator. Accumulators are part of some ABS Systems, but are not ABS themselves. In ABS systems that include accumulators, if the wheel sensors send signals that tell the computer that the wheel is beginning to slip, the computer sends a control signal to the modulator to close the isolation valve, which prevents the driver from pushing further fluid from the master cylinder out to the caliper. Then, the computer issues control signals to the controller to open a dump valve, which allows the brake fluid to be released from the brake line and to be stored in a low-pressure accumulator. When sufficient fluid has been dumped so that the wheel begins to spin again at about 10% slip, the computer signals to the modulator to increase pressure. A high-pressure electrical pump then restores fluid from the accumulator to the brake line, as needed, to increase wheel slip, until slip again reaches about 30%, at which point the cycle begins again. The accumulator in such an ABS system is simply a storage device that supplies fluid to the pump, which in turn supplies the fluid to the brake lines. This is unlike respondents' accumulators, which are plumbed directly into the brake lines to provide a supply of energy for braking force (Tr. 876-80). Accumulators are not themselves ABS, because accumulators alone do not have the capacity to measure wheel speeds, make error determinations, and issue control signals to adjust the brake torques and braking response to actively and automatically control the degree of rotation of wheel slip of one or more of the wheels during the braking maneuver (Tr. 876). Thus, the ABS/Trax device does not have the components needed to operate as an ABS system.

4. Testing Antilock Brake Systems

50. To demonstrate that a product controls the degree or level of rotational wheel slip (and thus prevents or substantially reduces wheel lockup, skidding and loss of control), as called for by the NHTSA and SAE definitions, adequate, competent and reliable testing is needed that compares the performance of a vehicle equipped with the purported ABS system, to the performance of the same vehicle not equipped with the system, under controlled conditions, during a variety of driving maneuvers where controllability during braking is at issue. The driving maneuvers should include stops on a variety of road surfaces, such as changing friction surfaces (*e.g.*, where the road changes from dry to slick, or vice versa), split friction surfaces (where one side of the road is high friction and the other side of the road is

low friction), a low friction lane change, or a low friction curve maneuver (Tr. 1127-31; 802-12, 1907-08). Some testing involving curves or turns is important because the lateral force generation capability of a vehicle--that is, its ability to maintain maneuverability during a stop--is an important aspect of wheel slip control (Tr. 806-09). During the testing, sufficient pedal force should be applied so that lockup would occur, but for the operation of the device (Tr. 803-04, 1909-10, *see* Tr. 1128).

51. Conditions that should be controlled include the condition of the tires and brakes, the road surface, the velocity at the onset of braking and the brake application (Tr. 804-05, 1129-30). One way to ensure that the tire, brake and road surface conditions are as similar as possible is to run the tests with and without the device on the same vehicle as contemporaneously as possible (Tr. 804-05).

52. Additionally, proper instrumentation to record the parameters of interest is needed, including the velocity of the vehicle at the commencement of the stop, the brake pedal force applied, the line pressures developed in the brake system during the stop (measured, for example, by a brake force transducer), the wheel slip (calculated, for example, from data derived from wheel sensors), and whether the wheel lockup had occurred or was being modulated (Tr. 1129-31, 802-12). A visual display of conditions to ensure that the driver can repeat the pedal force he used in the prior test is also needed (Tr. 810, 1132).

53. Results of an antilock brake test should be adequately documented (Tr. 1287) (requiring "documentation that's without dispute"). If a test shows that a braking device shortens stopping distance, that alone does not demonstrate that it is an antilock brake system, because it does not show that the device eliminates or controls wheel lockup (Tr. 1132, 812). However, if a stopping distance test shows that a vehicle experiences lockup, it does demonstrate that wheel slip has not been controlled (Tr. 1132, 813). Anecdotal consumer reports that a device reduced lockup or prevented accidents do not provide competent and reliable evidence that a device is an antilock brake system, because consumers do not have the expertise required to evaluate an antilock system, and because they cannot tell whether or not specific wheels experienced lockup (Tr. 813, 1132, 1912).

54. The SAE has published a test procedure for evaluating antilock systems that is widely recognized throughout the automotive testing industry (Tr. 829). SAE J46, originally adopted in July 1973 and re-approved without change in 1993, sets forth a test code for evaluating whether or not a product controls wheel slip (CX-39, CX-40; Tr. 1133-34). The objectives of the test procedure are to separate antilock systems from non-antilock systems and to enable antilock manufacturers to evaluate alternatives in systems under development (Tr. 1091). SAE J46 identifies appropriate instrumentation, test facilities, and vehicle preparation, and sets forth four series of recommended road test maneuvers, including: (a) constant friction surface tests at various speeds; (b) split friction surface tests, (c) changing friction (high to low friction) tests; and (d) lane change tests (CX-40-A, -D; Tr. 1134-35). SAE does not set forth a required pedal force, but assumes that sufficient force would be applied to cause lock-up, but for the operation of the device (Tr. 1136). SAE J46 does not set forth exact parameters of testing, but was designed to permit each test facility to select road conditions and test conditions that were appropriate to it, considering that road surfaces varied among test facilities, and to develop comparative data (Tr. 1135).

5. Testing Comparative Stopping Distance

55. Scientifically sound evidence that one braking system provides shorter stopping distance than another system (that is, a comparative stopping distance test) requires competent and reliable testing that compares the performance of a vehicle with the device engaged to the performance of the same vehicle with the device disengaged. Braking a vehicle is an energy conversion process in which the vehicle's kinetic energy is changed into heat energy. Because the kinetic energy of the vehicle is proportional to the square of the velocity, even minor variations in speed can result in significant differences in the distance traveled. Accordingly, the speed that the vehicle is traveling at the point the brakes are applied must be carefully controlled. When there are minor variations in speed, the stopping distance may be corrected by following an SAE-approved procedure which requires that the vehicle be equipped with instrumentation that captures and records the actual speed of the vehicle at the point of braking, and the actual distance traveled from the point the brake was applied until the point the vehicle comes to rest (Tr. 814-19, 1160-66, 1916-18).

56. All other elements of the testing, *i.e.*, the tires, brakes, and the road surface must be controlled. Tests with and without the device should be conducted sufficiently close in time to avoid the possibility of an independent variable causing any apparent difference in results. The driver must be provided with a protocol for applying force to the pedal, so as to control the applied force, because differences in pedal apply time can affect stopping distance. One appropriate protocol is to tell the driver, under each condition, to use whatever brake pedal force is necessary to bring the vehicle to a stop in the shortest distance possible (Tr. 822, 1160-66, 1913-16, 2008). A minimum of three stops should be conducted to determine whether the results produced are consistent (Tr. 822).

57. A report regarding stopping distance tests should reflect the recording equipment used, show some evidence that information was taken from recorded data, and demonstrate that appropriate controls were used (Tr. 1165). It should show what the test protocol was, and what instructions were given to the driver (Tr. 1986-87, 2010).

58. Reports of consumer experiences do not provide competent and reliable evidence that a device provides comparative stopping distance benefits (Tr. 823-24). Test reports reflecting use of a tape measure to measure stopping distance are not reliable because they suggest that: (a) the tester was not aware of the vehicle's precise speed at entry, and thus was not able to correct for differences in kinetic energy; and (b) there was no certainty regarding the point at which braking commenced. An onlooker cannot reliably tell at what point the driver first applied the brake, and a driver cannot reliably brake at a predetermined point on the road (Tr. 824, 1164-65, 1918). Even minor errors regarding the point that braking commenced are significant, as a vehicle traveling at 60 miles per hour is moving at 88 feet per second; thus, an error time of even a tenth of a second can result in an 8.8 foot error in measured distance (Tr. 1163-64, 1919).

59. A competent and reliable test designed to measure stopping distance and wheel slip control would cost approximately $50,000 (*see*, Tr. 2202, Tr. 901).

6. The Performance of ABS/Trax

a. Evidence Relied Upon By Respondents

(1) Mr. Schops' Opinion Evidence

60. In support of the various ABS and ABS performance claims, respondents rely upon Mr. Schops' opinions regarding the performance of the ABS/Trax device and of factory-installed ABS; however, only competent and reliable testing, not opinion evidence, can establish that a device shortens stopping distances or provides wheel slip control (F. 50, 58). Moreover, Mr. Schops' opinions are not reliable and probative because he lacks the expertise to evaluate the performance of ABS systems or the ABS/Trax device. At trial, Mr. Schops did not offer himself as an expert witness, and his background and training do not demonstrate that he has the requisite expertise. Mr. Schops is a high school graduate who, from 1960 to 1970, was employed by various advertising agencies and media, selling advertising and advertising time (Tr. 2365-66). From 1970 to 1991 he started and operated several different businesses and served as a marketing consultant (Tr. 2367). He has no engineering degree, is not a member of the SAE, and has never attended classes on ABS systems given by any of the ABS manufacturers (Tr. 2367).

61. Mr. Schops' experiences driving vehicles equipped with aftermarket devices (Tr. 2373), and which he admits are anecdotal (Tr. 2416), are not reliable or probative because consumers do not have the expertise needed to evaluate an antilock system or to tell whether or not specific wheels experienced lockup (Tr. 1132, 813).

(2) AccuBrake Testing

62. In support of their claims, respondents also rely upon reports of certain tests. In October 1991, when respondents first disseminated their claims, ABSI had not conducted any tests to determine whether or not the ABS/Trax device controlled wheel slip (Tr. 2415). Instead, they relied on information provided by their supplier, Marketex, with regard to the performance of the AccuBrake system, the first ABS/Trax device sold by ABSI. The AccuBrake information is the only written test report Mr. Schops recalls seeing, and on which he relied in writing ads. It was an anonymous, one page report of stopping distance tests which demonstrated that when the AccuBrake system was installed on a vehicle, that vehicle continued to experience lockup (CX-30-F; Tr. 2415-16). This test supports the

conclusion that the ABS/Trax is not an antilock brake system, and does not constitute substantiation for respondents' claims (*see* Tr. 1132; Tr. 813).

63. The AccuBrake test report indicates that the device tested shortened stopping distances from 119 feet to 106.6 feet, or by 11%. However, the report shows that the tester dismissed the shortest of the test runs without the device; if this run is included, the "before" stopping distance drops to 115 feet, and the stopping distance improvement drops to 7.3% (CX-30-F; *see* Tr. 2418). Finally, the test report does not state how the stopping distances, each of which is reported as a whole number, were measured (CX-30-F). Mr. Schops testified that the stopping distances may have been measured with a tape measure (Tr. 2419). Stopping distance measurements conducted with a tape measure are not reliable (F. 58).

(3) Thailand Testing

64. Respondents also rely upon a videotape of testing conducted in Thailand, the date of which is not indicated (Tr. 2339). Mr. Schops testified that this test was conducted on "a mechanical ABS system that we had" (Tr. 2371). The entire tape is narrated in a foreign language, and the graphics are also foreign. There is no English translation. The tape shows a series of stopping distance runs at a racetrack facility. A vehicle would pass a point at which a person held a checkered flag; thereafter the vehicle would come to a stop, and stopping distances were measured with measuring tapes (Tr. 2024-31, 1242, 2438). The tape did not show that the vehicle was properly instrumented to record the speed at which braking commenced, that reliable means were utilized to measure the stopping distances, that sufficient runs were made to provide reliable data, or that stopping distances were corrected to accommodate differences between the actual speed and the target speed. Thus, it does not provide reliable evidence regarding stopping distances (Tr. 1242, 2024-31).

65. The Thailand test video tape shows that, with or without the device installed, the vehicle's wheels locked up almost immediately upon brake application (Tr. 2031). Thus, the tape does not provide competent and reliable scientific evidence that the ABS/Trax device controls the degree of wheel slip (Tr. 2032). A written report of the Thai testing also did not indicate that any appropriate evaluation of

the device's antilock brake system capacity was made, nor did it provide any reliable stopping distance data (Tr. 1242-47, 2023-24).

(4) Australia Testing

66. Respondents also rely on tests conducted by an Australian test entity in December 1993 (Tr. 2351-53, 2434-37). Mr. Schops testified that he was not certain on what version of his product the test was conducted (Tr. 2372). The report states that, "the ABS/Trax-fitted vehicle gained higher deceleration rates in all testing and, as such, shorter stopping distances" (Tr. 2352). In fact, the test organization tested only for deceleration levels, and did not directly measure stopping distances. It is not possible to reliably compute stopping distances from deceleration levels, because deceleration is not constant (Tr. 2019-20). Therefore, the report does not provide competent and reliable evidence that the ABS/Trax device will shorten stopping distances (Tr. 2021).

67. The report of the Australian testing also states that when the ABS/Trax device was installed, the vehicle continued to experience lockup, but less often (Tr. 2352-53). That test, however, nowhere states that the device tested controlled the degree of wheel slip (Tr. 2436). The report does not show that split mu or lane change testing was conducted, or that the testers used instrumentation such as wheel sensors to compare the degree of wheel slip with and without the device. The report does not show specific occasions where wheel lockup occurred without the device engaged, so that one could evaluate what percentage of the time the ABS/Trax device prevented wheel lockup. The report does indicate that during the testing, the wheels locked up with the device installed, and that driver control was required for unlocking (Tr. 2434-37). Thus, the report demonstrates that the device tested was not an antilock brake system (Tr. 1252); and it does not provide competent and reliable evidence that the ABS/Trax device controls the degree of wheel slip (Tr. 2021). In any event, Mr. Schops did not rely on this test when making advertising claims (Tr. 2438).

b. NHTSA Investigation and Testing

68. In 1991, NHTSA's Ohio-based VRTC became aware of aftermarket devices advertised as antilock brake systems which would also shorten stopping distances. To evaluate the performance of these devices, VRTC conducted tests on an AccuBrake device.

Subsequently, ODI opened a new defects investigation to assess the safety performance of devices sold by ABSI and two other companies (CX-32-K). As part of ODI's investigation, VRTC conducted carefully controlled road testing designed to evaluate the capacity of respondents' devices to prevent wheel lockup, skidding and loss of control under a variety of road conditions where, in real life, a vehicle without antilock brakes will experience wheel lockup, resulting in loss of vehicular control (CX-32-Z-2l, CX-34). These tests demonstrated that none of respondents' devices prevented lockup in those circumstances, that the test vehicle performed no better with the devices turned on than it did when they were turned off, and that the performance of the various devices was extremely similar. *See generally*, CX-34. By contrast, the identical vehicle equipped with factory-installed ABS and subjected to the same road tests maintained control. *Id.* NHTSA concluded that further allocation of resources to its investigation was unlikely to lead to an order to recall the devices and closed the defect investigation. However, because the testing and investigation indicated that the devices did not perform as claimed in advertising, the matter was referred to the Federal Trade Commission (CX-32-G).

(1) 1991 Testing

69. CX-35 is a report of tests that VRTC performed in 1991 on the AccuBrake device originally marketed by ABSI in 1991 (Tr. 2384, 2422-23). These included straight line stopping distance tests, as well as stopping distance tests during a lane change and on a 500-foot radius curve, on a variety of surfaces (CX-35-L; Tr. 1172). The test vehicle was properly instrumented for stopping distance tests, and included a lockup box designed to permit visual indication of individual wheel lockup (CX-35-H; Tr. 1171-72). Stopping distances were corrected to account for any difference between the target speed and the actual speed (Tr. 1173; CX-35-K). Tests with and without the device were conducted on the same vehicle, a Toyota pickup truck. An adequate number of runs were made and the parameters of the test were carefully controlled (Tr. 1173-74, 1177; CX-35-S (tests with and without device conducted in series so as to assure consistent conditions)). CX-35 was performed in a competent manner and the results are reliable (Tr. 1177).

70. The AccuBrake device did not reduce stopping distances; indeed, stopping distances were somewhat longer, on average, when the device was installed (CX-35-Z-3). The results of 69 different tests conducted when the vehicle contained no cargo provided an average stopping distance without the device of 152 feet, whereas the average stopping distance of the same number of runs with the device installed was 165 feet (CX-35-Z-2, CX-35-S, -T). An additional series of tests were conducted with the vehicle loaded with cargo. Two drivers conducted these tests, with each driver conducting a complete set of tests with and without the device (*i.e.*, each made 66 runs with the device, 66 without). The first driver's average stopping distance without the device was 172 feet, whereas his average with the device was 181 feet. The second driver's average stopping distance without the device was 161 feet, and his average with the device was 162 (CX-35-Z-2, Z-l9-2l). The results of CX-35 provide competent and reliable evidence that the AccuBrake device does not shorten stopping distances (Tr. 1177; CX-35-Z-3).

71. The report also provides results of 60 mph stopping distance tests (CX-35-T, -W). In the first series of these tests, the AccuBrake device extended the stopping distance by 36 feet (from 173 to 209 feet), or by 20%. In the second series of 60 mph tests, the device extended the stopping distance by 3 feet (from 217 to 220), or by 1.3%. In the third series, the device shortened the stopping distance from 202 to 194 feet, or by 4.1% (CX-35-T, -W). These tests provide competent and reliable evidence that the AccuBrake device tested does not shorten stopping distances by up to 30% when the brakes are applied at 60 mph. (*See* Tr. 1177).

72. In VRTC's 1991 stopping distance tests, the AccuBrake device tested failed to prevent lockup in 26 of 30 panic stop tests (CX- 35-S (reference to "full dump" tests), -U). Thus, it did not perform as an antilock device (CX-35-U; Tr. 1132, 813). Indeed, in some instances, rear lockup occurred with the device engaged, where it had not occurred with the device disengaged (CX-35-U).

(2) 1992-93 Testing

73. CX-34 reports the results of VRTC tests performed in 1992 and 1993 on two versions of the ABS/Trax device: one purchased in July 1992, and a second that Mr. Schops provided in October 1992 and which he described as "upgraded through 23 additional

`patentable' changes" (CX-32-L). One of these was the Cardenas version of the ABS/Trax device (Tr. 2427).

74. Four different road braking tests were conducted to determine if the two ABS/Trax devices and three other aftermarket "ABS" devices could control the degree of road-wheel slippage when subjected to panic braking on medium to very low friction surfaces (CX-34-K; Tr. 826-27, 1137). The performance of the test vehicle with each device engaged was compared to that of the same vehicle with the device disengaged (Tr. 1138). In addition, the same tests were performed on a nearly identical vehicle with factory-installed antilock brakes, tested with the ABS on and off, to demonstrate the performance of the factory-installed ABS and make the results more understandable to the consumer (CX-34-F; Tr. 883, 1138).

75. The aftermarket device tests were conducted on a low mileage (three to five thousand miles) 1992 vehicle without factory-installed antilock brakes ("aftermarket vehicle"). Prior to the beginning of testing, new tires, front brake pads and rear brake shoes were installed on the vehicle, and the brakes were burnished to control their condition (Tr. 833-36). The devices tested were the appropriate size for the test vehicle, and installed so they could be engaged and disengaged (CX-32-I, -L; Tr. 831-32, 80). The factory-installed ABS tests were conducted on a new 1992 vehicle ("OEM vehicle"), with just a few hundred miles on the odometer, again equipped with new tires and brakes, which were appropriately burnished prior to the testing. A switch was installed so that the ABS could be turned on and off (Tr. 832-36). The only difference between the two vehicles was that the aftermarket vehicle had rear drum brakes, whereas the OEM vehicle had rear disc brakes. There is no reason to believe that the rear brakes on the two vehicles would have in any manner affected the test results (Tr. 833, 871).

76. The test protocol included test maneuvers set forth in SAE J46, including the lane change test, a changing friction surface test, and a split friction surface test (Tr. 827). The test was based upon SAE J46 because it is a test procedure that is widely recognized throughout the automotive testing industry as appropriate for the testing being done (Tr. 829-30). In addition, the vehicles were tested on a five hundred-foot radius curve surface, which evaluated the ability of a vehicle to come to a stop on a wet curve, without leaving the road and without hitting a barrier in front of it (Tr. 855).

77. The same driver was used for all tests. The surfaces where the tests were conducted were monitored, used exclusively for vehicle tests and regularly checked for friction levels. On the surfaces that are used wet, the facility uses a water truck to keep it uniformly wet. Application of brakes was controlled by instructing the driver to apply the same level of pedal force (112 pounds) during each driving maneuver, an appropriate level of pedal force (Tr. 833-41, 845; CX-34-H). The test parameters were appropriately controlled (Tr. 1148).

78. After the ABS/Trax I device was installed on the aftermarket vehicle pursuant to the manufacturer's instructions, the vehicle was run through the test procedures six times with the device off and then six times with the device on. Tests with and without the device were conducted within minutes of each other. This procedure was calculated to ensure that the various parameters of the tests with and without the device were controlled (Tr. 841-42). Immediately after completing the tests of the ABS/Trax I device, the tests were run on the ABS/Trax II device (Tr. 834). Since the results of testing on the ABS/Trax I device had been so consistent, all subsequent tests were conducted with only three runs for each permutation. This number of test runs was appropriate (Tr. 841, 1147). Comparison tests on the OEM vehicle with the factory-installed ABS engaged and disengaged were conducted five days before the ABS/Trax I tests, and immediately after the ABS/Trax II tests (Tr. 842). The five-day interval between the testing of the ABS/Trax I device and the factory-installed device is unlikely to have affected the results of the testing, given the other controls used and the fact that the weather was mild during the time of the testing (Tr. 843).

79. The aftermarket device test vehicle was instrumented to provide the test driver with a visual readout of vehicle speed, applied pedal force (obtained from the brake force transducer), deceleration, stopping distance, and elapsed time of maneuver. Additionally, an onboard computer data acquisition system was used to record the time history of vehicle speed, pedal force, vehicle acceleration, brake line pressure at four wheels, and wheel speed at four wheels (CX-34-I, -J; Tr. 833-36). The baseline tests on the OEM vehicle were conducted using this same equipment. This test also served as the comparison test for the ABS/Trax I device. For the comparison tests to the ABS/Trax II testing, the OEM vehicle was instrumented with the same visual readout (vehicle speed, applied pedal force, deceleration, stopping distances and elapsed time of maneuver) but the only data

automatically recorded was the time history of pedal force and a marker for the time of braking, when the comparison test to the ABS/Trax II testing was run (CX-34-J). The instrumentation was appropriate for this test (Tr. 1147-48).

80. The low-friction surface lane change test simulates a situation where a driver traveling at 35 mph on a wet, two lane highway encounters a stopped vehicle (denoted in the test by cones in the road) approximately 90 feet ahead, applies the brakes with 112 lbs. of pedal force, and attempts to switch to an adjacent lane and stop before hitting a second vehicle somewhat further ahead (CX-34-L, -M; Tr. 846-48). This test procedure is one of the primary procedures within SAE J46 and is conducted so frequently that there is a permanently marked course for it at the VRTC test facility (Tr. 847). When equipped with the ABS/Trax I device, the test vehicle failed to negotiate successfully the course regardless of whether the device was engaged or disengaged. In every attempt, when the brakes were applied all four wheels locked and the driver lost control of the vehicle, hitting the cones in the first lane and traveling uncontrolled until gradually coming to rest off the road (CX-34-S, -T; Tr. 851-53, 1140). The results of the ABS/Trax II testing were virtually the same, as were the results of the tests on the OEM vehicle when the factory-installed ABS was disengaged (CX-34-S, -U, -Z-l3; Tr. 850-53, 1139-40). By contrast, when the factory ABS was engaged on the OEM vehicle, the road wheels were observed to slow down and spin back up, avoiding lockup, so that the driver was able, on every attempt, to avoid the obstacle in lane 1 by steering into lane 2, and bringing the vehicle to a controlled stop well short of the obstacle in lane 2 (CX-34-S; Tr. 853, 1139).

81. The low friction surface curve test simulates a situation on a wet two lane curve, where the driver proceeding at 35 mph encounters a vehicle stopped ahead of him, but cannot change lanes because of obstacles in the second lane. He must apply 112 lbs. of pedal force and attempt to stop before striking the vehicle ahead of him, without leaving the road (CX-34-N). Although not a part of SAE J46, this procedure is used so frequently that a course for conducting the test is permanently marked at the VRTC test facility (Tr. 854). On each occasion when equipped with the ABS/Trax II devices, whether they were engaged or disengaged, the test vehicle experienced four wheel lockup, and the driver lost control of the

vehicle which proceeded in a straight line, leaving the curved road (Tr. 857-58, 1140-41; CX-34-U, -V, -W, -Z-18). Had there been obstacles off the road, such as trees, the vehicle would have struck them (Tr. 857). Similarly, when the OEM vehicle's ABS was disengaged, it experienced four wheel lockup, leaving the road (Tr. 856; CX-34-U, -V). When the factory-installed ABS was engaged, however, lockup was avoided and the driver was able to steer safely around the course, coming to a stop prior to colliding with the obstacle placed in the road (Tr. 856-57, 1141; CX-34-V).

82. The changing-friction surface test requires a vehicle to brake while experiencing a large change in surface friction, simulating the experience of a driver traveling on a wet highway at 40 mph who hits the brakes with 112 lbs. of pedal force and then encounters a patch of ice (CX-34-O, -P). This test procedure is described in SAE J46 and there is a preexisting test surface for such tests at the VRTC test facility (Tr. 860). CX-34, the report of the VRTC testing, contains graphs depicting the history of wheel slip during the changing friction surface test, based upon data obtained from the instrumentation installed in the vehicles (Tr. 863). The graphs show that whether the ABS/Trax I or II was engaged or disengaged, as the front and rear axles proceeded onto the very low friction surface, the wheels proceeded almost immediately to 100% wheel slip, where they remained throughout the rest of the maneuver (CX-34-W, -Z-23-26; Tr. 865-66). When the factory-installed ABS was disengaged, the OEM vehicle's performance mimicked that of the aftermarket test vehicle (CX-34-X). When its ABS was engaged, the graphs show that as the wheels transitioned onto the very low friction patch, the wheels commenced toward lockup. As the OEM ABS system detected the lockup, however, it adjusted the level of braking downward, and allowed the wheels to spin again. A controlled, optimal level of braking was established at each wheel, and slippage was held to between 10 and 20% throughout the remainder of the maneuver. On graphs appended to the test report, short duration spikes at approximately one-half second intervals show the ABS system continually assessing wheel speed and adjusting braking action as appropriate (Tr. 864, 1142-43; CX-34-X, -Z-2).

83. The fourth test was a split-friction surface test, also recommended in SAE J46 and also conducted on a track permanently dedicated to such testing at VRTC. In this test, a twelve-foot lane is marked so that the wheels on one side of a vehicle will be on a

surface similar to a wet highway, and the other side's wheels will be on a surface similar to an ice-covered highway. The driver was instructed to approach the course at 40 mph, apply 112 lbs. of brake pedal force, and try to steer a straight path. In such a test, if wheel slippage is not controlled, the subsequent loss of steering control generally will cause the vehicle to spin toward the higher friction surface (CX-34-Q, -R). During this testing, when the ABS/Trax I and II devices were engaged, all four wheels locked, resulting in the vehicle yawing (spinning) anywhere from 20 to 310 degrees out of control. When the OEM vehicle's ABS was disengaged, that vehicle, too, experienced loss of control, yawing between 90 and 190 degrees. When the OEM vehicle's ABS was engaged, however, the vehicle experienced no yaw; instead, it proceeded straight through the course, under control (CX-34-Z-3; Tr. 868-70).

84. VRTC disassembled and inspected the ABS/Trax I and II devices and concluded that they were simple small-volume hydraulic accumulators, that is, hydraulic energy storage devices. Other devices tested by VRTC, which were subject to the same road tests as the ABS/Trax devices and performed in the same manner, varied in the volume, hardness, and weight of the rubber insert. One of these other devices also had a screw which permitted the volume and stiffness of the insert to be adjusted. There is no reason to believe that redesigning the devices would have any effect on the outcome of the tests (CX-34-Z-5, -Z-6; Tr. 872-73).

85. The test reported in CX-34 was competent and reliable (Tr. 1149), and demonstrates that the ABS/Trax devices do not control the degree of rotational slip at one or more road wheels, as set forth in the NHTSA definition of ABS (CX-37-A; Tr. 880-81, 1150), nor do the devices control the level of rotational slip in the direction of rotation of the wheel on one or more wheels during braking, as set forth in the SAE J2246 definition (CX-103; Tr. 880-81, 1151). Thus, respondents' devices are not ABS as braking engineers define that term (CX-102-G, -I) since they do not sense the rate of angular rotation of the wheels, do not transmit signals regarding the rate of wheel angular rotation to one or more controlling devices, and do not transmit controlling signals to modulators that adjust brake actuating forces in response to those signals (Tr. 880-81, 1151).

86. The tests of the aftermarket vehicle reported in CX-34 demonstrate that the ABS/Trax devices do not prevent or

substantially reduce wheel lockup, skidding, and loss of control. In those tests there was no indication that the devices had any capacity to control the degree of wheel slip (Tr. 881, 1151).

87. The tests reported in CX-34 demonstrate that respondents' devices provide no wheel lockup control benefits (Tr. 881). By contrast, the factory-installed system tested in CX-34 demonstrated effective wheel lockup control (CX-34-Z-7; Tr. 104). By definition, genuine antilock braking systems provide wheel lockup control benefits (Tr. 1152; Respondents' Admission 69). Respondents' devices do not provide antilock brake system benefits, including wheel lockup control benefits, that are at least equivalent to those provided by OEM ABS (Tr. 881).

88. SAE J46 does not contain any performance standards or goals to be met in order to pass. Thus, a claim that a product complies with a performance standard set forth in SAE J46 is untruthful (Tr. 1136-37). Moreover, the testing that Mr. Schops relied on when preparing the ABS/Trax advertising, that is, the AccuBrake study, did not reflect any split mu or changing surface testing, as set forth in SAE J46 (CX-30-F; Tr. 2421-22). When tested pursuant to a protocol consistent with SAE J46, respondents' device did not perform as antilock brakes (CX-34).

III. CONCLUSIONS OF LAW

A. *Respondents Made The Alleged Claims*

Through the use of their trade names, advertising and promotional materials attached to the complaint, and a television ad, respondents made the claims alleged in the complaint (F. 13-18).

Each of the ads described in the findings make the challenged claims expressly, or convey their meaning so clearly that I can confidently find that they make one or more of the claims alleged in the complaint. *See Kraft, Inc.*, 114 FTC 40, 121 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

Respondents intended to make many of these claims (F. 19), and it is appropriate to consider their intent when deciding whether a claim has been conveyed. *Thompson Medical Co.*, 104 FTC 648, 791, *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

B. The Level Of Substantiation Required To Support Respondents' Claims

An ad is likely to mislead if the message it conveys is false, or if claims which are made are unsubstantiated, and advertisers must possess a reasonable basis for substantiation of claims which are made. *Thompson Medical* 104 FTC at 813, 818-19. Respondents' ads do not, with one exception,[2] reveal the level of support which they had for their claims. Thus, one must consider, for these claims, the six "Pfizer factors" which determine the type and amount of substantiation respondents should have possessed when they were made. *Thompson Medical Co.*, 104 FTC 648, 821 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

These factors include the type of claim, the product involved, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation which experts in the field believe is reasonable. *Thompson Medical*, 104 FTC at 821; *Pfizer, Inc.*, 81 FTC 23, 64 (1972).

Respondents' braking device involves automobile safety, and the experts called by complaint counsel agree that scientific tests should be conducted to verify claims made for it (F. 50-54; antilock claims) (F. 55-58; stopping distance claims).

The benefits of a truthful claim are evident and the cost of substantiation would not be prohibitive (F. 59).

The consequences of a false claim are significant, for each consumer who relied on respondents' claims paid approximately $450 for a device which does not operate as advertised (F. 8).

Consideration of the Pfizer factors compels the conclusion that the proper level of substantiation for the claims that respondents' braking device is an antilock braking system and complies with the NHTSA ABS definition, and for the braking distance and stopping distance claims, is competent and reliable scientific testing. *Thompson Medical*, 104 FTC at 826; *Firestone Tire & Rubber Co.*, 81 FTC 398, 463 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

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[2] Some ads stated that the specific stopping distance claims were proven by tests and respondents should have had appropriate scientific evidence in support of them. *Removatron Int'l Corp.*, 111 FTC 206, 302, *aff'd*, 884 F.2d 1489 (1st Cir. 1989).

C. *Respondents' Claims Are False And Unsubstantiated*

The ABS/Trax devices advertised and promoted by respondents are not, in fact, antilock brake systems. As specified by the original and clarified NHTSA definitions, as defined by SAE, as understood by engineers in the brake field since 1990, and as advertised to consumers, an antilock brake system is one that controls the level or degree of rotational wheel slip (F. 40, 41, 44, 45, 47). Respondents' device does not have the components necessary to accomplish this feat. (Compare F. 42, 43, 45 with F. 6, 48-49). Competent and reliable testing conducted by VRTC on three versions of the ABS/Trax device demonstrates that it does not control wheel slip (F. 72, 87). Respondents have submitted no competent and reliable evidence that supports their claims (F. 62-67). Thus, the claims that the ABS/Trax device is an antilock brake system and complies with the NHTSA ABS definition (Complaint ¶¶ 5 and 7d) are false and unsubstantiated.

The results of the testing described in CX-34 demonstrate that respondents' device does not prevent or substantially reduce wheel lockup, skidding, or loss of steering control (F. 86). Respondents have submitted no competent and reliable evidence to support this claim (F. 60-67). To the contrary, the results of testing relied upon by respondents demonstrated that wheel lockup commonly resulted during stopping distance tests. *Id.* Accordingly, the claim that the ABS/Trax device prevents or substantially reduces wheel lockup, skidding and loss of steering control in emergency stopping situations (Complaint ¶ 7a) is false and unsubstantiated.

The results of the testing set forth in CX-34 demonstrate that respondents' device does not provide any meaningful wheel lockup control (F. 86). The testing further provides substantial evidence that factory-installed antilock brake systems do provide meaningful wheel lockup control (*Id.*; F. 87). Respondents have submitted no competent and reliable evidence to support the equivalence of their device with factory-installed ABS (*see* F. 60-67). Accordingly, the claim that ABS/Trax provides ABS benefits, including wheel lockup control benefits, at least equivalent to those provided by original equipment manufacturer electronic ABS systems (Complaint ¶ 7f), is false and unsubstantiated.

SAE J46 does not contain any performance standards or goals to be met. It is simply a test protocol, and any claim that a product

complies with a performance standard set forth in SAE J46 is false (F. 54). Moreover, respondents did not possess and rely on any testing conducted pursuant to SAE J46 at the time they made the claim (F. 62-67). When later tested by NHTSA pursuant to a protocol consistent with SAE J46, respondents' device did not perform as antilock brakes (CX-34). Accordingly, the claim that the ABS/Trax device complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46 (Complaint ¶ 7c) is false and unsubstantiated.

Respondents' claim that installation of the ABS/Trax will qualify a vehicle for an automobile insurance discount in a significant proportion of cases (Complaint ¶ 7b) is false and unsubstantiated (Partial Summary Decision, Oct. 13, 1996).

Respondents' representation that tests prove that the ABS/Trax device reduces stopping distances by up to 30% when the vehicle's brakes are applied at a speed of 60 mph (Complaint ¶ 7e) is false. At the time this claim was made, the testing relied upon by respondents showed, at best, an 11% stopping distance improvement. In any event, respondents have not shown that this testing is competent and reliable (F. 63). Nor have respondents submitted any other competent and reliable evidence in support of this claim (F. 60-67). By contrast, competent and reliable testing performed by VRTC provides substantial evidence that such a stopping distance enhancement will not occur (F. 70).

Respondents' claim that the ABS/Trax device will improve stopping distances in an emergency situation is unsubstantiated (Complaint ¶ 9a). Respondents possess no competent and reliable evidence in support of this claim (F. 60-67). By contrast, testing performed by VRTC found no stopping distance improvement from the device (F. 70).

Respondents introduced no evidence that their device will make a vehicle safer (F. 60-67; Tr. 1255). By contrast, competent and reliable testing performed by VRTC found that the device did not shorten stopping distances, and did not control wheel slip (F. 70, 80-83). Accordingly, respondents' claim that the ABS/Trax device will make a vehicle safer than a vehicle not equipped with the device (Complaint ¶ 9b) is unsubstantiated.

D. Respondents' Deceptive Claims Are Material

Advertising misrepresentations are deceptive under Section 5 of the FTC Act only if they are "material" (FTC Policy Statement on Deception ("Deception Statement"), 103 FTC 174, 182 (1984)). A material misrepresentation is one that is likely to affect a consumer's choice of or conduct regarding a product, *i.e.*, reasonable consumers would consider the information in the claims important. *Id.*

Materiality is presumed for express claims. *Id.* Many of the claims alleged in the complaint were made expressly. This includes the claim that the product is an antilock brake system (Partial Summary Decision (Ad Meaning), at 4); the insurance discount availability claim (*Id.* at 13); the NHTSA ABS standard and SAE J46 compliance claims (*Id.* at 16-17; claims virtually express); the general and specific stopping distance claims (*Id.* at 17); and the comparative safety claim (*Id.* at 23).

Materiality is presumed for claims that respondents intended to make, *i.e.*, the claims that the ABS/Trax device was an antilock brake system, that it would substantially reduce lockup, skidding and loss of control, and that it complied with the NHTSA ABS definition and with SAE J46 (F. 19).

The Commission also presumes claims to be material if they pertain to the "central characteristics of a product . . . such as those relating to its purpose . . . [or] efficacy," or to safety (*Thompson Medical Co.*, 104 FTC at 816-17; Deception Statement, 103 FTC at 182). The majority of the challenged claims made for the product directly involved its purpose, efficacy, safety and cost. The central theme of respondents' advertising was that the ABS/Trax device was an antilock brake system that provided certain braking and stopping distance improvements, and that installing an antilock brake system like ABS/Trax would make the vehicle safer (*e.g.*, CX-1, CX-2, CX-3, CX-4). The SAE J46 and NHTSA ABS claims served to reinforce the impression that the device was an antilock brake system, and thus drove home this "safety" message.

Finally, claims regarding cost are presumed material (Deception Statement, 103 FTC at 182). The insurance discount availability claim made by respondents pertained to the overall cost of using the ABS/Trax device and hence it was material.

E. Mr. Schops Is Individually Liable For Respondents' Ad Claims

An individual can be held liable for a corporation's violations of Section 5 if he formulates, controls or directs corporate policy. *See Benrus Watch Co. v. FTC*, 352 F.2d 313, 324-25 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Standard Distribs. v. FTC*, 211 F.2d 7, 13-15 (2d Cir. 1954); *Griffin Sys., Inc.*, D. 9249, 1994 FTC LEXIS 76, at *22-28 (Apr. 29, 1994); *see also Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir.), *cert. denied*, 414 U.S. 828 (1973).

Mr. Schops is individually liable for the illegal conduct described in this decision because he incorporated ABSI to market the ABS/Trax device, prepared and placed the deceptive and misleading ads, and sent materials repeating the advertising claims to hundreds of potential distributors. He also represented ABSI in attending trade shows, as a signatory to distribution agreements, and in correspondence with suppliers and purchasers (F. 2).

Mr. Schops is also individually liable for the activities of DTT (F. 3) and ABSTSI (F. 4)

F. Respondents' Defenses

Respondents' post hearing brief asserts several defenses, none of which are supported by the record in this case.

1. This Proceeding Is In The Public Interest

Respondents argue that this proceeding is not in the public interest because there were few consumer complaints regarding the ABS/Trax device and because the few ads which were disseminated did not result in extensive sales.

The ads in question were disseminated over an extensive period of time (October 1991 through 1995) in three nationally distributed periodicals and on TV (in 1991). In addition, ABSI sponsored a booth at the SEMA show in 1991 and attended SEMA shows in 1992, 1993, and 1994 at which it attempted to sell the ABS/Trax device (F. 9, 10, 11). Total advertising costs during this period were significant (F. 12). Some ads were directed to the trade, not to consumers, but this does not absolve respondents from responsibility. *See Litton Ind., Inc.*, 97 FTC 1, 13-15 (1981), *aff'd as modified*, 676 F.2d 364 (9th Cir. 1982).

Respondents' device sold for $459 to $499, and some 7000 units were sold from January 1992 to January 1996 (F. 8). These figures include foreign sales, over which the Commission has jurisdiction because they were initiated in the United States (Tr. 2401). *Branch v. FTC*, 141 F.2d 31, 35 (7th Cir. 1944).

There were few customer complaints but this is not due to consumer satisfaction but to the difficulty a layman would have in evaluating the efficacy of the ABS/Trax device (F. 58). I therefore find that this proceeding is in the public interest.

2. ABS Criteria Are Objective and Well Known

I reject respondents' argument that there are no criteria for determining whether an aftermarket device is an antilock braking system, for government and industry have established such criteria and they are well known (F. 40-46, 50-54).

3. Accumulators Are Not ABS

There is no evidence in this record that accumulators are ABS (F. 49).

4. NHTSA's Tests Were Competent and Reliable

Respondents assert, without any record evidence, that NHTSA's tests of the ABS/Trax device were flawed. The record amply supports complaint counsel's argument that NHTSA's tests were competent and reliable.

5. There Was No Foreign "Approval" of Respondents' Ads

Respondents argue that they have not violated Section 5 of the FTC Act because foreign testing of their device constituted official approval of that device. However, the tests cited by respondents did not "approve" their device; in fact both tests show that it did not control wheel lockup (F. 64-67).

G. The Appropriate Order

1. Introduction

Complaint counsel urge me to adopt, as an appropriate remedy, the notice order attached to the complaint and, in addition, the reseller and consumer notification provision in the order I entered after I found that respondents in a companion case, BST Enterprises, Inc., D. 9276, had defaulted.

After considering the matters discussed below, I agree that a broad fencing-in order is appropriate in this proceeding. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965).

2. The Violations Were Serious

Respondents made false claims over a four year time period (F. 9-11) for a device involving automobile safety where claimed performance could not be evaluated by consumers. *See Stouffer Foods Corp.*, D. 9250, FTC LEXIS 196 at 39-40 (Sept. 26, 1994); *Thompson Medical*, 104 FTC at 834.

3. The Violations Were Deliberate

In the face of substantial, contrary evidence, of which they were aware (F. 62-63), respondents disseminated false ads claiming that their braking device was an antilock brake system and had the attributes of factory-installed ABS. The willingness to make claims in the face of contrary, convincing evidence warrants the relief sought by complaint counsel. *See Thompson Medical*, 104 FTC at 834-35.

4. The Violations Are Transferable

In view of Mr. Schops' conduct in promoting and selling the products involved in this proceeding through false and misleading ads for which no reasonable basis existed, it is apparent that, unless he is ordered not to do so, he will use the same tactic in promoting other products which he might manufacture or distribute in the future. *See Litton Indus. Inc.*, 97 FTC 1 (1981), *aff'd as modified*, 676 F.2d 364, 370, 372 (9th Cir. 1982).

5. Reseller And Consumer Notification Is Appropriate

The reseller and consumer notification provisions will alert respondents' customers that they should not rely on the benefits promised in ads for the ABS/Trax device. *Removatron Int'l Corp.*, 111 FTC 206, 311 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Southwest Sunsites, Inc.*, 105 FTC 7, 176-78, *aff'd*, 785 F.2d 1431 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986); *Amrep Corp.*, 102 FTC 1362, 1678-80 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986).

6. Trade Name Excision Is Warranted

In my partial summary decision (Ad Meaning) at 27, I found that respondents' product logos that employ the "ABS" acronym falsely convey to reasonable consumers that their products are antilock braking systems.

In such a situation the only practical remedy is to order excision of the ABS in connection with the promotion of respondents' device, *see Thompson Medical*, 104 FTC at 837-38, for any qualifying phrase would create more confusion that it could cure. *Continental Wax Corp. v. FTC*, 330 F.2d 475, 480 (2nd Cir. 1964); *Resort Car Rental Sys. Inc.*, 83 FTC 234, 298 (1973), *aff'd*, 518 F.2d 962 (9th Cir.), *cert. denied*, 423 U.S. 827 (1975).

H. Summary

1. The Federal Trade Commission has jurisdiction over respondents and over their acts and practices that are the subject of this proceeding under Section 5 of the FTC Act.

2. The acts and practices of respondents as described in my findings of fact constitute unfair or deceptive acts and practices in or affecting commerce in violation of Section 5(a) of the FTC Act.

3. The following order is appropriate under applicable legal precedent and the facts of this case.

ORDER

DEFINITIONS

For the purposes of this order:

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based upon 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; and

2. "*Purchasers for resale*" shall mean all purchasers of A•B•S/Trax or A•B•S/Trax^2 for resale to the public, including but not limited to franchisees, wholesalers, distributors, retailers, installers, and jobbers.

I.

It is ordered, That respondents, Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and their officers, and Richard Schops, individually and as an officer and director of said corporations, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of A•B•S/Trax, A•B•S/Trax^2 or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from employing the initials or term ABS in conjunction with or as part of the name for such product or the product logo.

II.

It is further ordered, That respondents, Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and their officers, and Richard Schops, individually and as an officer and director of said corporations; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of A•B•S/Trax, A•B•S/Trax^2 or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product:

A. Is an antilock braking system;

B. Prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;

C. Will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

D. Complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

E. Complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

F. Has been proven in tests to reduce stopping distances by at least 30% when the vehicle's brakes are applied at a speed of 60 mph; or

G. Provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems.

III.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and their officers, and Richard Schops, individually and as an officer and director of said corporations, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any braking system, accessory, or device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. In emergency stopping situations, a vehicle equipped with the system, accessory, or device will stop in a shorter distance than a vehicle that is not equipped with the system, accessory, or device; or

B. Installation of the system, accessory, or device will make operation of a vehicle safer than a vehicle that is not equipped with the system, accessory, or device;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and their officers, and Richard Schops, individually and as an officer and director of said corporations, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other

device, in connection with the manufacturing, labeling, 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 misrepresenting, in any manner, directly or by implication:

A. The contents, validity, results, conclusions, or interpretations of any test or study;

B. The compliance of any such product with any standard, definition, regulation, or any other provision of any governmental entity or unit, or of any other organization; or

C. The availability of insurance benefits or discounts arising from the use of such product.

V.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and their officers, and Richard Schops, individually and as an officer and director of said corporations, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the absolute or comparative attributes, efficacy, performance, safety, or benefits of such system, accessory, or device, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

VI.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and Richard Schops shall:

A. Within forty-five (45) days after the date of service of this order, compile a current mailing list containing the names and last known addresses of all purchasers of A•B•S/Trax or A•B•S/Trax^2 since January 1, 1990. Respondents shall compile the list by:

1. Searching their own files for the names and addresses of such purchasers; and

2. Using their best efforts to identify any other such purchasers, including but not limited to sending by first class certified mail, return receipt requested, within five (5) days after the date of service of this order, to all of the purchasers for resale with which respondents have done business since January 1, 1990, an exact copy of the notice attached hereto as Appendix A. The mailing shall not include any other documents. In the event that any such purchaser for resale fails to provide any names or addresses of purchasers in its possession, respondents shall provide the names and addresses of all such purchasers for resale to the Federal Trade Commission within forty-five (45) days after the date of service of this order.

3. In addition, respondents shall retain a National Change of Address System ("NCOA") licensee to update this list by processing the list through the NCOA database.

B. Within sixty (60) days after the date of service of this order, send by first class mail, postage prepaid, to the last address known to respondents of each purchaser of A•B•S/Trax or A•B•S/Trax^2 identified on the mailing list compiled pursuant to subparagraph A of this Part, an exact copy of the notice attached hereto as Appendix B. The mailing shall not include any other documents. The envelope enclosing the notice shall have printed thereon in a prominent fashion the phrases "FORWARDING AND RETURN POSTAGE GUARANTEED" and "IMPORTANT NOTICE--U.S. GOVERNMENT ORDER ABOUT A•B•S/TRAX or A•B•S/TRAX^2 BRAKING DEVICE."

C. Send the mailing described in subparagraph B of this Part to any person or organization not on the mailing list prescribed in subparagraph A of this Part about whom respondents later receive information indicating that the person or organization is likely to have been a purchaser of A•B•S/Trax or A•B•S/Trax^2, and to any purchaser whose notification letter is returned by the U.S. Postal Service as undeliverable and for whom respondents thereafter obtain a corrected address. The mailing required by this subpart shall be made within ten

(10) days of respondents' receipt of a corrected address or information identifying each such purchaser.

D. In the event respondents receive any information that, subsequent to its receipt of Appendix A, any purchaser for resale is using or disseminating any advertisement or promotional material that contains any representation prohibited by this order, immediately notify the purchaser for resale that respondents will terminate the use of said purchaser for resale if it continues to use such advertisement or promotional material.

E. Terminate within ten (10) days the use of any purchaser for resale about whom respondents receive any information that such purchaser for resale has continued to use any advertisement or promotional material that contains any representation prohibited by this order after receipt of the notice required by subparagraph A of this Part.

VII.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, and Richard Schops shall for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. The list compiled pursuant to subparagraph A of Part VI of this order;

B. Copies of all notification letters sent to purchasers pursuant to subparagraphs B and C of Part VI of this order;

C. Copies of notification letters sent to purchasers for resale pursuant to subparagraphs A and D of Part VI of this order, and all other communications with purchasers for resale relating to the notices required by Part VI of this order.

VIII.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors or assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff 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, and complaints or inquiries from governmental organizations.

IX.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., their successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, provide a copy of this order to each of respondents' 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 service of this order, provide a copy of this order to each of respondents' 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 assumes his or her position.

X.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc., their successors and assigns, shall notify the Commission at least thirty (30) days prior to any proposed change in the corporations 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 corporation which may affect compliance obligations under this order.

XI.

It is further ordered, That respondent Richard Schops shall, for a period of ten (10) 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. Each notice of affiliation with any new business or employment shall include 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.

XII.

It is further ordered, That this order will terminate twenty years from the date of its issuance, 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 flied 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.

XIII.

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

APPENDIX A

[Automotive Breakthrough Sciences, Inc. or ABS Tech Sciences, Inc. letterhead]

Dear A•B•S/Trax Reseller:

Our records indicate that you are or have been a distributor or retailer of the A•B•S/Trax or A•B•S/Trax^2 (hereinafter "A•B•S/Trax"), a brake product. This letter is to advise you that the Federal Trade Commission ("FTC") recently obtained an Order against Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. regarding certain claims made for the A•B•S/Trax device. Under that Order, we are required to notify our distributors, wholesalers and others who have A•B•S/Trax to stop using or distributing advertisements or promotional materials containing these claims. We are also asking for your assistance in compiling a list of A•B•S/Trax purchasers, so that we may contact them directly. Please read this letter in its entirety and comply with all parts.

The FTC's Decision and Order

The Federal Trade Commission has determined that the following claims made for the A•B•S/Trax device in Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc.'s advertisements, logos and promotional material are **FALSE** and **MISLEADING**:

(a) A•B•S/Trax is an antilock braking system.

(b) A•B•S/Trax prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;

(c) A•B•S/Trax will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(d) A•B•S/Trax complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

(e) A•B•S/Trax complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

(f) A•B•S/Trax has been proven in tests to reduce stopping distances by up to 30% when the vehicle's brakes are applied at a speed of 60 mph; and

(g) A•B•S/Trax provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems.

The FTC Order requires Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. to cease and desist from making these false claims for the A•B•S/Trax device.

In addition, the FTC Order requires Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. to cease and desist from

making claims that A•B•S/Trax will shorten stopping distances in emergency stopping situations or make a vehicle safer, unless at the time of making such representation it possesses competent and reliable scientific evidence substantiating the representation.

We need your assistance in complying with this Order.

Please immediately send us the names and last known addresses of all persons or businesses, including other resellers, to whom you have sold an A•B•S/Trax or A•B•S/Trax² since January 1, 1990. We need this information in order to provide the notification required by the FTC Order. If you do not provide this information, we are required to provide your name and address to the FTC.

Please stop using the A•B•S/Trax or A•B•S/Trax² promotional materials currently in your possession. These materials may contain claims that the FTC has determined to be false or unsubstantiated. You also should avoid making any of the representations as described in this letter. Under the FTC Order, we must stop doing business with you if you continue to use the prohibited materials or make the prohibited representations.

If you have any questions, you may call Deborah Kelly of the Federal Trade Commission at (202) 326-3004. Thank you for your cooperation.

Very truly yours,

Richard Schops
President
Automotive Breakthrough Sciences, Inc.

APPENDIX B

[Automotive Breakthrough Sciences, Inc. or ABS Tech Sciences, Inc. letterhead]

Dear A•B•S/Trax Customer:

Our records indicate that you previously purchased an A•B•S/Trax or A•B•S/Trax² (hereinafter "A•B•S/Trax") for your vehicle. This letter is to advise you that the Federal Trade Commission ("FTC") recently obtained an Order against Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. regarding certain claims made for the A•B•S/Trax device. Please read this letter in its entirety.

The FTC's Decision and Order

The Federal Trade Commission has determined that the following claims made for the A•B•S/Trax device in Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc.'s advertisements, logos and promotional material are **FALSE** and **MISLEADING**:

(a) A•B•S/Trax is an antilock braking system.

(b) A•B•S/Trax prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;

(c) A•B•S/Trax will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(d) A•B•S/Trax complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

(e) A•B•S/Trax complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

(f) A•B•S/Trax has been proven in tests to reduce stopping distances by up to 30% when the vehicle's brakes are applied at a speed of 60 mph; and

(g) A•B•S/Trax provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems.

The FTC Order requires Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. to cease and desist from making these false claims for the A•B•S/Trax device.

In addition, the FTC Order requires Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. to cease and desist from making claims that A•B•S/Trax will shorten stopping distances in emergency situations or make a vehicle safer, unless at the time of making such representation it possesses competent and reliable scientific evidence substantiating the representation.

If you have any questions, you may call Deborah Kelly of the Federal Trade Commission at (202) 326-3004. Thank you for your cooperation.

Very truly yours,

Richard Schops
President
Automotive Breakthrough Sciences, Inc.

OPINION OF THE COMMISSION

BY ANTHONY, *Commissioner*:

I. INTRODUCTION

This case is before the Commission on appeal from an initial decision and order by Administrative Law Judge Lewis F. Parker.[1] Judge Parker found that respondents, Automotive Breakthrough Sciences, Inc. ("ABSI"), ABS Tech Sciences, Inc. ("ABSTSI"), and Richard Schops, engaged in unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 ("Section 5"), in connection with the sale and promotion of their "ABS/Trax" after-market braking device.[2]

Like its companion case, Brake Guard Products, Inc., Docket No. 9277,[3] this case is important, not only because of the deceptive practices that form the core of respondents' claims, but also, because respondents' actions have potentially grave implications for motor vehicle safety. After careful examination of the record, the Commission affirms the initial decision of the Administrative Law Judge and adopts his findings and conclusions to the extent they are not inconsistent with this opinion.[4] The order we issue, however, differs slightly from that issued by the Administrative Law Judge and is substantially similar to the order issued in Brake Guard Products, Inc.

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[1] References to the record are abbreviated as follows:

ID	Initial Decision
IDF	Initial Decision Finding
RAB	Respondents' Appeal Brief (styled "Motion To Appeal")
Tr.	Transcript of Testimony
CX	Complaint Counsel's Exhibit
PSD1	Partial Summary Decision of May 22, 1996
PSD2	Partial Summary Decision of October 16, 1996
F.	Finding in Partial Summary Decision

[2] "ABS/Trax" is used herein to refer collectively to all the after-market devices sold or marketed by respondents for installation on a vehicle to improve its braking performance. The original 1991 product was sold under the name "AccuBrake." *See* CX-30-A through -C. Subsequent versions were sold as ABS/Trax and ABS/Trax2. The same claims were made with respect to all versions of the device. *See* IDF 7.

[3] *See infra* note 6.

[4] There appears to be a typographic error on page 41 of the Initial Decision. On line 11 of that page, the ID refers to braking "distance" instead of braking "control." This seems to be incorrect in the context. Changing the word "distance" to the word "control" makes the sentence consistent with the record, the discussion immediately preceding the sentence in question (*id.* at 40) and with the cited findings of fact. The Commission adopts the discussion with this modification.

II. BACKGROUND

Beginning in 1991, the respondents[5] sold various versions of the ABS/Trax device through advertising placed in print media, on television and at trade shows. On September 27, 1995, the Commission issued its complaint[6] challenging a number of respondents' advertising claims as false and/or unsubstantiated and alleging that they violated Section 5.[7] The complaint alleged that respondents made the following false and/or unsubstantiated claims:

1. Antilock Brake System Claims:
   a. That ABS/Trax is an antilock brake system (Complaint ¶ 5);
   b. That ABS/Trax prevents or reduces lock-up, skidding and loss of steering control (Complaint ¶ 7(a));
   c. That ABS/Trax provides antilock braking benefits that are as good as those provided by original equipment manufacturer-installed electronic antilock braking systems (Complaint ¶ 7(f));
2. Stopping-Distance Claims:
   a. That in emergency stopping situations, ABS/Trax will stop a vehicle in a shorter distance than a vehicle that is not equipped with the device (Complaint ¶ 9(a));
   b. That tests prove that ABS/Trax reduces stopping distances by up to 30% at a speed of 60 mph (Complaint ¶ 7(e));
3. General Comparative Safety Claim:
   That ABS/Trax will make operation of a vehicle safer than operation of a vehicle not equipped with ABS/Trax (Complaint ¶ 9(b));
4. Compliance with Standards Claims:
   a. That ABS/Trax complies with National Highway Traffic Safety Administration ("NHTSA") standards for antilock brakes (Complaint ¶ 7(d));

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[5] ABSI and ABSTSI are New York corporations with their principal place of business in Wheatley Heights, New York. IDF 1. ABSI was formed in 1991 for purposes of marketing a brake product known as "ABS/Trax." The designer of the device, respondent Richard Schops, was ABSI's Chief Executive Officer and, with another individual, managed the firm on a day-to-day basis. In addition to selecting the product name and logo, Mr. Schops drafted and placed the advertising and promotional materials. Since 1992, ABS/Trax has been sold through ABSTSI. In his capacity as officer and director of ABSTSI, Mr. Schops attends trade shows, signs agreements with product distributors, and prepares promotional materials. IDF 2, 4.

[6] On the same date, the Commission issued substantially similar complaints in BST Enterprises, Inc., Docket No. 9276, and Brake Guard Products, Inc., Docket No. 9277. On October 16, 1996, the Administrative Law Judge entered a judgment by default in Docket No. 9276, and on May 30, 1997, the Commission issued its final order. On May 2, 1997, the Administrative Law Judge issued an initial decision in Docket No. 9277, which was appealed to the Commission. On January 15, 1998, the Commission issued a final order and opinion in that proceeding.

[7] The complaint alleged that the general stopping-distance and comparative safety claims (Complaint ¶ 9) were unsubstantiated (Complaint ¶ 10), and that the remaining claims were both unsubstantiated and false (Complaint ¶¶ 5 and 7).

b. That ABS/Trax complies with performance standards set forth in the Wheel Slip Brake Control System Road Test Code of the Society of Automotive Engineers ("SAE J46") (Complaint ¶ 7(c)); and

5. Insurance Discount Claim:

That installation of ABS/Trax will qualify a vehicle for an insurance discount in a significant proportion of cases (Complaint ¶ 7(b)).

On October 21, 1995, trial began,[8] and on May 22, 1996, the Administrative Law Judge granted complaint counsel's motion for partial summary decision, holding that respondents had made the alleged claims through their trade names, advertising, and promotional materials.[9] On October 16, 1996, in a second partial summary decision, the Administrative Law Judge found that respondents' claim (Complaint ¶ 7(b)) that installation of their device would qualify a vehicle for an insurance discount was both false and unsubstantiated.[10]

The record closed on December 9, 1996, and on March 3, 1997, the Administrative Law Judge issued his initial decision and order.[11] The Judge concluded that each of the claims challenged in the complaint was false and/or unsubstantiated, in violation of Section 5.[12] He found corporate liability and also held respondent Richard Schops individually liable for the violations.[13]

With the initial decision, Judge Parker issued an order prohibiting respondents from making any of the claims found to be false and from making any of the unsubstantiated claims without proper support. He also barred them from using the term "ABS" in marketing their braking device or substantially similar products. The Judge's order also prohibited respondents from making certain claims in connection with products other than ABS/Trax or similar devices. Order ¶¶ III, IV and V.

Respondents do not appeal Judge Parker's finding that they made the claims challenged in the complaint. The principal contentions in

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[8] This case was consolidated with Docket Nos. 9276 and 9277.

[9] PSD1; *see also* IDF 13.

[10] PSD2; *see also* ID 43.

[11] The initial decision includes some findings and conclusions on issues first addressed in the earlier partial summary decisions.

[12] ID 41-43; PSD2.

[13] ID 45.

respondents' appeal appear to be[14] that the Administrative Law Judge erred in finding their claims for ABS/Trax false and/or unsubstantiated and also erred in ordering them to cease using the term "ABS." Respondents also contend that the Commission's adjudicative procedures are unfair[15] and that this proceeding was not in the public interest.

The Commission's review of this matter is based on the record of the proceeding, which does not include oral argument by the parties. The Commission's Rules of Practice provide that "[o]ral arguments will be held in all cases on appeal to the Commission, unless the Commission otherwise orders upon its own initiative or at the request of any party made at the time of filing of his brief." 16 CFR 3.52(i)(1998).

After issuance of the initial decision on March 3, 1997, the parties submitted appeal briefs, and neither requested that oral argument not be held. Indeed, respondent Schops made known his desire to present argument on several occasions.[16] On May 14, 1998, the Commission convened to hear oral argument, and although complaint counsel were

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[14] The document filed by respondents as their appeal brief is styled "Respondent(s)' Motion To Appeal from the Decision." It fails to comply with § 3.52(b) of the Commission's Rules of Practice, 16 CFR 3.52(c) (1998), which specifies that an appeal brief "shall contain [among other things]. . . [a] concise statement of the case; . . . [a] specification of the questions intended to be urged; . . . [t]he argument presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific page references to the record and the legal or other material relied upon . . . and [a] proposed form of order. . . ." The document filed is conclusory and difficult to follow. Nonetheless, recognizing that respondents are appearing *pro se*, the Commission accepted the appeal and endeavored to understand, consider and address respondents' contentions.

[15] In connection with their fairness argument, respondents also seem to suggest that the Commission brought this action on behalf of manufacturers of new automobiles and their brake equipment suppliers, who, respondents argue, stand to benefit from the proceeding. *See* RAB 7-8, 13. Respondents also suggest that because "the Giant Manufacturers" have not brought suit against respondents, their claims for ABS/Trax must be true. *See* RAB 14-15. Respondents cited no record evidence in support of these bald assertions, and the Commission rejects them as without factual basis.

[16] Oral argument was originally scheduled for August 14, 1997. On three occasions between that date and May 14, 1998, respondent Schops requested that the Commission postpone the argument, and each time, the Commission granted his request. On the last such occasion, on April 1, 1998, in response to the latest letter from Mr. Schops seeking yet another postponement of the date of argument, the Commission issued an order postponing oral argument scheduled for April 6 and further stating that if respondents failed to appear at the next scheduled argument date, the Commission would decide the case on the papers. On April 16 the Commission issued a notice rescheduling the oral argument for May 14 at 2:00 p.m. Copies of both the April 1 order and the April 16 notice were dispatched to Mr. Schops on numerous occasions by multiple methods including express mail, commercial delivery service and facsimile transmission. In addition, the Office of the Secretary of the Commission left several recorded messages on Mr. Schops' telephone answering device describing the documents to Mr. Schops and requesting that he advise the Commission whether he intended to participate in the argument on May 14. No answer was received as of that date. *See* Transcript of Hearing Before the Commission, 3-5, May 14, 1998.

present, neither respondent Schops, nor anyone else representing the respondents, appeared. Having heard the Secretary of the Commission describe his efforts to satisfy Mr. Schops' expressed desire for an opportunity to present argument as well as to notify Mr. Schops of various argument dates and to accommodate his numerous requests for postponement, the Commission issued an order, consistent with Rule 3.52(i), canceling the oral argument and reiterating its intention, as stated in its notice of April 16, to decide the matter on the papers.[17]

III. CONCLUSIONS OF LAW

Under Section 5 of the FTC Act, an advertising claim is deceptive if it is "likely to mislead consumers acting reasonably in the circumstances, and . . . is material."[18] A claim that is false and material[19] is misleading to reasonable consumers and, therefore, is deceptive. In addition, the Commission long has held that "a firm's failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair and deceptive act or practice in violation of Section 5."[20] When an advertisement promises a level or type of substantiation, such as "75% of doctors agree" or "tests show," the level or type of substantiation promised constitutes a reasonable basis

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[17] On May 18, 1998, Mr. Schops sent a letter to the Secretary explaining his failure to appear at the oral argument and stating that he had been out of town and had not received the notices of the May 14 date until four days after it had passed. The letter concludes, "As a *pro se* Respondent unfamiliar with protocols and *pursuancies*, I respectfully request instruction as to re-opening the oral argument on appeal opportunity." On May 19, complaint counsel filed in opposition, noting that the Commission's April 16 notice setting the argument for May 14 was consistent with the respondents' earlier request by letter of March 30, 1998, that the argument be set for "mid-May." Although the Commission's Rules do not permit a reply from a moving party (16 CFR 3.22(c)), Mr. Schops submitted such a reply on May 20. By order of May 27, the Commission denied respondents' motion, noting once more its previous efforts to accommodate respondents' *pro se* status and citing Commission Rule 3.52(i). On May 29, respondents requested that the Commission reconsider its order of May 27, and the Commission denied this motion by order of June 25, 1998.

[18] *Cliffdale Associates, Inc.*, 103 FTC 110, 164-65 (1984); *see id.* at 174-84 (Appendix) (Federal Trade Commission Policy Statement on Deception ("Deception Statement")); *accord, Kraft, Inc.*, 114 FTC 40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Removatron Int'l Corp.*, 111 FTC 206 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989).

[19] To be material, a claim must be "important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product. . . ." *Cliffdale Associates, Inc.*, 103 FTC at 165; *see* Deception Statement, 103 FTC at 182.

[20] *Thompson Medical Co.*, 104 FTC 648, 839 & 839-42 (Appendix) (FTC Policy Statement Regarding Advertising Substantiation ("Advertising Substantiation Statement")) (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *see National Dynamics Corp.*, 82 FTC 488, 552-53 (1973), *aff'd and remanded on other grounds*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), *reissued* 85 FTC. 391 (1976).

for the claims made. When no level or type of support is specified, the Commission applies the following analysis:

> [W]hat constitutes a reasonable basis is essentially a factual issue which will be affected by the interplay of overlapping considerations such as (1) the type and specificity of the claim made -- *e.g.*, safety, efficacy . . . ; (2) the type of product -- *e.g.*, . . . potentially hazardous consumer product . . . ; (3) the possible consequences of a false claim -- *e.g.*, personal injury, property damage; (4) the degree of reliance by consumers on the claims; (5) the type, and accessibility, of evidence adequate to form a reasonable basis for making the particular claims.[21]

Also relevant is "the amount of substantiation experts in the field believe is reasonable."[22]

Advertisers must have appropriate substantiation for claims when they are made,[23] and the Commission has observed that, "in fairness and in the expectations of consumers," the only reasonable basis for some types of claims for some types of products would be competent and reliable scientific evidence.[24]

In this case the Commission concludes that the claims, which potentially involve consumer safety, require substantiation by competent and reliable scientific evidence. As discussed further below, the Commission also concludes that respondents' claims that their device would make a vehicle safer and would shorten stopping distances in emergency stopping situations are unsubstantiated and that the other challenged claims are both unsubstantiated and false. The claims are material. Therefore, as a matter of law, the claims are deceptive and violate Section 5. The Commission further concludes that the violations are serious and readily transferable to other products. The Commission believes that barring use of the term "ABS" is appropriate, but we modify the fencing-in provisions in the Judge's order to tailor them more closely to the circumstances before

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[21] *Pfizer, Inc.*, 81 FTC 23, 64 (1972); *see also* Advertising Substantiation Statement, 104 FTC at 839-40 (1984).

[22] *Removatron Int'l Corp.*, 111 FTC 206, 297 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *see* Advertising Substantiation Statement, 104 FTC at 840.

[23] *See, e.g., Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 302 n.6 (7th Cir. 1979); *Pfizer*, 81 FTC at 67 (1972) ("[T]o have had a reasonable basis, the tests must have been conducted prior to, and actually relied upon in connection with, the marketing of the product in question."); *see also* Advertising Substantiation Statement, 104 FTC at 839.

[24] *Pfizer Inc.*, 81 FTC at 64; *see, e.g., Removatron Int'l Corp.*, 111 FTC 206 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Firestone Tire & Rubber Co.*, 81 FTC 398, 463 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

us and to include certain technical changes consistent with Commission's Rules of Practice. Finally, the Commission concludes that the proceedings in this matter are fair and in the public interest.

IV. RESPONDENTS' CLAIMS VIOLATE SECTION 5

A. ABS/Trax Is Not and Does Not Provide the Benefits of an Antilock Braking System

1. ABS/Trax Is Not an Antilock Braking System

We first consider respondents' advertising claims that ABS/Trax is an antilock braking system. The essential features of an antilock braking system are reflected in well established and widely accepted industry and governmental standards.[25] In brief, an antilock braking system must automatically control the level or degree of rotational wheel slip, which is the proportional amount of wheel or tire skidding relative to vehicle forward motion.[26] IDF 37, 40-41, 44-45.

To control the level of rotational wheel slip automatically, a system must have sensors at the road wheels or drive train and a computational device to evaluate whether lock-up is approaching. IDF 42. The system also must be able to send signals to a control device that will reduce brake force so that the wheels will continue rolling. *Id.* ABS/Trax lacks the necessary components to detect and control the level or degree of rotational wheel slip automatically. IDF 6, 42-43, 45, 48-49, 72, 87. Rather, the ABS/Trax device is simply a "hydraulic accumulator": a resilient membrane in a metal housing that may be attached to the hydraulic brake line of an automobile. In a hard stop, the membrane expands to accept some brake fluid, returning it to the line when the brake pedal is released. IDF 6.

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[25] NHTSA regulations set forth the components of an antilock braking system. *See* CX-102; CX 37-A. The fundamentals of an antilock system are also set forth in a publication of the Society of Automotive Engineers, "Antilock Brake System Review -- SAE J2246." CX-103. SAE publications are regarded as authoritative by experts in the field. IDF 41. The views of experts in the field as to the essential features of an antilock system are consistent with definitions reflected in NHTSA and SAE standards. IDF 43; ID 41.

[26] As brake application is increased, wheel slip increases. After 20% slippage, the ability to make turns falls precipitously. At 100% wheel slip, the wheels are locked and no longer rotating. IDF 37-38. If the front wheels lock up first, the driver is unable to steer. If the rear wheels lock first, the vehicle spins out of control. IDF 39.

Respondents' contention that ABS/Trax qualifies as an antilock system because it is an "accumulator" (RAB 3) is without merit. As explained by complaint counsel's witnesses, experts in the field of automotive brake systems,[27] although some antilock systems contain accumulators, an accumulator, by itself, does not qualify as an antilock braking system because it does not have the capacity to measure wheel speed, make error determinations or issue control signals to control automatically the degree of rotational wheel slip. Respondents' Admissions 70; Tr. 876-80 (Hague); IDF 48-49.

There also is no merit to respondents' contention (RAB 3) that the Administrative Law Judge erred in assuming that a brake system must use an electronic apparatus if it is to be advertised or promoted as an antilock braking system.[28] The record does not show that the case was either tried or decided on such an assumption. Rather, as noted by the Administrative Law Judge, the gist of the complaint is that respondents promoted and advertised ABS/Trax as an antilock braking system even though the device lacks the capability, through whatever means, to control rotational wheel slip automatically. Although the antilock systems being marketed in the United States today rely on electronics to sense wheel rotation and transmit control signals (*see* CX 102-L), NHTSA has stated that these "functions could be performed using pneumatic, hydraulic, optic, or other mechanical means." *Id.* Nothing in the initial decision assumes away such a possibility.

2. ABS/Trax Does Not Provide the Benefits of an Antilock Braking System

We next consider respondents' advertising claims that their braking device provides the benefits of a factory-installed antilock braking system, such as preventing or reducing wheel lock-up, skidding and loss of steering control. Respondents did not submit or cite any evidence in support of these claims apart from lay opinion testimony by respondent Schops and patently unreliable tests.

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[27] Respondents presented no expert testimony.

[28] Respondent argues further that by predicating use of the term "ABS" or "antilock braking system" on the presence of an electronic apparatus, the Commission essentially limits use of the term to new car manufacturers and their suppliers.

The testimony of respondent Schops is not reliable or probative. Mr. Schops clearly lacks the training necessary to evaluate the performance of an automotive braking system[29] and, indeed, did not offer himself as an expert. IDF 60. Mr. Schops admits that his experiences driving vehicles equipped with aftermarket devices are anecdotal (Tr. 2416), and the record shows that as a layman, he cannot reliably evaluate whether specific wheels experienced lock-up either with or without the ABS/Trax device. Tr. 813, 1132 (Hague); IDF 58, 60-61. Therefore, his observations do not constitute the requisite competent and reliable scientific evidence to support respondents' claims that the ABS/Trax device will prevent or reduce wheel lock-up, skidding and loss of control in emergencies.

Mr. Schops recalls seeing only one written report before developing the advertisements for AccuBrake, the first ABS/Trax device sold by respondents. Tr. 2416. This report is an anonymous, one-page document setting forth purported results of tests apparently aimed at assessing comparative stopping distance performance of a 1980 Triumph TR-8 with and without respondents' device. CX-30-F. This document is devoid of any description of test protocols or other details necessary to permit assessment of the reliability and probative value of the results. *Id.*; IDF 62; Tr. 2416; compare with CX-34 (documenting NHTSA tests of five after-market add-on brake devices) and CX-35 (documenting NHTSA tests on an AccuBrake device sold by respondents).[30] In any event, the test results described in the report show that when the test vehicle was equipped with the ABS/Trax device, it continued to experience wheel lock-up. Even disregarding the absence of documented protocols and methodology, therefore, the test fails to support respondents' claims that its device will prevent or reduce wheel lock-up. IDF 62-63.

Respondents' reliance on a videotape of tests conducted in Thailand on "a mechanical system that [respondents] had" (Tr. 2371

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[29] Mr. Schops has neither formal scientific training nor background in engineering. Before his involvement with ABSI and ABSTSI, he worked for various advertising agencies selling advertising and advertising time. He has started and operated several businesses and also worked as a marketing consultant. *See* IDF 60. He also admits he is not an expert. Tr. 198. In contrast, complaint counsel offered and the Judge found persuasive the testimony of three expert witnesses. IDF 20-35. We agree with Judge Parker's assessment of this testimony.

[30] Although CX-35 on its face reports testing on a "Brake-Guard" device, testimony shows that although identical to the Brake-Guard product, the tested device, in fact, was a product called "AccuBrake," which was the first version of ABS/Trax to be marketed by respondent Schops and his companies. Tr. 46, 2415-16; CX-30-A through C.

(Schops)) is likewise without merit.[31] The record shows that competent and reliable testing is necessary to demonstrate that a product controls wheel slip, thereby preventing lock-up, skidding and loss of control, and that it reduces stopping distances. *See* IDF 50-58. According to complaint counsel's expert, Mr. Kourik, the tests reported on the videotape appear to have been conducted without any instrumentation, and Mr. Kourik also stated that they show "nothing on methodology at all." Tr. 1244-49. Mr. Hinch, another of complaint counsel's expert witnesses, testified that the videotape shows that with or without the ABS/Trax device installed, "the wheels locked-up on the vehicle almost immediately upon brake application." Tr. 2031; IDF 65. He also testified that the videotape does not provide competent and reliable scientific evidence that ABS/Trax controls the degree of wheel slip. *Id.* Therefore, the videotape does not support respondents' claim that the device reduces or prevents wheel lock-ups or otherwise provides the benefits of an antilock braking system.

Respondents cite an Australian test conducted in December 1993 (Tr. 2435 (Schops)) on deceleration levels of an ABS/Trax-fitted vehicle. This test is not on the record. Nonetheless, it is deficient because it does not show that split mu[32] or lane-change testing was conducted or that instrumentation was used to compare wheel slip with and without the device. Regardless of its methodological deficiencies, the Australian test demonstrates that the test vehicle continued to experience lock-up with respondents' device installed. IDF 67. In any event, respondents did not use or rely on the Australian test results at the time they made their claims for ABS/Trax. IDF 67; Tr. 2438 (Schops). Therefore, the results do not show that respondents had or relied on competent and reliable

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[31] The audio of the tape, its graphics and the accompanying written report, none of which is on the record, are in a foreign language, apparently Thai, and are unaccompanied by English subtitles or other translation. IDF 64-65.

[32] The Greek letter "mu" in the context of brake testing stands for the frictional coefficient of the surface on which the test is being conducted. *See* Tr. 792 (Hague). Uncontroverted expert testimony in the record establishes that appropriate methodology for testing whether a product controls the level or degree of rotational wheel slip as called for in the NHTSA regulations and SAE J2246 specifications (*see supra* note 25) includes test runs on a variety of surfaces with different frictional or mu levels. A "split mu" test is conducted on a surface with different frictional levels on the right and left sides of the test vehicle. Tr. 1127 (Kourik).

scientific evidence in support of their performance claims at the time the claims were made.[33]

In contrast to respondents' proffered substantiation, tests conducted by NHTSA in accordance with SAE J46 (CX-39, CX-40), a widely-accepted industry protocol (Tr. 829-30; IDF 76), demonstrate that ABS/Trax will not prevent wheel lock-up. *See* CX-34; CX-35; IDF 68-87.[34] The expert testimony offered by complaint counsel's witnesses corroborates the testing results and confirms that ABS/Trax does not provide the benefits of an antilock braking system. *See, e.g.*, Tr. 873-83 (Hague); Tr. 1140-52 (Kourik).

Respondents argue that the NHTSA "testings" relied on by the Administrative Law Judge are "highly arguable and inarguably limited/biased," stating that they have been "shown to be dysfunctional in protocol and conclusion, actually producing (mis)information that unabashedly confers 15% shortened stopping on electronic (OE) ABS." They assert further that this "determination is now scandalously admitted by the car makers and ABS brake manufacturers themselves to be mostly inaccurate and inarticulate . . . ." RAB 7.

Respondents do not identify the testing to which they refer. If respondents' intention is to challenge the validity of the NHTSA tests on the record, such as CX-34 and CX-35, which were relied on by the Administrative Law Judge, and which we consider both reliable and probative, they cite no supporting record evidence. The Commission finds these arguments without factual basis in the record.[35] We find, therefore, that the NHTSA test results, the expert testimony presented by complaint counsel and respondents' failure to submit competent and reliable evidence to substantiate their claims provide strong

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[33] *See supra* note 23.

[34] Respondents also argue that "[t]here are . . . no D.O.T. standards . . . effectively no discreet pass/fail delineation." RAB 5. Assuming that by this, respondents mean to argue that no objective means exist to evaluate wheel-slip control, the record is to the contrary. Well established protocols exist for evaluating the ability of a device to control wheel slip and were used in the NHTSA testing. *See* IDF 50-54.

[35] Respondents seem to argue that the NHTSA test results relied on by the Administrative Law Judge are flawed as indicators of the performance of their products, because they constitute "simple, selective, and single minded testing of mostly new cars." They argue that "RESPONDENT company agenda is primarily the retrofit of mostly older or somewhat aged, non ABS equipped cars," but also "admit [ ] application of its claims to all non ABS cars, including newly manufactured hydraulics braking facilitate vehicles." RAB 9. This argument is somewhat opaque. In any event, however, none of the advertising claims challenged in this proceeding distinguishes between old and new vehicles.

support for concluding that respondents made false and unsubstantiated claims that ABS/Trax would perform like and as well as an antilock braking system with respect to wheel lock-up, skidding and control in panic stops.

B. ABS/Trax Does Not Reduce Stopping Distances in Emergencies; Nor Do Tests Show Using ABS/Trax Reduces Stopping Distances by Up To 30%

Respondents' advertising made two claims concerning stopping distances: a general claim that vehicles equipped with ABS/Trax would experience shorter stopping distances in emergency circumstances than would vehicles without the device; and a more specific claim that "simulation testing has shown that use of the device would reduce a vehicle's stopping distances by up to 30% at a speed of 60 mph." We find both of these claims unsubstantiated and the second false, as well.

Respondents appear to argue that because no performance standards for vehicle stopping distances exist, testing or other competent reliable scientific evidence is not required to support the claims. RAB 1. This argument is in error. Two of respondents' advertisements expressly state that "simulation testing has shown" the claimed reduction in distances needed for emergency stops. Respondents, therefore, were obligated to have and rely on tests demonstrating the validity of those claims.[36] The remaining advertisements that include claims about reduced stopping distances do not reference testing results and are properly assessed under the analysis in Pfizer. *See supra* pp. 293-94. Under a Pfizer analysis, respondents' claims require substantiation by competent and reliable scientific evidence. *See* IDF 50-58; ID 40-41.

Respondents do not specify a basis in the record for their apparent disagreement with the Administrative Law Judge's decision that their general stopping-distance claim was unsubstantiated and their specific claim that tests showed up to 30% reduction in stopping distance was false. Respondents appear to argue that because they claimed that tests showed that vehicles using their device would experience "up to" 30% shorter stopping distances than those without it, any reduction in stopping distance in any test, regardless of that

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[36] *Removatron Int'l Corp.*, 111 FTC at 297-98 & n.11.

test's validity or its showing with respect to the consistency of the device's performance, would substantiate the claim. Respondents' position seems to be that the "up to" qualification is "necessary because every car and especially as it ages/wears its various braking component parts... will produce unspecific predictably unpredictable results without add-on ABS, thereby the same consistent inconsistencies are anticipated with add-on ABS." RAB 10.

Even had respondents' device been shown on the record to produce consistent small reductions in stopping distances, which it was not, the claim challenged in the complaint was not so limited. The claim, "tests show up to 30% reduction," in our view, conveyed a message that respondents had and relied on tests that showed consistently significant reductions in stopping distances. In fact, the record is devoid of test results that demonstrate that ABS/Trax consistently reduced stopping distances by any substantial percentage, let alone 30%. To the contrary, the record contains both reliable and probative evidence that respondents' product did not and could not perform as claimed. *See, e.g.*, CX-34, CX-35; discussion *supra* pp. 295-305.

We already have addressed and rejected as unreliable and not probative the extra-record testing material cited by respondents to support their wheel lock-up and related claims. *See supra* pp.296-302. In the context of respondents' stopping-distance claims, we note additional deficiencies in this evidence.

Although the one-page AccuBrake test report states that use of respondents' device shortened stopping distances by an average of 11.6%, it does not state how those distances were measured. CX-30-F. Mr. Schops testified that a tape measure could have been used. Tr. 2419. The manner in which stopping distances are measured is critical to permit control of all relevant factors and ensure accuracy. IDF 50-58. Casual consumer observations and use of tape measures are not reliable means of assessing comparative stopping distances.

Tr. 824, 1242, 1287, 1912-19, 2031-32; IDF 53 & 58.[37] This unscientific test does not support either of respondents' claims of reduced stopping distances.

Similarly, the Thailand test videotape does not provide reliable evidence regarding stopping distances that would support either claim. Brake engineering experts testified without contradiction that the videotape shows the test vehicle was not properly instrumented to record the speed at which braking was commenced, that reliable means were not used to measure the stopping distances, that insufficient test runs were made to provide reliable data and that stopping distances were not corrected to accommodate differences between the actual speed and the target speed. IDF 64; Tr. 1242 (Kourik), 2024-31 (Hinch), 2438-39 (Schops).[38]

The Australian test also is deficient with respect to respondents' two stopping-distance claims. Stopping distances cannot be computed reliably from deceleration levels because deceleration is not constant. IDF 66; Tr. 2019-20 (Hinch). In addition, respondent Schops admits that the reported stopping distances were measured with a tape measure, a measurement technique that uncontroverted expert testimony persuades us is unreliable. IDF 58; Tr. 824 (Hague), 1242 (Kourik), 2031-32 (Hinch).

Tests conducted by NHTSA demonstrate clearly that ABS/Trax does not reduce stopping distances in emergencies. CX-35; IDF 69-71. Indeed, in some instances, this competent and reliable testing shows that respondents' device actually extended stopping distances by as much as 20%. CX-35-T, -W; IDF 71. Based on all of these tests, the Commission finds that both of respondents' stopping distance claims were unsubstantiated. It further finds that the claim

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[37] CX-30-F also is inaccurate on its face. The calculation of average stopping distances reflected in the report does not appear to have included the figure for the shortest stop by the control vehicle, which was not equipped with respondents' device. The report does not show that the figures used were adjusted to compensate for the unequal number of test runs for the control and test vehicles. If the omitted stopping distance is included in the calculation, the resulting figure shows a reduction of four feet in the average stopping distance needed by the control vehicle and decreases to 7.3% the percentage of purported improvement for the vehicle using respondents' device. *Id.*; IDF 63. These results of an unreliable and inaccurately reported test, although minimally favorable to respondents' general position, do not constitute competent and reliable scientific evidence sufficient to support respondents' stopping-distance claims.

[38] The expert testimony concerning the Thailand test and that of respondent Schops was based on the pictures appearing on the videotape because the audio, graphics and accompanying written material were in Thai. *See* Tr. 2024 (Hinch); *see also supra* note 31.

that respondents had tests showing up to a 30% reduction in stopping distances at a speed of 60 m.p.h. was false.

C. *Respondents Lacked Reasonable Basis for Claim that ABS/Trax Provides Comparative Safety*

We next address respondents' advertising claim that installation of ABS/Trax will make operation of a vehicle safer than operation of a vehicle not equipped with the device. This claim is unsubstantiated.

Respondents offered no evidence in support of their comparative safety claim, and their appeal brief points to no record evidence to substantiate the representation. The only evidence in the record that might be relevant to this claim is the material relating to the ability of ABS/Trax to prevent or reduce wheel lock-up, skidding and loss of steering control and to reduce stopping distances in emergencies. We already have found that this material is neither probative nor reliable, and that it does not support a claim that ABS/Trax prevents or reduces wheel lock-up, skidding or loss of steering control (*see supra* pp. 296-303) or a claim that the product will shorten stopping distances in emergency circumstances. *See supra* pp. 299-302. It follows, there-fore, that this material does not support respondents' comparative safety claim. *See* Tr. 1254-55 (Kourik); ID at 43.

D. *ABS/Trax Does Not Comply with NHTSA Antilock Brake Standards or with Performance Standards in SAE J46*

As already discussed (*supra* pp. 295-96), respondents' claim that their device complies with NHTSA standards for antilock braking systems is unsubstantiated and false. Respondents also claim falsely and without substantiation that ABS/Trax complies with performance standards set forth in SAE J46 ("Wheel Slip Brake Control System Road Test"). SAE J46, on its face, however, does not contain performance standards. *See* CX-39, CX-40. As stated in the publication itself, "This document establishes a uniform procedure for the road test of wheel-slip brake-control systems. . . ."[39] *See also* IDF 54, 88.[40] Because SAE J46 does not contain performance standards,

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[39] CX-40 at ¶ 1.4.

[40] None of the tests relied on by respondents at the time they made their claims was conducted according to the protocol prescribed by SAE J46. IDF 62-67.

"the claim that the ABS/Trax device complies with a performance standard set forth in . . . SAE J46 . . . is false and unsubstantiated." ID at 42-43.

E. Installation of ABS/Trax Will Not Qualify Vehicles for Insurance Discounts in a Substantial Proportion of Cases

We next address the allegation that respondents have made unsubstantiated and false representations that installation of ABS/Trax will qualify a vehicle for an insurance discount. The record shows that respondents, in making their claim, relied on promotional literature from Allstate and another unspecified insurer stating that consumers could get a discount on their auto insurance if they had antilock brakes. In fact, Allstate expressly limits its discount to factory-installed ABS systems. *See* PSD2, F. 12. In addition, although respondents contacted insurance brokers at about the time they prepared their advertisements, they could not get an answer to whether their device would qualify for a discount. *Id.*, F. 14. By their own admission, respondents simply "took a look at some of the advertising literature of some of the insurance carriers," and "where their advertising [said] 'ABS discount,' and did not invoke any electronics . . . factory or any other qualification for it . . . [they] put two and two together and said, 'If this is ABS and ABS discounts apply, this certainly would qualify for it.'" *Id.*

Respondents' leap of faith was unwarranted. The record shows that ABS/Trax is not an antilock braking system. Even if respondents' device somehow were classified as such a system, vehicles equipped with the device would not necessarily qualify for an insurance discount because insurers that offer brake-related discounts typically limit the availability of such a discount to factory-installed antilock braking systems. *See* PSD2, F. 2a-f; Affidavits from GEICO, State Farm, Allstate and others, appended to Complaint Counsel's Motion for Summary Decision on Insurance Discount Issue.[41]

Respondents argue that the Administrative Law Judge incorrectly found false and unsubstantiated their claim that vehicles using their

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[41] As noted in the insurance company affidavits and PSD2, the only exception to the general policy of providing discounts for only factory-installed automatic braking systems was in the State of Florida, which until 1993, prohibited insurers from conditioning discounts on factory-installation of the device. PSD2, F. 7d.

device would receive an insurance discount in a significant proportion of cases. They assert error in the Judge's finding "that insurance carriers only recognize factory (OE) ABS for safety discount." RAB 12. Arguing, in effect, that the insurance carriers fail to take account of what respondents believe are "serious concerns about the safety delivered by factory (OE) ABS," and that these firms are "self-admittedly, not that knowledgeable about the technology" (*id.*), respondents contend that the Administrative Law Judge "deems to disqualify ABS claims of possible 'insurance acceptance based upon individual carrier policy' as untruthful, when there is every reason to believe add-on ABS should, could and would qualify were it not for the NHTSA, GM and FTC misteachings and 'tortous' [sic] conduct." *Id.* at 12-13. We have found the challenged advertising claim that users of respondents' device would receive a discount in their insurance in a significant proportion of cases is false and without substantiation, and the record is devoid of evidence of the collusion between the FTC and NHTSA on the one hand and the automobile manufacturers on the other. The fact that respondents believe their product should or could qualify for insurance discounts is irrelevant. What is relevant is that respondents failed to present evidence that their device qualified for such a discount.

V. FAIRNESS AND PUBLIC INTEREST

Respondents have challenged on appeal the fairness of this adjudication, particularly the delegation of the trial to an administrative law judge who, respondents assert, is in an "inseparable relationship" with the Commission, the final adjudicator of the merits. RAB 1. Section 556 of the Administrative Procedure Act, 5 U.S.C. 556, however, expressly authorizes agencies to delegate the duties of conducting an adjudication to an administrative law judge. Nonetheless, the Commission itself must conduct a *de novo* review of the decision of an administrative law judge on appeal by a party to the proceeding, or it may do so on its own motion. *See* 5 U.S.C. 557.

Respondents also appear to argue that the Commission's roles of prosecutor and adjudicator conflict to deprive respondents of a fair and objective proceeding. Section 554(d) of the Administrative Procedure Act, 5 U.S.C. 554(d), explicitly provides for separation of investigatory or prosecutory functions and adjudicative functions

within an administrative agency such as the Commission.[42] In addition, this argument has been rejected repeatedly by the courts.[43] Respondents' position, therefore, is without merit. Fairness and failure to prevail on the merits should not be confused.

Finally, respondents argue that this proceeding is not in the public interest. Respondents' assertion appears to be based largely on their conviction that the absence of consumer complaints or enforcement actions by other agencies renders this proceeding an "overreaction." RAB 7. The FTC Act permits the Commission to issue an administrative complaint only on finding "reason to believe," based on available information, but not necessarily on complaints or enforcement actions by other agencies, that Section 5 has been violated and that an administrative proceeding "in respect thereof would be to the interest of the public." 15 U.S.C. 45(b). These requirements were met when the Commission issued its complaint in this matter.

The Commission looks with disfavor on challenges to its initial public interest determination in adjudications.[44] Nothing in respondents' brief or in the record suggests or supports the notion that this proceeding is not in the public interest. To the contrary, even had we not found the allegations supported by a preponderance of the evidence in the record,[45] if consumers purchased respondents' product based on respondents' unsubstantiated or false claims of product safety and performance, we may reasonably assume that these consumers are at some physical risk and have suffered economic loss as well. This more than adequately justifies the conduct of the current

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[42] But *see* 5 U.S.C. 554(d)(2)(C) (exempting head of agency from separation of functions requirements of the Administrative Procedure Act).

[43] *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (assertion of unfairness based on combination of investigative and adjudicative functions "must overcome a presumption of honesty and integrity in those serving as adjudicators"); *Sheldon v. SEC*, 45 F.3d 1515 (11th Cir. 1995) ("'It is uniformly accepted that many agencies properly combine the functions of prosecutor, judge and jury.'") (*quoting Touche Ross & Co. v. SEC*, 609 F.2d 570, 581 (2d Cir. 1979)); *FTC v. Cinderella Career and Finishing Schools*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) ("It is well settled that a combination of investigative and judicial functions within an agency does not violate due process.").

[44] *See, e.g., Pepsico, Inc.*, 83 FTC 1716 (1974) (interlocutory order) ("Only in the most extraordinary circumstances" will the Commission review its public interest determination); *Exxon Corp.*, 83 FTC 1759 (1974) (interlocutory order).

[45] To justify issuance of a complaint, the Commission must simply find reason to believe the law has been violated. This may be based, for example, on evidence suggesting that liability is more likely to be found than not. To find liability, however, the Commission must be persuaded that each of its findings is supported by a preponderance of the evidence on the record. *See Adventist Health System/West*, 117 FTC 224, 297 (1994); *Charlton v. FTC*, 543 F.2d 903, 907 (D.C. Cir. 1976).

proceeding. We therefore reject respondents' argument on appeal as groundless.

VI. RELIEF

A. Standards

Having concluded that respondents have violated Section 5 in advertising for their after-market braking devices, the Commission will impose an order to prevent recurrence of the unlawful acts and practices found. The Commission has wide discretion in its choice of a remedy, and it is authorized to enter an order that is sufficiently broad to ensure that respondents will refrain from engaging in similar conduct or conduct that likely would have the same or similar effects.[46]

The discretion of the Commission is limited by two constraints. First, the order must be sufficiently clear and precise that its requirements can be understood.[47] Second, the order must bear a "reasonable relation" to the unlawful practices found.[48] The Commission's fencing-in relief is not limited to enjoining unlawful actions. "[I]t is within the Commission's discretion to determine that the only effective way to terminate the effects of the unlawful conduct is by barring an otherwise lawful course of conduct which could have the practical effect of continuing the unlawful conduct unmitigated."[49]

In determining whether to impose fencing-in relief, the Commission considers the seriousness and deliberateness of the violations; the ease with which the unlawful conduct can be transferred to other products; and whether the respondents have a history of violations.[50] The more egregious the facts with respect to any one of these elements, the less important it is that other negative factors be present.[51]

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[46] *See, e.g., FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946).

[47] *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965).

[48] *Jacob Siegel Co.*, 327 U.S. at 612.

[49] *Sandura Co. v. FTC*, 339 F.2d 847, 860-61 (6th Cir. 1964). *See FTC v. National Lead Co.*, 352 U.S. 419, 430 (1957); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

[50] *See Thompson Medical Co.*, 104 FTC at 833.

[51] *See Sears Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982); *Thompson Medical Co.*, 104 FTC at 833.

B. Commission Order

The order the Commission issues in this matter, like that accompanying the initial decision, enjoins respondents from using the term "ABS" in conjunction with or as part of the name or logo for ABS/Trax or any substantially similar product. Order ¶ I. The order also enjoins respondents from making any of the claims found both false and unsubstantiated for ABS/Trax or any substantially similar product (*id.* ¶ II); and from making the two claims found simply unsubstantiated for ABS/Trax and certain other products, unless respondents can support them with "competent and reliable scientific evidence." *Id.* ¶ III. In addition, the order prohibits respondents from making misrepresentations concerning tests or studies, the compliance of ABS/Trax and certain other products with any standard, definition or regulation and the availability of insurance benefits and discounts based on use of certain products. *Id.* ¶ IV. The order also enjoins representations concerning the attributes, efficacy, performance, safety or benefits of ABS/Trax and certain other products unless the representations are true and supported by competent and reliable scientific evidence. *Id.* ¶ V. Paragraph VI of the order requires, among other things, that respondents mail to each purchaser of their ABS/Trax products a prescribed letter notifying the recipients of the order.[52]

1. Prohibition of Use of Term "ABS"

Respondents' appeal the prohibition in the order issued by the Administrative Law Judge on use of the term "ABS." Respondents call this provision "unconscionable and unconstitutional" and argue that their "entitlement to the ABS acronym ought not be a subjective arbitrary whim or an unwitting aberration." RAB 3. The Commission agrees that brand-name excision should not be ordered arbitrarily. We have considered, therefore, whether the deception inherent in respondents' use of the term "ABS" is properly remedied by prohibiting them from using the term in conjunction with, or as part of, their trade name.

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[52] Paragraph VII of the order requires respondents to maintain the list required by Paragraph VI for five years along with copies of the letters sent to purchasers. Paragraphs VIII-XI and XIII are standard compliance provisions typically found in Commission orders, and Paragraph XII provides for sunsetting of the order consistent with current Commission policy.

Brand name excision may be appropriate when a less restrictive remedy, such as an affirmative disclosure, is insufficient to eliminate the deception conveyed by the name or will lead to a "confusing contradiction in terms."[53] The relevant question is whether any less restrictive means exists for eliminating the deception inherent in the respondents' use of "ABS" in conjunction with, or as part of, their trade name or trademark.[54]

Trade names and trademarks are valuable business assets. Here, however, the record shows the association of the term "ABS" with antilock braking systems and their performance attributes to be sufficiently established that consumers are likely to be misled into believing that the ABS/Trax device is equivalent to and provides the benefits advertised for factory-installed antilock braking systems. PSD1, F. 3. The terms "ABS" and "antilock brakes" are used interchangeably in advertising for new cars. *Id.* Indeed, the record demonstrates that new car manufacturers are willing to use promotional materials in which the shorthand expression "ABS" appears without an accompanying explanation, which reflects a high degree of confidence among industry marketing personnel that the consuming public has a clear understanding of the meaning of the term. PSD1, F. 1; Respondents' Answers to Complaint Counsel's First Request for Admissions 54-55. Consumers commonly use the term "ABS" to refer to antilock braking systems in their contacts with NHTSA officials, another reliable indicator that consumers would assume that a product described as "ABS" is an antilock braking system. PSD1, F. 2; Respondents' Answers to Complaint Counsel's First Request for Admissions 67-69.

In light of the strong association of the term "ABS" with antilock braking systems and their performance attributes, adding a qualifying phrase to respondents' trade names or advertising claims using the term would result in an apparent contradiction in terms and would likely confuse consumers.[55] The potential for confusion is of

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[53] *Continental Wax Corp. v. FTC*, 330 F.2d 475, 479-80 (2d Cir. 1964), *aff'g* 62 FTC 1064 (1963); *see Thompson Medical Co.*, 104 FTC at 837-39.

[54] *See Jacob Siegel Co. v. FTC*, 327 U.S. at 612; *Continental Wax Corp., supra.*

[55] *See Continental Wax Corp.*, 330 F.2d at 479-80 (where "the offending deception is caused by a clear and unambiguous false representation implicit in the product's name, [so that] addition of a qualifying phrase would lead to a confusing contradiction in terms, no remedy short of complete excision of the trade name will suffice").

particular concern to us here, where the product and claims relate to the safety and performance of a motor vehicle. Permitting respondents to continue using the term "ABS " in conjunction with or as part of their trade name or trademark would enable them to continue selling a product to consumers that not only would deceive them by failing to perform as advertised, but also, could lull them into believing that the product will make their vehicles safer when the opposite would be true. Therefore, the Commission enjoins respondents from using the term "ABS " in conjunction with or as part of their trade name or trademark.[56]

2. Scope of Fencing-in Provisions

The Commission believes that respondents' practices are serious and deliberate and are readily transferable to other products and claims. *See* ID 48 and findings and cases cited therein. They clearly justify fencing-in relief.[57] Respondents' broad based campaign to market their braking device as an antilock braking system over an extended period (IDF 4-11), without regard to whether there was reliable information to support their claims[58] and in the face of substantial information that the claims were false, demonstrates the serious and deliberate nature of the violations before us. First, respondent Schops admitted that many of the challenged claims were intentional. Tr. 2403-04 (Schops); IDF 19. In addition, although required by Section 5 to have a reasonable basis for their claims in the

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[56] Compare *Continental Wax* with *Beneficial Corp.*, 86 FTC 119, 167-68 (1975), *vacated and remanded in part*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). In Beneficial, the Third Circuit vacated and remanded a provision in the Commission's order barring use of the term "Instant Tax Refund." The court held that the term could be explained without creating ambiguity or confusion and that "[i]n failing to consider fully the feasibility of requiring merely that advertising copy be rewritten in lieu of total excision of the offending language, the Commission would appear to have exceeded its remedial authority under § 5. . . ."

The record in this proceeding shows that unlike the term the Commission attempted to bar in Beneficial, the term "ABS," which, among other things, is part of respondents' product name, is widely used by industry as a synonym for factory-installed antilock braking systems and is not susceptible to unambiguous clarification. As we said in Continental Wax, the term "is more than a trade name; it is an allegation concerning the performance of a product." 62 FTC at 1084. We have found that performance allegation false and unsubstantiated. Therefore, we believe that any genuine effort to explain that respondents' product name should not be taken as a claim that the product is, or will perform as if it is, a factory-installed antilock braking system would be contradictory and confusing.

[57] *See, e.g., Stouffer Foods Corp.*, 118 FTC 746, 813-15; *see also id.* at 815-18 (Commissioner Azcuenaga concurring in part) (1994); *Kraft, Inc.*, 114 FTC 40, 139-42 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

[58] Respondents even professed reliance on a test, the results of which appear to have been manipulated to support their claims. IDF 63; CX-30-F; Tr. 2418; *supra* note 37.

form of competent and reliable scientific evidence (*supra* pp. 302-03), and despite being informed by NHTSA that their claims were not supported,[59] respondents failed to obtain an independent and scientific assessment of their product before continuing to disseminate their advertising claims. This conduct supports the conclusion that respondents did not want to discover or accept the truth and that their false and unsubstantiated claims were deliberate.

We also find that the ease with which the unlawful conduct here might be transferred to other products justifies limiting future claims regarding products in addition to ABS/Trax and similar devices. Respondents have demonstrated a lack of interest in using proper scientific methodology to test equipment purportedly designed to enhance the safety and performance of motor vehicles, and they have ignored the results of competent and reliable tests repudiating their claims for such equipment. Such irresponsible conduct easily could be transferred to the testing of other products.[60]

Taking into account that respondents' advertising representations are "credence" claims that consumers cannot evaluate accurately on their own, considering that the claims and product involve the performance and comparative safety of a motor vehicle, and noting the respondents' repeated and apparently deliberate disregard for testing results inconsistent with their claims, we readily conclude that strong fencing-in relief is required to prevent recurrence of the respondents' unlawful conduct.[61]

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[59] NHTSA sent Mr. Schops a letter in early January 1992, informing him that NHTSA was "investigating the performance of bolt-on 'antilock' devices to determine if their performance was consistent with the marketing claims being made by their manufacturers and distributors." CX-29-A. The letter also informed Mr. Schops that "[b]ased on preliminary testing," NHTSA had "contacted the Federal Trade Commission when it appeared the devices did not perform as claimed." *Id.* The claims described in the NHTSA letter included several of the claims at issue in this proceeding. Respondents submitted information and product in response to the NHTSA letter and offered to assist in the investigation. CX-30 and CX-31. Mr. Schops also testified that he received a report from NHTSA at some time before August 16, 1994, concluding that ABS/Trax did not function as an antilock braking system. Tr. 2431-32. Despite their contacts with NHTSA, respondents continued to disseminate their claims throughout this period and beyond, offering as substantiation only the unsupported conclusions of respondent Schops and a few demonstrably unreliable reports, one of which is in a foreign language offered without translation.

[60] *See Kraft, Inc.*, 114 FTC 40, 141-42 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Cf. American Home Products*, 98 FTC 136, 405 (1981) ("effort to misrepresent the nature of a quite ordinary ingredient is a technique that could easily be applied to advertising of ... products other than [this one]").

[61] *See Kraft, Inc.*, 114 FTC at 140-42; *Thompson Medical Co.*, 104 FTC at 832-33; *Sears, Roebuck*, 676 F.2d at 392; *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370-72 (9th Cir. 1982).

"All-product" coverage, however, in our view, is overly broad. The record does not show that respondents' business has extended beyond manufacturing and promoting one or more versions of the ABS/Trax device; nor does the record suggest that respondents are likely to extend their endeavors beyond automobile and other motor vehicle accessories and devices in the future.[62] On the other hand, coverage limited to "any braking system, accessory or device" appears less than adequate to protect against future related violations with respect to other automotive and motor vehicular products. The Commission, therefore, has decided to make all three fencing-in provisions of the order applicable to "any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle."[63]

This approach will make the fencing-in coverage in paragraphs III, IV and V consistent and, we believe, appropriately tailored.[64] This language also parallels that in the comparable provisions of the final order in Docket No. 9277.

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[62] The record shows that respondent Schops was the founder, CEO and virtual alter ego of the corporate defendants, controlling nearly every aspect of their business. IDF 1-4. Respondent Schops, however, made clear on several occasions in this proceeding that his financial resources are modest. For example, he explained to the Administrative Law Judge that he "was financially unable to attend" the entire trial (Tr. 8); and he requested that the Commission pay his travel expenses to enable him to present oral argument on appeal to the Commission. Respondent's Response to Notice of Schedule of Oral Argument and Request for Adjournment and Request for Continuance at 1 (May 30, 1998). In addition, he stated on two occasions since the close of the administrative trial that he "has voluntarily ceased operation (Respondent's Motion for Continuance of the September 3, 1997 Appeal Hearing Based Upon Exigent Medical Circumstance at 1 (August 26, 1997)) and that "there is no product being manufactured, no inventory and no product being sold." Response to Notice of Schedule of Oral Argument and Request for Adjournment and Request for Continuance, *supra*. We are persuaded that neither respondent Schops nor the corporate respondents he controls are likely to expand business beyond the manufacture and sale of products for automobiles and other motor vehicles. *Cf. Kraft, Inc.*, 970 F.2d at 327 (approving Commission finding that violations with respect to Kraft Singles were transferable only to other Kraft cheese products).

[63] Compare Administrative Law Judge Order ¶ III ("any braking system, accessory, or device"); with Administrative Law Judge Order ¶ IV ("any product"); and Administrative Law Judge Order ¶ V ("any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle").

[64] We also make several technical modifications to the order issued by the Administrative Law Judge. These changes in paragraphs VI-A and B, IX-A and B and XIII are consistent with the Commission's Rules of Practice and are intended simply to conform the order more closely to the Rules. *See also* Brake Guard Products, Inc., Docket No. 9277 (Order Denying Respondents' Motion for Reconsideration and Modifying Final Order) (March 27, 1998).

3. Notification Requirements

The Commission adopts without change the notification provisions in the order issued by the Administrative Law Judge.[65] Generally, these provisions require respondents to compile a mailing list of all purchasers of their braking devices since 1990 and to send to each purchaser a prescribed letter notifying the purchaser that the Commission has found most of the advertising claims at issue in this proceeding "false and misleading" and that the FTC has issued an order barring respondents from making such claims in the future. The notice letter explains further that the order prohibits respondents from making safety claims and claims that their product reduces stopping distances in emergencies without having competent and reliable scientific evidence substantiating the representation. Respondents also are required to notify their distributors and seek their cooperation in locating purchasers.

It is well established that the Commission may order respondents to notify product distributors and retail purchasers that advertising claims for products they have purchased have been found to violate Section 5.[66] Such notification is intended to apprise consumers of the truth about their purchase and to reduce the likelihood of further deception from any recurrence of the false or deceptive claims.[67]

Notification provisions are especially appropriate to warn consumers about potential safety concerns.[68] Here, it is reasonable to conclude that consumers decided not to purchase factory-installed antilock braking systems in reliance on respondents' deceptive claims that their product was an equally effective alternative. It also is reasonable to conclude that these consumers will not find out until

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[65] Respondents do not appear to challenge the notification provisions in the Administrative Law Judge's order. Nonetheless, in view of respondents' *pro se* status, we will address these provisions briefly.

[66] *See, e.g., Removatron Int'l Corp.*, 111 FTC 206, 311 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Southwest Sunsites, Inc.*, 105 FTC 7, 176-78 (1985), *aff'd*, 785 F.2d 1431 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986).

[67] *FTC v. Virginia Homes Mfg. Corp.*, 509 F.Supp. 51, 56-59 (D.Md. 1981); *Removatron*, 111 FTC at 311 (notification of Removatron operators to prevent future dissemination of deceptive sales materials to consumers); *Figgie, Int'l, Inc.*, 107 FTC 313, 368-70, 395 (1986), *aff'd*, 817 F.2d 102 (4th Cir. 1987); *Southwest Sunsites*, 105 FTC at 176-78; *AMREP Corp.*, 102 FTC 1362, 1678-80 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986).

[68] *See Figgie*, 107 FTC at 368-70, 395; *see also, e.g., MACE Security Int'l, Inc.*, C-3487 (Mar. 25, 1994) (consent order); *Aquanautics Corp.*, 109 FTC 34 (1987) (consent order); *Bayleysuit, Inc.*, 102 FTC 1285 (1983) (consent order).

too late that unlike factory-installed systems, the device will not reduce stopping distances (CX-35; IDF 69-87) and will leave them susceptible to wheel lock-up, loss of control and possible injury. *Id.*[69]

VII. CONCLUSION

The Commission concludes that the respondents have engaged in unfair and deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act. Accordingly, the Commission issues the attached final order.

FINAL ORDER

DEFINITIONS

For the purposes of this order:

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based upon 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; and

2. "*Purchasers for resale*" shall mean all purchasers of A•B•S/Trax or A•B•S/Trax² for resale to the public, including but not limited to franchisees, wholesalers, distributors, retailers, installers, and jobbers.

I.

It is ordered, That respondents, Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and their officers, and Richard Schops, individually and as an officer and director of said corporations, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of A•B•S/Trax, A•B•S/Trax² or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade

[69] *See Figgie*, 107 FTC at 363 (reasonable to conclude that consumers purchased heat detectors in reliance upon respondents' safety claims and will be unable to determine for themselves until it is too late that their heat detectors will not provide the promised protection).

Commission Act, do forthwith cease and desist from employing the initials or term "ABS" in conjunction with, or as part of the name for, such product or the product trademark.

II.

It is further ordered, That respondents, Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and their officers, and Richard Schops, individually and as an officer and director of said corporations, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of A•B•S/Trax, A•B•S/Trax² or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product:

A. Is an antilock braking system;
B. Prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;
C. Will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;
D. Complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;
E. Complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;
F. Has been proven in tests to reduce stopping distances by at least 30% when the vehicle's brakes are applied at a speed of 60 mph; or
G. Provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems.

III.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and their officers, and Richard Schops, individually and as an officer and director of said corporations, and

respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. In emergency stopping situations, a vehicle equipped with the system, accessory, or device will stop in a shorter distance than a vehicle that is not equipped with the system, accessory, or device; or
B. Installation of the system, accessory, or device will make operation of a vehicle safer than a vehicle that is not equipped with the system, accessory, or device;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and their officers, and Richard Schops, individually and as an officer and director of said corporations, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle, 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:

A. The contents, validity, results, conclusions, or interpretations of any test or study;

B. The compliance of any such product with any standard, definition, regulation, or any other provision of any governmental entity or unit, or of any other organization; or
C. The availability of insurance benefits or discounts arising from the use of such product.

V.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and their officers, and Richard Schops, individually and as an officer and director of said corporations, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the absolute or comparative attributes, efficacy, performance, safety, or benefits of such system, accessory, or device, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

VI.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, their successors and assigns, and Richard Schops shall:

A. Within forty-five days after the date this order becomes final, compile a current mailing list containing the names and last known addresses of all purchasers of A•B•S/Trax or A•B•S/ Trax[2] since January 1, 1990. Respondents shall compile the list by:

1. Searching their own files for the names and addresses of such purchasers; and

2. Using their best efforts to identify any other such purchasers, including but not limited to sending by first class certified mail, return

receipt requested, within five days after the date this Order becomes final, to all of the purchasers for resale with which respondents have done business since January 1, 1990, an exact copy of the notice attached hereto as Appendix A. The mailing shall not include any other documents. In the event that any such purchaser for resale fails to provide any names or addresses of purchasers in its possession, respondents shall provide the names and addresses of all such purchasers for resale to the Federal Trade Commission within forty-five days after the date this order becomes final.

3. In addition, respondents shall retain a National Change of Address System ("NCOA") licensee to update this list by processing the list through the NCOA database.

B. Within sixty days after the date this order becomes final, send by first class mail, postage prepaid, to the last address known to respondents of each purchaser of A•B•S/Trax or A•B•S/Trax² identified on the mailing list compiled pursuant to subparagraph A of this Part, an exact copy of the notice attached hereto as Appendix B. The mailing shall not include any other documents. The envelope enclosing the notice shall have printed thereon in a prominent fashion the phrases "FORWARDING AND RETURN POSTAGE GUARANTEED" and "IMPORTANT NOTICE -- U.S. GOVERNMENT ORDER ABOUT A•B•S/TRAX or A•B•S/TRAX² BRAKING DEVICE."

C. Send the mailing described in subparagraph B of this Part to any person or organization not on the mailing list prescribed in subparagraph A of this Part about whom respondents later receive information indicating that the person or organization is likely to have been a purchaser of A•B•S/Trax or A•B•S/Trax², and to any purchaser whose notification letter is returned by the U.S. Postal Service as undeliverable and for whom respondents thereafter obtain a corrected address. The mailing required by this subpart shall be made within ten (10) days of respondents' receipt of a corrected address or information identifying each such purchaser.

D. In the event respondents receive any information that, subsequent to its receipt of Appendix A, any purchaser for resale is using or disseminating any advertisement or promotional material that contains any representation prohibited by this order, immediately notify the purchaser for resale that respondents will terminate the

use of said purchaser for resale if it continues to use such advertisement or promotional material.

E. Terminate within ten days the use of any purchaser for resale about whom respondents receive any information that such purchaser for resale has continued to use any advertisement or promotional material that contains any representation prohibited by this order after receipt of the notice required by subparagraph A of this Part.

VII.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., corporations, and Richard Schops shall for five years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. The list compiled pursuant to subparagraph A of Part VI of this order;
B. Copies of all notification letters sent to purchasers pursuant to subparagraphs B and C of Part VI of this order;
C. Copies of notification letters sent to purchasers for resale pursuant to subparagraphs A and D of Part VI of this order, and all other communications with purchasers for resale relating to the notices required by Part VI of this order.

VIII.

It is further ordered, That for five years after the last date of dissemination of any representation covered by this order, respondents, or their successors or assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff 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, and complaints or inquiries from governmental organizations.

IX.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc. and ABS Tech Sciences, Inc., their successors and assigns, shall:

A. Within thirty days after this order becomes final, provide a copy of this order to each of respondents' 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 years from the date this order becomes final, provide a copy of this order to each of respondents' 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 days after the person assumes his or her position.

X.

It is further ordered, That respondents Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc., their successors and assigns, shall notify the Commission at least thirty (30) days prior to any proposed change in the corporations 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 corporation which may affect compliance obligations under this order.

XI.

It is further ordered, That respondent Richard Schops shall, for a period of ten (10) years from the date this order becomes final, notify the Commission within thirty 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 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.

XII.

It is further ordered, That this order will terminate twenty years from the date it becomes final, 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.

XIII.

It is further ordered, That respondents shall, within sixty days after the date this order becomes final, 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 of their compliance with this order.

APPENDIX A

[Automotive Breakthrough Sciences, Inc. or ABS Tech Sciences, Inc. letterhead]

Dear A•B•S/Trax Reseller:

Our records indicate that you are or have been a distributor or retailer of the A•B•S/Trax or A•B•S/Trax² (hereinafter "A•B•S/ Trax"), a brake product. This letter is to advise you that the Federal Trade Commission ("FTC") recently obtained an Order against Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. regarding certain claims made for the A•B•S/Trax device. Under that Order, we are required to notify our distributors, wholesalers and others who have A•B•S/Trax to stop using or distributing advertisements or promotional materials containing these claims. We are also asking for your assistance in compiling a list of A•B•S/Trax purchasers, so that we may contact them directly. Please read this letter in its entirety and comply with all parts.

The FTC's Decision and Order

The Federal Trade Commission has determined that the following claims made for the A•B•S/Trax device in Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc.'s advertisements, logos and promotional material are **FALSE** and **MISLEADING**:

(a) A•B•S/Trax is an antilock braking system;
(b) A•B•S/Trax prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;
(c) A•B•S/Trax will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;
(d) A•B•S/Trax complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;
(e) A•B•S/Trax complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;
(f) A•B•S/Trax has been proven in tests to reduce stopping distances by up to 30% when the vehicle's brakes are applied at a speed of 60 mph; and
(g) A•B•S/Trax provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems.

The FTC Order requires Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. to cease and desist from making these false claims for the A•B•S/Trax device. In addition, the FTC Order requires Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. to cease and desist from making claims that A•B•S/Trax will shorten stopping distances in emergency stopping situations or make a vehicle safer, unless at the time of making such representation it possesses competent and reliable scientific evidence substantiating the representation.

We need your assistance in complying with this Order.

Please immediately send us the names and last known addresses of all persons or businesses, including other resellers, to whom you have sold an A•B•S/Trax or A•B•S/Trax² since January 1, 1990. We need this information in order to provide the notification required by the FTC Order. If you do not provide this information, we are required to provide your name and address to the FTC.

Please stop using the A•B•S/Trax or A•B•S/Trax² promotional materials currently in your possession. These materials may contain claims that the FTC has determined to be false or unsubstantiated. You also should avoid making any of the representations as described in this letter. Under the FTC Order, we must stop doing business with you if you continue to use the prohibited materials or make the prohibited representations.

If you have any questions, you may call the Division of Enforcement of the Federal Trade Commission at (202) 326-2998. Thank you for your cooperation.

Very truly yours,

Richard Schops
President
Automotive Breakthrough Sciences, Inc.

APPENDIX B

[Automotive Breakthrough Sciences, Inc. or ABS Tech Sciences, Inc. letterhead]

Dear A•B•S/Trax Customer:

Our records indicate that you previously purchased an A•B•S/Trax or A•B•S/Trax² (hereinafter "A•B•S/Trax") for your vehicle. This letter is to advise you that the Federal Trade Commission ("FTC") recently obtained an Order against Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. regarding certain claims made for the A•B•S/Trax device. Please read this letter in its entirety.

The FTC's Decision and Order

The Federal Trade Commission has determined that the following claims made for the A•B•S/Trax device in Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc.'s advertisements, logos and promotional material are **FALSE** and **MISLEADING**:

(a) A•B•S/Trax is an antilock braking system;
(b) A•B•S/Trax prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;
(c) A•B•S/Trax will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;
(d) A•B•S/Trax complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;
(e) A•B•S/Trax complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;
(f) A•B•S/Trax has been proven in tests to reduce stopping distances by up to 30% when the vehicle's brakes are applied at a speed of 60 mph; and
(g) A•B•S/Trax provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems.

The FTC Order requires Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. to cease and desist from making these false claims for the A•B•S/Trax device. In addition, the FTC Order requires Automotive Breakthrough Sciences, Inc., and ABS Tech Sciences, Inc. to cease and desist from making claims that A•B•S/Trax will shorten stopping distances in emergency situations or make a vehicle safer, unless at the time of making such representation it possesses competent and reliable scientific evidence substantiating the representation.

If you have any questions, you may call the Division of Enforcement of the Federal Trade Commission at (202) 326-2998. Thank you for your cooperation.

Very truly yours,

Richard Schops
President
Automotive Breakthrough Sciences, Inc.

IN THE MATTER OF

GLOBAL INDUSTRIAL TECHNOLOGIES, INC.

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

Docket C-3825. Complaint, Sept. 10, 1998--Decision, Sept. 10, 1998

This consent order, among other things, requires Global Industrial Technologies, Inc. ("Global"), the Texas-based producer of glass-furnace silica refractories, to restructure its proposed acquisition of AP Green Industries, Inc. ("AP Green"), and to divest certain assets of AP Green's silica refractories business to a Commission-approved buyer. The consent order provides that if Global does not complete the divestiture within the time-frame indicated, the Commission may appoint a trustee to complete the divestiture. In addition, the consent order contains a provision requiring Global to maintain the viability and marketability of the Global and AP Green silica refractories businesses pending the divestiture.

Participants

For the Commission: *Gregg Vicinanza, Joseph Krauss, William Baer, Russell Mangum,* and *Jonathan Baker.*

For the respondent: *D. Stuart Meiklejohn, Sullivan & Cromwell,* New York, NY.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Global Industrial Technologies, Inc. ("Global"), hereinafter sometimes referred to as respondent, has agreed to acquire AP Green Industries, Inc. ("AP Green"), in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Global Industrial Technologies, Inc. is a corporation organized, existing and doing business under and by

virtue of the laws of Delaware with its office and principal place of business located at 2121 San Jacinto Street, Suite 2500 Dallas, Texas.

2. Respondent manufactures and sells refractories, which are heat-resistant materials used to line furnaces in industries that involve the heating or containment of solids, liquids, or gases at high temperatures.

3. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUIRED COMPANY

4. AP Green is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at Green Boulevard, Mexico, Missouri.

5. AP Green also manufactures and sells refractories.

6. For purposes of this proceeding, AP Green is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE PROPOSED ACQUISITION

7. On or about March 3, 1998, Global and AP Green entered into an Agreement and Plan of Merger pursuant to which Global, through a subsidiary, agreed to acquire AP Green.

8. Global and AP Green are substantial direct competitors in the United States market for glass-furnace silica refractories.

IV. THE RELEVANT MARKET

9. The relevant line of commerce in which to analyze the effects of the acquisition is the United States market for glass-furnace silica refractories, which are heat-resistant materials sold in the form of bricks, shapes, and mortar. Glass manufacturers, including producers of float glass (flat glass for homes, offices, and automobiles), container glass (for bottles and jars), and other types of glass (*e.g.*, for

video screens, light bulbs, lenses, and beakers), require glass-furnace silica refractories to build the roofs and several other areas of the glass-melting furnaces in which they melt raw materials—silica, soda ash, salt cake, and dolomite—into a homogenous mass of molten glass.

10. Glass-furnace silica refractories are used by glass manufacturers because they are resistant to acid slags, have a high melting temperature, resist fumes and dust, and do not spall (*i.e.*, flake) at high temperatures. Glass manufacturers would not substitute other materials for glass-furnace silica refractories even in response to a significant increase in price.

11. Imports of glass-furnace silica refractories into the United States are small. The potential for significant imports is constrained by overseas production costs, and shipping and handling costs. Product availability and product quality issues also limit the competitiveness of most of the glass-furnace silica refractories produced overseas. In any event, customers in the United States would require extensive testing over several years before using glass-furnace silica refractories produced overseas.

12. Total annual sales of glass-furnace silica refractories in the United States are approximately $4 million.

V. CONCENTRATION

13. Global and AP Green are the only two producers in the United States of glass-furnace silica refractories. Therefore, the United States glass-furnace silica refractories market is extremely concentrated as measured by the Herfindahl-Hirschmann Index, and the acquisition would result in a monopoly.

14. It is likely that Global will obtain unilateral market power in the United States market for glass-furnace silica refractories.

VI. ENTRY CONDITIONS

15. Entry into the glass-furnace silica refractories market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the acquisition.

16. Obtaining product qualification at glass producers, who require extensive life cycle testing before they will use glass-furnace silica refractories in their plants because these products are so critical to the manufacturing process, would require many years. The total

time from initial entry to significant market impact likely would be many years.

17. Entry would also be unlikely because it would require a large sunk capital investment. Moreover, efficient production would require entry at a scale that would be relatively large compared to the total sales available in the glass-furnace silica refractories market, making entry more risky and unlikely.

VII. EFFECTS OF THE ACQUISITION ON COMPETITION

18. The acquisition of AP Green by Global may substantially lessen competition and tend to create a monopoly in the United States market for glass-furnace silica refractories because, among other things:

a. It will increase concentration substantially in a highly concentrated market;

b. It will eliminate substantial head-to-head competition between Global and AP Green;

c. It will leave Global as the sole producer of glass-furnace silica refractories in the United States, allowing Global unilaterally to exercise market power;

d. It will likely result in increased prices for glass-furnace silica refractories; and

e. It will likely result in diminished product innovation in glass-furnace silica refractories.

VIII. VIOLATIONS CHARGED

19. The acquisition agreement between Global and AP Green described in paragraph five violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

20. The proposed acquisition of AP Green by Global would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

21. The proposed acquisition of AP Green by Global, if consummated, would allow Global to monopolize the United States markets for glass-furnace silica refractories in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by the respondent named in the caption above of AP Green Industries, Inc., and respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Acts, 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, 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 Global Industrial Technologies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 2121 San Jacinto Street, Suite 2500, Dallas, Texas.

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*" or "*Global*" means Global Industrial Technologies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; and its subsidiaries, divisions, groups and affiliates controlled by Global Industrial Technologies, Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*AP Green*" means AP Green Industries, Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at Green Boulevard, Mexico, Missouri.

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

D. "*Acquisition*" means the acquisition described in the Agreement and Plan of Merger, dated as of March 3, 1998, between Global and AP Green pursuant to which Global has agreed, through a subsidiary, to acquire AP Green.

E. "*Silica Refractories*" means refractory silica products, including silica bricks and shapes, and silica mortar, but excluding fused, foam, and vitreous silica.

F. "*Hile Plant*" means the manufacturing facility located in Northeast, Maryland that is currently owned and operated by Harbison-Walker Refractories Company ("HWR"), a subsidiary of Global.

G. "*Lehi Plant*" means the manufacturing facility located in Lehi, Utah that is currently owned and operated by AP Green.

H. "*Divested Assets*" means the assets required to be divested pursuant to paragraphs II and III of this order.

I. "*Acquirer*" means the entity to whom Global shall divest the Divested Assets.

J. "*Assets and Businesses*" means assets, properties, businesses, and goodwill, tangible and intangible, relating to the research, development, production, sale, or distribution of Silica Refractories, including, without limitation, the following:

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

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

3. All intellectual property rights, patents, patent rights, patent applications, formulas, inventions, copyrights, trade secrets, trademarks, and trade names;

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

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

6. All right, title, interest, and contractual rights in and to sources of raw material for Silica Refractories;

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

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

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

10. All federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto; and

11. All items of prepaid expense.

K. "*AP Green Silica Refractories Properties to be Divested*" means AP Green's Lehi Plant, and all other Assets and Businesses of AP Green relating to the research, development, production, sale, or distribution of Silica Refractories, but excluding AP Green's manufacturing facility in Sproul, Pennsylvania provided however that, at the option of the Acquirer, Global shall install at the Lehi Plant prior to the divestiture the mixing equipment necessary to manufacture silica mortar.

L. "*HWR Silica Refractories Properties to be Divested*" means Global's Hile Plant, and all other Assets and Businesses of Global relating to the research, development, production, sale, or distribution of Silica Refractories, but excluding Global's manufacturing facility in Calhoun, Georgia provided however that, at the option of the Acquirer, Global shall install at the Hile Plant prior to the divestiture the mixing equipment necessary to manufacture silica mortar.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, at no minimum price, the AP Green Silica Refractories Properties to be Divested as an ongoing business. The divestiture shall be made either:

1. Within thirty (30) days of the date this order is accepted by the Commission for public comment to Robert R. Worthen and Dennis R. Williams (jointly or through a corporation or partnership to be established by them) in a manner that receives the prior approval of the Commission; or

2. Within ninety (90) days of the date this order is accepted by the Commission for public comment to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. The purpose of the divestiture of the Divested Assets is to ensure the continued use of the Divested Assets in the same business in which the Divested Assets are engaged at the time of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Divested Assets pursuant to paragraph II or paragraph III of this order, respondent shall take such actions as are necessary to maintain the viability and marketability of the Divested Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divested Assets except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the AP Green Silica Refractories Properties to be Divested within ninety (90) days of the date this order is accepted by the Commission for public comment, then the Commission may appoint a trustee to divest, at the option of the Trustee, the AP Green Silica Refractories Properties to be Divested, or the HWR Silica Refractories Properties to be Divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the AP Green Silica Refractories Properties to be Divested and the HWR Silica Refractories Properties to be Divested in order to accomplish the divestiture required by this order.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission (and, in the case of a court-appointed trustee, of the court), transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. of this order to accomplish the divestiture required by this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission (or, in the case of a court-appointed trustee, by the court); provided, however, the Commission may extend this period for no more than two (2) additional terms of twelve (12) months each.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the AP Green Silica Refractories Properties to be Divested and the HWR Silica Refractories Properties to be Divested, or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by the respondent shall extend the time for divestiture under paragraph III.B.4. of this order in an amount equal to the delay, as determined by the Commission (or, in the case of a court-appointed trustee, by the court).

6. The trustee shall use his or her best efforts to expeditiously negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made only to an Acquirer or Acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, the trustee shall submit all bids to the Commission, and if the Commission approves

more than one such acquiring entity, then the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

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

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, recklessness, willful or wanton acts, or bad faith by the trustee.

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

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

11. The trustee may divest such additional ancillary assets related to the Divested Assets and effect such ancillary arrangements as are necessary to satisfy the requirements or purposes of this order.

12. The trustee shall have no obligation or authority to operate or maintain the AP Green Silica Refractories Properties to be Divested or the HWR Silica Refractories Properties to be Divested.

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

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties that have contacted respondent or that have been contacted by respondent. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

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

B. Upon five (5) days' notice to respondent and without restraint or interference from them, to interview officers, directors, or employees of respondent.

VII.

It is further ordered, That this order shall terminate on September 10, 2008.

IN THE MATTER OF

NUTRIVIDA, INC., ET AL.

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

Docket C-3826. Complaint, Sept. 10, 1998--Decision, Sept. 10, 1998

This consent order prohibits, among other things, the New York-based corporation and its officer from making any unsubstantiated claims regarding the health benefits, performance or efficacy of Cartilet (a dietary supplement comprised of shark cartilage), or any food, drug or dietary supplement. In addition, the consent order prohibits the use of testimonials, unless they reflect the typical experience of consumers or the required disclosure is made, and the consent order requires the respondents to disclose that radio or video presentations are paid advertisements.

Participants

For the Commission: *Donald D'Amato, Carole Paynter, Denise Tighe,* and *Michael Bloom.*

For the respondents: *Gary Hailey, Venable, Baetjer, Howard & Civiletti*, Washington, D.C. and *Jeffrey Rubin, Rubin & Shang*, New York, NY.

COMPLAINT

The Federal Trade Commission, having reason to believe that Nutrivida, Inc., a corporation, and Frank Huerta, individually and as an officer and director of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

PARAGRAPH 1. Respondent Nutrivida, Inc. ("Nutrivida") is a New York corporation with its principal office or place of business at 25 Chapel Street, Brooklyn, New York. Nutrivida produces and distributes program length television advertisements, or "infomercials." These infomercials include an advertisement for Nutrivida's "Cartilet" shark cartilage capsules, a dietary supplement which purports to treat or cure, among other things, cancer, arthritis, and diabetes.

Respondent Frank Huerta is an officer and director of the corporate respondent. Individually or in concert with others, he

formulates, directs, participates in, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His business address is 25 Chapel Street, Brooklyn, New York.

PAR. 2. Respondents have manufactured, labeled, advertised, offered for sale, sold, and distributed products to the public, including Cartilet shark cartilage capsules. This product is a "food" and/or "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55.

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 Nutrivida and Frank Huerta have disseminated or have caused to be disseminated advertisements for Cartilet shark cartilage capsules, including, but not limited to, the attached Exhibit A (partial transcript of a program length television advertisement). Advertisements for Cartilet shark cartilage capsules have been broadcast in Spanish language television media, including Telemundo's New York metropolitan cable channel. These advertisements contain the following statements:

*****

Narrator (male): "[F]rom the complexities of the ocean to the wonders of the natural. Shark cartilage. The shark does not sleep. We bring our cartilage from clean waters, without contamination. Its [shark cartilage's] marvelous properties are already known. It [shark cartilage] has been used in studies against cancer, arthritis, diabetes, and other illnesses."

*****

Copy on Screen: "It has been used in studies against:
Cancer Arthritis Diabetes"

*****

Dr. J. Casas: "My friends, as you all know, for there to be a tumorous process, for a fibroid, for a tumor in the body to grow, survive, it definitely needs nourishment. How do you nourish a tumor? How do you nourish a fibroid? Well, you only and exclusively nourish it through the blood vessels. It must have blood irrigation -- the main -- the best that shark cartilage has is that it inhibits the formation of blood vessels that irrigate and cause the tumor to grow. [T]his is a basic principle which has been documented various times, it is written in many books how shark cartilage has a predilection and goes directly to inhibit the growth of the

blood vessels that nourish the tumor. Because there are no nutrients, because there is no nourishment, because there is no blood to nourish that tumor, it has no alternative but to disappear and to give in to the shark cartilage. In few words, my friends, shark cartilage is the medium by which to inhibit any nutrients so that that tumor can not prosper.... Shark cartilage has many indications of being a potent anti-inflammatory. For that reason, it is indicated in the processes of rheumatism, in the processes of arthritis, in bursitis, in the circulatory process, in all that has to do with pain and inflammation. Remember, it is important to always visit your doctor . . . . It definitely works, because in it we find elements that help . . . those cells and arteries that nourish that cyst, that fibroid, that tumor, to simply stop providing nourishment . . . malnourishment to the blood and that fibroid, that cyst, can no longer grow. The results at this moment are extraordinary. Thank God. Shark cartilage, like they have properly stated, sharks do not get cancer . . . ."

*****

Consumer (female): "Dr. Pestano, I believe because the experience has been marvelous. I personally did not believe much in natural medicine, truly. But really, my son, who had visited Miami, came to my house and brought me . . . Cartilet. He said, 'Mom, try this.' I had suffered for a very long time from a pain in my left arm; my arm was paralyzed, I was tormented, I was desperate. I had taken other medicines, and nothing had been effective. I listened to my son and started to take the capsules of this wonderful product. I later learned it was shark cartilage, and it worked a miracle because my arm was cured."

Dr. R. Martinez: "What I want to emphasize is that to separate and place shark cartilage like a great medicine, as an independent weapon in the fight against these illnesses, is a mistake. Shark cartilage must be treated like a powerful weapon, but, within the combination of medicines and therapeutic possibilities we have; all natural, all complementary, but, directed towards the same end . . . ."

*****

Dr. R. Martinez: "When we speak about inflammation, we also speak about cancer, about arthritis, about rheumatism . . . . [T]he results in patients with different types of arthritis are parallel to the results obtained with different types of cancer -- regarding effectiveness. This all depends on the dosage -- in accordance with the individual's weight in accordance with the patient's immune system. But I repeat, the results with different types of arthritis were highly effective, without

> toxicity, and with little side effects. In comparison with the other weapons we have in the modern pharmacopoeia against these illnesses or to alleviate these illnesses, it has come to represent a step in advancement -- in my opinion -- extraordinary."

PAR. 5. Through the means described in paragraph four, respondents Nutrivida and Frank Huerta have represented, expressly or by implication, that:

a. Cartilet shark cartilage capsules are effective in the symptomatic relief, treatment, or cure of cancer;

b. Cartilet shark cartilage capsules are effective in the symptomatic relief or treatment of rheumatism, arthritis, diabetes, fibroids, bursitis, circulatory problems, and cysts; and

c. A testimonial from a consumer appearing in the advertisements for Cartilet shark cartilage capsules reflects the typical or ordinary experience of members of the public who use the product.

PAR. 6. Through the means described in paragraph four, respondents Nutrivida and Frank Huerta have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five at the time the representations were made.

PAR. 7. In truth and in fact, respondents Nutrivida and Frank Huerta did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five at the time the representations were made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

PAR. 8. Through the means described in paragraph four, respondents Nutrivida and Frank Huerta have represented, expressly or by implication, that studies prove that Cartilet shark cartilage capsules are effective in the symptomatic relief or treatment of cancer, arthritis, and diabetes.

PAR. 9. In truth and in fact, studies do not prove that Cartilet shark cartilage capsules are effective in the symptomatic relief or treatment of cancer, arthritis, and diabetes. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

PAR. 10. Through the advertising and dissemination of the program length television advertisement for Cartilet shark cartilage capsules, respondents Nutrivida and Frank Huerta have represented,

expressly or by implication, that the program length television advertisement for Cartilet shark cartilage capsules is an independent television program and is not paid commercial advertising.

PAR. 11. In truth and in fact, the program length television advertisement for Cartilet shark cartilage capsules is not an independent television program and is paid commercial advertising. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. The acts and practices of respondents 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

EXHIBIT A

* * * * *

Narrator (male): "[F]rom the complexities of the ocean to the wonders of the natural. Shark cartilage. The shark does not sleep. We bring our cartilage from clean waters, without contamination. Its [shark cartilage's] marvelous properties are already known. It [shark cartilage] has been used in studies against cancer, arthritis, diabetes, and other illnesses."

"De los complejos del mar a la maravilla de lo natural. Cartílago de tiburón. El tiburón no duerme. Nuestro cartílago lo traemos de aguas limpias y sin contaminación. Ya se conoce sus maravillosas propiedades. Se ha utilizado en estudios contra el cáncer, artritis, diabetes, y otras enfermedades . . . ."

* * * * *

Copy on Screen: "It has been used in studies against:
Cancer
Arthritis
Diabetes"

"Se ha utilizado en estudios contra:
Cáncer
Artritis
Diabetes"

* * * * *

Dr. J. Casas: "My friends, as you all know, for there to be a tumorous process, for a fibroid, for a tumor in the body to grow, survive, it definitely needs nourishment. How do you nourish a tumor? How do you nourish a fibroid? Well, you only and exclusively nourish it through the blood vessels. It must have blood irrigation -- the main -- the best that shark cartilage has is that it inhibits the formation of blood vessels that irrigate and cause the tumor to grow. [T]his is a basic principle which has been documented various times, it is written in many books how shark cartilage has a

EXHIBIT A

predilection and goes directly to inhibit the growth of the blood vessels that nourish the tumor. Because there are no nutrients, because there is no nourishment, because there is no blood to nourish that tumor, it has no alternative but to disappear and to give in to the shark cartilage. In few words, my friends, shark cartilage is the medium by which to inhibit any nutrients so that that tumor can not prosper. . . . Shark cartilage has many indications of being a potent anti-inflammatory. For that reason, it is indicated in the processes of rheumatism, in the processes of arthritis, in bursitis, in the circulatory process, in all that has to do with pain and inflammation. Remember, it is important to always visit your doctor. . . . It definitely works, because in it we find elements that help . . . those cells and arteries that nourish that cyst, that fibroid, that tumor, to simply stop providing nourishment . . . malnourishment to the blood and that fibroid, that cyst, can no longer grow. The results at this moment are extraordinary. Thank God. Shark cartilage, like they have properly stated, sharks do not get cancer . . . ."

"Mis amigos, como ustedes todos saben para que haya un proceso tumoral, para que un fibroma, para que un tumor en el cuerpo pueda crecer, sobrevivir, se necesita definitivamente que se nutra. Como se nutre un tumor? Como se nutre un fibroma? Bueno, se nutre unica y exclusivamente por las vasos sanguineos. Tiene que tener riego sanguineos -- el principal -- lo mejor que tiene cartílago de tiburón es que precisamente inhibe la formación de vasos sanguineos que van ha irrigar y hacer que este tumor cresca. [E]ste es un principio básico el cual ya se ha documentado varias veces, esta escrito en muchos libros como el cartílago de tiburón tiene predilección y va directamente haya ha inhibir el crecimiento de esos vasos sanguineos que van ha alimentar el tumor. Como no hay nutriente, como no hay alimentación, como no hay sangre para nutrir ese tumor, el no tiene alguna alternativa que desvanecer y ceder ante el cartílago de tiburón. En pocas palabras, mis amigos, el cartílago de tiburón es el medio por lo cual se inhibe que haga cualquier tipo de nutrición para que ese tumor no pueda prosperar . . . . El cartílago de tiburón tiene muchas indicaciónes por ser un anti-inflamatorio potente Por lo tanto, esta indicado en los procesos ruematicos, en los procesos artriticos, en la bursitis, en los procesos circulatorio, en todo aquello que tenga que ver con dolor y inflamación. Recuerden que siempre es importante visitar su médico . . . . Trabaja definitivamente, porque en el encontramos elementos que ayudan . . . ha que esas células, ha que esos vasitos

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arteriales que alimentan ese quiste, ese fibroma, que ayuda precisamente, que alimentan a ese tumor, pues que simplemente no le de mas nutrición para la alimentación para desnutriente, para la sangre, y por lo tanto ese fibroma, ese quiste, no puede crecer mas. Los resultados hasta el momento son extraordinario. Gracias a Dios. El cartílago de tiburón, como muy bien lo han dicho, los tiburónes no tienen cáncer . . . ."

* * * * *

Consumer (female): "Dr. Pestano, I believe because the experience has been marvelous. I personally did not believe much in natural medicine, truly. But really, my son, who had visited Miami, came to my house and brought me . . . Cartilet. He said, 'Mom, try this.' I had suffered for a very long time from a pain in my left arm; my arm was paralyzed, I was tormented, I was desperate. I had taken other medicines, and nothing had been effective. I listened to my son and started to take the capsules of this wonderful product. I later learned it was shark cartilage, and it worked a miracle because my arm was cured."

"Dra. Pestano, he creido, porque la experiencia ha sida maravillosa. Yo personalmente no creia mucha en la medicina natural, la verdad. Pero realmente, llego a mi casa mi hijo que fue a Miami. Me llevo . . . Cartilet. Me dice 'Mami, prueba con esto.' Porque sufria por mucho tiempo un dolor en el brazo izquierdo; que tenia mi brazo paralizado, era para mi tormentoso, yo estaba desesperada. Habia tomado otras medicinas y nada habia sido efectivo. Entonces le hice caso a mi hijo y empeze a tomar las capsulas de este maravilloso producto que despues vine a saber que se llamaba exactamente cartílago de tiburón, y que obro en mi un milagro, una maravilla, porque mi brazo se curo."

Dr. R. Martinez: "What I want to emphasize is that to separate and place shark cartilage like a great medicine, as an independent weapon in the fight against these illnesses, is a mistake. Shark cartilage, must be treated like a powerful weapon, but, within the combination of medicines and therapeutic possibilities we have; all natural, all complementary, but, directed towards the same end . . . ."

"Lo que quiero enfatizar es que separar al cartílago de tiburón como una gran medicina y colocarlo como una arma independiente en la lucha contra las enfermededas es un error. El cartílago de

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tiburón, hay que tratarlo como una arma poderosisima, pero dentro del conjunto de medicamentos y de posibilidades terapéutica que tenemos; todas naturales, todas complementarias, pero dirigido con el mismo fin . . . ."

* * * * *

Dr. R. Martinez:

"When we speak about inflammation, we also speak about cancer, about arthritis, about rheumatism . . . . [T]he results in patients with different types of arthritis are parallel to the results obtained with different types of cancer - regarding effectiveness. This all depends on the dosage -- in accordance with the individual's weight in accordance with the patient's immune system. But I repeat, the results with different types of arthritis were highly effective, without toxicity, and with little side effects. In comparison with the other weapons we have in the modern pharmacopoeia against these illnesses or to alleviate these illnesses, it has come to represent a step in advancement -- in my opinion -- extraordinary."

"Cuándo se habla de inflamación, se habla tambien de cáncer, de artritis, se habla de reumatismo, se habla de . . . . [L]os resultados con pacientes de los diferentes clases de artritis son paralelos a los resultados que se han obtenido con distinto tipo de cáncer, en cuanto a la efectividad. Es muy importante dosisitar de acuerdo con el peso de la persona -- en acuerdo con el estado inicial del sistema inmunologico del paciente. Pero repito, el resultado con diferentes tipos de artritis son de altas efectividad, de ninguna toxicidad, y muy poco efecto secundario. Por lo tanto en comparación con todas las otras armas que tenemos en la farmocopeoia moderna en contra de estas enfermedades o para tratar de aliviar estas enfermedades, a venido a representar un paso de avance -- en mi opinion -- extraordinario."

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

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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, 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 Nutrivida, Inc. ("Nutrivida") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 25 Chapel Street, Brooklyn, New York.

Respondent Frank Huerta is an officer and director of the corporate respondent. Individually or in concert with others, he formulates, directs or controls the policies, acts, or practices of the corporation. His business address is 25 Chapel Street, Brooklyn, New York.

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

DEFINITIONS

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

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

2. Unless otherwise specified, "*respondents*" shall mean Nutrivida, Inc., a corporation, its successors and assigns and its officers; and Frank Huerta, individually and as an officer and director of the corporation; and each of the above's agents, representatives, and employees.

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

4. "*Video advertisement*" shall mean any advertisement intended for dissemination through television broadcast, cablecast, home video, or theatrical release.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Nutrivida's Cartilet shark cartilage capsules or any other product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product:

A. Is effective in the symptomatic relief, treatment, or cure of cancer; or
B. Is effective in the symptomatic relief or treatment of rheumatism, arthritis, diabetes, fibroids, bursitis, circulatory problems, or cysts,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Nutrivida's Cartilet shark cartilage capsules, or any food, dietary supplement, or drug as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the health benefits, performance, or efficacy of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Nutrivida's Cartilet shark cartilage capsules or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, or drug as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement (as endorsement is defined in 16 CFR 255.0(b)) of the food, dietary supplement, or drug represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
B. Respondents disclose in the same language as the predominant language that is used in the advertisement, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

   1. What the generally expected results would be for users of the food, dietary supplement, or drug, or
   2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

V.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in the labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VI.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration or under any new drug application approved by the Food and Drug Administration.

VII.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, do forthwith cease and desist from creating, producing, selling, or disseminating:

A. Any advertisement that misrepresents, expressly or by implication, that it is not a paid advertisement; and
B. Any commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer

that does not display visually in the same language as the predominant language that is used in the advertisement, in a clear and prominent manner, and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein; and

C. Any radio advertisement fifteen (15) minutes in length or longer or intended to fill a time slot of fifteen (15) minutes in length or longer that does not state in the same language as the predominant language that is used in the advertisement, in a clear and prominent manner, and in a volume and cadence sufficient for an ordinary consumer to hear, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE LISTENING TO IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the presentation of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the stating of the disclosure provided herein.

VIII.

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

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

IX.

It is further ordered, That respondent Nutrivida, Inc., and its successors and assigns, and respondent Frank Huerta, for a period of five (5) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

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

mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

It is further ordered, That respondent Frank Huerta, for a period of three (3) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment that involves the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, or drug as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XII.

It is further ordered, That respondent Nutrivida, Inc., and its successors and assigns, and respondent Frank Huerta shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIII.

This order will terminate on September 10, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

IN THE MATTER OF

HERBAL WORLDWIDE HOLDINGS CORP., ET AL.

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

Docket C-3827. Complaint, Sept. 16, 1998--Decision, Sept. 16, 1998

This consent order prohibits, among other things, a Florida-based company and its two principal officers from making any unsubstantiated weight-loss claims for "Fattaché," a purported dietary product, or from representing that any dietary supplement, food or drug can cause or contribute to achieving or maintaining weight loss without dieting, that such a product can prevent the absorption of ingested fat, helps eliminate ingested fat, or has any beneficial effect, unless the claims are supported by competent and reliable scientific evidence. In addition, the consent order prohibits the respondents from representing that any endorsement or testimonial represents the typical experience of users, unless they can substantiate the experience or the respondents provide the required disclosure.

Participants

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

For the respondents: *Stephen Nagin, Nagin, Gallop & Figueredo*, Miami, FL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Herbal Worldwide Holdings Corp., a corporation, José Diaz, individually and as an officer of the corporation, and Eduardo Naranjo, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Herbal Worldwide Holdings Corp. ("Herbal") is a Florida corporation with its principal office or place of business at 3326 Mary Street, Miami, Florida.

2. Respondent José Diaz is an owner and officer of respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.

3. Respondent Eduardo N. Naranjo is an owner and officer of respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.

4. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed an over-the-counter weight-loss product to the public called "Fattaché." The ingredients of Fattaché include psyllium, chitosan (from deacetylated shellfish shells), glucomannan, and apple pectin. Fattaché is a "food" and/or "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. 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.

6. Respondents have disseminated or have caused to be disseminated Spanish-language advertisements for Fattaché, including but not necessarily limited to the attached Exhibit A, which is the transcription of a television advertisement with an English-language translation. The advertisement contains the following statements:

A. Fattaché, a revolutionary product to lose weight easily and in little time.
B. I obtained results very quickly without having to leave my favorite foods. [During this statement, a subscript states "voluntary testimonial"].
C. Nutrition specialists agree that Fattaché is the best alternative to absorb the fat in your body.
D. ... two capsules of Fattaché that will look for fat converting it into a layer of fiber which the body will automatically eliminate. That fat, if it remains in our body, is what causes weight gain ....
E. Fattaché helps eliminate the fat that enters your body before it is digested.

7. Through the means described in paragraph six, respondents have represented, expressly or by implication, that:

A. Fattaché causes weight loss without a change in diet.
B. Fattaché prevents the absorption of ingested fat.
C. Fattaché helps eliminate ingested fat before it is absorbed.
D. Testimonials from consumers appearing in advertisements for Fattaché reflect the typical or ordinary experience of members of the public who use Fattaché.

8. Through the means described in paragraph six, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made. Among other reasons, much of the research relied on by respondents did not address the weight loss and fat absorption effects discussed in the advertisement, and/or the results of the research could not be extrapolated to the population as a whole because of methodological weaknesses. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. The acts and practices of respondents 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

TRANSLATION

Announcer: To show a nicer figure get Fattache.
Fattache, a revolutionary product to lose weight easily and in little time.
Subscript: "Voluntary testimony"
"I obtained result very quickly without having to leave my favorite foods."
Subscript: "Fattache helps eliminate the fat that enters your body before it is digested. It is not designed to directly reduce the fat already in your body. Results may vary individually."
Announcer: Nutrition specialists agree that Fattache is the best alternative to absorb the fat in your body. Mixing water with olive oil, we will add two capsules of Fattache that will look for fat, converting it into a layer of fiber which the body will automatically eliminate. That fat, if it remains in our body, is what causes weight gain and serious health problems.
Subscript: "Voluntary testimony:"
With Fattache, I lost what I was not able to lose with other diets.
Jar of Fattache with 180 tablets for only $39.95. Free gift of additional jar with 60 tablets.
Call toll free now at 1-800-600-4040
7940 SW 8th St., Miami, FL 33144

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PARA LUCIR UNA MEJOR FIGURA obtenga Fattache.
Fattache un producto revolucionario para adelgar facil y en poco tiempo.
"Testimonio voluntario"
Yo obtuve resultado muy rapido sin tener que dejar las comidas que mas me gustan."
"Fattache ayuda a eliminar la grasa que entra en su cuerpo antes que esta sea digerida. No esta disenada para directamente reducir la grasa que ya esta en su cuerpo. Los resultados pueden variar en cada persona."
Especialista en nutricion estan de acuerdo en que Fattache es la mejor alternative para absorber las grasas de su cuerpo. Mezclando agua con aceite de oliva, le agregaremos dos capsulas de Fattache que buscara la grasa convirtiendola en una capa de fibra que el cuerpo automaticamente eliminara. Esa grasa, si permanece en nuestro cuerpo es la que produce todas las causas de sobrepeso y problemas graves de salud.
"Testimonio voluntario:"
Con Fattache baje lo que no pude bajar con otras dietas.
Frasco de Fattache con 180 capsulas por tan solo $39.95. Te regalo con su orden reciba un frasco adicional con 60 capsulas.

DECISION AND ORDER

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

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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, 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 Herbal Worldwide Holdings Corp. ("Herbal") is a Florida corporation with its principal office or place of business at 3326 Mary Street, Miami, Florida.

2. Respondent José Diaz is an owner and officer of proposed respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.

3. Respondent Eduardo N. Naranjo is an owner and officer of proposed respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.

4. 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

DEFINITIONS

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

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

2. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the advertisement is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement, promotional material or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in all of the languages that are present in the advertisement. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. Unless otherwise specified, "*respondents*" shall mean Herbal Worldwide Holdings Corp., a corporation, its successors and assigns and their officers; José Diaz, individually and as an officer of Herbal, Eduardo Naranjo, individually and as an officer of Herbal, and each of the above's agents, representatives, and employees.

4. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. "*Drug*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

6. "*Food*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Fattaché®, or any food, drug or dietary supplement, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Such product causes weight loss without a change in diet;
B. Such product prevents the absorption of ingested fat;
C. Such product helps eliminate ingested fat before it is absorbed; or
D. Such product has any beneficial effect,

unless at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the

product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
B. Respondents disclose, clearly and prominently, and in close proximity to the testimonial or endorsement, either:

1. What the generally expected results would be for users of the product, or
2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0 (b).

III.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IV.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

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

A. All advertisements and promotional materials containing the representation;
B. All materials that were relied upon in disseminating the representation; and

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

VI.

It is further ordered, That respondent Herbal, and its successors and assigns, and respondents José Diaz and Eduardo N. Naranjo shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

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

VIII.

It is further ordered, That respondent Herbal, and its successors and assigns, and respondents José Diaz and Eduardo N. Naranjo shall,

within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IX.

It is further ordered, That respondents José Diaz and Eduardo N. Naranjo, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include the respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

This order will terminate on September 16, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

IN THE MATTER OF

GERALD W. SCHWARTZ, ET AL.

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

Docket C-3828. Complaint, Sept. 17, 1998--Decision, Sept. 17, 1998

This consent order, among other things, prohibits, for ten years, Gerald W. Schwartz and his subsidiary, Sky Chefs, Inc., from acquiring any concern that controls the Las Vegas catering operations formerly operated by Ogden Aviation Food Services without prior Commission approval. In addition, for ten years, Sky Chefs is required to provide prior notice to the Commission before it acquires its only in-flight catering competitor at any airport in the United States.

Participants

For the Commission: *Stephen Riddell, Phillip Broyles, William Baer, Charlotte Wojcik,* and *Jonathan Baker.*

For the respondents: *Mark Godler, Kaye, Scholer, Fierman & Hays*, New York, N.Y. and *Steve Palmer, Swidler & Berlin*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Gerald W. Schwartz, through his subsidiaries, Onex Corporation, SC International Services, Inc. and Sky Chefs, Inc., entered into a letter of intent to acquire all the voting stock of Ogden Aviation Food Services, Inc. and Ogden Aviation Food Services (ALC), Inc., and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

A. The Respondents

1. Respondent Gerald W. Schwartz ("Schwartz") is a natural person with a principal place of business located at Onex Corporation, 161 Bay Street, Toronto, Ontario, Canada M5J 2S1.

2. Respondent Onex Corporation ("Onex"), a wholly-owned subsidiary of Gerald W. Schwartz, is a corporation organized, existing, and doing business under and by virtue of the laws of Ontario, Canada, with its office and principal place of business located at 161 Bay Street, P.O. Box 700, Toronto, Ontario, Canada M5J 2S1.

3. Respondents Schwartz and Onex are engaged in diverse businesses that include in-flight catering, chain restaurant food service, electronics manufacturing and other businesses.

4. Respondent SC International Services, Inc. ("SCIS"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 524 East Lamar, Arlington, TX. SCIS is an indirect subsidiary of Onex.

5. Respondent Sky Chefs, Inc. ("Sky Chefs"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 524 East Lamar, Arlington, TX. Sky Chefs is a wholly-owned subsidiary of SCIS.

6. Respondent Sky Chefs has in-flight catering kitchens situated throughout the United States and the world. In 1997, Sky Chef's worldwide catering kitchens posted sales of approximately $1.3 billion. Its 1997 revenue from its U.S. catering operations was over $1 billion to which its Las Vegas catering kitchen contributed $12.9 million.

7. At all times relevant herein, respondent Schwartz has been and is now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and is a natural person whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

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

B. Ogden

9. Ogden is engaged in diverse businesses, including entertainment, energy and aviation support services. Ogden Aviation Food Services, a wholly-owned indirect subsidiary of Ogden Corporation, provides in-flight catering services to airlines. In 1997, Ogden posted sales of $164 million from its catering activities in the United States, of which $9.1 million were from its Las Vegas, Nevada, catering kitchen.

C. The Proposed Acquisition

10. On March 6, 1998, Mr. Schwartz, through his indirect subsidiary Sky Chefs, signed a Letter of Intent, whereby Sky Chefs proposed to acquire all of the voting stock of Ogden Aviation Food Services, Inc. ("proposed acquisition"). The proposed acquisition included Ogden's entire United States airline catering business and eight catering kitchens. One of these catering kitchens was located at the McCarran International Airport, Las Vegas, Nevada.

11. After being advised by Commission staff of potential competitive issues and concerns in connection with the proposed acquisition of all of Ogden's in-flight catering business and kitchens, respondents and Ogden modified their original proposal to exclude Ogden's Las Vegas in-flight catering business and kitchen. Under the modified agreement, SCIS would acquire the remainder of Ogden's catering business and kitchens.

12. On May 22, 1998, Ogden entered into an agreement to sell the Las Vegas in-flight catering business and kitchen to Dobbs International Services, Inc.

D. Trade and Commerce

13. The relevant product market in which to analyze the effects of Sky Chefs' proposed acquisition of Ogden's airline catering kitchens is the sale of in-flight catering services to airlines.

14. As used herein, in-flight catering services includes the preparation of meals, stocking of beverage carts, delivery of meals and carts to the aircraft, the loading of the galley, the unloading of incoming carts, utensils and trash, and cleaning and storage of carts and utensils.

15. The relevant geographic market in which to analyze the effects of Sky Chef's proposed acquisition is the McCarran International Airport, Las Vegas, Nevada.

16. Entry into the relevant market would not be timely, likely, or sufficient to prevent anticompetitive effects for the following reasons, among others. Entry requires a significant investment of several million dollars. A substantial portion of the investment would not be recoverable if the entrant failed to achieve the minimum viable scale of operation. It would be very difficult for an entrant in airline catering at McCarran Airport to reach a viable scale of operation. To be viable, an entrant would need to capture a large share of the catering business in this market, and some of that business is committed to the incumbents through multiple year contracts.

E. Market Structure

17. Ogden has an in-flight catering kitchen located at McCarran International Airport in Las Vegas, Nevada, that provides in-flight catering services to airlines at McCarran.

18. Sky Chefs has an in-flight catering kitchen located at McCarran International Airport in Las Vegas, Nevada, that provides in-flight catering services to airlines at McCarran.

19. The market for in-flight catering at McCarran International Airport is highly concentrated. Sky Chefs and Ogden are the only two firms that sell in-flight catering services to airlines departing or landing at Las Vegas' McCarran Airport. The acquisition, as originally proposed, would leave Sky Chefs with a monopoly of in-flight catering services at McCarran Airport. The proposed acquisition, as modified, would result in no change in market concentration.

F. Effects of the Proposed Acquisition

20. The proposed acquisition, as originally proposed and if consummated, would likely have led to a substantial lessening of competition in the McCarran Airport in-flight catering market in the following ways, among others:

a. By eliminating direct competition between Sky Chefs and Ogden; and
b. By increasing the likelihood that Sky Chefs would unilaterally exercise market power;

each of which would increase the likelihood that the price of in-flight catering services would increase and the quality of in-flight catering services would decline.

G. Violations Charged

21. The acquisition of the voting stock of the Ogden entities that operate in-flight catering kitchens by Sky Chefs, if consummated as originally proposed, would have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of the voting securities of Ogden Aviation Food Services, Inc., and Odgen Aviation Food Services (ALC), Inc., by Gerald W. Schwartz, through his subsidiaries, Onex Corporation, SC International Services, Inc. and Sky Chefs, Inc., (collectively "respondents"), and it now appearing that respondents, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

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

hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Sky Chefs, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 524 East Lamar, Arlington, TX.

2. Respondent SC International Services, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 524 East Lamar, Arlington, TX.

3. Respondent Onex Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of Ontario, Canada, with its office and principal place of business located at 161 Bay Street, P.O. Box 700, Toronto, Ontario M5J 2S1.

4. Respondent Gerald W. Schwartz, is a natural person with a principal place of business located at Onex Corporation, 161 Bay Street, Toronto, Ontario, Canada M5J 2S1.

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

A. "*Respondents*" means Sky Chefs, Inc. ("Sky Chefs"), SC International Services, Inc. ("SCIS"), Onex Corporation ("Onex"), and Gerald W. Schwartz ("Mr. Schwartz"), their directors, officers, employees, agents and representatives, predecessors, successors, and assigns; their subsidiaries, divisions, groups and affiliates controlled by Sky Chefs, SCIS, Onex, or Mr. Schwartz, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. "*Ogden*" means Ogden Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with a principal place of business located at Two Pennsylvania Plaza, New York, New York.

C. "*Proposed Acquisition*" means the proposed acquisition by Sky Chefs of all of the voting securities of Ogden Aviation Food Services, Inc. and Ogden Aviation Food Services (ALC), Inc., pursuant to a Letter of Intent, dated March 6, 1998.

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

E. "*Retained Airline Catering Kitchen*" means the airline catering kitchen owned by Ogden in the vicinity of the McCarran International Airport in Las Vegas, Nevada, which the respondents, pursuant to the "Stock Purchase Agreement Among SC International Services, Inc., Ogden Corporation and Ogden Entertainment, Inc.," dated May 1, 1998, and the "Amendment to Stock Purchase Agreement," dated May 7, 1998, no longer propose to acquire.

F. "*Single Competing Airline Catering Business*" means an airline catering business, owned by a person other than the respondents, located on or near an airport in the United States at which respondents own or operate the only other airline catering business, excluding any airline catering businesses that collectively account for no more than 1 % of the annual catering revenue realized at that airport.

II.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, respondents shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire more than 1% of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in the Retained Airline Catering Kitchen; or

B. Acquire the Retained Airline Catering Kitchen or any assets thereof.

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without providing advance written notice to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire more than 1% (or, for investment purposes, 5%) of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in any Single Competing Airline Catering Business in the United States; or

B. Acquire any Single Competing Airline Catering Business in the United States.

Said prior notification 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 Notification to the Commission at least thirty (30) 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 or documentary material (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by paragraph III of this order 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.

IV.

It is further ordered, That one (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and

form in which they have complied and are complying with paragraphs II and III of this order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request and reasonable notice, respondents shall permit any duly authorized representative of the Commission:

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

B. Upon five (5) days' notice to the respondents, and without restraint or interference, to interview officers, directors, employees, agents or independent contractors of the respondents, who may have counsel present.

VI.

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

VII.

It is further ordered, That this order shall terminate on September 17, 2008.

IN THE MATTER OF

TRENDMARK, INC., ET AL.

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

Docket C-3829. Complaint, Sept. 23, 1998--Decision, Sept. 23, 1998

This consent order prohibits, among other things, the Tennessee-based corporation and its owners from making claims about the health benefits, performance or efficacy of its weight-loss products, called Neuro-Thin and Lipo-Thin, or any food, drug or device without competent and reliable scientific substantiation. The consent order also prohibits the respondents from misrepresenting the existence, result, or interpretation of any test, study, or research, and requires a disclosure concerning the testimonials and endorsements for the products.

Participants

For the Commission: *Ronald Waldman* and *Michael Bloom.*

For the respondents: *Regina Morrison, Hodges & Hodges*, Memphis, TN.

COMPLAINT

The Federal Trade Commission, having reason to believe that TrendMark Inc., a corporation, William McCormack, and E. Robert Gates, individually and as officers of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent TrendMark Inc. ("TrendMark") is a Tennessee corporation with its principal office or place of business at 3665 South Perkins, Suite 8, Memphis, TN.

2. Respondent William McCormack is an owner and officer of respondent TrendMark. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of TrendMark, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of TrendMark.

3. Respondent E. Robert Gates is an owner and officer of respondent TrendMark. Individually or in concert with others, he

formulates, directs, or controls the policies, acts, or practices of TrendMark, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of TrendMark.

4. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed over-the-counter weight-loss products to the public called "Neuro-Thin™" and "Lipo-Thin™." Neuro-Thin™ and Lipo-Thin™ are "foods" or "drugs," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. 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.

6. Respondents have disseminated or have caused to be disseminated advertisements, including but not necessarily limited to Exhibit A -- a copy of a bulk e-mail sent to users of America Online--which, among other things, directs the recipient to click on a hyperlink which takes the recipient directly to TrendMark's website (excerpts from a printout of the website are attached as Exhibit B). These advertisements contain the following statements:

A. **"NEW ALL-NATURAL WEIGHT LOSS PRODUCT, NOW ON THE MARKET!!!'**
If you've heard about the new 'Phen/Fen' Diet, and thought about trying it..... DON'T!!!
With the ALL NATURAL 'Thin-Thin Diet', you can achieve the same results, without the dangerous side-effect of Drugs! Eat the foods you want, and STILL lose 10-12 pounds per month! Patent Pending Thin-Thin Diet works for you to lose weight and KEEP IT OFF.
. . .
The Thin-Thin Diet Program is a Nutritional Breakthrough Program with a NO DIET, NO WILL POWER, easy way to LOSE UP TO 20 POUNDS PER MONTH and KEEP IT OFF!!"
(Exhibit A)

B. **"<u>Read what a few of the THIN-THIN DIET™ users are saying:</u>**
. . . 'Because of the THIN-THIN Diet™, I have reached my weight-loss goal and my diabetes is much less of a problem!'
***Toni H.*, Ohio**
'After my husband died, I suffered from depression and gained 50 pounds. I tried several diets, but just couldn't lose any of the weight. I've lost 14 pounds already on the THIN-THIN DIET™ and feel great!'
***Kay M.*, Tennessee**
NEURO-THIN™ turns your 'hunger switch' off.
. . .

NEURO-THIN™ help[s] balance the levels of serotonin and dopamine in your brain. The result? Food cravings and hunger pangs are eliminated . . . and . . . you'll be on the way to achieving your goal!
LIPO-THIN™ Features:
*Absorbs and binds fat.
*Inhibits LDL cholesterol and boosts HDL cholesterol.
*Promotes healing of ulcers and lesions.
. . .
*Helps prevent irritable bowel syndrome.
*Reduces levels of uric acid in the blood.
. . .
*Correlates with improved cardiovascular health.
LIPO-THIN™ eliminates fat before your body can absorb it.
Forbidden foods that you craved before beginning your **THIN-THIN DIET™** can still be eaten in moderation because the fat they contain is blocked by the chitin fiber found in **LIPO-THIN™.** This remarkable, naturally occurring ingredient acts like a 'fat magnet' or a 'fat sponge' in your digestive tract. It forms a non-digestible gel that binds with fat molecules and prevents their absorption into your body.
. . .
This program works. The THIN-THIN DIET™ is based on the latest scientific studies. It stops cravings and blocks fat absorption."
(Exhibit B)

7. Through the means described in paragraph six, respondents have represented, expressly or by implication, that:

A. Neuro-Thin™ controls appetite.
B. Taking Neuro-Thin™ and Lipo-Thin™ in combination causes significant weight loss without a change in diet.
C. Taking Neuro-Thin™ and Lipo-Thin™ in combination causes long-term or permanent weight loss.
D. Lipo-Thin™ helps prevent the absorption of ingested fat.
Lipo-Thin™ lowers LDL cholesterol and boosts HDL cholesterol.
F. Lipo-Thin™ promotes healing of ulcers and lesions.
G. Lipo-Thin™ helps prevent irritable bowel syndrome.
H. Lipo-Thin™ reduces levels of uric acid in the blood.
I. Lipo-Thin™ helps improve cardiovascular health.
J. Testimonials from consumers appearing in advertisements for the Thin-Thin Diet reflect the typical or ordinary experience of members of the public who use Neuro-Thin™ and Lipo-Thin™.

8. Through the means described in paragraph six, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made. Among other reasons, the purported support which proposed respondents did rely upon for the above claims--studies on individual components of Neuro-Thin™ or Lipo-Thin™-- did not relate adequately to their advertising claims. For example, most of the studies that were submitted by the proposed respondents as support were test tube studies and studies of rats. These studies cannot be used as adequate support for the therapeutic effects of Neuro-Thin™ and Lipo-Thin™ in human beings. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. Through the means described in paragraph six, respondents have represented, expressly or by implication, that scientific studies prove that Neuro-Thin™ and Lipo-Thin™ cause significant weight loss.

11. In truth and in fact, scientific studies do not prove that Neuro-Thin™ and Lipo-Thin™ cause significant weight loss. Therefore, the representation set forth in paragraph ten was, and is, false or misleading.

12. Through the means described in paragraph six, respondents have represented that the statements of Toni Holcomb, John Vaught, and Kay Morton appearing in website advertisements are endorsements of Neuro-Thin™ and Lipo-Thin™. Respondents have failed to disclose adequately that these endorsers have a material connection with individuals and entities marketing and profiting from the sales of Neuro-Thin™ and Lipo-Thin™. At the time of providing their endorsements, Toni Holcomb and John Vaught were the spouses of independent distributors of Neuro-Thin™ and Lipo-Thin™. At the time of providing her endorsement, Kay Morton was an independent distributor of Neuro-Thin™ and Lipo-Thin™. These facts would be material to consumers in their purchase or use decisions regarding Neuro-Thin™ and Lipo-Thin™. The failure to disclose adequately this fact, in light of the representation made, was, and is, a deceptive practice.

13. The acts and practices of respondents 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

Subj: Fwd: New Product Intro / FREE Registration for Dream Vacation
Date: 97-08-11 14:39:45 EDT
From: CyberPro36
To: TrendMrk

Rich,

Here's the latest. Doing better????

Dave
913 321 3508

Forwarded Message:
Subj: New Product Intro / FREE Registration for Dream Vacation
Date: 97-08-11 13:57:50 EDT
From: cyberpro36temp@usa.net (Trend Mark International)
Reply-to: Hyperlink@below.com
To: cyberpro36temp@usa.net

****

NEW ALL-NATURAL WEIGHT LOSS PRODUCT, NOW ON THE MARKET !!!

****

If you've heard about the new "Phen/Fen" Diet, and thought about trying it..... DON'T!!!

With the ALL NATURAL "Thin-Thin Diet", you can achieve the same results, without the dangerous side-effects of Drugs! Eat the foods you want, and STILL lose 10-12 pounds per month! Patent Pending Thin-Thin Diet works for you to lose weight and KEEP IT OFF.

Find out the SECRET to losing weight and keeping it off with the Thin-Thin Diet Program! This Weight loss Program is based on cutting edge research, revealing how Serotonin and Dopamine can help you stop craving and bingeing. Helps you lose weight, eliminate fatigue and START FEELING GREAT!

The Thin-Thin Diet Program is a Nutritional Breakthrough Program with a NO DIET, NO WILL POWER, easy way to LOSE UP TO 20 POUNDS PER MONTH and KEEP IT OFF!!

Works 24 hours a day!!!

****

YOU CAN GO DIRECTLY TO OUR WEB SITE BY

CLICKING HERE

AND LEARN ALL ABOUT THE THIN-THIN DIET PROGRAM!!

****

We diligently remove all who do not wish to receive unsolicited emails.

Monday August 25, 1997 America Online: TrendMrk Page: 1

EXHIBIT B

Thin-Thin Diet™

Congratulations ! You've taken the first step toward losing weight and that's always the hardest. Let me introduce myself. My name is Cort McLeod and I'm the Director of Nutrition for TrendMark International. After 34 years of research, I have finally solved the weight-loss puzzle. Now, a 100-percent safe, non-addictive, weight-loss program is available for you at an affordable price.

Read what a few of the THIN-THIN DIET™ users are saying:

"My diabetes caused my weight to become uncontrollable and I had almost given up hope of ever being able to lose those extra pounds. Because of the THIN-THIN DIET™, I have reached my weight-loss goal and my diabetes is much less of a problem!"

***Toni H.*, Ohio**

"I tried a drug diet program but had to quit because of its side effects. Thanks to the Internet, I discovered the THIN-THIN DIET™ and today I'm losing weight and feeling good!"

***Bob L.*, Florida**

"Through the years, I've spent a lot of money on various diets. Unfortunately, I never lost the weight. Since using the THIN-THIN DIET™, however, I've lost more than 100 pounds in less

EXHIBIT B

than eight months and I feel great!"

***Virginia L.*, Tennessee**

"I've always been a big eater. The THIN-THIN DIET™ curbed my appetite almost immediately. If it worked for me, it can work for anybody!"

***John V.*, Texas**

"After my husband died, I suffered from depression and gained 50 pounds. I tried several diets, but just couldn't lose any of the weight. I've lost 14 pounds already on the THIN-THIN DIET™ and feel great!

***Kay M.*, Tennessee**

Order

Order now and get *TRIPLE* entries into our FREE VACATION DRAWING!!

PRODUCTS

NEURO-THIN™ Features

*All-natural amino acid and vitamin and mineral formula that restores proper brain chemistry.

*Unique, 100-percent safe formulation of commonly used ingredients -- all pharmaceutical grade, for your peace of mind.

*Non-addictive -- no withdrawal symptoms.

*Convenient, easy-to-take capsules.

*Hypoallergenic and contains no sugars, starches, yeast, salt, milk or preservatives.

NEURO-THIN™ turns your "hunger switch" off.

Food cravings originate in your brain when the levels of serotonin and dopamine are out of balance. These chemical neurotransmitters affect your body temperature, metabolic rate and mental state of being. The natural ingredients found in **NEURO-THIN™** help balance the levels of serotonin and dopamine in your brain. The result? Food cravings and hunger pangs are eliminated -- without the use of drugs. If you're not hungry, and you don't crave food, you'll be on the way to achieving your goal!

Click on the bottle for the ingredients.

EXHIBIT B

Homepage

LIPO-THIN™ Features

*Absorbs and binds fat.

*Inhibits LDL cholesterol and boosts HDL cholesterol.

*Promotes healing of ulcers and lesions.

*Antibacterial.

*Antacid properties.

*Helps prevent irritable bowel syndrome.

*Reduces levels of uric acid in the blood.

*Functions as non-digestible dietary fiber.

*Correlates with improved cardiovascular health.

LIPO-THIN™ eliminates fat before your body can absorb it.

Forbidden foods that you craved before beginning your **THIN-THIN DIET™** can still be eaten in moderation because the fat they contain is blocked by the chitin fiber found in **LIPO-THIN™**. This remarkable, naturally occurring ingredient acts like a "fat magnet" or a "fat sponge" in your digestive tract. It forms a non-digestible gel that binds with fat molecules and prevents their absorption into your body.

Click on the bottle for the ingredients.

Vacation Giveaway

Fill out the appropriate surveys below and/or order the THIN-THIN DIET™ and be entered into our weekly and monthly vacation drawings*.

THIS WEEKS WINNER: To be announced 8/25/97

THIS MONTHS WINNER: To be announced 8/25/97

Weekly prizes consist of 2for1 cruises ($800 Value)

Monthly prizes consist of 40 Land/Air/Sea Packages ($10,000 Value)

EXHIBIT B

Home Page

Order now and get *TRIPLE* entries into our FREE VACATION DRAWING!!

*All winners must be at least 21 years of age at the time the survey/order is submitted. Verification of age will be required prior to awarding of prize.

To lose 5-20 pounds click on the target below.

To lose 20 pounds or more click on the target above.

Order

Order now and get *TRIPLE* entries into our FREE VACATION DRAWING!!

This Website designed by: Richard Carnegie

8/25/97 1:45:55 PM

EXHIBIT B

Yes ☐

8. I'm afraid of any diet that isn't natural and uses stimulants.

Yes ☐

9. I don't want to lose weight only to gain it back.

Yes ☐

10. If I lost weight and could keep it off, I would tell everyone.

Yes ☐

11. Please let us know how you found out about this website. If one of our representatives sent you here please put the name and/or rep number of that person below:

12. When is the best time for a Weight Management Consultant to contact you?

Did you fill out the form completely?

Order now and get *TRIPLE* entries into our FREE VACATION DRAWING!!

Submit Form Reset Form

You've seen the power of NEURO-THIN™ and LIPO-THIN™. Now let me tell you six reasons why this is the best weight-loss program available today.

1. This program works. The THIN-THIN DIET™ is based on the latest scientific studies. It stops cravings and blocks fat absorption.

2. The products are all natural. This is safe, simple, non-addictive nutrition that uses only the highest quality pharmaceutical-grade ingredients.

3. We assign you a coach. We provide the support, at no cost to you.

4. National Support Line. Another free service to answer questions and provide support.

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

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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, 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.a. Respondent TrendMark Inc. ("TrendMark") is a Tennessee corporation with its principal office or place of business at 3665 South Perkins, Suite 8, Memphis, TN.

1.b. Respondent William McCormack is an owner and officer of respondent TrendMark. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of TrendMark, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of TrendMark.

1.c. Respondent E. Robert Gates is an owner and officer of respondent TrendMark. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of

TrendMark, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of TrendMark.

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

DEFINITIONS

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

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

2. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in all of the languages that are present in the advertisement. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. Unless otherwise specified, "*respondents*" shall mean TrendMark Inc., its successors and assigns, and its officers William McCormack and E. Robert Gates, individually and as an officers of TrendMark Corp., and each of the above's agents, representatives, and employees.

4. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. "*Drug*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

6. "*Food*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Neuro-Thin™ and Lipo-Thin™, or any other product or program in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Such product or program controls appetite;

B. Such product or program causes significant weight loss without a change in diet;

C. Such product or program causes long-term or permanent weight loss;

D. Such product or program prevents or helps prevent the absorption of ingested fat;

E. Such product or program lowers LDL cholesterol or boosts HDL cholesterol;

F. Such product or program promotes healing of ulcers or lesions;

G. Such product or program helps prevent irritable bowel syndrome;

H. Such product or program reduces levels of uric acid in the blood; or

I. Such product or program helps improve cardiovascular health,

unless at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the testimonial or endorsement, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

III.

It is further ordered, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Neuro-Thin™ or Lipo-Thin™, or any other food, dietary supplement, drug, or device, as "food," "drug," and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any

representation, in any manner, expressly or by implication, about the health benefits, performance, or efficacy of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

V.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, shall disclose, clearly and prominently, a material connection, when one exists, between a person providing an endorsement for any product or program, as "endorsement" is defined in 16 CFR 255.0(b), and any respondent, or any individual or entity labeling, advertising, promoting, offering for sale, selling, or distributing such product or program. For purposes of this Part, "material connection" shall mean any relationship that might materially affect the weight or credibility of the endorsement and would not reasonably be expected by consumers.

VI.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VII.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VIII.

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

A. All advertisements and promotional materials containing the representation;

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

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

IX.

It is further ordered, That, for a period of ten (10) years after the date of issuance of this order, respondent TrendMark, and its successors and assigns, and respondents William McCormack and E. Robert Gates shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

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

XI.

It is further ordered, That each of respondents William McCormack and E. Robert Gates, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XII.

It is further ordered, That respondent TrendMark, and its successors and assigns, and respondents William McCormack and E. Robert Gates shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIII.

This order will terminate on September 23, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

IN THE MATTER OF

SOUTH LAKE TAHOE LODGING ASSOCIATION

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

Docket C-3830. Complaint, Oct. 7, 1998--Decision, Oct. 7, 1998

This consent order prohibits, among other things, the California-based trade association, representing the interest of motel and hotel operators, from participating in, suggesting, or assisting any agreement, combination or conspiracy with its members to restrict the posting of signs advertising the prices at which its individual members offer lodging. The consent order requires the respondent to amend its by-laws to incorporate the provisions of this order and requires the respondent to distribute copies of the amended by-laws to each of its members.

Participants

For the Commission: *David Newman, Jeffrey Klurfeld, Willard Tom, William Baer, Oliver Grawe,* and *Jonathan Baker.*

For the respondent: *J. Dennis Crabb, Rollston, Henderson, Rasmussen & Crabb*, South Lake Tahoe, CA.

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 South Lake Tahoe Lodging Association (hereinafter "respondent") has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent South Lake Tahoe Lodging Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business located at P.O. Box 5746, South Lake Tahoe, California.

PAR. 2. Respondent is a trade association representing the interests of motel and hotel operators and other operators of lodging

properties in the South Lake Tahoe area. For purposes of this complaint, the South Lake Tahoe area comprises those portions of El Dorado County, California, and Douglas County, Nevada, lying within the Lake Tahoe basin. Respondent's members are generally engaged in the offering of short-term lodging in the South Lake Tahoe area. Respondent has approximately 63 members, who, together with certain of respondent's associate members, constitute approximately 70 percent of the available lodging units in the South Lake Tahoe area. Except to the extent that competition has been restrained as alleged herein, respondent's members have been and are now in competition among themselves and with other motels, hotels, and lodging properties.

PAR. 3. Respondent is organized for the purpose of guarding and fostering the interests of its members. Respondent engages in activities that further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. Respondent's acts and practices, including the acts and practices alleged herein, are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 5. Respondent has been and is acting in agreement, combination or conspiracy with its members, or in agreement, combination or conspiracy with some of its members, to restrain trade in the offering of lodging in the South Lake Tahoe area by eliminating the posting of signs advertising the prices at which its individual members offer such lodging.

PAR. 6. The purposes or effects of the agreement, combination or conspiracy and respondent's acts or practices as described in paragraph five are and have been to restrain competition unreasonably and to deprive consumers of the benefits of competition in one or more of the following ways, among others:

(a) By foreclosing, reducing and restraining competition among providers of lodging in the South Lake Tahoe area;

(b) By depriving consumers of truthful information concerning the prices of lodging in the South Lake Tahoe area; and

(c) By depriving consumers of the benefits of competition among providers of lodging in the South Lake Tahoe area.

PAR. 7. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. These acts and practices are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 South Lake Tahoe Lodging Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business located at P.O. Box 5746, South Lake Tahoe, California.

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

ORDER

I.

It is ordered, That for the purposes of this order, "respondent" or "SLTLA" shall mean the South Lake Tahoe Lodging Association, its predecessors, successors and assigns, and its directors, committees, officers, delegates, representatives, agents and employees.

II.

It is further ordered, That SLTLA, directly or indirectly, or through any person or any corporate or other device, in or in connection with its activities as a trade association, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from carrying out, participating in, inducing, suggesting, urging, encouraging, or assisting any agreement, combination or conspiracy with its members, or agreement, combination or conspiracy with some of its members, to restrict the posting of signs advertising the prices at which its individual members offer lodging;

Provided, however, that nothing in this order shall be construed to prevent respondent or its members from exercising rights protected under the First Amendment to the United States Constitution to petition any federal, state or local government executive agency or legislative body concerning legislation, rules, programs, or procedures, or to participate in any federal, state or local administrative or judicial proceeding.

III.

It is further ordered, That SLTLA shall:

A. Within sixty (60) days after the date this order becomes final, amend its by-laws to incorporate by reference paragraph II of this order, and distribute by first-class mail a copy of the amended by-laws to each of its members;

B. Within thirty (30) days after the date this order becomes final, distribute by first-class mail a copy of this order and the complaint to each of its members;

C. For a period of five (5) years after the date this order becomes final, provide each new member with a copy of this order, the complaint, and the amended by-laws within thirty (30) days of the new member's admission to SLTLA; and

D. Within seventy-five (75) days after the date this order becomes final, and annually thereafter for a period of five (5) years on the anniversary of the date this order becomes final, file with the Secretary of the Commission a verified written report setting forth in detail the manner and form in which SLTLA has complied with and is complying with this order.

IV.

It is further ordered, That SLTLA shall notify the Commission at least thirty (30) days prior to any change in SLTLA, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation that may affect compliance obligations arising out of this order.

V.

It is further ordered, That for the purposes of determining or securing compliance with this order, respondent shall permit any duly authorized representative of the Commission:

A. Upon seven (7) days notice to respondent, to have access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon seven (7) days notice to respondent and without restraint or interference from it, to interview directors, committees, officers, delegates, representatives, agents and employees.

VI.

It is further ordered, That this order shall terminate on October 7, 2018.

IN THE MATTER OF

NORTEK, INC.

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

Docket C-3831. Complaint, Oct. 8, 1998--Decision, Oct. 8, 1998

This consent order requires, among other things, Nortek, Inc., to divest M & S, its wholly-owned subsidiary and seller of hard-wired residential intercoms, to a Commission-approved third-party within six months, and to provide technical assistance at the purchaser's request, for up to one year after the sale. The consent order also requires that Nortek preserves and maintains the competitive viability of M & S and operates M & S separately from Nortek until the divestiture is completed.

Participants

For the Commission: *Paul Block, Gary Cooper, Colleen Lynch, David Keniry, Andrew Caverly, William Baer, Leslie Farber, Hajime Hadeishi,* and *Jonathan Baker.*

For the respondent: *Kevin Arquit, Rogers & Wells*, New York, N.Y. and *John Christie, Hale & Dorr*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Nortek, Inc., a corporation subject to the jurisdiction of the Commission, through its wholly-owned subsidiary NTK Sub, Inc., has agreed to acquire all the outstanding shares of the capital stock of NuTone Inc., a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would be in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. "*Hard-Wired Residential Intercoms*" means electrical devices installed in residences to provide audio-only room-to-room or room-

to-entrance communication or monitoring functions through in-the-wall low voltage wiring, including, but not limited to, such devices that incorporate music features.

II. RESPONDENT

2. Respondent Nortek, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 50 Kennedy Plaza, Providence, Rhode Island. In 1997, Respondent Nortek, Inc. had net sales of $1.13 billion. M & S Systems LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2861 Congressman Lane, Dallas, Texas. Broan Mfg. Co., Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its principal place of business located at 926 W. State Street, Hartford, Wisconsin. M & S Systems LP and Broan Mfg. Co., Inc. are wholly-owned subsidiaries of Nortek, Inc.

3. Respondent, through its wholly-owned subsidiaries M & S Systems LP and Broan Mfg. Co., Inc., is engaged in, among other things, the manufacture, production and sale of Hard-Wired Residential Intercoms. In 1997, respondent's total sales of these products were approximately $14 million.

4. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

5. NuTone Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Madison & Red Banks Roads, Cincinnati, Ohio. In 1997, NuTone Inc.'s net sales were approximately $199 million. NuTone Inc. is a wholly-owned subsidiary of Williams Y&N Holdings, Inc., which is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 700 Nickerson Road, Marlborough, Massachusetts.

Williams Y&N Holdings, Inc. is a wholly-owned subsidiary of Williams U.S. Holdings Inc., which is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 700 Nickerson Road, Marlborough, Massachusetts. Williams U.S. Holdings Inc. is a wholly-owned subsidiary of Williams PLC, which is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Pentagon House, Sir Frank Whittle Road, Derby DE2 4XA England.

6. NuTone Inc. is engaged in, among other things, the manufacture, production and sale of Hard-Wired Residential Intercoms. In 1997, NuTone Inc.'s total sales of these products were approximately $25 million.

7. NuTone Inc., Williams Y&N Holdings, Inc., Williams U.S. Holdings Inc., and Williams PLC are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

8. On or about March 9, 1998, Williams Y&N Holdings, Inc. and NTK Sub, Inc. entered into a stock purchase and sale agreement whereby NTK Sub, Inc., a wholly-owned subsidiary of respondent Nortek, Inc., agreed to acquire all of the outstanding shares of the capital stock of NuTone Inc. for approximately $242.5 million ("Acquisition").

V. THE RELEVANT MARKETS

9. The relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture, production and sale of Hard-Wired Residential Intercoms.

10. The United States is the relevant geographic market in which to analyze the effects of the Acquisition in the relevant line of commerce.

VI. STRUCTURE OF THE MARKET

11. The parties to the Acquisition are the two leading producers and suppliers of Hard-Wired Residential Intercoms in the United States. Respondent Nortek, Inc. has an approximately 31% share and NuTone Inc. has an approximately 56% share. The market for the manufacture, production and sale of Hard-Wired Residential Intercoms is very highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI"), or the two-firm and four-firm concentration ratios. The two-firm concentration ratio is approximately 87%; the four-firm concentration ratio is approximately 98%; and the post-acquisition HHI would be over 7600.

VII. CONDITIONS OF ENTRY

12. Entry into the market for the manufacture, production and sale of Hard-Wired Residential Intercoms would not be timely, likely, or sufficient to deter or counteract the adverse competitive effects described in paragraph thirteen because of, among other things, the difficulty of establishing a network of wholesale distributors, and gaining brand name recognition and customer acceptance.

VIII. EFFECTS OF THE ACQUISITION

13. The effects of the Acquisition, if consummated, may be substantially to lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) By eliminating actual, direct and substantial competition between respondent Nortek, Inc. and NuTone Inc. in the relevant market;

(b) By increasing the likelihood that respondent Nortek, Inc. will unilaterally exercise market power in the relevant market; and

(c) By increasing the likelihood of or facilitating collusion or coordinated interaction between respondent Nortek, Inc. and its remaining competitors in the relevant market;

each of which increases the likelihood that the prices of Hard-Wired Residential Intercoms will increase, and that services and innovation will decline.

IX. VIOLATIONS CHARGED

14. The Acquisition agreement described in paragraph eight constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

15. The Acquisition described in paragraph eight, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by the respondent Nortek, Inc. ("Nortek"), through its wholly-owned subsidiary NTK Sub, Inc., of all the outstanding shares of the capital stock of NuTone Inc., and respondent having been furnished with a draft of complaint which, if issued by the Commission, would charge respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, 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, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, makes the following jurisdictional findings and enters the following order:

1. Respondent Nortek is a corporation organized, existing and doing business under and by virtue of the laws of the State of

Delaware with its office and principal place of business located at 50 Kennedy Plaza, Providence, Rhode Island.

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*" or "*Nortek*" means Nortek, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, including but not limited to M & S Systems LP, and its divisions, groups and affiliates controlled by Nortek, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. M & S Systems LP ("M & S") is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2861 Congressman Lane, Dallas, Texas. M & S is a wholly-owned subsidiary of Nortek.

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

D. "*Hard-Wired Residential Intercoms*" means electrical devices installed in residences to provide audio-only room-to-room or room-to-entrance communication or monitoring functions through in-the-wall low voltage wiring, including, but not limited to, such devices that incorporate music features.

E. "*Assets To Be Divested*" means M & S and all its assets, properties, business and goodwill, tangible and intangible, including, but not limited to, the following:

1. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

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

3. All copyrights, brands, brand names, trade marks and trade names owned or used by M & S, and all rights relating thereto, except that the Broan and Novi trade names and trade marks shall not be included;

4. Inventory and storage capacity;

5. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

6. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

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

8. All books, records, and files; and

9. All items of prepaid expense.

F. "*Proposed Acquisition*" means the proposed acquisition by Nortek of all of the shares of the capital stock of NuTone Inc.

II.

It is further ordered, That:

A. Respondent shall divest at no minimum price, absolutely and in good faith, within six (6) months from the date respondent executes the agreement containing consent order, the Assets To Be Divested.

B. Respondent shall divest the Assets To Be Divested only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the Assets To Be Divested in the same business in which the Assets To Be Divested are engaged at the time of the Proposed Acquisition, and to remedy the lessening of competition in the manufacture, production and sale of Hard-Wired Residential Intercoms resulting from the Proposed Acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are necessary to maintain the viability and marketability of the Assets To Be Divested and to prevent the

destruction, removal, wasting, deterioration, or impairment of any of the Assets To Be Divested except for ordinary wear and tear.

D. Upon reasonable notice from the acquirer to respondent, respondent shall provide such technical assistance to the acquirer as is reasonably necessary to enable the acquirer to manufacture and sell products in substantially the same manner and quality as they were manufactured and sold prior to the divestiture of the assets described in paragraph I.E of this agreement, except that Nortek shall only be required to provide such technical assistance that is within its operation or control and shall not be required to provide third-party technical assistance. Such assistance shall include reasonable consultation with knowledgeable employees and training at the acquirer's or the respondent's facility, at the acquirer's option, for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the skills necessary to manufacture and sell the products. Respondent shall convey all know-how necessary to manufacture and sell the products in substantially the same manner and quality as they were manufactured and sold prior to the divestiture. However, respondent shall not be required to continue providing such assistance for more than one year from the date of the divestiture. Respondent shall charge the acquirer at a rate no more than its own direct costs for providing such technical assistance.

E. Respondent shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as respondent has divested all the Assets To Be Divested as required by this order.

III.

It is further ordered, That:

A. If Nortek has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time period in paragraph II, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), or any other statute enforced by the Commission, Nortek shall consent to the appointment of a trustee in such action. Neither the

appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III. B. 3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's

duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III. A of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

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

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraphs II or III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture. The final compliance report shall include a statement that the divestiture has been accomplished in the manner approved by the Commission and shall include the date the divestiture was accomplished.

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 that may affect compliance obligations arising out of the order, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

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

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, employees, agents or independent contractors of respondent.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate is by and between Nortek, Inc. ("Nortek"), a corporation organized and existing under the laws of the State of Delaware, M & S Systems LP ("M & S"), a limited partnership organized and existing under the laws of the State of Delaware and a wholly-owned subsidiary of Nortek, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

PREMISES

Whereas, Nortek, through its wholly-owned subsidiary NTK Sub, Inc., has proposed to acquire all the outstanding shares of the capital stock of NuTone Inc. ("Proposed Acquisition"); and

Whereas, the Commission is now investigating the Proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, Nortek has entered into an Agreement Containing Consent Order ("Consent Agreement"), which requires, among other things, Nortek to divest certain assets of M & S, as defined therein; and

Whereas, if the Commission accepts the Consent Agreement, the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached preserving the status of M & S during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm and divestiture or other relief resulting from a proceeding challenging the legality of the Proposed Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, Nortek and M & S entering into this Agreement to Hold Separate shall in no way be construed as an admission by Nortek that the Proposed Acquisition constitutes a violation of any statute; and

Whereas, Nortek understands that no act or transaction contemplated by this Agreement to Hold Separate shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement to Hold Separate.

Now, therefore, upon the understanding that the Commission has not yet determined whether it will challenge the Proposed Acquisition, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, Nortek and M & S agree as follows:

1. Nortek agrees to execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Nortek signs the Consent Agreement.

2. The terms capitalized herein shall have the same definitions as in the Consent Agreement.

3. Nortek agrees that from the date the Proposed Acquisition is consummated until the earlier of the dates listed in subparagraphs 3.a - 3.b, it will comply with the provisions of paragraph 4 of this Agreement to Hold Separate:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's rules; or

b. The day after the divestiture required by the Consent Order has been completed.

4. To ensure the complete independence and viability of M & S and to assure that no competitive information is exchanged between the M & S and Nortek, Nortek shall hold M & S separate and apart on the following terms and conditions:

a. Nortek will cause to be appointed, within three (3) days of the date the Proposed Acquisition is consummated, Richard Denman to manage and maintain M & S who will make no changes to M & S other than changes made in the ordinary course of business. This individual ("the Manager") shall manage M & S independently of the management of Nortek's other businesses. The Manager shall not be involved in any way in the operations or management of any other Nortek business.

b. The Manager shall have exclusive control over M & S, with responsibility for the management of M & S and for maintaining the independence of M & S.

c. Nortek shall not exercise direction or control over, or influence, directly or indirectly, the Manager relating to the operation of M & S; provided, however, that Nortek may exercise only such direction and control over the Manager and M & S as is necessary to assure compliance with this Agreement to Hold Separate and with all applicable laws.

d. Nortek and M & S shall maintain the marketability, viability, and competitiveness of M & S and shall not sell, transfer, encumber it (other than in the normal course of business or to assure compliance with the Consent Agreement), or otherwise impair its marketability, viability or competitiveness.

e. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Proposed Acquisition, defending investigations or litigation, negotiating

and executing agreements to divest the Assets To Be Divested, complying with this Hold Separate Agreement or the consent order, or as necessary to comply with its reporting requirements as a public company, Nortek shall not receive or have access to, or the use of, non-public business information, or any material confidential information about M & S or the activities of the Manager or support service employees involved in the operation of M & S, not in the public domain. In addition, Nortek may receive aggregate financial information relating to M & S, but only to the extent necessary to allow Nortek to prepare federal and state consolidated financial reports or tax returns and to comply with its reporting requirements as a public company. Such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

f. Nortek shall circulate to all its employees involved with M & S, or any line of products that M & S manufactures and sells, and appropriately display, a copy of this Agreement to Hold Separate and the Consent Agreement.

g. If the Manager ceases to act or fails to act diligently, a substitute Manager shall be appointed subject to the Commission's approval.

h. The Manager shall have access to and be informed about all companies who inquire about or seek or propose to buy any of the Assets To Be Divested. M & S may require the Manager to sign a confidentiality agreement prohibiting the disclosure of any material confidential information gained as a result of his or her role as a Manager to anyone other than the Commission.

i. The Manager shall report in writing to the Commission every thirty (30) days concerning his or her efforts to accomplish the purposes of this Agreement to Hold Separate.

5. Nortek waives all rights to contest the validity of this Agreement to Hold Separate.

6. For the purpose of determining or securing compliance with this Agreement to Hold Separate, subject to any legally recognized privilege, and upon written request, and on reasonable notice, to Nortek made to its principal office, Nortek and M & S shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Nortek and M & S, and in the presence of counsel, to inspect any facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Nortek or M & S relating to compliance with this Agreement to Hold Separate; and

b. Upon five (5) days' notice to Nortek and M & S, without restraint or interference from it, to interview officers, directors, or employees of Nortek or M & S, who may have counsel present, regarding any such matters.

7. This Agreement to Hold Separate shall not be binding until accepted by the Commission.

IN THE MATTER OF

TOYS "R" US, INC.

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

Docket 9278. Complaint, May 22, 1996–Final Order, Oct 13, 1998

This final order prohibits, among other things, the nation's largest toy retailer from continuing, entering into, or attempting to enter into, vertical agreements with its suppliers to limit the supply of, or refuse to sell, toys to a toy discounter. The order also prohibits Toys "R" Us from facilitating, or attempting to facilitate, an agreement between or among its suppliers relating to the sale of toys to any retailer, and from urging or coercing suppliers to restrict sales to any toy discounter.

Participants

For the Commission: *L. Barry Costilo, Richard Dagen, Patrick Roach, Sarah Allen, James Frost, Michael Antalics, William Baer, Richard Ludwick, David Glasner,* and *Jonathan Baker.*

For the respondent: *Michael Tumolo*, in-house counsel, Paramus, N.J., *Michael Feldberg, Schulte, Roth & Zabel*, New York, N.Y. and *Irving Scher, Weil, Gotshal & Manges*, New York, N.Y.

COMPLAINT

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

PARAGRAPH 1. Respondent Toys "R" Us, Inc. ("TRU") is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 461 From Road, Paramus, New Jersey.

PAR. 2. TRU is the largest toy retailer in the United States. It has approximately 600 stores located throughout the United States and 300 stores in foreign countries, which sell toys, infant supplies and

equipment, juvenile sporting goods and related items ("products"). In 1995 its total sales were approximately $9.4 billion.

PAR. 3. TRU's acts and practices, including the acts and practices alleged herein, are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. TRU's importance as a provider of distribution to manufacturers of toys and related products has given it the ability to exercise market power over those manufacturers, and TRU has exercised this power.

PAR. 5. Warehouse clubs ("clubs") charge a membership fee and retail a broad variety of products, including toys and other products sold by TRU. The clubs operate on lower margins than TRU or other national chain discounters. During the late 1980's and early 1990's, club sales were growing at a much faster rate than other retailers. During that period, the toy manufacturers wanted to increase their sales to this relatively new channel of distribution because of the growth potential of the clubs and the manufacturers' desire to have additional outlets for their merchandise. Before TRU engaged in the conduct described in paragraphs seven through nine below, the clubs generally were able to buy popular individual toys from open stock (*i.e.*, any toys sold by the manufacturer without restriction) from most of the major manufacturers, which they generally sold at lower prices than TRU and other retailers. The clubs needed the option to buy the same toys from the manufacturers that TRU and the other major retailers were carrying in order to compete effectively.

PAR. 6. TRU has cultivated the image with the public as a toy discounter that has everyday low prices. However, it does not have the lowest retail prices among national toy retailers, and it generally does not lead prices down. In the early 1990's the clubs' low prices were putting competitive pressure on TRU. TRU feared that consumers would draw unfavorable and embarrassing comparisons between the clubs' prices and its prices, and that its image for everyday low prices could be eroded.

PAR. 7. Beginning at least as early as 1989, TRU used its power to gain agreements or understandings with various suppliers relating to toy sales to the clubs. These agreements or understandings included the following:

(a) The suppliers agreed not to sell to the clubs the same individual toys that TRU carried;

(b) In the event a supplier wanted to sell to the clubs some toys carried by TRU, TRU and the suppliers agreed upon toy products that could be sold to the clubs. These generally were "club specials" consisting of combination packs of two or more different items, or other product that was differentiated from regular open stock items. The items in the club specials could not be readily price-compared to products sold by TRU, the club specials generally cost more to produce, and the club specials raised the clubs' prices to consumers; and

(c) The suppliers agreed to advise TRU in advance of the specific products, including club specials, that the suppliers wanted to sell to the clubs. If after reviewing the products TRU determined that they did not pose a competitive conflict with the products sold by TRU, the supplier could sell the product to the clubs.

PAR. 8. Some major manufacturers were reluctant to give up their sales of individual toys to the clubs so long as their competitors were selling them to the clubs. To secure the agreements or understandings alleged in paragraph seven, TRU facilitated understandings among competing manufacturers to achieve substantial unity of action among them relating to their dealings with the clubs.

PAR. 9. TRU sought, received, and negotiated agreements or understandings with manufacturers with respect to the toys they would not sell to the clubs. TRU policed the manufacturers' sales and repeatedly brought any infractions to their attention. When it deemed necessary, TRU enforced its policy by taking product off its shelves or not buying product that manufacturers had sold to the clubs.

PAR. 10. By 1994 and continuing to the present, most of the major U.S. toy manufacturers had stopped selling popular individual toys to the club channel of distribution that were carried by TRU.

PAR. 11. The purpose and effect of the agreements and understandings described in paragraphs seven through ten was to restrain competition among toy retailers and among toy manufacturers.

PAR. 12. By engaging in the acts or practices described in paragraphs four through eleven of this complaint, TRU has unreasonably restrained competition in the following ways, among others:

(a) Retail price competition has been restrained, and toy prices to consumers are higher than they would have been absent TRU's conduct;

(b) Competition among toy manufacturers, including competition with respect to their distributional practices and their dealings with TRU's competitors, has been restrained;

(c) The clubs' costs were increased, which impeded the growth of a new method of toy distribution in its incipiency; and

(d) Information that would enable consumers to make informed price comparisons has been suppressed.

PAR. 13. The acts or practices of TRU alleged herein were and are to the prejudice and injury of the public. The acts or practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

Commissioner Azcuenaga and Commissioner Starek dissenting.

INITIAL DECISION *

BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE
SEPTEMBER 25, 1997

INTRODUCTION

The Commission's complaint of May 22, 1996, charges respondent Toys "R" Us, Inc. with unfair methods of competition in violation of the Federal Trade Commission Act, alleging as follows:

-- The low toy prices of the warehouse clubs put competitive pressure on TRU, compromising TRU's image for everyday low prices.
-- Being the largest toy retailer in the United States, TRU used its power to gain agreements with various suppliers to limit toy sales to the club.
-- Suppliers agreed not to sell to the clubs the same toys that TRU carried. TRU and the suppliers agreed upon specially packaged toy products that could be sold to the clubs. These "club specials" consisted of packs of two or more items.

* Note: [ ] indicates information has been redacted.

-- The suppliers agreed to get TRU's approval in advance of items they wanted to sell to the clubs. The sellers could sell the product. TRU facilitated understandings among competing manufacturers to achieve substantial unity of action among them relating to their dealings with the clubs.
-- TRU policed the manufacturers' sales and infractions and enforced its policy. By 1994. most of the major U.S. toy manufacturers stopped selling to the clubs the toys carried by TRU.
-- TRU unreasonably restrained competition among toy manufacturers and retailers. Toy prices to consumers are higher. The clubs' costs increased, impeding the growth of a new method of toy distribution in its incipiency. Information to enable consumers to make price comparisons was suppressed.

Respondent denied the principal allegations of the complaint. Respondent's motion for summary decision was denied on February 27, 1997. The hearing in this matter began on March 5, 1997. Complaint counsel called 25 witnesses including two expert witnesses and the respondent called 18 witnesses including three expert witnesses.

Respondent subpoenaed Gary L. Roberts, Associate Director for Antitrust in the Commission's Bureau of Economics, asserting that his uncle was the chief executive officer of Wal-Mart, and that Mr. Roberts' parents had received a substantial gift from his uncle. I granted a *motion in limine* for failure to allege facts indicating conflict of interest and to avoid interference with the deliberative process of the Commission. (RX-885.)

Complaint counsel's economic expert, F. M. Scherer, submitted rebuttal evidence on June 25, 1997. Closing arguments were on July 1, 1997 and September 5,1997, closing a trial of 43 trial days and over 9500 pages of trial transcript; about 2600 exhibits were admitted (CX-l through CX-l830; RX-l through RX-915).

FINDINGS

RETAIL SALE OF TOYS IN THE UNITED STATES

A. Respondent

1. Toys "R" Us, Inc. ("TRU") is a corporation organized. and doing business under the laws of Delaware, with its principal office at 461 From Road, Paramus, New Jersey.

2. TRU is the world's largest toy retailer, operating over 650 toy stores in the U.S. and 300 in twenty other countries. (TRU Answer to Complaint ¶ 2.) TRU had revenues of $9.4 billion in 1995 and $10 billion in 1996. (TRU Answer to Complaint ¶ 2.)[1]

3. TRU is a "category killer" chain -- a specialized retailer offering an array of merchandise in a particular category, sold at discount. (Scherer (CX-1822-C) ¶ 6.) TRU stores offer children's toys, games, bicycles, and electronic video games -- 16,000 "SKUs" in the early 1990's.[2] (Goddu 30:6574/10 - 6575/17.). TRU's stores are typically 45,000 square feet in major markets. (Goddu 30:6973/11-12.) TRU operates self-service where customers find products. (Goldstein 36:8242/18 - 8243/1.)

B. Toy Industry

1. Retail sale of toys

4. Traditional "mom and pop" stores "were challenged by department stores, which were challenged by mail-order houses, chain stores, supermarkets, hypermarkets, and more recently, "category killers" like TRU. Price-cutting by chain stores was the target during the 1930's of the Fair Trade laws and the Robinson-Patman Act. (Scherer CX-1822-B-C.) Between the end of World War II and the late 1980's, there were major innovations in retail toy distribution. Television ads "pull" toys making self service retailing feasible. The repeal in 1974 of the Miller-Tydings Act supporting state resale price maintenance laws facilitated discounting of toys at retail. With consumers' increased mobility, discount chains proliferated. They began stocking nationally advertised toys at discount prices. Toys "R" Us was one of the first specialized "category killer" retailers. (Scherer *CX-1822-C.*)

5. During the early 1990's, some other major toy supermarket chains (Lionel Leisure and Child World) went out of business. (CX-503-A.) By the 1990's, TRU's principal competition came from

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[1] References to the record use the following abbreviations:

F. (Findings of Fact), CX (Commission Exhibit), RX (Respondent's Exhibit); References to trial transcript are made using witness name, volume, page and lines. References to exhibits include prefix, number and page. References to investigational hearing or deposition transcripts included as exhibits include witness name and the designation "IH" or "Dep.", exhibit number, and transcript page and lines. In camera portions of the record are in italics/brackets.

[2] A "SKU" (stock-keeping unit) is a product in an inventory control system.

national, mass-market general merchandise discount chains like Wal-Mart, Target and K-Mart. (Goddu 30:6517/7-10.) [ ]

6. [ ]

7. [ ] TRU carries toys year-round, but the fourth quarter exceeds their sales for all three prior quarters combined. (CX-1616.) [ ]

8. [ ] TRU recently reduced its SKUs to 11,000, three times as many SKUs as its next closest competitor. (RX-621 at 27; Goddu 30:6574/22-25; Walters, 28:6068/21 - 6069/7.)

2. Toy manufacturing

9. The top four manufacturers of toys in the U.S. market are Mattel, Hasbro, Tyco and Little Tikes. In 1994, for the total U.S. toy market, Mattel had 18%, Hasbro had 17 %, Tyco had 3.2% and Little Tikes had 2.8%. (CX-1669-C; CX-1230-J.)

10. [ ] Hasbro sells Mr. Potato Head, G.I. Joe, Monopoly, Tinker Toys, Lincoln Logs, Play-Doh, and toys based on motion pictures such as Star Wars and Jurassic Park. (Verrecchia 7:1412/14-16, *1548/1-13*, 1336/13.) Tyco sells the Magnadoodle, radio control cars, and matchbox cars. (Grey 14:2986/5-9.) Little Tikes sells large blown plastic toys. (Schmitt 11:2275/12-23; DePersia 10:2133/11-18; CX-1230-J.)

11. In recent years, there are fewer toy manufacturers. The three largest toy manufacturers acquired a dozen smaller competitors. In 1993, Mattel acquired Fisher-Price, Inc., a $1.2 billion transaction. (Cohen, 35:7926/7-8.) In 1994, Hasbro acquired the game division of Western Publishing, adding "Pictionary" to its collection of other board games such as Monopoly. (Wilson, 26:5784/24-5785/2.) Recently, Mattel has merged with Tyco. (Grey 14:2985/16-22.)

12. The market for toys is highly differentiated -- a plastic sandbox is an imperfect substitute for a Hot Wheels car. (Carlton (RX-877) at 9.) Competition among toy manufacturers is most direct between those firms whose products are substitutes such as firms which produce large molded plastic toys. (Murdough 27:5884/16 - 5886/15.) Television ads "drive" demand for toys. (CX-773-J.)

13. Because of the seasonal demand for toys and the desire of toy manufacturers to operate their plants year-round, manufacturers induce retailers to ease the burden of warehousing. These incentives include "dating" terms (deferring the date by which the retailer must

make payment), allowances for placing orders and taking shipment of goods early, and warehousing. (Okun 13:2829/24 - 2838/1.)

C. Warehouse Clubs

1. Growth

14. Warehouse clubs are low-frills, low-cost, low-price retailers, undercutting other firms in both price and service. (Ingene 41: 9039/25 - 9040/8.) The first modern warehouse club was the original "Price Club" opened by Sol Price in a converted airport hangar in San Diego in 1976. (Buzzell (RX-894) at 8 n.2; CX-178-C). [ ]

15. Warehouse clubs do not sell to the general public but to members who pay an annual fee to shop at the warehouse club. (Sinegal 2:147/24-148/17; Zarkin 21:4784/1-2.) Warehouse clubs offer prices below those available in other retail channels. (Sinegal 2:149/11 - 150/1; Zarkin 21:4801/17 - 4802/19.)

16. Warehouse clubs operate at profit margins lower than other channels. Their gross margin -- the difference between the selling price and cost of merchandise -- averages about 9-12%. (Sinegal 2:150/2-12; Zarkin 21:4803/15-4804/1; Buzzell (RX-894) at 18; RX-741.) This is lower than for other channels like discount drugstores, 20 % (Buzzell (RX-894) at 18; RX-741); grocery stores, 20-25% (Sinegal 2:150/19-20; Buzzell (RX-894) at 18; RX-741); mass merchandisers, 25% (Zarkin 21:4804/4-8; Buzzell (RX-894) at 18; RX-741); and department stores, 45-50% (Sinegal 2:150/18-19; Zarkin 21:4804/8-9).

17. The main warehouse clubs in 1992 were Sam's Club (a division of Wal-Mart, 256 stores, Pace (a division of Kmart, 115 stores), Price Club (based in San Diego, 94 stores), Costco (based in Redmond, Washington, 100 stores), and BJ's Wholesale (based in Natick, Massachusetts, 39 stores). [ ] After consolidations, by early 1997 the main warehouse clubs were Price/Costco (renamed Costco) (with 1996 sales of about $20 billion). Sam's (also $20 billion in 1996 sales), and BJ's (with $3 billion in 1996 sales). (Sinegal 2:145/5-147/10; Zarkin 21:4785/15 - 4786/22.)

18. Warehouse clubs sell to small business customers and to individual consumer members. (Buzzell (RX-894) at 8-9.) [ ]

19. Warehouse clubs' sales consists of food and grocery products, (Sinegal 2:207/25-208/11; Zarkin 21:4789/22-24), (grocery about 60% of sales at Costco and BJ's), and electronics, appliances, jewelry,

cameras, video and audio recordings, books, hardware, housewares, sporting goods, automotive, tires, office supplies, health and beauty aides, apparel, seasonal goods and others. (Sinegal 2:147/13-21; Zarkin 21:4789/11-15.) With non-food products, warehouse clubs compete with other warehouse club chains, discounters such as Wal-Mart and Kmart and specialized "category killer" retailers such as Toys "R" Us, Sports Authority, and Circuit City. (Zarkin 21:3787/8-20.)

20. Warehouse clubs keep down prices by reducing operating costs and increasing the rate of inventory turnover. Warehouse clubs reduce capital costs for storing goods in inventory; a warehouse club selling merchandise to club members before payment is due to the vendor does not bear the capital costs of carrying that merchandise. (Sinegal 2:159/7- 160/7; Zarkin 21:4807/17-4808/13; Buzzell (RX-894) at 18.) [ ]

21. Warehouse club buildings are large buildings (100,000 square feet or more) using industrial lighting and plain steel shelving, located in areas where land acquisition or lease costs are low. (Buzzell (RX-894) at 13; Ingene 41:9045/15 - 9046/2; Sinegal 2:156/23 - 157/6.) Warehouse clubs are staffed with few employees. Checkout lanes have a single employee operating the cash register and scanner, and customers pack their own purchases. (Zarkin 21:4806/24 - 4807/16; Buzzell (RX-894) at 14-15.)

22. The clubs purchase merchandise from suppliers packed on pallets and marked with computerized codes that can be read by the scanners at checkout lanes. (Sinegal 2:157/13-21; Zarkin 21:4806/11-4807/3, 4809/9-15.) Goods are shipped by vendors to centralized distribution centers to reduce freight costs and typically are dispatched the same day to individual warehouse clubs. (Zarkin 21:4809/16 - 4810/8.) Merchandise is delivered directly to the sales floor, displayed on the pallets on which it was shipped. or stored in tall steel shelving. (Sinegal 2:157/12-21; Zarkin 21:4809/24- 4810/6.) This lessens costs of labor, inventorying, unpacking, marking and displaying goods. (Sinegal 2:157/22 - 159/6.)

23. Maximizing inventory turnover affects products offered by the warehouse clubs. Warehouse clubs carry the most popular branded items that are most likely to generate the high inventory turnover. (Zarkin 21:4797/4-7; Sinegal 2:153/1-17,161/8 -162/21; Buzzell (RX-894) at 10-12.) Warehouse clubs carry 4000 "SKUs" (Zarkin

21:4808/14-19; Sinegal 2:151/19-23), compared to about 22,000 SKUs at a supermarket or 80,000 SKUs at a Wal-Mart. (Zarkin 21:4808/22-25; Buzzell (RX-894) at 11.) The smaller assortment of products simplifies inventory and ordering. (Sinegal 2:161/23 - 162/17.)

24. Name-brand merchandise is important to the clubs. (Zarkin 2 1:4797/15-16.) Members are more likely to be aware of the prevailing price for the item in other outlets and recognize the low price in the club as a value. (Zarkin 21:4797/17-22.) About 70-80 % of club items are branded products. (Buzzell 38:8381/12-13; RX-433; Zarkin 21:4829/23 - 4830/11; Sinegal 2:153/1-17.)

25. Some manufacturers have restricted the availability to warehouse clubs of name-brand products (Sinegal 2:230/17 - 237/18), typically brands that manufacturers choose not to distribute in any discount or mass merchant channel, not merely warehouse clubs. (Buzzell 38:8377/20 - 8406/25; Zarkin 21:4829/23 - 4830/11; Ojendyk 18:4035/8 - 4038/13, 4290/11 - 4298/14; Hilson, 20:4542/6-4543/4.)

26. Warehouse clubs frequently change the mix of non-food products offered. Warehouse clubs create a "treasure hunt" atmosphere that will persuade members to take advantage of bargains that may not be available the next time the member comes to shop at the club. (Zarkin 21:4788/18 - 4791/14; Sinegal 2:151/4 - 152/13.) This assists the clubs by developing its reputation and membership by word-of-mouth spread by their members. (Zarkin 21:4798/2-17.)

27. Warehouse clubs often stock packages containing multiple items or larger quantities of the product, to encourage members to make larger purchases and increase inventory turnover. (Zarkin 21:4799/9-24; Sinegal 2:166/25 - 167/23; Buzzell (RX-894) at 17.) This technique is best suited for products that are highly consumable. (Zarkin 21:4800/10 - 4801/8; Sinegal 2:167/24 - 168/14.)

28. The clubs advertise by direct mailings to members, newsletters listings products currently for sale in the clubs. (Sinegal 2:160/19 - 161/7; Zarkin 21:4825/11 - 4826/4.) The clubs make few expenditures for advertising in mass media. (Zarkin 21:4824/24 - 4825/9; Sinegal 2:160/8-21.)

29. Members pay annual fees of about $30-35 to shop at a warehouse club. (Sinegal 2:165/12-16; Zarkin 21:4820/18-24.) Clubs require association with a business or employment group (Sinegal

2:148/5-15), or permit any member of the public to join at a higher fee. (Zarkin 21:4821/3-6.) The gross income provided by membership fees for Costco and BJ's has exceeded the net income of those clubs. (Sinegal 2:163/17-24; Zarkin 21:4824/1-22.)

30. The requirement of the membership fee provides a financial incentive to shop at the club consistently and in larger quantities in order to realize the greatest value from their investment in the fee, achieving greater inventory turnover. (Zarkin 21: 4821/5 - 4822/19.) The fee also ensures that club members have resources to spend. Club members are more likely to be homeowners and long-time residents, with higher income and larger households than the general population. (Sinegal 2:171/19 - 172/21; Zarkin 21:4822/20 - 4823/13.) Warehouse clubs costs for bad checks and loss of inventory are lower than other forms of retailing. (Sinegal 2:156/13-22, 172/7-174/9.)

2. Toy sales

31. Toys are well-suited to the "treasure hunt" approach of the warehouse clubs. (Zarkin 21:4828/1-16.) Warehouse clubs sell toys at their average merchandise margins. [ ] Halverson 3:355/22-25 (Pace, 10-14% including freight); Hilson 20:4436/1-3 (BJ's, 10%).)

32. Warehouse clubs carry fewer toys and periodically change the mix of toys that they carry; they carry more toys during the holiday season. Pace had about 50 toys during January to September and about 125 items in the Christmas season from October to December. (Halverson 3:484/24 - 485/4.) Costco had about 100 toy items in the Christmas season and 15 at other times with the total number of toy items carried during a year about 400. (Moen 4:615/5 - 616/20.) BJ's (including juvenile furniture items) had about 150 toy items during the holiday season and 50 items in January, with the total in the year of 300. (Hilson 20:4417/23-4419/11.) Sam's Club had about 60 toy items during the fall and about 45 items at other times. (Jette, 5:996/2 - 997/22.)

33. Warehouse club toy buyers attend the annual New York Toy Fair in February and other industry shows. (Hilson 20:4424/10 - 4426/16; Jette, 5:1007/5-13.) Warehouse club toy orders for the holiday season are typically placed during March, April, and May presentations by manufacturers at Toy Fair. (Hilson 20:4424/10 - 4426/16; Moen, 4:611/2 - 613/14; Halverson 3:349/7-11; Jette, 5:1006/12 - 1007/4.) Shipments of products for sale during the

holiday season begin to arrive at the warehouse clubs in August or September. (Hilson 20:4419/2-11; Moen 4:622/3-5.)

34. Up to the early 1990's, warehouse clubs purchased regular line products of toy manufacturers. (Halverson 3:357/3-20; Moen 4:606/8-22.) Warehouse clubs also worked with toy manufacturers to develop specially-packaged products increasing the price and value of an item offered for sale to warehouse club members. Warehouse clubs purchased "combo" packs of ten or twenty Matchbox or Hot Wheels toy cars that could be priced for sale to club members in the $10 - 15 dollar range (Moen 4:606/23 - 608/8; Halverson 3:358/2-22). [ ]

35. Costco's toy buyer preferred open line products to combo packs because combo packs could make it difficult to compare prices in other retailers. (Moen 4:608/9-22; Hilson *20: 4573/15 - 4575/7.*) Up to 1991 about 15-20% of Pace's toy selection was combo packs. (Halverson 3:358/19 - 359/21.) About half of the toy items offered by Sam's were regular line products rather than combo packs. (Jette 5:1001/18 - 1002/13.)

36. In deciding whether products are likely to be good sellers, the warehouse club toy buyers rely on their own assessments of products characteristics, the strength of the product brand and on information concerning such things as planned manufacturer advertising in support of the products. (Halverson 3:352/4 - 353/18; Hilson *20:4581/4 - 4582/13*; Jette 5:1003/12 - 1004/16.) Warehouse club toy buyers typically do not make product selections based on other retailers' advertising plans or sales experience. (Hilson *20:4582/14-21*; Halverson 3:354/5-19; Jette 5:1004/17-23.)

37. Many toys carried by warehouse clubs are not best-sellers. Complaint counsel's marketing expert showed that in 1991 of 310 toy items carried by warehouse clubs that year, 11% were among the 100 top-selling toys industry-wide, and 27 % were among the top 500. (CX-1827; Ingene 41:9078/20 - 9079/20.) In 1991 the warehouse clubs were not successful in "cherry-picking" only the best-selling toy items for their product lines.

AGREEMENTS

A. Warehouse Clubs as an Innovation

38. [ ] During the 1980's, warehouse clubs were selling mainly to business customers. But then they began to encourage private consumers to become members. (Zarkin 21:4791/24 - 4792/10.) [ ]

Using selective procurement of merchandise, sales from pallets rather than shelves, wide aisles to facilitate easy pallet movement, and avoiding low-priced items, the clubs operated at retail margins lower than those of TRU and the discounters. The margin between retail sales revenues (excluding fees) and merchandise procurement costs for Price Costco ranged from 9.1 - 9.4% in fiscal years 1992 to 1995. (RX-342 at 8; Sinegal 2:150/2-12.) At Pace, the average mark-up was 10 - 14 %. (Halverson 3:355/22-25.) [ ] Sinegal, the president of Price Costco, testified, "Almost invariably our presence in the community is going to have a tendency to drive prices down." (Sinegal 2:200/10-12.)

39. [ ] According to a May 1989 analysis by Goldman Sachs in the TRU files (CX-1632):

> We continue to regard the warehouse club industry's prospects as quite bright *** Price Company's skills as a merchant and an operator are unsurpassed *** we also believe that the combination of value and merchandise excitement offered by warehouse clubs is simply being discovered by more and more shoppers * * * We continue to believe that this retailing revolution has much further to go, and the tilt to retail simply means that warehouse clubs are becoming an increasingly important competitive factor for traditional retailers in nearly every merchandise category.

40. The clubs' lower prices threatened TRU's reputation as a toy discounter. (Goldstein 36:8110/2-10.) [ ]

41. Toys "R" Us initiated a price image program in February 1991. This program lowered prices on some high profile, volume products. (CX-1038-E.)

42. TRU knew that consumers form opinions of a store's relative prices based on highly visible items. (Scherer 22:5006/21 - 5008/7; Carlton 32:7075/1-11.) TRU designates these toys as "Price Image" or "Price Sensitive" items. (Goddu 30:6543/23 - 6544/13.) TRU priced these items at lower margins than other products to enhance TRU's price image. (CX-1024; Goddu 30:6544/18-19.) These items bring customers into the TRU stores where they will also buy other, high profit margin toys. (Goldstein 36:8135/4.) TRU had sales of $500 million of these items in 1995. (CX-1826.)

43. [ ]

44. [ ]

45. TRU price charts track competition in geographic areas. (Goddu 30:6555/19 - 6558/5.) These areas match newspaper circulation areas (known as an ADI or Area of Dominant Influence).

(Goddu 30:6556/12-23.) Price-sensitive items are priced based on the competition in an ADI. (Goddu 30:6554/6 - 6559/7; 31:6790/22 - 6796/23.) In setting prices, TRU considers national discounters (Target, Kmart and Wal-Mart) and some regional retailers. (Goddu 30:6527/11-19.)

46. Senior TRU executives discussed the warehouse clubs since 1989. (Goddu 30:6613/8-10.) The architects of the response to club competition at TRU were Goddu, Lazarus, Nakasone and Goldstein. (Goddu 31:6826/3-6.)

47. [ ]

48. TRU shopped warehouse clubs in 1989. (Goddu 30:6746/3-9; CX-1545-B.) TRU learned that Price Club, Costco, BJ's and Pace carried 120-240 toy SKUs competing with TRU. (CX-1545-B.) [ ]

49. TRU knew that the clubs had lower costs and thinner margins. (CX-1042-43; CX-1036-I.) TRU felt its costs were the lowest in retailing, other than the warehouse clubs. TRU's U.S. expense rate to sales is 17%. The expense ratio at the clubs is 9%. (Sinegal 2:162/22-163/9.)

50. [ ]

51. TRU executives believed that the clubs were in the same class as Wal-Mart as a competitive threat. [ ] Spencer, 9:1844/19 - 1845/1.)

52. TRU feared that the clubs' prices could damage its price image and cause it to lower prices. (Goddu 31:6798/24 - 6807/8; [ ] TRU worried that the clubs were forcing down prices at other retailers the same way that Wal-Mart had. (Goddu 30:6615/20-6618/2; 31:6818/11-6819/7; CX-1576-B.) [ ]

53. TRU feared that the clubs would erode TRU's profits and price image. "We were concerned that, in the eyes of the customer, they would be recognized as being a price leader." (Goddu 30:6616/11-12; [ ]

54. [ ]

55. TRU watched warehouse clubs competing near TRU stores. In 1992, TRU created a list of TRU stores that competed within a five-mile radius of warehouse clubs. (CX-912-A.) This document was circulated to Lazarus, Goddu, Goldstein, Nakasone, and Reinebach. (CX-912-A.)

56. [ ]

57. [ ]

B. TRU and the Warehouse Clubs

1. Toy manufacturers

58. TRU began to discuss the clubs with its suppliers, Mattel, Fisher-Price, and Playskool in 1989-1991. (CX-529; Cohen 35:7937/7-24, 7938/6-13; Spencer 9:1847/18 - 1851/11.) TRU said it might stop buying from manufacturers that sold to the clubs. (Spencer 9:1850/3-18.) TRU's top officials contacted Mattel and "threatened to 'review' their support of those manufacturers that overly supported the warehouse clubs." (CX-529.)

59. TRU's first written policy relating to sales by manufacturers to warehouse clubs was in late 1990 or early 1991. (CX-957, Goddu 30:6628/10-23.) This early approach was complicated and was abandoned by TRU. (Goddu 30:6629/16-25.)

60. Prior to and at Toy Fair 1992, TRU informed the manufacturers of its warehouse club policy (CX-1681):

Warehouse Clubs - TRU Position

- No new or promoted product unless entire line is carried.
- All specials and exclusives to be sold to the clubs should be shown first to TRU to see if TRU wants the item.
- Old and basic product should be in special packs.
- Clearance/Closeouts are OK providing TRU is given first opportunity to buy this product.
- No discussion about prices.

This document, drafted by Goddu, is dated January 29, 1992. (CX-955; Goddu 30:6631/11 - 6638/8, 31:6826/11 - 6829/22; CX-1793.)

61. The TRU theme at Toy Fair 1992 was the clubs. (Spencer 9:1863 - 1864; Verrecchia 7:1503 [ ]

62. [ ]

63. [ ] To avoid the future meetings, TRU sought the commitments up front.

64. [ ] A May 1991 LEGO market report gave the toy manufacturer's view of the clubs:

Warehouse clubs are the ultimate extensions of low margin, low cost, high turn philosophy. In fact, clubs may be the most important new format development in retailing in the past century. Retail sales should approach 28 billion in 1991, which is a four fold increase over the past four years. . . .There will be over 500 warehouse clubs in the U.S. by the end of the year generating about 55 million each in sales. No single market is saturated yet. . . .

(CX-487-B; CX-523 (Mattel) ("retail business is rapidly swinging to the clubs"); CX-506-B ("they sell large volumes of product to a certain type of consumer who chooses to shop there rather than elsewhere"); CX-698-B (Fisher-Price) (the opportunity for growth is phenomenal); CX-573-H (from 1988 to 1992, clubs fastest growing retail segment); CX-78 (Hasbro) ("Clubs are one of the fastest growing segments of the entire retail business"); CX-526.)

65. TRU also had to alleviate the manufacturers' fears of losing business to rivals who did sell to the clubs. (Scherer (CX-1822) at ¶¶ 32-53.)

2. Ceasing sales to the clubs

66. Manufacturers were reluctant to restrict sales to the warehouse clubs. [ ]

67. [ ]

68. The manufacturers did not want to give up sales and they were also concerned that their competitors would gain share at their expense. "[I]t was obvious it was an economic thing as far as they were concerned. If the competitor's products was there, they wanted to be there too." [ ] The manufacturers did not want their competitors to sell to the clubs if they could not. (Lazarus 24:5443/9-10;[ ])

69. The competition between the manufacturers with respect to the clubs -- the interbrand competition -- was intense. The manufacturers told TRU that they were in the clubs because their competitors were there. This information was transmitted between the manufacturers by TRU.

70. Mattel, Hasbro, Tyco, Little Tikes, Fisher-Price and others all wanted to know how competitors were reacting to TRU. The manufacturers wanted assurances from TRU that their competitors were subject to the same rule. (DePersia 10:2149/15 - 2151/4; Goddu 30/6679/20 - 6680/13.) They informed TRU that they wanted a level playing field to avoid being placed at a competitive disadvantage. (Goldstein 36:8157/23 - 8158/4.)

71. The president of Hasbro's Playskool division testified that he wanted a level playing field, which included not wanting competitors to have access to volume that Hasbro could not have. He did not want to be at a competitive disadvantage. (Owen 6:1131/3-18.) [ ]

72. Verrecchia believed that the agreements would not hold, and that Hasbro would be able to sell to the clubs again. (Inano

16:3335/15-20.) Verrecchia established club shops to determine whether Mattel or other competitors were selling regular line product to the clubs. These shops began after the restrictions. (Verrecchia 7:1365/18-1366/1, 1368/3-9; 1373/16-20; CX-46 - CX-63; CX-71.)

73. Prior to the TRU conduct, Hasbro knew that its competitors were selling regular product to the clubs. [ ] He asked Hasbro personnel to be "very aggressive" in determining what Mattel and other competitors were selling to the clubs. (Verrecchia 7:1489/13-23.) [ ]

74. Hasbro complained the most frequently about competitor product in the clubs. [ ] 30:6701/13-18; CX-336.) [ ] Fisher-Price and others also complained when regular line product from their competitors was found in the clubs. [ ] Weinberg 34:7628/15-34:7629/1; CX-811; Shiffman 10:2017-7-18; 2018/3-16,2021/24 - 2022/7, 2026/3-6.) And when Mattel heard rumors that Hasbro and Tyco might be selling regular line to the clubs, the president of Mattel's Boy Division instructed that the clubs be shopped and the information sent to TRU. (CX-626-B.)

75. The manufacturers told TRU that they did not want to be prevented from selling regular line product to the clubs without assurances that their competitors were similarly excluded. Goddu found it "frustrating" that vendors were always talking about what their competition was doing. (Goddu 31:6877/11-13.)

76. The manufacturers did not want to be selling to the clubs when none of their competitors were. (Inano 16:3451/13 - 16; Moen 4:648/24 - 649/4, 651/17 - 23.) [ ]

3. Coordinated response

77. TRU tried to obtain a coordinated response from manufacturers by assuring them that TRU was applying its policy to each of its competitors and by telling each of the major manufacturers that its competitors were only selling to the clubs because the other was. TRU explained that the policy applied to everybody. (Goldstein 36:8157/23 - 8158/4.) Lazarus told manufacturers that TRU was talking to each manufacturer about its club policy, so that they would know there was going to be a level playing field. (Lazarus 24:5440/5 - 10, 5442/14 - 16.)

78. TRU told vendors that it would administer the TRU policy "in a fair and equitable manner across all vendors." TRU did this

"because it was of concern to the vendors that whatever we did with them, the same kind of merchandising approach was applied to their competition." (Goddu 30:6679/20 - 6680/4, 31:6871/11 - 6878/1, 6880/7 - 6883/3.)

79. [ ]

80. The manufacturers required assurance that their competitors would go along; they were aware that TRU was communicating its policy to the other manufacturers and that without unanimity, regular line product sales to the clubs would recommence.

4. Manufacturers

81. In an October 1991 meeting between high officials of Mattel and TRU, Mattel CEO, John Amerman, told TRU CEO, Charles Lazarus, that Mattel "[W]ould not sell the clubs the same items we were selling them. This was based on the fact that competition would do the same." (CX-532-A.)

82. [ ]

83. Goddu understood each of the major manufacturers when they said that they were only selling to the clubs because their competition was selling to the clubs. and that they would get out of the clubs if their competition got out.

5. *Quid Pro Quo*

84. During conversations with manufacturers, TRU did not merely announce that it would refuse to deal with manufacturers selling to the clubs, or inform manufacturers that all manufacturers would be treated equally. Instead, TRU communicated the *quid pro quo* (*i.e.*, I'll stop if they stop) from manufacturer to manufacturer. (Goddu, IH (CX-1658) at 276-80.)

6. TRU's orchestration of combination

85. TRU used the acquiescence of certain manufacturers in order to obtain the acquiescence of others. After Mattel agreed not to sell to the clubs the same products "based on the fact that competition does the same" (CX-532), TRU told Hasbro that Mattel had agreed. (Verrecchia 7:1393/5-14, 23-25, 1394/1-4; Owen 6:1128/5 - 1129/25, 1132/6 - 1135/9; Inano 16:3333/12 - 3335/7.)

86. TRU informed Hasbro that the club special pack only approach would probably also fly with other manufacturers. (Owen, 6:1136/20-1141/14.) [ ]

87. Before committing not to sell certain products to the clubs, Little Tikes asked TRU what its main competitor in the clubs (Today's Kids) was going to do. Goddu informed Little Tikes that Today's Kids "was going to start doing less business with the warehouse clubs," whereupon Little Tikes committed to restrict its sales. (DePersia 10:2147/7-14, 2147/18-24, 2150/3-12, 2150/25-2151/4.) [ ]

88. TRU attempted to gain agreement from Sega and Nintendo to not sell any products to the clubs.[3] [ ]

89. TRU's Goddu explained how he dealt with Sega and Nintendo [ ]

90. Lazarus and Goddu told Sega that TRU had convinced Nintendo to stop selling product to the clubs as part of TRU's effort to convince Sega to do the same. (CX-1776; Kalinske 12:2490/7-25, 2491/24 - 2492/2.) TRU argued that Sega should stop selling because TRU had convinced Nintendo to stop. (Kalinske 12:2515/12 - 2516/2.) Hasbro's Milton Bradley division president wrote on August 13, 1992, that TRU's Goddu told him what Hasbro's competitor, Mattel, was doing regarding the clubs (CX-1612.):[4]

> In a conversation I had with Roger Goddu yesterday, I thought it was interesting to note that he claims to have had a conversation with Mattel executives, including Amerman, on Tuesday concerning the warehouse clubs and Mattel's fear that this whole issue will end up in the courts.
>
> He further went on to explain that their fear wasn't based on the issue of a manufacturer's right to pick and choose the customers they want to sell, but rather. they were concerned that the case could lead to questions concerning the discounts and favorable treatment that one customer may receive relative to another. In essence. Mattel's major concern is that a court case could lead to exposure of the terms and discounts that they give to Toys "R" Us.

91. [ ]

92. [ ]

93. On August 10, 1992, TRU circulated internal Hasbro memoranda detailing the extent to which Hasbro's competitors,

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[3] [ ]

[4] This discussion refers to the memorandum summarizing the results of TRU's contacts with various manufacturers. (CX-913-A-F.)

including Mattel, were restricting (or not restricting) sales to the clubs. (CX-1633; Goddu 30:6689/13 - 6690/10.) [ ]

94. TRU promised to "take care of it" after Fisher-Price representatives complained about a TV-promoted Playskool product they found in Price Club. (Chase 8:1666/4 - 1667/1.) After Tiger complained about finding a competitor's product in the clubs, a Tiger representative testified that Goddu told him: "because this was a new company and they hadn't, you know, explained their policy with regard to club sales to the people at Yes Entertainment, basically, it was you know, kind of like what we told them, don't do it again or God knows what." (Shiffman 10:2027/10-l4.)

95. The transmission of the complaints between the manufacturers allowed TRU to monitor compliance with the agreements and assured the manufacturers that their competitors were complying.

96. By these communications, TRU facilitated horizontal agreement among the manufacturers.[5]

97. The manufacturers did not want to be placed at a competitive disadvantage against their rivals. (Scherer (CX-1822) ¶ ¶ 41-50; Owen, 6:1130/15 - 1134/18; DePersia. 10:2146/10-25; Lazarus, 24:5441/17 - 5442/16.)

98. TRU policed the agreements with the manufacturers. It regularly conducted "shops" of the warehouse clubs to determine which manufacturers were selling product to the clubs. (Goddu 30:6746/3-9; CX-1545 through CX-1565.) [ ] TRU's policing was aided by manufacturers who reported to TRU when they found their competitors' products in the clubs, including Mattel, Hasbro, Fisher-Price, Nintendo, Sega, Western Publishing, and Little Tikes. (Goldstein 36:8157/2-22, 36:8230/12 - 8242/10.)

99. [ ] These contacts were made at the request of Charles Lazarus. (24:5437/18-22.) Zablow of Mattel wrote on September 12, 1991, that Bob Weinberg of TRU "visited Costco on the West Coast. He called to comment that he felt that there was an 'inordinate' amount of Mattel infant product being sold in this store vs. product of other vendors." (CX-529.) Weinberg of TRU called Today's Kids about two products he saw in a warehouse club. Weinberg told Today's Kids that it needed "to do something to the item or the packaging." (CX-857.)

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[5] When a manufacturer complained about sales to the clubs, these communications related to the most immediate competitors. [ ]

100. In the spring of 1992, Goddu and his staff investigated products found in the clubs during a club shop (CX-926 - CX-927); the results were reported in a memo from Goddu to TRU's Lazarus in June 1992. (CX-913; Goddu, 30:6748/2-6754/13.) TRU discussed this with manufacturers during 1992 and 1993. (Goddu. 31:6863/19 - 6864/4.)

101. TRU's threats resulted in manufacturers' communicating back to TRU their commitment not to sell certain toys to the clubs. [ ] This memo was sent to TRU's then-CEO, Charles Lazarus:

MFG.	DESCRIPTION	COMMENTS
Hasbro	Puppy Surprise	Shipped early. No more will be shipped to warehouses.
Binney & Smith	{various}	Per Brent Blaine, understood our concern. Going forward they will offer special packs only for '93. Commitments already made for '92.
Mattel	Barbie Dream House	Sold LY mdse. Will not sell again.
Huffy Sports	Graphite Ultra Pak	Per Dave Allen, VP Sales, they admit their mistake. Effective immediately only special Backboards will be sold to clubs....
Playtime, (Div. of Tyco)	Super Saturator	Per Howard Abrams, SVP Sales, pleaded ignorance. He's now aware and other than some prior commitments, they will only sell club "special" item or items we don't carry.
Today's Kids	Activity Rocker Little Golfer All Star Baseball	Per Jim Stephens, they needed the business, but fully understand our position. They will sell special items going forward.
Tyco	123 Firehouse Blocks Deluxe Set Magnadoodle DB Nursery/Playground	Per Ken Shumaker, these are goods shipped last year - prior to their new "no ship" policy on current goods we carry.
Century	Elite Car Seat	Vendor will stop shipping BJ's.
Fisher-Price	Nursery Monitor	They have agreed to stop selling this item to the clubs.
Safety 1st	Swivel Bath Seat	They have agreed to stop selling the clubs this item.

Playskool Baby (a Hasbro Div.)	Nighttime Feeder	We have reached a corporate agreement on the sale of this item to the club stores.
Kransco	Swim Sweater	Will not be selling like items to them next year. Will change graphics/packaging to differentiate item in future.
Morey Boogie	Sting Ray Board	Admitted they screwed up - will not happen again. Will continue to sell them but in a "completely" different packaging and graphics on the boards.
Nintendo	Asst.	"Not getting it from Nintendo" per Randy. They will "look into."
Sega	Asst.	Will continue to sell as long as Nintendo is in Warehouse Clubs.

102. TRU become dissatisfied with the manufacturers' efforts not to sell hot or promoted products to the clubs. TRU concluded that commitments relating to hot product were too difficult to interpret. (Goddu 30:6639/6 - 6645/2.)

103. TRU changed and simplified its policy during late '92 or early '93. TRU told manufacturers it would not buy any product sold to warehouse clubs. (Goddu 30:6645/5-9; 31:6846/22 - 6848/9; 31:6861/22 - 6862/22.)

104. There was some testimony that TRU stated they were simply "reserving the right not to buy" products they found in the clubs, but the weight of the evidence is that TRU told manufacturers that TRU would not buy products that did not comply with the TRU policy. [ ] (CX-809 (Tiger) (TRU won't buy, period end of story); CX-1521 (Little Tikes) ("make it clear that TRU will not carry identical products as the warehouse clubs"); CX-532 (Mattel) (TRU will "allocate open-to-buy based on who agreed not to support the clubs"). [ ] In a document drafted around Toy Fair 1993, Greg Staley from TRU's international division summarized TRU's policy as follows:

> Our buying is simple - we will not carry any identical item which is sold to a Warehouse Club. If we find an item in both our assortments and those of a Club, we will discontinue carrying that item immediately; and we reserve the right to take clearance markdowns to dramatically accelerate the rate of sale on that item. In

summary, the vendor has to make a choice as to whom he sell an item - either us or them. Discussions with our vendors should not go beyond what I have stated above.

(CX-1591; Goddu 6864-65 (confirms this was TRU policy at the time).)

105. By early 1993, Mattel, Hasbro and others ceased selling any identical product to the clubs. TRU policed these agreements by "shopping" the warehouse clubs. (Scherer 24:5403/1-2.) Manufacturers also continued to report to TRU when they saw their competitors products in the clubs. (CX-811: Shiffman 10:2017/7- 18, 2018/3-16, 2021/24-2022/7, 2026/3-6.)

7. TRU's intent

106. TRU club policy aimed at eliminating the competitive threat of the clubs. TRU tried to keep merchandise out of the clubs, or to make sure that the price of toys in the clubs was not directly comparable to TRU's price. (Goddu, 3 1:6840/20 - 6841/7.)

107. TRU tried to gain commitments from the manufacturers to sell the clubs only combo packs or differentiated product: [ ]

108 TRU did not object to the clubs selling combination packs because (1) they prevented the customer from making a direct pricing comparison between items on TRU shelves and the clubs shelves, (2) TRU did not want the packs, and (3) consumers were less likely to want combination packs than individual items. (Lazarus 24:5430/16-23, 5430/24-5431/4, 5431/18-29, 5432/12-14, 5433/3-10; Goddu 30:6635/13-24; 31:6827/20-22; RX-813-A.)

109. TRU argues that the primary reason for the club policy was TRU's inability to obtain hot product. (Lazarus 24:5350/21 - 5351/3; Butler 5490/17-22.) The exhibits relating to perceived shortages occurred after the club policy was implemented, and those shortages were not attributed to the clubs. (Carlton 32:7227/6 - 7228/11.) [ ]

110. Goddu testified that shortages were not the primary focus of the policy. [ ]

111. [ ]

C. Agreements

1. Mattel

112. Since 1993, Mattel Inc. ("Mattel") has been the nation's largest toy manufacturer. (CX-1814; Verrecchia 7:1317/25 - 1318/11.)

In 1994 its share of the U.S. toy market was 18%. (CX-l669-C.) Mattel's products include the Barbie doll line, Hot Wheels, Disney toys, pre-school toys and Nickelodeon. (Okun l3:2604/24 - 2605/4.)

113. In November 1993, Mattel acquired Fisher-Price, [ ] (Chase 8:1641/9-13; Cohen 35:7926/9-17; [ ]) In 1997, Mattel acquired Tyco, then the nation's third largest toy maker whose popular toys include Magna-Doodle, Tickle Me Elmo and Sesame Street products. (Grey l4:2985/16-22, 2986/5-9, 16-18; Hilson 20:4484/23 - 4486/1; CX-1814.)

114. TRU is Mattel's largest customer. (CX-1669-D; CX-1276-D-E.) TRU bought 25% of Mattel products in 1992 and 29% in 1993. (CX-1276-E; CX-l669-D; [ ] In 1985, TRU accounted for 12% of Mattel sales. (CX-1669-D.)

115. In December of 1990, Mattel's CEO, John Amerman, stated to his staff: "The constriction in the number of traditional retail outlets that carry toys" was going to be a "bigger and bigger problem as time passes." (CX-523.) He mentioned the financial problems of Child World and other major customers of Mattel. (CX-523; [ ]

116. Amerman noted the clubs' rapid growth rate. He told his staff that he wanted to be much more aggressive in pursuing the club channel of distribution, so Mattel would not be as dependent on TRU. (CX-523; [ ]

117. Mattel's retail customers became increasingly concentrated. Mattel's sales to the top five toy retailers (TRU, Wal-Mart, Kmart. Target and Kay Bee) increased forn 28% in l985 to 53% by 1990 and a projected 72% in 1994 (CX-l669), with TRU and Wal-Mart accounting for almost half of Mattel's sales volume. (CX-1669-B; [ ])

118. [ ] From 1989 to 1991, Mattel's sales volume to the clubs increased by 87%. (CX-574; [ ] *2653/19.*) Mattel's overall sales growth rate increased by 10% during this period. (CX-530-E; [ ] In 1989, 94% of the clubs' purchases from Mattel were from its regular product line (as compared to customized product). (CX-691; [ ])

119. On September 26, 1991, for a meeting called by TRU to discuss the club and other issues (CX-530-A; [ ]), Mattel's vice president, Frederick Okun, sent a briefing memo to his boss Jill Barad (then-president of Mattel's girls division):

WAREHOUSE CLUBS

This is one of the fastest growing channels of distribution in the country. As a public company we owe it to our shareholders to maintain our business by selling this class of trade. . . . Two years ago we committed to Toys R Us that we would do our best not to sell them regular line goods. We have reached a point where we are selling them approximately 50% of our volume on a customized basis. We will continue to move in this direction and promise to increase the percentage sold on a customized basis.

(CX-530-B.) The memo recommended in connection with the upcoming meeting with TRU that Mattel "should commit" not to sell critical items to the clubs. (CX-530-B.)

120. The memo's reference to Mattel's commitment to TRU two years earlier to do its best not to sell the clubs regular line product relates to Toy Fair 1990. ([ ]) TRU's officials met in February 1990 with Mattel's officials and "threatened to review their support of those manufacturers that overly supported the warehouse clubs" (CX-529; [ ]. Following Mattel's commitment to TRU in February 1990, by September 1991 Mattel's sales of regular line product to the clubs dropped from 94% in 1989 to 50% in 1990. (CX-530-B; CX-691.)

121. An April 1990 Mattel memo states that Mattel's then-president, Bob Sansone, discussed with TRU Mattel's "policy to grow the Wholesale Club business with non-competiting SKUs." (CX-600-B; [ ] Mattel vice president Okun's response in December 1990 to John Amerman's memo (CX-523) urged Mattel to aggressively pursue the club channel of distribution. In his memo, Okun states "[w]e must acknowledge the TRU issue, but if we give [the clubs] specials we should be ok." (CX-595-B; [ ].)

122. In 1990, TRU and Mattel reached an agreement under which Mattel committed to TRU that it would do its best to move the clubs away from regular line product to customized product and Mattel adhered to its commitment.

123. The meeting referred to in Okun's September 6, 1991 memo was at TRU's headquarters on October 3, 1991. (CX-1763.) High level TRU and Mattel executives attended. (CX-532; [ ]) Okun wrote a summary of that meeting the same day. ([ ]; CX-532.)

124. At the meeting, [ ] He said "regular line specials" were not the answer and that Mattel would have to choose between selling the same items to TRU and to the clubs. (CX-532-A; [ ]) At the meeting TRU vice chairman, Michael Goldstein, said that TRU "was

going to allocate open-to-buy based on who agreed not to support the clubs." (CX-532-A).

125. In response to TRU's threats ([ ] Barad 35:7843/18 - 7844/1), Mattel's CEO, John Amerrnan, assured TRU that Mattel would not sell the same items to the clubs that it was selling to TRU. (CX-532-A; [ ]) TRU vice president, Roger Goddu, testified that Amerman committed to TRU that Mattel would not sell any merchandise to the clubs. (Goddu 30:6663/6-22.)

126. Okun's meeting summary said that Amerman's statement not to sell the same items to the clubs that it was selling to TRU "was based on the fact that competition would do the same." (CX-532-A.) [ ]

127. Mattel conditioned its agreement on its competitors also going along with TRU's club policy. (Goddu IH (CX-1658) at 276/8 - 279/21.) I find that it was not in the unilateral business interest of Mattel to enter alone into an agreement with TRU because if it was in Mattel's unilateral interest. it would have done so without regard to the positions taken by its competitors.

128. Mattel also "agreed" at the meeting to supply TRU with customer quantities and volume, even though Okun was nervous about supplying data to TRU about TRU's competition. [ ] I find it was against Mattel's unilateral business interests to transmit this confidential competitive information to TRU.

129. After the October 3, 1991 meeting, Barad told TRU's Roger Goddu that he should realize that Mattel could not live up to what its CEO has agreed to and added, "we need to talk." (Goddu 31:6885/17 - 6887/2; Barad 35:7891/19 - 7892/10.) Barad then called Goddu a few days later and told him [ ] "we'll get back, we'll work this thing out." (Goddu 31:6887/17 6888/15; Goddu IH (CX-1658) at 282/13 - 284/12.)

130. Barad testified that she also called TRU's Michael Goldstein within a few days of the October 3, 1991 meeting, in order to tell him that she knew what Amerman had said, but that Mattel could not stop selling everything to the clubs because Mattel already had outstanding commitments to them, and what Mattel really wanted to do was to sell special packs to the clubs. (Barad 35:7894/7-20; Goldstein IH (CX-1659) at 100/17-101/13; Goldstein 36:8266/25 - 8268/22.) Barad further testified that Mattel wanted to continue selling to the clubs because she thought the clubs were an important channel of

distribution in order to grow Mattel's business. (Barad 35:7896/21 - 7897/7.) [ ]

131. Following the October 3, 1991 meeting and Barad's follow-up phone calls to Goddu and Goldstein, Mattel committed to sell only exclusive items to the clubs. (Goddu 31:6891/13 - 6892/14.)

132. Two weeks after the October 3, 1991 meeting, a memo from Rita Rao of Mattel to Mattel's Arco division president, Bill Quinlan, stated that Arco would not be permitted to sell the clubs Mattel's current promoted products. (CX-624.) Rao also suggested showing specialized products to TRU's Peter Spencer before showing them to the clubs. If Spencer passed on buying these products, she wrote, it would then be "ok to sell to the Clubs." (CX-624.)

133. A January 22,1992 memo from Cathy Larson, Arco's then-vice president of marketing who had just come to Arco from its parent company Mattel [ ] summarized a conversation she had with Okun and stated that Mattel had initially "committed" not to do "any business with the clubs" but that Mattel had been able to "negotiate to do exclusive items only so that there would be no direct competitive threat to TRU." (CX-540.)

134. The Larson memo stated that "our agreement with TRU is that all of these [club] items will be offered to them as well so we must plan for a presentation to TRU." (CX-540.) It also stated that the clubs "do not know that we will not be selling them the regular line dolls. U.S. Sales will position it to them as risky availability items." (CX-540.)

135. Mattel's Arco division operates as a letter of credit business under which its customers purchase products by paying prior to shipment from manufacturing plants located in the orient. (Leighton 15:3145/14 - 3146/3.) The reference to "U.S. Sales" in Larson's memo refers to the Mattel Toys U.S. operation. (Okun 13:2604/5-21.) Okun, Mattel's vice president for U.S. sales, and Tom Northup, the Mattel employee who sold to the clubs (Ojendyk 18:3983/2-12), received copies of this memo. (CX-540.)

136. Okun discussed with Larson TRU's meeting with Mattel where according to him, "TRU came away thinking there was an agreement." [ ]

137. [ ] that the contemporaneous business documents and Mattel's actions that are consistent with these documents are entitled to more weight than Okun's explanation.

138. [ ] Butler told Spencer that they would review Arco merchandise to "select what merchandise could be shown to the warehouse clubs or what merchandise was not to be shown to them." (Spencer, 9:1860/3 - 1861/25.)

139. A July 21, 1992 memo to Mattel CEO Amerman from Arco's president Bill Quinlan, who also was present at Toy Fair 1992 when Arco showed its club specials to TRU's Spencer and Butler [ ], corroborates this account of the event: "At Toy Fair we showed Van and Peter all of our club specials. We paid particular attention to the Barbie doll/Arco accessory combinations. We offered each and every one to TRU on a 'right of first refusal' basis. They passed on every item leaving us free to sell to the Wholesale Clubs." (CX-550-A; CX-624.)

140. At Toy Fair 1992, Mattel told Costco's toy buyer Michelle Moen that some items that she wanted would not be available because they would be in short supply. (Moen 4:609/9-610/19-20.) Items are not typically in short supply at that time: some items have not even been produced yet. (Moen 4:612/9-15.)

141. During Toy Fair 1992, Pace's Halverson asked Mattel salesman Nick Snider why they were not stopping to look at certain regular line Mattel products, and Snider told Halverson that Pace could not buy those products. (Halverson 3:378/24 - 379/16.) Snider admitted to Halverson that TRU executives had pressured higher-level Mattel people not to sell key items to the clubs, in part because the clubs sold these products at a lower retail price than TRU, which hurt TRU's value image. (Halverson 3:379/15 - 381/12.)

142. At Toy Fair 1992 and on other occasions, TRU told Hasbro that Mattel and other manufacturers had agreed not to sell promoted product to the clubs. (Inano 16:3333/12 - 3335/5, 3343/17 - 22; Owen 6:1132/6 - 1135/9; Verrecchia 7:1391/22 - 1393/14, 1393/23 - 1394/4.)

143. At a meeting on February 27, 1992, TRU executives Goddu, Butler and Spencer and Mattel's Okun (CX-541) agreed to TRU's right of first refusal and Mattel's not selling certain products to the clubs. [ ] Mattel's written summary of the meeting describes the agreements reached (CX-541):

WAREHOUSE CLUB

- Agreed to show TRU all specials/exclusives . . . they will have first right of refusal.

- Regular line product - won't sell them hot product that we know about, i.e., Teen Talk, Totally Hair, etc. We did not agree that we would not sell them any 1992 regular line items.
- We agreed not to ship Warehouse Club items we can't supply TRU.
- Roger will talk to Charles . . . can't predict his reaction.

144. During the spring of 1992, Mattel was still taking orders from the clubs for regular line product. In March and April 1992, Costco placed with Mattel orders for the Christmas season, with deliveries to begin in early August. (Moen 4:611/2-7, 619/10-25.) In April of 1992, in response to a letter from Costco about certain products Costco wanted that Mattel was not offering to them (CX-1369), Mattel's Jill Barad informed Costco that "when we feel production capacity or availability are potential issues, we have tried to guide you away from the item." (CX-1371.)

145. Pace also placed orders with Mattel in the spring for the Christmas 1992 season (CX-1710-A-Z-33) and received written confirmation from Mattel. (Halverson 3:371/18 - 372/15, 561/6 - 563/14.) One of the items Pace ordered from Mattel was Air Pro Hockey, but Mattel tried to steer Pace to a "special" version with extra hockey sticks added, which would have made the product a poor value and the retail price non-competitive for Pace. (Halverson 3:372/12 - 374/13; CX-1633-B.) Pace buyer, Scott Halverson, complained to Mattel and Mattel shipped some of the regular line product in the spring without the added sticks. (Halverson 3:374/14-25; CX-1633-B.)

146. Pace's additional orders for Air Pro Hockey were scheduled to be delivered in July 1992. (Halverson 3:375/1-9.) However, the product did not arrive on schedule, and when Pace asked Mattel when it could expect shipment, it received no answer. (Halverson 3:375/3-9; CX-1692.)

147. In late June 1992, one of TRU's vice presidents, Robert Weinberg, complained to Mattel about finding Air Pro Hockey and two other TRU-promoted products in the clubs. (Weinberg 34:7690/20 - 7691/23,7701/10 - 7702/3; [ ].) To protect its image for low prices and avoid being embarrassed with its customers, TRU marked down the prices on these products [ ] to meet the club prices in areas where the club stores competed with TRU stores. (Weinberg 34:7696/13 - 7698/10, 7701/10-19, 7703/20 - 7705/6; [ ].) TRU put a hold on payment to Mattel for these products in order "to send a message" to Mattel. (Weinberg 34:7692/11 - 16, 7699/13 - 22.) [ ]

148. At a meeting on July 17, 1992, of TRU CEO Charles Lazarus and Mattel CEO John Amerman (CX-1772), [ ]

149. [ ] I find that TRU relaying Hasbro's complaints about Mattel to Mattel, as well as Mattel's complaints about Hasbro to Hasbro, informed each manufacturer that the other one was willing to go along with TRU's club policy if its chief competitor stopped selling regular line products to the clubs and that this behavior by TRU facilitated horizontal understandings among the toy manufacturers.

150. On July 24, 1992, the president of Mattel's boys' division, David Mauer [ ] wrote a memo to Mattel's CEO. (CX-626.) The memo states: "Our company policy is to ship only specials to the clubs. As a general rule, the specials will not include what is likely to be hot/allocated first year merchandise. I recommend, however, that if we are in doubt about whether a special falls within the guidelines that we expose it to TRU, rather than assume it shouldn't be shipped." (CX-626-A.)

151. Mauer's memo states that the "'specials only policy' will be implemented immediately .... Our new policy will result in some volume loss to Mattel for the balance of the year,"[6] and that an upcoming meeting was scheduled on August 10, 1992 between Mattel and TRU for TRU "to review the specific product that will be shipped to the clubs for the balance of the year." Mauer suggested that Mattel should ascertain what its competition was shipping to the clubs so that the matter could be raised with TRU and that the 'specials only policy' should be conveyed to the clubs at Mattel's pre-Toy Fair meeting in La Jolla, California. (CX-626.)

152. [ ]

153. Also on August 10, 1992, TRU's Goddu sent to his CEO confidential internal Hasbro reports listing various Mattel regular line products that Hasbro found in the clubs and relating assurances by Mattel's Amerman to one of the clubs' toy buyers that Mattel would ship the club the regular line items it had ordered. (CX-1633.) On August 12th, Goddu talked to a Hasbro division president about a conversation he had with Mattel executives, including Amerman, concerning the warehouse clubs. (CX-1612.)

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[6] Mattel reported that "in 1992, Price Costco was booked in excess of $13,000.0 million [sic] prior to Mattel's decision to sell only customized products" to the clubs, but only sold $5.7 million. (CX-590.) This confirms both the implementation of a specials only policy in 1992, and the effect on sales to the clubs.

154. Goddu testified about ongoing conversations he had with both Mattel and Hasbro (as well as other vendors), in which he assured each that the other was selling to warehouse clubs "only because my competitor is there." (Goddu IH (CX-1658) at 276/17 - 277/25): [ ]

155 Pace's buyer testified that around August 10th "all of our orders for Mattel dried up." (Halverson 3:414/14-20.) Mattel toys due at Pace in the beginning of August did not arrive and Mattel representatives said the goods were not available and could not be shipped. (Halverson 3:414/21 - 415/9.)

156. On July 7, 1992, Mattel informed Costco that deliveries scheduled later in July would be on time. (CX-1372-A; Moen 4:619/10-25.) When the orders were not received by August 10th or 11th, Costco's toy buyer, Michelle Moen, called Mattel's sales representative who told Moen there were some product availability issues. (CX-1372-A; Moen 4:620/1-l6.)

157. At Mattel's pre-Toy Fair in La Jolla, California held on August 24,1992, Mattel told Moen and Costco's merchandise manager, Gary Ojendyk, that except for a few items, the unshipped orders from Mattel would not be delivered because the product was unavailable. (CX-l375-A; Ojendyk 18:3989/1 - 3990/11.) These orders were for the bulk of the toys Costco ordered for the 1992 Christmas season. (CX-1375-A; Moen 4:623/19 - 624/2; Ojendyk 18:3990/1-11.)

158. Mattel tried to sell Costco products from its international line, but Costco declined these items as higher priced than the domestic products Costco already had ordered. (CX-l375-A; Moen 4:622/18 - 623/7; Fuentevilla 18:4117/2-24; CX-626-A.) When Costco asked if it could purchase other items from Mattel's domestic line, Mattel's Okun said everything in their domestic line was in short supply and nothing was available. [ ] CX-1375-A; Moen 4:623/8-l8; Ojendyk 18:3991/5-13, 3992/17-24.) Mattel had over 1000 regular line products in 1992, and they were not all in short supply (Barad 35:7907/25 - 7908/5; [ ]

159. Mattel salesman Nick Snider, who attended the 1992 pre-Toy Fair meeting, called Ojendyk to apologize and told him that what Okun told Costco about product unavailability was untruthful. (Ojendyk 18:3996/5 - 3997/12; CX-1677.)

160. Mattel also told BJ's at the 1992 pre-Toy Fair that there was a shortage or every item that BJ's had ordered but had not yet received. (Hilson 20:4440/25 - 4442/4, 4443/1-8.) BJ's had placed its orders for the fall season in the spring and Mattel confirmed the orders. (CX-1330-A; Hilson 20:4443/21 - 4444/3.) But Mattel now said that BJ's would only be sold products that were reconfigured, bundle-packed or made special for the club channel of distribution. (Hilson 20:4441/21 - 4442/4.) When BJ's toy buyer, James Hilson, asked why there was a change in Mattel's policy, Mattel vice president Ramon Fuentevilla said that Mattel's senior management was being either coerced or influenced by TRU. (Hilson 20:4453/3 - 4454/1.)

161. Following the August 1992 pre-Toy Fair, Costco, BJ's and Pace sent letters to Mattel complaining about the claimed shortages and threatening litigation if the products were not supplied. (CX-1688 (Pace); CX-1330 (BJ's); CX-748 (Costco).) Mattel then notified the companies that it would supply most of the products that Mattel previously said were unavailable to the clubs. (Hilson 20:4440/25 - 4441/20; Moen 4:628/2-18; Halverson 3:419/8-22.)

162. Following the 1992 pre-Toy Fair, Mattel created a task force to study how it should deal with the clubs. (CX-553-B; Amerman 17:3693/6-13.) In its memo setting up the task force, Mattel stated that its "marketing independence was compromised in 1992 by uninvited communications from Toys "R" Us." (CX-553-A.)

163. In late December 1992, Mattel's general counsel promulgated the formal club policy recommended by the task force that Mattel will not sell the same SKUs to the clubs as it sells to traditional retail channels and will only offer differentiated product to the clubs. ([ ] CX-688; [ ]) Mattel has followed this policy ever since. ([ ] ; Barad 35:7917/22 - 7918/16.) [ ]

164. I find that Mattel's policy was not arrived at unilaterally, but through TRU's orchestration, with other manufacturers, including Hasbro. I also find that Mattel and TRU agreed that Mattel would submit to TRU for approval a product Mattel intended to sell to the clubs.

165. Mattel's change of policy in selling to the clubs retarded the growth of the clubs' sales of Mattel product. Mattel's sales of regular line product to the clubs dropped from $17 million in 1991 to zero in

1993, and its sales of customized product to the clubs only increased from $6.7 million to $7.5 million in the same time. (CX-574.) Costco's sales of all Mattel products (both by Mattel Toys and by divisions owned by Mattel) dropped by more than half during this period (CX-1745-Z-11), even though the number of Costco stores increased (including Price Clubs) by over 40% (CX-1745-Z-10) and Costco's overall sales growth was over 25%. (CX-1745-Z-9.)

166. Based on the evidence discussed above and elsewhere in these findings, I find that Mattel, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to clubs.

2. Hasbro

167. Hasbro, Inc. ("Hasbro") is the second largest U.S. toy manufacturer with worldwide sales of $3 billion. (Verrecchia 7:1316/16-17.) It has a 12-14% share of the traditional toy market in the United States. (Verrecchia 7:1317/5-13.) Forty percent of Hasbro's business is done outside the United States. (Verrecchia 7:1316/20-22.)

168. Hasbro's products include Mr. Potato Head, G.I. Joe, Monopoly, Tinker Toys, Lincoln Logs, Play-Doh, and toys based on motion pictures such as Star Wars and Jurassic Park. (Verrecchia 7:1412/14-16, [ ], 1336/13; Halverson 3:527/17-19.)[7] Hasbro's domestic operations include its Hasbro Toy Group (Playskool Toy, Hasbro Toy, Playskool Baby, Kid Dimension, and Kenner divisions), and its game group, (Milton Bradley and Parker Brothers). (Verrecchia 7:1315/19 - 1316/13.)

169. TRU is Hasbro's largest customer. (Owen 6:1102/13-14.) Currently, TRU buys 30% of Hasbro's toy and game sales in the United States. (Owen 6:1102/5-17.) [ ]

170. In 1991, Hasbro's Playskool division viewed the clubs as having growth potential that it wanted to exploit. (Owen 6:1105/4-7.) [ ]

171. In the fall of 1990, TRU's CEO, Charles Lazarus, met with Hasbro's executives and told them that the clubs were a threat to TRU because of their low prices. (Spencer 9:1848/4 - 1849/22.) He said that if Hasbro continued to aggressively supply the clubs, especially Pace, that this could affect their business at TRU, although he was

[7] [ ]

open to the sale of multi-packs to the clubs. (Spencer 9:1850/3 - 1851/11.)

172. Playskool's president responded that his company could not stop doing business with the clubs, and that in view of the consolidation in the retail trade it was important for Playskool to have other customers than TRU. (Spencer 9:1850/23 - 1851/4.) [ ]

173. When national toy chains Lionel Leisure and Child World went out of business in the early 1990s, TRU was the only national free standing toy chain left. (Owen 6:1158/9-23.) The demise of these toy chains made TRU more important to Hasbro. (Owen 6:1158/24 - 1159/2.)

174. If TRU stopped purchasing toys found in the clubs, there would not be enough other outlets to make up the volume. (Owen 6:1151/3-10.) TRU's support in promoting a new product is necessary for success. (Owen 6:1154/6-9.)

175. Between late 1991 and 1992, TRU's vice president, Roger Goddu, complained to Playskool's CEO, Dan Owen, that a Playskool product was in the clubs. (Owen 6:1106/5 - 1107/25.) Goddu told Owen that TRU would not carry products Hasbro sold to the clubs. (Owen 6:1108/1-5.)

176. Owen wrote a memo on January 24, 1992 to Hasbro's CEO Verrecchia stating the clubs are one of the fastest growing segments of the entire retail business, and that Playskool's cost of doing business with the clubs is lower than average and much lower than for TRU. (CX-78.) He stated that "it is very important that we achieve some major concessions if we are to dramatically change the way we approach the Warehouse Clubs [sic]." (CX-78.)

177. Just before or at Toy Fair 1992, Hasbro's then western regional sales manager, James Inano, met with Verrecchia. (Inano 16:3333/12-3334/2.) Verrecchia said that he had just come from a meeting with TRU, that TRU had met with Hasbro's competitors, including Mattel and Fisher-Price, and that they had agreed not to sell promoted products to the clubs. (Inano 16:3334/21 - 3335/5, 3343/17-22.) Verrecchia said that because Hasbro's competitors had agreed not to sell promoted product, Hasbro would go along with the agreement, that Verrecchia did not expect them to stick to this course for long, and that when someone else sold promoted product to the clubs, "the door would be open for us." (Inano 16:3335/15-20.)

178. Verrecchia had complained to TRU that it was selling knock-offs of Hasbro merchandise and "that was one of the things he hoped

to gain in return." (Inano 16:3335/21 - 3337/6.) Verrecchia told his staff that Hasbro would not sell promoted products to the clubs and that Hasbro would watch other manufacturers' sales to the clubs. (Inano 16:3338/15-21.) Hasbro would refrain from selling to the clubs until another manufacturer broke the agreement. (Inano l6:3335/15-20.)

179. Inano's testimony about the agreement of major toy manufacturers not to sell promoted products to the clubs is corroborated. Verrecchia testified that TRU told him that the other major manufacturers would go along with its policy, which Verrecchia took to mean Mattel, Fisher-Price, Little Tikes, Tyco, and maybe Lego. (Verrecchia 7:1393/5-14, l393/23-25, 1394/2-4.) Owen understood from his discussions with Goddu that Mattel, Fisher-Price, Tyco and Little Tikes would not be selling promoted individual in-line merchandise to the clubs. (Owen 6:1132/6 - 1134/17.)

180. The effort by Hasbro to seek concessions from TRU, including knock offs, is corroborated in a Hasbro document (CX-78) [ ] The reference to Verrecchia wanting to monitor what was happening with respect to the other manufacturers' sales to the clubs is also corroborated. (CX-180.)

181. Inano's testimony is further corroborated by notes showing that Inano told Pace's Scott Halverson in December of 1992 (which is closer to the time of the event) that he obtained information from his company that Mattel's Amerman agreed that Mattel could no longer sell products to the clubs and that Mattel would end up selling specially configured products to the clubs. (CX-1630-A-B; Halverson 3:428/17 - 430/4.)

182. Inano's bonuses were based on his sales to the clubs. (Inano, *16:3544/22-3545/6.*) Acting without Hasbro's knowledge or authority, and perhaps showing more affiliation with stockholders than his superiors, Inano tried to help the clubs by talking to the clubs and their lawyers about possible litigation. (Inano l6:3454/10 - 3462/21, 3468/14-25.) Nevertheless, Inano's testimony is corroborated by other evidence, and I rely on it.

183. TRU asked Hasbro for a response to TRU's "policy." (Goddu IH (CX-l657) at 130/20-25). TRU informed Hasbro that its competitors had agreed not to sell promoted product to the clubs. Hasbro went along.

184. During 1992 and 1993, Hasbro's Owen spoke to TRU and described his company's evolving policies relating to not selling to the clubs some of the hottest toys. (Owen 6:1114/21 - 1115/5, 6:1117/6-9.)

185. When contacted by TRU about Hasbro products found in the clubs, Hasbro explained to TRU that its Puppy Surprise product was shipped early and that Hasbro did not plan to ship any more to the clubs. (Butler 25:5535/24 - 5535/18; CX-913-B.) TRU Vice President Butler confirmed that "[T]his was during the [1992] period...when they [Hasbro] had told us that they weren't going to ship key product to the warehouse clubs." (Butler 25:5535/5-9.)

186. In regard to a TRU inquiry to Hasbro's Playskool baby division about Hasbro product found in the clubs, TRU noted "[w]e have reached a corporate agreement on the sale of this item to the club stores." (CX-913-F.) Playskool was under the impression that less important items could be sold to the clubs." (CX-913-C.)

187. Hasbro wanted to ensure that TRU's policy on sales to the clubs was being applied to its competitors so that Hasbro would not be discriminated against. (Verrecchia 7:1385/7-25, 1376/16 - 1377/12.) TRU assured Hasbro that it was talking to the major manufacturers about the clubs [ ], Owen 6:1128/5 - 1131/2.)

188. Hasbro did not want to be placed at a competitive disadvantage by losing club sales volume to its competitors if it complied with TRU's policy and its competitors did not. It wanted a level playing field. (Owen 6:1130/24 - 1131/18.) [ ]

189. In May of 1992, at a toy manufacturers conference, Hasbro's CEO Allan Hassenfeld discussed with Tyco's CEO Richard Grey what each company was doing or not doing with respect to the clubs. (Grey 14:3011/12 - 3012/24.) Tyco's CEO discussed its 25-item policy with Hassenfeld. (Grey 14:3012/25 - 3013/4.)

190. Following Toy Fair 1992, Hasbro monitored its competitors' products in the clubs. (Verrecchia 7:1366/6 - 1367/7; CX-309; CX-47 - CX-50.) Verrecchia directed his staff to be "very aggressive" in determining whether Mattel and other competitors were selling to the clubs. (CX-180; [ ]; CX-363.)

191. Hasbro complained to TRU when it discovered product from competitors like Mattel, Fisher-Price, Nintendo, Little Tikes, and Tyco that should not have been in the clubs. (Verrecchia 7:1374/13 - 1376/20; CX-336.) [ ] Fisher-Price complained TRU that the clubs were selling Playskool's products. (Weinberg 34:7628/15 - 7629/1.)

And Mattel, through John Amerman or Jill Barad, complained to TRU that Hasbro's products were in the clubs. [ ]

192. [ ]

193. TRU's CEO admitted that he sent competitors' complaints about each other to the respective competitors. (Lazarus 24:5452/12-18.) He admitted that he could have sent to Mattel Hasbro's complaints about Mattel's product being shipped to the clubs. (Lazarus 24:5451/14 - 5452/7.) [ ]

194. At a meeting on July 17, 1992 (CX-1772) between TRU's Charles Lazarus and Mattel's John Amerman [ ] Later on the same day, Lazarus met with Hasbro's CEO, Allan Hassenfeld. (CX-1772; CX-1773-B; Lazarus 24:5448/13-16; CX-1174.)

195. Following the July 17th meeting with Hasbro, TRU received confidential internal Hasbro memos dated from June 30 to July 31, 1992, which reported information about Mattel's sales to the clubs as well as those of other Hasbro competitors. (CX-1633.) On August 10th, Goddu sent this information to TRU's CEO, [ ]

196. In an August 13,1992 memo, the president of Hasbro's Milton Bradley division referred to a conversation he had with Goddu the day before concerning a discussion Goddu had with Mattel's CEO about the clubs. (CX-1612.) Around this time, Pace's and Costco's scheduled shipments from Mattel stopped because of alleged availability problems. (Halverson 3:414/4 - 415/9 (shipments "dried up"); Moen 4:619/10 - 621/22.)

197. TRU complained to Hasbro during 1992 about Hasbro products found in the clubs, most often through high level officials, Mike Goldstein or Roger Goddu. (Verrecchia 7:1353/6-17, 1363/13-24.) If the products sold violated Hasbro's policy, Hasbro would ensure that the sales to the clubs would not be repeated. (Verrecchia 7:1364/10-15.)

198. Playskool's former president, Dan Owen, was pressured by TRU and Goddu in 1992, concerning Hasbro's dealing with the clubs. (Owen 6:1145/17 - 1146/14, 1148/12-16.) Hasbro worried that TRU could retaliate against it in subtle ways, involving end caps, shelf space and advertising. (Owen 6:1109/1-14; Verrecchia 7:1407/10 - 1408/15.) But for TRU's pressure in 1992, Playskool would have sold more or different toys to the clubs. (Owen 6:1147/8-11.) Verrecchia acknowledged that Hasbro might have sold more toys to the clubs were it not for TRU's position. (Verrecchia 7:1414/5-12.)

199. Owen's statements about unwanted pressure from TRU were confirmed by other statements from Hasbro representatives. Jeff Berman of Hasbro told Pace's Halverson that "Geoffrey" [the TRU giraffe symbol] was "putting the screws to them." (Halverson 3:391/18-22.) Jim Inano also told Pace about TRU pressure and said the source of his information was Hasbro's CEO, Al Verrecchia. (Halverson 3:388/25 - 389/12.) Inano also made statements to Costco about TRU pressure. (Moen 4:769/12-19.)

200. In August of 1992, Goddu told then Playskool sales vice president, George Miller, that if Playskool continued to ship to the clubs, TRU would continue to purchase Playskool's TV-promoted product, but "wouldn't still buy [Playskool's] basic product." (Inano 16:3376/13-20, 3377/7-9, 3378/2-10.)

201. In 1992, when TRU found Hasbro selling its toys to Price Club, TRU called Playskool's then Vice President George Miller to its offices, and "took him to the shed." (Chase 8:1673/17-23.) Miller said "I never in my life want to go through that again." (Chase 8:1673/23-24.)

202. This occurred when Fisher-Price complained to TRU that Hasbro toys were in the clubs. (Chase 8:1666/4 - 1667/1.) TRU told Fisher-Price that "TRU was going to take care of it." (Chase 8:1666/18 - 1667/1; Verrecchia 7:1353/6-17, 1363/13-24.)

203. In 1992, Playskool promulgated a list of products captioned as "Verboten" to its sales staff that could not be sold to the clubs without receiving specific authorization. (CX-127; CX-130; [ ]

204. Some of Hasbro's claims that production shortages accounted for the clubs not getting product are specious. Inano told Costco that toys were available but that he was forbidden to sell them to Costco. (Ojendyk 18:4016/8-21.) A Hasbro memo states: "As discussed, we have no other planned business for the other warehouse clubs listed. We steered away from our regular items...due to 'capacity issues.'" (CX-132 quotes in original.)

205. Hasbro was willing to sell 15,000 One-Two-Three bikes to Costco in 1991, but only 2,000 of the bikes in 1992 when the line was no longer a new item. (Moen 4:665/18 - 668/11.)

206. In July 1992, Joseph Antonini (CEO of Pace's parent corporation, Kmart) complained to Hasbro's CEO: "Playskool has cut Pace's allocation over 75% from what was ordered and what PACE was told it would receive; and future orders are 'in doubt.'" (CX-364; CX-182.)

207. In 1992, Hasbro told Costco an item would be shipped, but it was not delivered. (Moen 4:668/24 - 669/7.) From August to September of 1992, there were erratic shipping patterns. (Moen 4:669/8-13.) Hasbro kept changing its mind whether it was going to cancel orders. (Moen 4:668/24 - 669/13, 670/22 - 671/5.) Inano informed Costco that his company was thinking about canceling orders as Mattel had done. (Moen 4:670/22 - 671/16.)

208. In 1992, Pace canceled $1.8 million orders with Hasbro because Hasbro was "very ambiguous" and could not give Pace confirmation of delivery information on when products were going to be shipped or if they ever were going to be shipped. (Halverson 3:372/1-11, 443/22 - 444/13; CX-1633.)

209. TRU's complaints to Hasbro about product found in the clubs increased in the 1992 Christmas selling season. ([ ] Owen 6:1143/2 - 1144/23.)

210. Hasbro's policy of selling to the clubs evolved by Toy Fair 1993 into its present policy of only selling differentiated products to the clubs. (Owen 6:1112/13-15, 1144/20 - 1145/14; Inano 16:3428/1-4.)

211. Before Hasbros 1993 policy became final, Hasbro told its plans to Goddu. Goddu gave his assent. (Owen 6:1136/20 - 1141/14.)

212. [ ] In Costco's FY 1992, Hasbro and its subsidiaries products accounted for 14.1% of Costco's sales. By Costco's FY 1996, they accounted for 2.6% of Costco's sales. (CX-1745/11.)

213. In June of 1994, Hasbro issued a written statement of only selling differentiated product to the clubs. (CX-243.) This document is dated after Hasbro received the Commission's February 7, 1994 letter requesting documents.

214. Hasbro also sent a letter to Costco in March 1994 indicating Hasbro's willingness to sell the clubs individual toys if Costco was willing to change the way it does business and promote and support Hasbro's product line to the extent of other retailers. (RX-373.)

215. Hasbro, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

3. Fisher-Price

216. During the early 1990's, Fisher-Price was the third largest toy manufacturer in the U.S. (Cohen 35:7926/9-17.) In 1993, Fisher-Price merged with Mattel. (Cohen 35:7926/7-8.) Fisher-Price makes

products for infants and juveniles, including pre-school toys, outdoor environmental play products and Power Wheels (battery-operated ride-ons). (Cohen 35:7928/5-12.) TRU has been Fisher-Price's largest customer since 1992, currently with 35% of its business. (Cohen 35:7926/18 - 7927/4.)

217. Fisher-Price considered the clubs to be a growth business and told its sales force to aggressively pursue club sales. (Chase 8:1646/23 - 1747/3.) [ ] Fisher-Price's regular line was sold to the clubs without restriction in the late 1980's. (Chase 8:1645/5-18.)

218. At a 1989 Toy Fair meeting with Fisher-Price, TRU's CEO stated that it would have to consider whether it would carry the same products being sold in clubs located near TRU's stores. (Cohen 35:7937/7-24, 7938/6-13.) In 1990 or 1991, TRU stated its policy to Fisher-Price and asked how it was going to deal with the clubs. (Cohen 35:7792/10-19; Weinberg 34:7732/8 - 7733/19; Weinberg IH (*CX-1662*) at 97/1-5.) [ ] TRU's approval of manufacturers selling special packs to the clubs was because they "avoid the customer being able to make a direct pricing comparison" between items sold by the clubs and TRU. (Goddu 30:6635/13-24.)

219. In 1990, Fisher-Price's sales staff received a list of items -- mostly new, hot or allocated product -- that they could not sell to clubs. (Chase 8:1652/14-19.) [ ]

220. In 1990, Fisher-Price still allowed some restricted items to be sold to the clubs. (Chase 8:1652/23 - 1653/7.) Fisher-Price was still selling a broad line of opening stock items to BJ's in 1991. (Cohen 35:7942/3-9, 8005/4-18.) [ ]

221. In 1991, Price Club's toy buyer asked Fisher-Price what he had to do to get product other than combo packs. (Chase 8:1655/10-18.) He was willing to consider buying more SKUs, taking delivery earlier, and warehousing products. (Chase 8:1655/10-25.) When Fisher-Price salesman John Chase asked Fisher-Price's regional sales manager Ken Walters how he should respond, he was told "don't tell them you can't sell because Toys "R" Us is pressuring, just make up a reason, tell them anything, but don't tell them you can't sell them because we're not allowed to because Toys "R" Us. [sic]." (Chase 8:1657/1-7.)

222. In September 1991, Fisher-Price's regional manager sent Chase a copy of a TRU shopping report showing products of Hasbro, Fisher-Price and Playskool found in Price Club. (Chase 8:1660/16 - 1661/5.) He told Chase that a TRU executive had sent the report to

Byron Davis, Fisher-Price's vice president for sales. (Chase 8:1660/16 - 1661/5.) The words "Byron, you promised this wouldn't happen" were written on the report. (Chase 8:1661/4-5.) After this event, Fisher-Price limited its club sales to special and combination packs. (Chase 8:1661/6-8.)

223. At Toy Fair 1992, TRU informed Hasbro that Fisher-Price and Mattel had agreed not to sell promoted product to the clubs. (Inano 16:3334/21 - 3335/5.) TRU's Goddu told Hasbro officials that Fisher-Price and other manufacturers would not be selling in-line promoted products to the clubs. (Owens 6:1132/6 - 1134/17; Verrecchia 7:1393/5 - 1394/4.)

224. Fisher-Price's meeting notes of Toy Fair 1992 state that Pace's Scott Halverson asked Fisher-Price what it would take to do business with Fisher-Price in 1992. (CX-684-A; Cohen 35:8011/9 - 8012/1.) The notes state that "[w]e were deliberately vague on our answer" and that "[w]e denied they [TRU] were the cause, but we weren't to [sic] convincing." (CX-684-A.) The notes point out that after Toy Fair 1992, Hasbro's Kenner and Playskool representatives told Fisher-Price that their company was "adamant that they would not be shipping key SKUs [sic] to the Clubs, at least not yet." (CX-684-B; Cohen 35:8015/3-23.)

225. In June of 1992, TRU contacted Fisher-Price about its nursery monitor that was found in Price Club. Fisher-Price "agreed to stop selling this item to the clubs." (CX 913-E.)

226. In November 1992, Fisher-Price's Byron Davis and John Chase were at a Price Club and saw a TV-promoted Playskool product in the club. (Chase 8:1666/4-13.) Davis told Chase he would call TRU to see if "they'll take care of it." (Chase 8:1666/14-16.) Davis then made a telephone call to TRU and later told Chase that Playskool was not "going to get away with it, that Toys 'R' Us is going to take care of it." (Chase 8:1666/18 - 1667/1.)

227. [ ] TRU's vice president Weinberg said that Fisher-Price complained to him about Playskool products that Fisher-Price found in the clubs. (Weinberg 34:7628/15 - 34:7629/1.) [ ]

228. At Toy Fair 1993, Fisher-Price offered the clubs combo packs and special packs. (Chase 8:1678/3-5.) Fisher-Price added extra dishes to a toy kitchen to create a combo pack. (Chase 8:1678/9-12.) When Fisher-Price executives walked through the display, they noticed the kitchen. (Chase 8:1678/16-17.) They took the person who

was in charge of developing the item, Jamie Leder, into a back room. (Chase 8:1678/17-18.) When he came out ten minutes later, "he was white." (Chase 8:1678/19.) Chase's regional manager told Chase about a half hour later that Leder was almost fired over the incident, because the kitchen was a "sensitive item" for TRU. (Chase 8:1678/20-23.) The item was pulled from display to the clubs. (Chase 8:1678/24-25, 1680/5-6.)

229. [ ]

230. A Fisher-Price study prepared for its 1993 annual meeting, stated the opportunity for toy growth at the clubs was "phenomenal." (CX-698-D; Cohen 35:7958/22 - 7959/4.) It refers to TRU "demanding" that the club products be differentiated from the products it carries. (CX-698-C; CX-699-A.)

231. Fisher-Price never imposed the restrictions it imposed on the clubs on any other channel of distribution. (Chase 8:1691/16-20.)

[ ]

232. Fisher-Price, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

4. Tyco Toys

233. During the 1990's, Tyco Toys was the third-largest traditional toy manufacturer in the United States, with worldwide sales of about $750 million in 1995. (Grey 14:2986/16-18.) Tyco makes radio-controlled toys, die-cast Matchbox cars, a drawing toy called Magna-Doodle, electric racing sets, boys toys, dolls and girls toys, games, science sets, and preschool toys. (Grey 14:2986/5-9.) During the trial in this case, Tyco was acquired by Mattel, Inc. (Grey 14:2985/16-22; RX-819; Barad 35:7912/10-15.)

234. During the 1990's, TRU was the largest customer of Tyco, buying between 30 and 41.4% of Tyco's domestic United States sales from 1990 to 1994; this was two to three times the next largest customer. (CX-1272-B; Grey 14:2986/22-2989/13.)

235. Tyco began to sell toys to the warehouse clubs in the 1980's. (Gray 14:2993/13-19; CX-1420, CX-1424, CX-1263, CX-1264.) Richard Grey (Tyco's CEO between 1981 and 1995), testified that Tyco sold the warehouse clubs primarily regular-line products, although Tyco sometimes would make up a special package. (Grey 14:2993/20-2994/9.)

236. [ ] "At some point we asked Tyco, as we did other vendors, you know, what is your merchandising philosophy. And I believe Dick Grey said, We'll get back to you." (Goddu 30:6677/6-8.)

237. At a 1992 Toy Fair luncheon, TRU again discussed the clubs with Tyco, with Lazarus telling Tyco that it and other toy manufacturers were making a mistake selling regular line merchandise to the clubs. (Grey 14:2996/9-17, 2996/22 - 2997/9.)

238. [ ]

239. [ ]

240. The policy adopted by Tyco in 1992, required customers wishing to purchase products from Tyco's regular line to submit a $20,000 minimum purchase order and order a minimum of 25 Tyco items. The policy required that the smallest quantity of any item ordered must be at least 20% of the unit count of the highest quantity ordered. The policy made exceptions for categories of customers (other than warehouse clubs) that did not typically purchase as many as 25 separate Tyco products. (CX-1418; Grey 14:3006/18 - 3009/1.)

241. The Tyco 25-item policy plainly was directed to the warehouse clubs. (CX-1418.) Prior to 1992 the warehouse clubs had not commonly purchased as many as 25 Tyco items (Grey 14:3002/12-14) and in discussing the proposed policy prior to its adoption Tyco executives "recognized that we might lose some or all of our warehouse club business." (Grey 14:3001/1-2.) The policy excepted other categories of Tyco customers who did not purchase 25 regular line items: specialty retailers, electronics customers, Disney stores and other sellers of licensed products, and customers who bought Tyco products for use as promotional premiums. (CX-1418 at ¶ 3; Grey 14:3008/9 - 3009/1, 3002/15 - 3006/3.) In effect, the policy applied only to the warehouse clubs. (Grey 14:3009/2 - 3010/15.)

242. TRU executives considered the policy adopted by Tyco a "unique" response. (Lazarus 24:5388/11-14; Goddu 30:6678/8-24, 6681/15-18.) [ ]

243. TRU contacted Tyco after a competition shop in the spring of 1992 found several Tyco products for sale in the clubs; TRU's Goddu reported to Lazarus by memo that the products were "goods shipped last year prior to their new 'no ship' policy on current goods we [TRU] carry." (CX-913-D.) TRU's Robert Weinberg spoke with the Tyco salesman and testified that the reference to a "no ship" policy was language used by the Tyco salesman Ken Shumaker

referring to the 25-item policy. (Weinberg 34:7716/2-5.) Tyco's Grey confirmed that Tyco had a "no-ship policy" -- the 25-item policy adopted in February 1992. (Grey 14:3047/2-11.)

244. In the summer of 1992 Goddu sent to senior TRU executives internal Hasbro correspondence which characterized the Tyco policy as a "tough program . . . impossible to qualify for the SKU-conscious club." (CX-1633-D.) After learning that BJ's had placed an order for 25 Tyco products, TRU obtained from Tyco details of the items and quantities ordered and shipped, which Goddu reported by memo to senior TRU executives in September 1992. (CX-808.) Tyco provided this information to TRU without BJ's knowledge. (Hilson 20:4505/5-4507/13).

245. In May of 1992 at an industry conference Tyco's CEO Grey and Hasbro's CEO Al Hassenfeld discussed their respective companies approaches to warehouse club sales. (Grey 14:3011/12-22). Grey told Hassenfeld about Tyco's 25-item policy, and Hassenfeld told Grey there were three different approaches at the time by the three Hasbro divisions. (Grey 14:3011/22 - 3013/4.)

246. Hasbro's Jim Inano, then western regional manager of sales, testified that at a trade show in California in April or May 1992, Tyco's regional sales vice-president Joel Tasman told him that the manufacturers problems in selling to the clubs began when the head of Mattel returned from a visit to TRU saying that Mattel would no longer be selling promoted products to the clubs. (Inano 16:3345/2 - 3347/4.)

247. After Toy Fair in 1992, Price Club placed an order meeting the 25-item minimum (Grey 14:3013/12 - 3015/17); Price Club met the minimum quantity requirement by buying the products for its clubs in various areas. (CX-1633-D.)

248. BJ's placed an order for 25 Tyco items, with large quantities of some items but small quantities of others; because the order failed to comply with the minimum quantities required under the Tyco policy, BJ's was shipped some combination pack products but not the regular line Tyco products it ordered. (Hilson 40:4478/1 - 4479/9, 4506/5 - 4507/6.) Pace considered a strategy similar to the one attempted by BJ's but decided not to place an order after being told that Tyco would not ship an order that did not comply with the policy. (Halverson 3:368/1 - 369/12.)

249. Costco also decided not to place an order under the 25-item policy in 1992 because Costco believed that the minimum quantity

requirements of the policy made it impractical to place an order for as many as 25 items. (Ojendyk 18:4009/22 - 4011/5; Moen 4:646/4-648/23.) Costco's toy buyer Michelle Moen asked Tyco how the mass discounters were able to satisfy the minimum quantity requirements of the Tyco policy. Tyco salesperson Julie Edwards told her that exceptions were made to those requirements for companies like Kmart, Target and TRU. (Moen 4:648/3-20.)

250. In 1992 after its adoption of the 25-item policy Tyco did "considerably less business" with the warehouse clubs than the $5 to 8 million it had been doing in prior years. (Grey 14:3016/11 - 3017/2; CX-1432 Z-7-Z-19.)[8] Tyco developed for 1993 a line of specially configured products which were offered to the warehouse clubs without regard to the 25-item minimum. (Grey 14:3017/3-3018/3, 3067/16-21.) The warehouse club line was printed on a blue price list and consisted of combination packs and other products packaged specially for the warehouse clubs that were different from Tyco's regular line merchandise. (Grey 14:3017/3 - 3018/3; CX-1269.)

251. Costco's toy buyer Moen testified that in late 1992 or early 1993 Tyco's salesperson Edwards told her that TRU put pressure on Tyco to sell combination packs to the warehouse clubs because other major toy companies were doing so; when Tyco went along, this fact was used by TRU to persuade other companies to go along. The three companies mentioned by Edwards were Tyco, Mattel and Hasbro. (Moen 4:651/17 - 652/9.)

252. Tyco continues to have the 25-item policy for regular line products, and a line of differentiated warehouse club products. (Grey 14:3020/22 - 3021/1, 3057/21 - 3058/24; CX-1405.) In effect this policy is similar to that of other major manufacturers who permit warehouse clubs to purchase only differentiated products. (CX-1412-B; Grey 14:3027/22 - 3029/12.) After 1992, no club bought regular line merchandise under the 25-item policy. (Grey 14:3021/13-23.)

253. TRU contacted Tyco's Playtime division to enforce the TRU warehouse club policy. Playtime, a division of Tyco operated separately from the principal domestic toy division of Tyco, had a separate sales staff and sold toys on a letter-of-credit basis to domestic United States customers. (Grey 14:2989/14 - 2991/1.)

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[8] In September 1992 Tyco told TRU that its sales to the clubs the prior year were $11 million and estimated that its sales in 1992 would be $2 million or less. (CX-808-B; [ ]

254. In its warehouse club competition shop in April 1992, TRU discovered a Playtime product, Super Saturator, for sale in warehouse clubs. (CX-l93-D.) TRU's Robert Weinberg, a divisional merchandise manager reporting to Roger Goddu, contacted Playtime's senior vice-president for sales Howard Abrams about the product, which was heavily promoted. (Weinberg IH (CX-1662) at 149/19 - 150/7; Weinberg 34:7677/14 - 7678/5; CX-l414-B.) Playtime's Abrams told Weinberg that, other than for some prior commitments, Playtime would sell the warehouse clubs only "special" items or items that TRU didn't carry. (CX-913-D; Weinberg 34:7719/7-22.)

255. [ ]

256. [ ] A confirming letter received by Weinberg from Playtime shortly after the meeting stated that "Playtime will not offer any merchandise to Warehouse Clubs that is bought by Toys R Us. This will make our policy exactly the same as Tyco's." (CX-914-A.)

257. [ ]

258. Playtime informed its warehouse club customers that they could only purchase the reconfigured Thunderstrike product. (Moen 4:655/7 - 659/4; Hilson 20:4481/18; CX-l408-A; CX-l409.) Playtime representatives told Costco buying personnel that the reason was pressure from TRU. (Moen 4:657/5-6, 658/1-3.) After Costco sent an angry letter to Tyco CEO Grey (CX-l270), Grey replied confirming that the product would be sold to Costco only in the "exclusive value-added version" (CX-1412-B); Costco canceled pending orders for $3.8 million from several Tyco divisions. (CX-1411.) Another separate Tyco subsidiary; Tyco Preschool, reconfigured several of the products to sell to warehouse clubs to comply with a policy "to offer the Clubs customized items only." (CX-l413-A.)

259. In 1993 and later years, Tyco sold to warehouse clubs only differentiated products from the special warehouse club line. (Grey l4:3021/13-23.) By 1995, Tyco's sales to the warehouse clubs were $8-10 million, all differentiated products. (Grey: 14/3021/24 - 3023/7.)

260. Tyco Toys, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

5. Little Tikes

261. The Little Tikes division of Rubbermaid Corporation makes large plastic outdoor children's toys and other juvenile products.

(Schmitt 11:2275/12-23; DePersia 10:2133/11-18.) [ ] TRU has been the largest customer of Little Tikes since the mid-1980's (Murdough 27:5862/20-24); in the early 1990's Little Tikes' sales to TRU were two or three times larger than to its next largest customer. (Schmitt 11:2282/7-14.)

262. Little Tikes was founded in 1970 by Thomas Murdough, who sold the company to Rubbermaid in 1984 and continued to manage the business as president and general manager of Little Tikes until leaving the company in 1989. (Murdough 27:5855/16 - 5857/2.) Under Murdough's leadership, Little Tikes focused on full-line dealers to preserve the profit margins of the retailers that distributed its products. (Murdough 27:5862/20 - 5864/7; DePersia 10:2134/21-2135/15.) Murdough preferred not to sell to warehouse clubs or other retailers he believed would "football" the products by selling at prices he thought were too low. (Murdough 27:5858/17 - 5859/6, 5861/4-12, 5882/13 - 5884/11; Ojendyk 18:4020/8 - 4021/8 (for a period in the late 1980's Costco carried Little Tikes items).) Murdough's strategy was motivated by the "rotational molding" process used to produce the products, which is more costly and time-consuming than the induction molding process used for other kinds of plastic products, and the bulkiness of the products which make them difficult to ship and display. (Murdough 27:5865/9 - 5867/8, 5859/12-19; DePersia 10:2134/21 - 2135/15.) Little Tikes' limited distribution strategy under Murdough differed from the strategy of the Rubbermaid organization which sought "to have products available wherever consumers wanted to purchase them." (Schmitt 11:2276/12 - 2277/3; CX-483.)

263. Murdough left Little Tikes in 1989, (Murdough 27:5856/25-5857/2, 5867/9 - 5868/21.) In 1991 Murdough founded the Step 2 Corporation, a manufacturer of rotationally-molded plastic products, including toys that compete with those made by Little Tikes. (Murdough 27:5857/12 - 5858/10, 5884/16 - 5885/4.) Step 2 has followed a distribution strategy similar to that which Murdough used at Little Tikes; Step 2 offered no products to the warehouse clubs until 1996 when it began to sell discontinued or low-demand products to the warehouse clubs. (Murdough 27:5868/22 - 5870/6, 5871/17 - 5872/12; DePersia 10:2226/6-16.)

264. Little Tikes made no sales to warehouse clubs early in 1990. (DePersia 10:2136/6-2 137/6; Ojendyk 18:4020/8-4021/8.)

265. By late 1990 or early 1991 Little Tikes began sales to the warehouse clubs, and sold to the clubs from 1991 to 1993. (DePersia 10:2137/2-11, 2138/17 - 2139/6; CX-1533-C-D.) [ ]

266. In late 1992, Wolf Schmitt, Rubbermaid CEO, wrote "For 1993 every one of our business units has tremendous upside potential with [the club]. Are your plans firmly in place to take advantage of those opportunities?" (CX-483 (11/21/92).)

267. After Little Tikes in the fall of 1992 agreed to broaden the range of products it would sell, Costco resumed purchasing from Rubbermaid and by January 1993 placed orders for a number of Little Tikes spring 1993 products. (Ojendyk 18:4025/6-20; CX-1385.) Costco believed that Little Tikes had agreed to make eight of its ten top-selling regular line items available for purchase each season, giving Little Tikes a year-round presence in Costco clubs. (CX-1387-B; Ojendyk 18:4023/12 - 4025/2.) [ ]

268. At Toy Fair in February 1993, TRU's Lazarus, Goddu and Sullivan met to discuss the warehouse clubs with Gary Baughman and Neal DePersia, Little Tikes president and sales vice-president, in the Little Tikes showroom in New York. (DePersia 10:2143/2 - 2144/11, 2145/4-14; Goddu 30:7613/16-25.) TRU had learned through its competition shops that Little Tikes had begun to sell its products to the clubs. (Goddu 30:6713/16 - 6714/20.) Goddu raised the warehouse clubs issue "strongly" because TRU perceived a change in Little Tikes sales activity with the warehouse clubs -- Little Tikes under Murdough had not been selling to the warehouse clubs but had begun to do so after Murdough left. (CX-509; Goddu 30:6713/23 - 6714/15.)

269. At the 1993 Toy Fair meeting TRU's Goddu told the Little Tikes executives TRU's policy that if a manufacturer was going to sell products to warehouse clubs, TRU would possibly not carry them. (DePersia 10:2144/12-22.) In response, the Little Tikes executives asked whether the TRU policy also would be applied to Today's Kids, at the time the only manufacturer of large plastic toys competitive with Little Tikes' whose products were being sold in the warehouse clubs. (DePersia 10:2146/17 - 2146/6; 2148/7-22.) The primary concern of Little Tikes was that this competitor might take away business and market share from Little Tikes. (DePersia 10:2214/23 - 2215/3.) Goddu responded that Today's Kids was not doing a lot of business with the clubs and would be getting out of the

business of selling to the warehouse clubs. (DePersia 10:2147/7-14, 2150/3-12.)

270. Goddu met with Today's Kids concerning the TRU warehouse club policy and he was told about that company's plans to discontinue sales to the warehouse club channel. (Goddu 30:6726/2-11; 6727/8-12; 6730/20 - 6732/2; 30:6738/5 - 6739/25.) [ ]

271. At the Toy Fair meeting and on the telephone with Goddu later in February 1993, Little Tikes' president Baughman told TRU that Little Tikes was only selling discontinued products to the warehouse clubs (which was not accurate), and in the future would only sell discontinued, near-discontinued or "value pack" merchandise to the clubs. (DePersia 10:2145/15 - 2146/9, 2151/13-23; CX-1510.) Baughman assured Goddu that Little Tikes' sales to Costco were a "one shot deal" and that Little Tikes did not plan to sell regular products to Costco in the future. (CX-1510.) Baughman told Goddu that the sales to Costco were made because Costco "threatened to throw Rubbermaid out" and told Goddu that he "may need his help" in dealing with Rubbermaid management. (CX-1510; Goddu 30:6714/21 - 6715/14.)

272. In a meeting at Toy Fair and in February and March 1993, Little Tikes personnel told Costco that Costco would not have access to Little Tikes' regular product line for the fall 1993 season, but would be offered only combination packs. (Ojendyk 18:4028/22 - 4029/25: CX-1387-A; CX-1511; CX-1513.) Costco threatened again to discontinue purchasing products from all Rubbermaid divisions. (Ojendyk 18:4029/20-25; CX-1387-B.)

273. In early April 1993 senior management of TRU and Little Tikes met with Wolf Schmitt, the recently-appointed CEO of Rubbermaid. (DePersia 10:2159/9 - 2160/7; Schmitt 11:2283/24 - 2284/23, 2288/2-7; Goddu 30:6715/15-6716/9.) Before the meeting TRU provided Little Tikes with a competitor shop report showing Little Tikes products for sales in warehouse clubs at prices less than at TRU. (CX-1516-B; DePersia 10:2162/15 - 2164/10.) [ ]

274. At the April 1993 meeting, TRU repeated that it would not carry any products carried by the clubs, asked to be informed what products were being sold by Little Tikes to the clubs, and expressed interest in purchasing value packs prepared by Little Tikes. (CX-1521 (Baughman file memo); CX-1519 (Schmitt handwritten notes);

Schmitt 11:2291/25 - 2292/13; 2297/1 - 18; DePersia 10:2172/7 - 2173/12.) [ ]

275. Little Tikes represented that its future sales strategy for warehouse clubs would be to sell value packs and discontinued and near-discontinued items. (CX-1521; DePersia 10:2170/22 - 2171/12; Schmitt 11:2294/2-14; Goddu 31:6900/8-20; 6916/18 - 6916/6.) There was further discussion focusing on the issue of products for which Little Tikes had unabsorbed production capacity. Schmitt felt that the parties did not find common ground on that "clarification" of the Little Tikes future strategy to sell the warehouse clubs value packs and discontinued and near-discontinued items. (Schmitt 11:2305/22-23, 2296/7-10.)

276. Little Tikes' vice-president of sales DePersia believed that the April 1993 meeting resolved the issue of warehouse clubs in the eyes of Little Tikes and TRU, and that Little Tikes would only be selling discontinued, near-discontinued and value pack merchandise to the warehouse clubs. (DePersia 10:2177/13-22.) Schmitt's contemporaneous notes of the meeting use the words "Agreement" and "Understandings" in referring to the discussion of the warehouse club distribution issues. (CX-1519.) TRU's President Michael Goldstein came away from the meeting understanding that the Rubbermaid/Little Tikes executives did not intend to sell to the clubs. (Goldsteiin 36:8298/9-20.)

277. In mid-April 1993, about a week after the meeting at TRU headquarters, Little Tikes issued a memo to its sales force listing the only Little Tikes items that were available for sale to warehouse clubs for the fall of 1993; the list was made up of value packs, discontinued and near-discontinued items. (CX-1520; DePersia 10:2176/16 - 2177/4; 2177/23 - 2179/10.) During the balance of 1993, the sales staff of Little Tikes limited the products available to the warehouse clubs to "value packs, discontinued and near-discontinued." (Hilson 20:4494/3-9; CX-1523; DePersia 10:2179/11-2180/13, 10:2180/15-2181/3.)

278. In August 1993, because of the limitations on availability of Little Tikes products, Costco again discontinued its purchases of products from Rubbermaid Corporation. (CX-1524; CX-1522.) This action cost Rubbermaid $15 to $20 million in annual sales to Costco. (Schmitt 11:2342/18 - 2343/6.)

279. During 1993 and 1994 Little Tikes tried to resolve the differences with Costco by offering to sell Costco its popular items

which were late in their product life-cycles. (DePersia 10:2183/2-2184/11 (Party Kitchen); Schmitt 11:2340/16 - 2341/9 (Cozy Coupe).) Little Tikes' DePersia believed this approach was consistent with the "value packs, discontinued and near-discontinued" commitment to TRU. (DePersia 10:2184/12 - 2185/11.) These offers were not accepted by Costco and the differences between Little Tikes and Costco continued to be unresolved through early 1994. (RX-225; DePersia 10:2187/24 - 2190/2; CX-1531; Schmitt 11:2346/21 - 2350/17.)

280. In January 1995 TRU's Lazarus contacted Rubbermaid's Schmitt to meet to discuss the warehouse clubs in light of changes in senior management at Little Tikes (Baughman, the president, and DePersia, the vice-president of sales, left Little Tikes in late 1994 and early 1995). (Schmitt 11:2325/10 - 2326/1, 2327/11 - 2328/5.) TRU competition shops showed that Little Tikes had begun to sell products to the clubs that did not conform to the strategy communicated to TRU in 1993. (Goddu 31:6896/9 - 6897/9, 6898/25 - 6901/1; Goddu IH (CX-1657) at 314/5-8, 317/11-18.)

281. At a January 1995 meeting Little Tikes told TRU that none of the products sold to TRU were sold to the clubs. (CX-1535; Schmitt 2338/2 - 2339/13.) TRU's president Goldstein felt that after the 1995 meeting TRU's concerns had been resolved (Goldstein 36:8286/25 - 8287/4.) [ ]

282. [ ]

283. Little Tikes and its parent Rubbermaid, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

6. Today's Kids

284. Today's Kids manufactures plastic toys for children up to nine years old. (Stephens 27:5893/9-10.) Today's Kids is smaller than its principal competitors, Little Tikes, Fisher-Price, and Step 2. (Stephens 27:5893/20 - 5894/1.) [ ]

285. From 1990 to 1993, Today's Kids directed its sales force to try to get as much of the warehouse club business as it could. (Stephens 27:5964/16-19.) [ ]

286. During the early 1990's, Today's Kids sold its regular line products to the clubs without restriction. (Stephens 27:5965/25 - 5966/3, 5896/24 - 5897/1; *CX-902*.) In 1993, Sam's wholesale club

was Today's Kids' largest customer among the clubs with purchases of [ ] in regular line product. (Stephens 27:5965/19-21; [ ]

287. In June 1992, TRU's Robert Weinberg complained to Today's Kids about an item that was found in the clubs and told Today's Kids that it needed to "do something to the item or the packaging." (CX-857.) TRU contacted Today's Kids about other products that were found in the clubs. (CX-913-D.) Today's Kid's sales vice president, James Stephens, stated that Today's Kids understood TRU's position, but needed the clubs' business. (CX-913-D.) Stephens told TRU that Today's Kids would sell "special items going forward." (CX-913-D.)

288. [ ]

289. Thereafter, there were several meetings between TRU and Today's Kids. (Goddu 30:6733/23 - 6734/3.) TRU told Today's Kids that it did not want to carry any identical product that was sold to the clubs. (Goddu 30:6728/10-15, 6730/20 - 6732/24.) If Today's Kids was going to sell product to the clubs, TRU wanted Today's Kids to notify it about the product so that TRU would not buy it. (Butler 25:5524/6 - 5525.) Today's Kids' response was to inquire "how much would we [TRU] work with them, how much time would they have, how much more business could we do with them" if they changed their distribution "away from the warehouse club channel." (Goddu 30:6729/9-22.)

290. In 1993, Today's Kids told TRU that they changed the amount of business they were doing with the clubs for their own benefit. (Goddu 30:6738/5-22, 6739/12-14.) Today's Kids told TRU that it was going to stop selling to the clubs or to minimize what they were going to sell to them. (Butler 25:5526/7-10, 25:5551/2-7.) Today's Kids asked TRU "if we could have more time." (Goddu 30:6739/4-7; Goddu IH (*CX-1657*) at 167/11-14.) [ ]

291. Today's Kids got back to TRU later in 1993 and discussed its intention of not selling to the clubs at all. [ ]

292. Also in 1993, Little Tikes complained to Roger Goddu of TRU about Today's Kids sales to the clubs. (DePersia 10:2146/10-25.) Goddu told Little Tikes' vice president, Neil Crosby DePersia, that Today's Kids would be getting out of the business of selling to the clubs. (DePersia l0:2147/7 - 2148/6, 2150/3-12.)

293. In November of 1993, a TRU representative warned Today's Kids that it might not order a product which Today's Kids sold to the clubs even though it was selling well at TRU. (CX-891.) The

following day, she advised Today's Kids that TRU's "top echelon said don't order any more now." (CX-892.) [ ]

294. In early February 1994, a Costco representative who met with Today's Kids stated that a change in Today's Kids' policy relating to the clubs might be made because of pressure from TRU. (Moen 4:682/11 - 684/6; CX-1678.)

295. In March 1994, following Toy Fair, Today's Kids informed the clubs that it would no longer sell any product to them. (Stephens 27:5985/5-11.) This was the first time that Today's Kids had ever decided not to sell a class of distribution. (Stephens 27:5989/22 - 5990/3.) [ ]

296. Today's Kids witness Stephens attributed Today's Kids' decision not to do business with the clubs to the unpredictability of the clubs' purchases, the lower price points at which the clubs sold, the clubs' cherry picking, and clubs tendency to cancel orders. (Stephens 27:5927/6-24.) I did not consider this to be credible testimony. (Stephens 27:5991/23 - 5992/5; CX-893.)

297. Today's Kids, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

7. Tiger Electronics

298. Tiger Electronics ("Tiger") makes electronic toys, hand held games and family games. (Shiffman 10:1993/4-12.)

299. TRU was Tiger's largest customer through 1994. In 1993 TRU bought twice as much as Tiger's second largest customer. (CX-822; Shiffman 10:1998/2-4) TRU's share of Tiger's sales was between 23% and 35.4% in the years 1991-1996. (CX-822; [ ]

300. Between 1992-1994, Tiger felt it needed to sell to TRU for Tiger to launch successfully a nationally advertised product. (Shiffman 10:2002/2-23.) The number and geographic coverage of TRU stores made it essential. [ ]

301. Between 1991 and 1993, Tiger's club business was growing well, and it was selling its regular line product, including some of its top ten items, to the clubs. (Shiffman 10:2004/22-24, 2012/24 - 2013/8; CX-1756.) In 1991, Tiger sold $273,000 worth of merchandise to the clubs. [ ]

302. In June of 1993, Tiger's Shiffman spoke over the telephone with TRU's Roger Goddu, during which he first heard directly from TRU about its warehouse club policy. (Shiffman 10:2007/17 -

2008/2, 2015/23 - 2016/8.) After the phone call, Shiffman dictated a memo of his talk with Goddu. (Shiffman 10:2008/3-14: CX-809.) In this memo, Shiffman wrote: "TRU will NOT handle any item that is made available for sale through clubs. Period. End of story. It makes no difference who the club is or what the price is. If it is a new television advertised product, they will drop it immediately and will not handle it whatsoever." (CX-809.) [ ]

303. Shiffman had asked Goddu whether TRU's policy applied to BJ's, a small club compared to the other warehouse clubs. (Shiffman 10:2013/22 - 2014/17.) Goddu's answer was that "the policy stands. If it is in a club including BJ's, it is out at TRU. Period. End of story one more time." (CX-809; Shiffman 10:2014/2-10.) Shiffman got the impression from Goddu that TRU's club policy would apply to all manufacturers in the industry. (Shiffman 10:2016/18 - 2017/1.)

304. Several months later, Shiffman wrote to TRU's Goddu in early December 1993 informing Goddu that Tiger had found one of its competitor's products in a BJ's club. (CX-811; Shiffman 10:2017/2 - 2019/12.) The club version of the competitive product merely had one additional videotape inside the box and a sticker attached to the outside of the box to differentiate it from the regular line product being sold at other retailers, including TRU. (Shiffman 10:2021/20 - 2022/7.) Shiffman felt that the package of the club version of the competitor's product was not differentiated enough from the regular line product's package and that the consumer could too easily compare the two versions of the product to comply with TRU's club policy. (Shiffman 10:2022/24 - 2023/14, 2023/25 - 2024/22.)

305. In his letter Shiffman wrote, "I understand that with regard to hot new product, television items, high profile items, etc., the only way these can be sold to the clubs is through very 'creative' packaging." (CX-811.) Shiffman indicated that, as Goddu knew, Tiger had not sold its similar product "to any club in the country," although Tiger "could have easily responded with a similar answer as this [competitive] product if we had known that it was acceptable to you." (CX-811.) Shiffman asked Goddu to let him know if that type of packaging was "satisfactorily meeting the needs and concerns of Toys R Us." (CX-811.) After sending this letter, Shiffman spoke with Goddu, who told him that although the competitive product's package did not meet TRU's club policy criteria, TRU had not yet explained its club policy to the company, but that Goddu would tell the competitor "don't do it again or God knows what." (Shiffman

10:2026/7 - 2028/13.) I find that Tiger's concern about its competitor's product being in the clubs and its statement to TRU that Tiger could "easily have responded with a similar answer" for selling its like product to the clubs if it had known that was acceptable to TRU shows that it was not in Tiger's unilateral business interests not to sell its regular line version of this product to the clubs.

306. In late January 1994, Shiffman had dinner with TRU's Goddu and after dinner, wrote an e-mail relating their conversation. (CX-814; Shiffman 10:2033/12-25.) At this dinner, Shiffman wanted more information on TRU's club policy so that he would know what products Tiger could sell to the clubs without jeopardizing its sales to TRU. (Shiffman 10:2037/4-10.) At dinner, Goddu told Shiffman that if Tiger sold the clubs a five-year-old product called Skip-It, as well as handheld games "in multipack with high price point," that would comply with TRU's club policy and would not adversely affect Tiger's sales to TRU. (CX-814; Shiffman 10:2037/1 - 2038/18, 2039/15-2040/2.) Goddu told Shiffman that he could get back to Goddu to review Tiger's club strategies with him and get approval in advance, even for individual products and packaging. (Shiffman 10:2044/21 - 2045/9; CX-814.)

307. On March 5, 1994, Tiger vice president of sales, Bernbaum, sent an e-mail to Tiger president Rissman urging Tiger to "address the club situation" since Costco wanted to purchase up to 300,000 handheld games alone, and "between their own stores and the Price Club acquisition they are going to be a huge factor." (CX-812.) Bernbaum explained that he needed an answer to give Costco since "I have to address the problem, TRU or no TRU." (CX-812.)

308. On April 6, 1994, executive vice president Shiffman, with the help of Tiger's in-house counsel, wrote and distributed a document that set out in a formal fashion Tiger's policy regarding sales to the clubs. (CX-818; Shiffrnan 10:2058/10 - 2059/3.)

309. After Tiger's policy went into effect, its sales to the clubs dropped from $3.5 million in sales to the clubs in 1993 to $31,740 in sales in 1994. (CX-822; Shiffman 10:2004/22-2005/6, 2055/22-24.) [ ] Tiger attempted to sell multi-packs to the clubs, but these were not successful. (Shiffman 10:2055/11-13.) I find that this also illustrates that it was not in Tiger's unilateral best interests to restrict its sales to the clubs.

310. Tiger's decision to restrict the clubs to multi-packs was not attributable to the fact that the clubs bought too few of its SKUs. (Shiffman 10:2053/3-9.) Tiger continued to sell its regular line products to drugstores, which carry an average of 4-10 Tiger products each year. (Shiffman 10:2052/14 - 2053/4.) Drugstores do not carry Tiger products year-round and like to be out of stock on Tiger items by December 25th each year. (Shiffman 10:2106/6-24.)

311. Tiger did not sell regular line products to the clubs again until 1996. (Shiffman 2057/7-12.)

312. Tiger, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

8. VTech Industries

313. VTech Industries makes electronic educational toys. (Walter 29:6061/22 - 6062/7.) In 1992, Toys "R" Us purchased 33% of VTech's U.S. sales. No other customer bought more than 9.6%. (CX-1305.) In 1993, VTech wanted to sell to retailers other than TRU to "reduce their dependence" on TRU. (CX-1301, CX-1318; O'Brien 12:2423/5-17.)

314. VTech sold regular line merchandise to the warehouse clubs for the 1992 Christmas season. (Walter 28:6087/21-24.) In 1993, VTech stopped selling regular line product to the clubs. (Walter 28:6087/21-24, Hilson 20:4508/6-9.) VTech "promised" TRU during the 1993 Toy Fair that they would not sell to the warehouse clubs. (CX-1318, O'Brien 12:2426/16 - 2427/18.)

315. Bill Walter, VTech's vice president of sales, testified that VTech stopped selling regular line products to the warehouse clubs for reasons unrelated to TRU. (Walter 28:6108/17 - 6109/17). He testified that clubs had excessive returns, returned product in poor condition, bought on a domestic rather than a letter of credit basis, and insisted on guaranteed sales. (Walter 28:6088/2 - 6090/2.)

316. Walter's testimony includes much post-hoc rationalization. (CX-1318; O'Brien 12:2432/1-19, 2424/10-14, 2412/1-3.) The TRU campaign motivated VTech's decision to stop selling to the clubs. (Walter 29:6190/19 - 6191/3.)

317. According to Walter, these issues were discussed orally with the clubs. (Walter 28:6189/10-19, 6190/19 - 6191/3.) This conflicts with the testimony of Jim Hilson, a toy buyer for BJ's, and a credible witness, who never heard any complaints about excessive returns

from VTech before VTech stopped selling to BJ's. (Hilson 20:4512/12-19.)

318. VTech, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

9. Binney & Smith

319. Binney & Smith (B&S) makes "Crayola" crayons, markers, colored pencils and similar products. (Blaine 29:6326/19 - 6327/20.) B&S competitors include Rose Art, Dixon Ticonderoga, Sanford Corporation, Amov and Battat. (Blaine 29:6340/23 - 6342/16.)

320. B&S began selling to the warehouse clubs in the 1980's. (Blaine 29:6342/17 - 6343/1.) B&S had trouble selling to the warehouse clubs because B&S regular line products had low price points. (A box of 64 Crayola crayons retails from $1.99 to $4.99.) (Blaine 29:6343/11 - 6344/24, 6328/6-10.)

321. B&S bundled packs of regular line merchandise for the warehouse clubs. (Blaine 29:6345/11-16.)

322. In May or June 1992, B&S' vice president of sales Brent Blaine was contacted by [ ] This meeting was called by TRU, after TRU found B&S products in the warehouse clubs. (Weinberg 34:7614/8 - 7617/5.)

323. At the meeting, Brent Blaine agreed to offer special packs only for 1993. (CX-913-C; Weinberg 34:7666/14 - 7667/18.)

324. After this meeting, B&S stopped selling regular-line merchandise to the warehouse clubs. (CX-913; Blaine 29:6934/2-19.) B&S makes differentiated products for drug stores and supermarkets. (Blaine 29:6461/7-25.) These other customers may also buy B&S regular line. (Blaine 29:6462/5 - 6463/17.)

325. In December 1992, Weinberg contacted Blaine and asked him to meet with him about B&S' warehouse club strategy. (Blaine 29:6418/11-19.) Blaine showed Weinberg samples of warehouse club products that B&S planned to sell to the warehouse clubs. (Blaine 29:6422/10-17.) After viewing these products, [ ]

326. After this December meeting, Blaine wrote a letter to Weinberg summarizing their discussions on the clubs: "Our intent is to differentiate our product offering to Membership Clubs from that sold through our traditional retail trade channel. We will do this with larger sets and multi-packs that move the clubs to higher price points.

In addition, we will alter contents to present the club customer with a non-comparable value." (CX-2.)

327. BJ's purchased regular line B&S products before B&S established their warehouse club policy. (Hilson 20:4531/23 - 4543/2.) BJ's had been successfully selling a B&S product called the "Crayola Drawing Desk." (Hilson 20:4532/13-14.) However, B&S stopped offering the regular line Crayola Drawing Desk to BJ's. (Hilson 20:4532/13-25.) B&S provided BJ's with no explanation for their change in policy. (Hilson 20:4533/10-15.)

328. Binney & Smith, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to clubs.

10. Lego

329. Lego is a leading manufacturer of plastic construction toys. [ ]

330. Until 1991, Lego sold to the clubs discontinued product. (CX-487-A; Hilson 20:4528/24 - 4529/8.) However, the growth of the clubs made the clubs an attractive market. (CX-487; CX-491.)

331. In the early 1990s, BJ's purchased older regular line product but sought new regular line products from Lego. The Lego salesman told BJ's that his management was influenced by TRU not to sell to the clubs. (Hilson 20:4529/18-4530/1.)

332. In December 1992, TRU informed Lego that it will "delist or not list any" Lego item that has wholesale club distribution. This policy affected several items that Lego was considering for the clubs. (CX-492.)

333. In February 1993, Lego decided to sell two items to the clubs and accept the consequences from TRU, but to change the color of two other items for the clubs and to use two combination packs for the clubs. Lego also decided to sell some discontinued product to the clubs and "to resurrect the strategy" of providing customized product for the clubs in 1994. (CX-493-A-B.) BJ's made no purchase of Lego product for several years until 1996 when it purchased some older product, some of which was about to be discontinued. (Hilson 20:4530/2-4531/1.)

334. Lego, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

11. Sega

335. Sega of America, Inc. ("Sega") makes home video game hardware and software. Its products include Sega Genesis, Saturn video game system and Game Gear hardware and software titles, including Sonic the Hedgehog and Joe Montana Football. (Kalinske 12:2470/20 - 2471/9.)

336. In 1990 Sega had 8-10% of United States sales of home video games, with Nintendo having almost all of the rest. (Kalinske 12:2473/13-15.) By 1994 Sega had 50% of the video game market. (Kalinske 12:2518/24 - 2519/2.) Sega's percentage of TRU's sales of video games ranged from the "high teens or low 20s." (Kalinske 12:2495/5-8.)

337. In 1990-1991 Sega sold to the clubs, which it considered to have sales growth potential. (Kalinske 12:2473/16-23, 12:2474/17-19.) In 1991, Sega sold old bundled software to Sam's. (CX-754.) Sega wanted to sell Sam's everything that it had in inventory. (Kalinske 12:2513/16 - 2514/5.)

338. [ ] In a fall 1991 meeting between Sega's CEO Thomas Kalinske, Charles Lazarus and top TRU executives at TRU's headquarters (Kalinske 12:2475/3-9), Lazarus expressed concern about Sega's sales to the clubs (Kalinske l2:2476/11-23), and said do not sell to them. (Kalinske l2:2540/17-20.) At the meeting, TRU asked what Sega's policy was in selling its Genesis product to the clubs. (Goddu IH (*CX-1658*) at 387/1 - 388/6.)

339. Kalinske said he was not selling any Genesis product to Sam's. Later, upon learning that his statement was not correct, he wrote a letter to Lazarus stating that he "could not look you in the eye" if he did not explain the following: "Frankly, we were also looking for a way to get Wal-Mart's attention. . . . The quantities of hardware are low with the software greater, but it's a one shot deal that when sold out, will not be restocked." (CX-754.) Kalinske further assured Lazarus that "Sam's Wholesale Club will have old Genesis software bundled with Hardware this Fall. . . ." (CX-754.)

340. [ ]

341. [ ]

342. In 1991, Sega sold Costco in-line product which it tested for Sega. (Moen 4:692/15-18.) By Christmas of 1992, Sega would only offer combo packs to Costco. (Moen 4:692/13 - 693/7). In 1992, Sega was selling BJ's its open line of merchandise, including a wide variety

of software. (Kalinske 12:2486/5-12, 12:2500/8-23; CX-769-A.) Sega's sales to BJ's were $25 million. (Kalinske 12:2498/5-9.)

343. In late spring or early summer of 1992, TRU contacted Sega about Sega product found in the clubs. Sega said that it would sell to the clubs "as long as Nintendo is in the warehouse clubs." (CX-913-F; Goldstein IH (CX-1659) at 59/10-17) [ ]

344. By February 1993 Sega limited its sales to BJ's to hardware packs only, as it was to the other clubs. (CX-769-A; Moen 4:692/15-693/18.) A Sega memo states "we have made a decision to package our product consistently with other manufacturers who sell to the warehouse club class of trade." (CX-769-A.) BJ's wanted to buy Sega's regular line video game software. (CX-769-A; Hilson 20:4520/19 - 4521/17.) Costco, Sam's and Pace also wanted to buy regular line product. (CX-701-B; CX-710-A; CX-716-B; CX-727 (Nintendo product); Moen 4:692/10 - 693/5 (Sega product).)

345. In April of 1993, BJ's still was selling regular line Sega merchandise. (Hilson 20:4521/6 - 4523/6; CX-678.) Charles Lazarus angrily confronted Kalinske at a Charity Ball about Sega's sales to the clubs and some other outlets TRU disfavored. Lazarus asked Kalinske "what he thought he was doing" (Lazarus 24:5393/14 - 5394/11) and implied that he had convinced Nintendo not to sell to the clubs and that Sega should follow suit. (CX-1776; Kalinske 12:2490/7-25, 2491/24 - 2492/2.)

346. Kalinske was concerned that TRU might retaliate against Sega. (CX-767-.A; Kalinske 12:2494/21 - 2495/4; CX-766.) Sega decided to restrict the clubs to bundled hardware/software packs rather than cutting them off completely. (Kalinske 12:2507/7-21.) Sega concluded that TRU has more to lose than Sega since Sega supported TRU with more product and promotional monies than all its other accounts combined, and Sega felt it could replace any shortfall with other customers. (CX-767-B.)

347. Sega's position from 1993 to near the time Kalinske left Sega in 1996 was that the clubs had to buy bundled packs. (Kalinske l2:2507/7-20; CX-760-A.) In 1995, after the popularity of Sega's products had declined somewhat, Sega offered Costco in-line products if it would purchase 16 SKUs of software. However by this time Costco was not interested. (Moen 4:692/15 - 693/18.) In 1996, Sega permitted BJ's to purchase from open stock. (Hilson 20:4526/19 - 4527/8.)

348. Sega agreed with TRU to restrict its sales to the clubs to combination packs of video game hardware and software. In the face of TRU pressure not to sell to the clubs at all, Sega told TRU that it would restrict the products it sold to the clubs to bundled software and hardware packs. Sega stopped selling regular line product to BJ's even though its business with BJ's was satisfactory to Sega.

349. Sega, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

12. Huffy

350. [ ]

351. [ ]

352. [ ]

353. [ ]

354. [ ]

355. [ ] At one point, Huffy asked TRU whether using a different name or color on a product that it sold to the clubs would differentiate it. (Butler 25:5560/5-12, 5561/6-10.) Van Butler of TRU advised that a name change would not be sufficient. (Butler 25:5561/6-10.)

356. [ ]

357. [ ]

358. Huffy, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

13. Just Toys

359. Just Toys, a maker of foam plastic toys and licensed toys, was selling toys to warehouse clubs by 1996; it sold regular line products as well as combo packs and specially configured products. (Hilson 20:4498/25 - 4500/5.) In 1993, Just Toys informed the buyer for BJ's that it would no longer sell BJ's regular-line products but only specially-configured products. A sales VP for Just Toys said that his management was being strong-armed by TRU and that Just Toys risked having its products thrown out of TRU if it continued to sell them to the warehouse clubs. (Hilson 20:4500/6-22.) Just Toys continued to follow this policy after 1993 until a management change in 1996; at the time of trial it offered its products to BJ's without restriction. (Hilson 20:4501/9-11, 4503/4-15.)

360. During 1993, Just Toys asked whether BJ's would participate in a product test, and BJ's agreed to place the item (a stretchable

plastic figure) in two of its stores in the New York area. Just Toys later informed BJ's that TRU had seen the product in BJ's stores, had decided not to carry it and had returned all of its inventory of the product to Just Toys. Without the support from TRU, Just Toys determined that it could not give the toy the promotional support it had intended. BJ's did not go forward with the item. (Hilson 20:4501/12 - 4503/3.)

361. Just Toys, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

14. New Bright

362. New Bright, a Hong Kong-based maker of radio controlled toys and other toys, sold both regular line and combination pack or differentiated products to warehouse clubs since the late 1980's. (Hilson 20:4515/6-22.) Just before Toy Fair in 1994, a New Bright sales representative told the toy buyer for BJ's that New Bright was "taking a vacation" from selling to the warehouse clubs. The New Bright representative said that his management had been reminded by TRU that products on the shelf at BJ's would not be purchased by TRU, and that if New Bright wanted to have its assortment expanded at TRU it would have to stop selling to BJ's. (Hilson 20:4515/23 - 4516/17.) After discontinuing sales to BJ's in 1994, New Bright resumed sales the following year and has sold to BJ's since. (Hilson 20:4517/17-23.)

363. New Bright, other toy manufacturers and TRU had a common design or understanding to restrict toy sales to the clubs.

D. Success of the TRU Campaign

364. The TRU campaign against the warehouse clubs achieved participation by toy manufacturers, including the largest toy makers.

365. [ ] [9]

366. In February 1994 the FTC's investigation was known by "virtually everybody in the industry." (Muris 33:7469/17-24.) After this date, some of the manufacturers who restricted their sales to warehouse clubs in cooperation with TRU began to sell to the clubs. This may have been caused by the FTC's investigation and proceeding. (Hilson 21:4776/22 - 4777/1.)

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[9] [ ]

ANTICOMPETITIVE EFFECTS

A. Effects

367. The purpose of the agreements in this case was to restrain competition among toy retailers and among toy manufacturers. TRU intended to prevent the clubs from competing with TRU (Kalinske 12:2488/20 - 2489/3 [ ]), to prevent toy manufacturers from competing with each other to sell products to the clubs ([ ] Kalinske 12:2488/20 - 2489/3, 2491/19 - 2492/6), and to prevent consumers from making direct price comparisons between products sold by TRU and products sold by the clubs. (Butler 25:5560/13-24; Goddu 30:6635/7-21.)

368. The TRU campaign had its intended effect -- the evidence shows that the campaign impeded the growth of the clubs as a emerging and innovative method of toy distribution, restrained retail price competition and caused toy prices to be higher than they would have been.

1. TRU impeded growth of the clubs

a. Growth of the warehouse clubs

369. The rise of the warehouse clubs and TRU's response is part of a recurring historical pattern in retailing -- [ ] (Scherer(CX-1822-B-C), Ingene 41:9039/25 - 9040/22; Okun 13:2791/15-2792/11.)

370. Ironically, when TRU was just becoming successful, established retailers thought the toy manufacturers should not sell to TRU because its prices were too low. (Kalinske 12:2516/13 -2517/5; [ ])

371. As a new, low cost toy retailer in Japan, TRU fought efforts by toy distributors in Japan to "pressure suppliers to not sell us or charge us higher prices. . . ." (CX-1031-G; Goldstein 36:8257/19-8258/10.)

372. [ ]

373. Toy manufacturers recognized the clubs potential. In 1990, Mattel's chief executive officer, John Amerman, instructed his staff to be aggressive in new channels of distribution, especially the clubs. (CX-523.) In Septernber 1991 Fred Okun of Mattel wrote, "This is one of the fastest growing channels of distribution in the country. As a public company we owe it to our shareholders to maintain our business by selling this class of trade." (CX-530-B.) A 1992 Hasbro

memo states "[w]e have only begun to see the potential for this channel of distribution." (CX-11; CX-78.) [ ]

374. The clubs were seeking aggressively to grow their toy business. (CX-1664; CX-373). Pace's toy department was one of the highest growth departments in the company. (Halverson 3:348/25 - 349/6.) Costco's toy sales from its FY 1991 to FY 1992 increased by 28%, compared to Costco's overall sales growth of 15%. (CX-1745-Z-9.) BJ's' purchases of toys in the early 1990's were also growing at a rapid rate. (CX-373.) Mattel's sales to the clubs increased 50% a year in both 1989 and 1990. (CX-530-E.)

375. The TRU campaign halted this growth trend and the clubs' threat to TRU's price image. [ ] [10]

376. An internal TRU memo in July 1993 removed the clubs from the list of "knock-off" competitors whose presence in the vicinity of a TRU store warranted an adjustment in sales and profit expectations of the store for manager compensation -- because the clubs were thought to have "no significant knock off impact on TRU stores." (CX 1058.)

b. The clubs' ability to obtain regular line toy products

377. Before the TRU conduct at issue in this case, warehouse clubs were able to buy regular line toys from toy manufacturers. (Moen 4:606/8 - 608/11; Halverson 3:357/3; Hilson *20:4573/15* - 4575/14; 4430/4-6.) In 1989, over 90% of Costco's purchases of Mattel's toys were regular line items. (CX-691) Eighty to eighty-five percent of Pace's toys were regular line items. (Halverson 3:359/13-21.)

378. The clubs purchased combinations packs or other differentiated products from leading toy manufacturers following TRU's actions. (Hilson 20:4536/18 - 4538/22.) While the clubs wanted some combination packs (Moen 4:634/12-15; [ ]),[11] they prefer to sell the same regular line product as the manufacturers sell to their retail competitors. ([ ] Moen 4:634/9-15; Jette 5:1001/13-17.)

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[10] [ ] In 1993 and 1994 the clubs sales volume growth slowed sharply when consolidations were occurring, but their growth rate is beginning to increase again. (Sinegal 2:154/5 - 155/15 (Costco); Zarkin 21:4785/15-23 (BJ's); Ingene 41:9042/23 - 9045/5; CX-1824; CX-1825.)

[11] Combination packs of hot wheel cars that each retail for less than a dollar make sense because the value is clear to the consumer who can see that the total price of the pack is less than the total of the retail price of each car. (Halverson 3:358/2 - 359/7.)

379. Parents see an individual toy promoted on TV or in a magazine and want to buy that individual toy. ([ ])

380. Combination packs make it difficult for consumers to compare prices of like items between the clubs and other retailers. (Butler 25:5560/13-24; Goddu 30:6635/7-21; [ ]) Manufacturers want to prevent such price comparisons by putting together combination packs for the clubs.(Okun 14:2897/23 - 2898/8; RX-813; CX-2.)

381. [ ]

382. The inability of the clubs to obtain regular line merchandise (CX-691; *CX-447-A-E*; Hilson 20:4437/5-19), caused by TRU's conduct, impeded the clubs' ability to become a more competitive force in the retail distribution of toys. TRU's conduct, which led the manufacturers to move the clubs into combination packs, made it difficult for consumers to make informed price comparisons between toys for sale in the clubs and those in other outlets such as TRU.

c. The clubs ability to obtain products from major manufacturers

383. The clubs relied on the brands of well-known toy manufacturers to attract customers to their stores. The TV-promoted products of these companies are the "lifeblood of the industry." (Goddu 23:6572/9-20; Hilson 20:4538/6-18; Halverson 3:356/19 - 357/2.)

384. In 1990 and 1991, a large part of Costco's toy purchases consisted of the products of major toy manufacturers.(Moen 4:603/24-605/9, CX-1745-Z-15.) In 1995, 64% of TRU's price image/sensitive toys were from major manufacturers and 70% of those toys were advertised on TV. (Ingene 41:9084/2 - 41:9085/1; CX-1826.)

385. The clubs' purchases of the brands of leading manufacturers dropped in 1993 after they were precluded from purchasing regular line toys from major manufacturers. ([ ]; CX-691 (Mattel); CX-1745-Z-15.) From FY 1993 to FY 1996, Costco's toy sales decreased by 1.6% whereas its overall sales increased by 19.5%; from Costco's FY 1991 to FY 1993 toy sales increased by 51% and Costco's sales of all products increased by 25%. (CX-1745-Z-9.) These decreases were caused at least in part by TRU's conduct and they had a negative impact on the ability of the clubs to become a competitive force in the retail distribution of toys.

386. After the clubs encountered difficulties obtaining regular in-line product from major toy manufacturers, they shifted their toy purchases to second or third-level toy manufacturers. (Hilson 20:4538/19-22; Halverson 3:434/7-23; Moen 5:893/17 - 5:894/8.)

387. These toys were generally not desirable for the clubs. (Sinegal 2:205/3-14; Hilson 20:4536/18 - 20:4537/3; Halverson 3:356/15 -357/2.) The major manufacturers did the bulk of promotion and the lesser known brands "didn't have [the] dollars to do this type of promotion." (Halverson 3:356/19-24.) If these second and third-tier manufacturers were as desirable to the clubs' customers as the brands of major toy makers, the clubs would have carried more of these lines in the first place. (Hilson 20:4537/21 - 4538/18.)

2. Retail price competition

a. TRU's prices to consumers

388. [ ] TRU was concerned about the clubs impairing its image for fair and low prices. (Weinberg 34:7697/4-11; 34:7699/7-12; [ ].)

389. The price differentials between toys sold by the clubs and TRU were illustrated by the competition shop reports prepared for TRU and toy manufacturers, which show the products and prices for toys available in TRU stores and warehouse clubs at particular times. (CX-46 through CX-64; CX-1545, CX-1550 through CX-1563.) These reports show warehouse clubs prices well below TRU. [ ] (CX-54-B).

390. When Costco enters a market, its presence pushes competitors' prices down. (Sinegal 2:200/7 - 201/9.) [ ] To keep its image for low prices from being eroded, in 1992 TRU lowered its prices to meet the clubs' prices on Mattel toys in local areas where the clubs competed (TRU reduced its price by 19% on 47,000 units of Mattel's Air Pro Hockey). (Weinberg 34:7696/13 - 7699/12, 7704/5 - 7705/3.)

391. In 1992, there were warehouse clubs within the areas of dominant influence of 486 out of 497 TRU stores -- that is, in the same local geographic areas reached by the newspapers in which TRU advertises. (CX-1823; Ingene 41:9050/2-21.) That same year, there were 238 TRU stores within five miles of a warehouse club; and 20% of TRU's stores were within one mile of a club. (CX-912; Ingene 41:9051/12 - 9052/11.) [ ]

392. I find that TRU would have lowered its prices had it not taken action to stifle the competitive threat posed by the clubs. If TRU, as the nation's largest toy retailer lowered its prices to meet the clubs competition, this would likely have driven prices down among all retailers. (Goddu 30:6616/19-23; Blaine 29:6372/12-20.) (Binney & Smith believed that the prices charged by the warehouse clubs would become the prevailing market price.)

b. The clubs' prices

393. By inducing the toy manufacturers to shift the clubs from regular line products to combination packs, TRU's conduct raised the clubs' retail prices. (CX-2; [ ] Hilson 20:4464/24 - 4465/20,4473/11 - 4475/13; Ingene 41:9083/1-19.) After the TRU policy the club packs sold by manufacturers to the clubs were designed to avoid price comparisons that would have been unfavorable for TRU.

394. Mattel's club policy required that the retail price of the combination packs sold in the clubs be higher than the retail price of any single component item in the package carried by TRU or other retailers. (CX-688; Okun *13:2809/11 - 2810/23*; Halverson 3:374/4-l8; Hilson 20:4473/11 - 4475/13.)

395. Hasbro's Playskool division designed its combination packs for the clubs to ensure that the retail price of the combination pack in the clubs would not be lower than the retail price of one of the regular-line items sold alone in other outlets. (Inano 16:3384/13 - 3385/5.) Hasbro told Hilson that it would not allow a combination pack to be put together for BJ's that would retail for less than one of the items elsewhere. (Hilson 20:4464/17 - 4466/6.)

396. Hilson testified that this raised the retail prices of the Hasbro products that BJ's could sell. (Hilson 20:4466/7-16.) BJ's placed an order for a combo pack made up of an inflatable toy with a pump, where the cost of the pack to BJ's would have permitted BJ's to sell the two items to consumers at a price less than the retail price for the inflatable toy alone (without the pump) in other retailers. A Hasbro vice-president later returned the purchase order papers to Hilson, saying that "a decision came down from above" at Hasbro not to sell the combo pack to the warehouse clubs. (Hilson 20:4466/7 - 4473/2; CX-1433.)

397. Consumers who only desired to purchase a promoted individual product would tend to purchase the product in regular toy channels because of the clubs higher price points for combination packs. (CX-688; Okun *13:2811/17-22.*) Consumers therefore paid more to get the individual toy they wanted -- [ ]

398. Costco charged higher prices for regular line products that were unavailable directly from the manufacturers because Costco had to purchase through distributors whose prices were higher than those charged by manufacturers and Costco passed on part of the added cost to its members. (Ojendyk 18:3999/8 - 18:4002/1; CX-1379; Sinegal 2:309/17 - 311/7.)

3. The warehouse clubs' price competition

399. TRU's marketing expert witness, Professor Buzzell, testified that even if TRU limited the availability of some toys to the clubs, the effect on toy prices would be trivial. (RX-894 at 32.)

400. Professor Buzzell relies on a list of 70-100 toys, which TRU deems to be price image ("PI") toys. (Goddu 30:6543/23 - 6544/1, 6551/19-22.) TRU prices these high profile toys at nationwide "sharp" prices. (Goddu 30:6544/18 - 6545/23, 6653/25-6554/11.)[ ]

401. Professor Buzzell fails to consider competition by warehouse clubs on toys outside this group of toys. Another 130 - 150 toys are deemed by TRU to be price sensitive ("PS") toys (Goddu 30:6551/23 - 6552/1), priced on competition in local markets. (Goddu 30:6554/12 - 6555/13.) TRU prices these "PS" toys at margins of 20%. (CX-l826.) TRU's margins are 30-35 % for toys ranked lower than the top 500 - 1000 toys. (Ingene 41:9078/20 - 9080/24.)

402. Most toys carried by the clubs rank lower than the top 500 - 1000 toys, and the difference between a club 10% margin and a TRU 30-35% margin is important to consumers. (CX-l827; Ingene 41:9080/2 - 9081/16.) "The real price impact and the real image impact comes not in the top 100 toys but outside of the top 100." (Ingene 41:9086/12 - 9087/3.)

403. The clubs wanted to expand their toy business. (CX-l664 (Costco); CX-373 (BJ's); Chase 8:1655/9 - 1656/3 (Price).) The expansion of the clubs' toy departments would have placed more downward price pressure on TRU.

404. [ ] However, his testimony is contradicted by evidence that TRU lowered its prices to respond to the clubs' prices.

405. Concerned about the clubs' low prices, and the effect on TRU's price image and profits, TRU took steps to prevent competition from the clubs. I conclude that the clubs' pressure on TRU to lower its prices would have caused TRU to lower its prices on toys beyond the top 100 - 250 toys.

406. TRU points to RX-430, a one page Costco document entitled "Items Price Costco Would Have Bought Individually But Did Not Want In Combination Packs." The document lists 13 items in fiscal years 1996 and 1995. TRU argues this shows the minor impact of its policy.

407. Little weight will be given to this ambiguous document. TRU did not clarify its meaning by questioning Costco witnesses at the hearing. (5:884/6-21.) [sic]

408. At Toy Fair 1997 there were 60 toys displayed that Costco wanted to purchase but the manufacturers would not sell to Costco. (Moen 4:638/5-649, 641/10 - 644/9.) There were more than 13 toys that Costco wanted in FY 1995 and 1996 that manufacturers refused to sell to Costco.

409. TRU argues that Sam's warehouse club is not affected by the TRU policy because Wal-Mart, its parent, prevents Sam's from carrying the same toys as Wal-Mart.(Reinebach 39:8724/17 - 8725/3.)

410. Christopher Jette, Sam's toy buyer from 1991 to 1995 (Jette 5:992/10- 993/3) testified that Wal-Mart had no policy against Sam's carrying the same toys as Wal-Mart, despite the industry rumor of such a policy. (Jette 5:1011/20 - 1012/1, 1012/21 - 1013/6.) Sam's has carried toys that were also carried at Wal-Mart. (Jette 5:1012/2-6.)

411. TRU policy did affect Sam's toy business. Sam's relied more heavily on combination packs than the other clubs (Jette 5:998/22 - 1001/12), but half of the toys carried by Sam's were regular line toy items, many "hotter sellers." (Jette 5:1001/13-25.)

412. [ ] Sam's placed orders for regular line toys from Hasbro's Playskool division in 1994, but Playskool would sell to Sam's only specially configured "value packs." (CX-462; CX-461.)

B. Market Power

413. [ ] Other TRU executives reported TRU's share at 22-25%. (CX-1052-E (June 1989); CX-1039-E (March 18, 1992); CX-1040-A (April 2, 1992).)

414. National statistics are poor indices of market structure in retail markets. [ ]

415. Local competition is recognized by Toys "R" Us. [ ]

416. [ ] [12]

417. TRU calculated its share among all toy retailers in newspaper areas of dominant influence ("ADI"). [ ]

418. TRU's own documents state that TRU is the dominant toy retailer. (CX-1040-A ("TRU is the dominant market share leader"); CX-1039-E; CX-1042; CX-1048-A; Goldstein 36:8249/16 - 8250/11.)

419. TRU studies show that toy retailing is growing increasingly concentrated, CX-1043-L-M:

> Other remaining retailers are the mass merchants such as Sears, Penneys and Wards and the catalogue showrooms. The mass merchants are losing share because they can't compete with the toy supermarkets on price and selection and can't compete with the disc on price. The catalogue stores are losing share because of their lack of selection. Other retailers include mom and pop toy stores, department stores, high priced toy shops like FAO Schwartz and convenience stores such as variety stores, drug stores and supermarkets. These retailers are losing share to the toy supermarkets and discounts because of price and to Kay-Bee because of convenience. So, just as there is consolidation in the toy industry with Hasbro, Mattel, Tyco gaining huge market shares, there is also consolidation in toy retailing

[12] RX-895 was developed specifically for this litigation.

with Toys R Us, Wal-Mart, Kmart and Kay-Bee gaining large market shares. I see this consolidation continuing with intensity in the 1990's.

420. On October 29, 1991, Mr. Goldstein, TRU's CEO, stated:

[W]e have seen the domination of category killers like Toys "R" Us, Home Depot, Circuit City, Staples and Office Club. So, what we have seen are new concepts, consolidation and huge, powerful retailers dominating the retail landscape. *** In my opinion, the companies such as Wal-Mart, Home Depot and Toys "R" Us that can continue to lower prices, gain market share and lower costs again will dominate retailing in this decade.*** Regarding category killers, consolidation is happening here also. Toys "R" Us is dominating the toy industry and is gaining market share.

(CX-l042-G-I (October 29, 1991); CX-235-A.)

421. TRU exerts its dominance as a buyer of toys. TRU also exercises market power as a seller of toys. TRU's power as a buyer and seller are related.

1. TRU's buyer power

422. TRU, the leading retailer of toys in the United States, has power as a purchaser of toys from manufacturers. (Scherer (*CX-1822*) ¶ 13; CX-1624-C (for 1986, largest drug chain had 3.8 % of U.S. drug industry's sales; the largest food store had 4% of food sales).)

423. Toy manufacturers would have difficulty finding alternative buyers to replace TRU. (Scherer (CX-l822) ¶16.)

424. TRU is the largest customer for the major traditional (non-video) toy manufacturers. (Okun (Mattel) l3:26-8/22-2609/1; Owen (Hasbro) 6:1102/13-17, 1159/1-2; CX-l272 (Tyco); DePersia (Little Tikes) *10:2256/8-10, 2257/15-16*; Cohen (Fisher-Price) 35:7926/18 - 7927/4.)

425. In 1994, TRU had 29% of the sales of the top ten traditional toy manufacturers. TRU purchased 28% of Mattel's toys, 28% of Hasbo's toys, 31% of Little Tikes' toys, and 48% of Tyco's toys. TRU has 35% of Fisher-Price's sales. (Cohen 35:7927/2-4.) TRU's average market share for four years from top ten firms is [ ] For the seven traditional manufacturers, the average share is [ ] These shares were growing, indicating that manufacturers were becoming more dependent on TRU. (Scherer (*CX-1822*) ¶13 & Exh. 1; Cohen (Fisher-Price) 35:7926/18 - 7927/4.)

426. [ ]

427. [ ]

428. Top manufacturers account for a low percentage of TRU's sales. [ ] This gives TRU leverage over the manufacturers.

429. Toy retailing is local (Scherer 23:5161/3-15), and because TRU has high local market shares in metropolitan areas, this adds to TRU's buyer power. To sell in many metropolitan areas, the manufacturer must have TRU distribution. (Shiffman 10:2249/12 - 2250/6, 2001/21 - 2002/1.)

430. TRU's buyer power is magnified when compared to other toy retailers. [ ] Kay-Bee sells discontinued and close-out merchandise. (Verrecchia 7:1549/18-20: CX-1036-C.)

431. TRU's main competitors (Wal-Mart, Kmart, and Target) carry less than a third of the toys carried by TRU; their floor space for toys is far less than TRU's. TRU's main competitors also carry a lower percentage of the manufacturers' lines after the Christmas season. (Goddu (CX-1658) at 356-57; Goldstein 36:8242/18 - 8249/5.)

432. [ ]

433. Manufacturers would have difficulty replacing sales if TRU did not purchase an item. (Okun *13:2813/22 - 2814/1*; Owen 6:1151/3-10; Verrecchia 7:1412/19-22.) As Amerman of Mattel testified, "Toys "R" Us is 30% of our business, so that is a very big number to put to other accounts that are already committed to what they feel is correct and would be unwilling to take more." (Amerman 17:3617/23 - 3618/16.)

434. A new toy can cost $12 million in television and tooling costs (sunk costs). (Verrecchia 7:1409/14 - 1410/2.)

435. TRU's support is essential in the sale of a new promoted toy because its size and geographic coverage generate the sales necessary to support an effective advertising campaign. (Fuentevilla 18:3886/12-15, 3888/9-22; Owen 6:1154/20 - 1155/2; CX-773 -F-G; Shiffman 10:2001/21 - 2002/1, 2002/20-23, 2249/12 - 2250/6.)

436. Manufacturers depend on TRU for promotion. Other national chains do not advertise toys year-round or to the extent that TRU does. (Goldstein 36:8244/21 - 8245/13.)

437. TRU's refusal to purchase a new toy could cause serious financial harm to manufacturers. In 1994 a small video game company put itself up for sale after TRU dropped its line. (CX-773-G.) Major manufacturers took seriously TRU's statements that it would not carry the same toys that the manufacturers sold to the clubs. (Fuentevilla 18:3892/17-20, 3893/17-20; Amerman 17:3656/19-25; Verrecchia 7:1486/14 - 1487/12.)

438. Mattel and Hasbro need TRU's purchases, the "critical mass" is essential for continued production. If TRU did not purchase older, basic toys, manufacturers could not profitably make them. Since initial promotion and tooling cost have already been amortized, these toys profit the manufacturers. (Amerman 17:3622/18 - 3624/24, Inano 16:3378/11-23; Owen 6:1151/11 - 1152/12.)

439. TRU used this power to enforce its club policy. In 1993, Just Toys asked BJ's to test a new item (a stretchable plastic figure) in two of its stores in the New York area. After TRU saw the product in BJ's stores, it returned all of its inventory of the product to Just Toys. Without the support from TRU, Just Toys could not promote the toy and did not go forward with the item. (Hilson 20:4501/12 - 4503/3.)

440. When considering whether to reduce the number of SKUs it carries, [ ] (CX-1013-Z-1.)

441. Hasbro officials were concerned that if they alienated TRU by selling first-year, TV-promoted products to clubs, TRU could retaliate by reducing purchases of their basic toys on which they depend. (Inano 16:3378/11-23.)

442. Manufacturers fear TRU retaliation by not including their products in TRU's catalogues and flyers or not giving them endcaps or desirable shelf space. (Owen 6:1109/1-14.)

443. Amerman of Mattel worried about increasing toy retail concentration. Mattel's top five customers doubled their share of Mattel's sales between 1985 and 1990 to half of Mattel's sales. (CX-1699.) On December 13, 1990, Amerman wrote "The constriction in the number of traditional retail outlets that carry toys is going to become a bigger and bigger problem as time passes." (CX-523.) By 1994, Mattel's top five customers accounted for 72% of Mattel's sales. (CX-1669.) Mattel's CEO wanted to increase sales to clubs to reduce dependence on TRU. (Okun *13:2631*; CX-523.)

444. [ ]

445. A Tiger Electronics vice president of sales wrote: "I am very worried about our future business as a whole for the following reasons: ***(2) TRU dictating to Tiger and becoming even a bigger percentage of our business...." (CX-813; Shiffman 10:2003/13-16, 2029/13-21.)

446. [ ] and Video Tech ("VTech") wanted to reduce dependence on TRU. ([ ]; CX-1301 (Video Tech).)

447. The manufacturers also depend on TRU for international sales. Half of Mattel's and Hasbro's sales are now outside the United States. TRU is the largest worldwide retailer of toys. [ ] (Scherer (*CX-1822*) at ¶16; Goldstein IH (*CX-1659*) at 179; Staley IH (*CX-1729*) at 56; CX-773-A-O; CX-235-C-D.)

448. [ ]

449. [ ] In addition, the monopsony regression could not determine whether TRU exercised its buyer power by extracting agreements from the manufacturers to restrict sales to the clubs. (Carlton 32:7036/25 - 7038/9.) Finally, Professor Carlton disregarded the manufacturer testimony as to their dependence on TRU. (Carlton 32:7059/19 - 7061/20.)

450. TRU pressured Playskool in 1992 and this pressure limited Hasbro's flexibility in the marketplace. (Owen 6:1145/17-20, 1146/5-14, 1148/12.) Playskool would have sold more and different products to the clubs were it not for the TRU pressure. (Owen 6:1147/8-11.) Limits on dealing with the clubs were in Hasbro's best business interest. (Owen 6:1146/24 - 1147/7.)

451. Mattel's CEO testified that TRU's club policy caused Mattel to "lose flexibility to enhance shareholder value and do things that were in the economic best interests of Mattel." (Amerman 17:3658/10 - 3659/4.)

452. TRU recognized that manufacturer profitability depended on TRU: "The key to increased profitability in the 90's will be doing more business with Toys R Us since most of the expansion in the toy industry, at retail, will be taking place in Toys R Us stores in the U.S. and throughout the world." (CX- 1650-E.)

453. Manufacturers were faced with TRU not carrying its toys, giving them inferior shelf space, or not buying nonpromoted toys. (Scherer 23:5172/24 - 5173/9, 5177/22 -5179/2.) Because of TRU's dominant position, I find that the threat faced by the manufacturers to be credible. (Scherer 22:5022/15-25.)

454. TRU has substantial buyer power or leverage and the ability to cause severe economic harm to its suppliers.

2. TRU's power at retail

455. [ ]

456. It is unnecessary for TRU to have the power to raise prices in order for its conduct to result in anticompetitive effects. (Carlton 32:7034/15 - 7035/25; Dennis W. Carlton and Alan S. Frankel, *The Antitrust Economics of Credit Card Networks*, 63 Antitrust L.J. 643, 654 (1995); Dennis W. Carlton and Alan S. Frankel, *The Antitrust Economics of Credit Cord Networks: Reply to Evans and Schmalesee Comment*, 63 Antitrust L.J. 903, 904-05 (1995).)

457. Thus, even where a firm does not have the power to raise prices, the prevention of entry by a new, low cost efficient competitor can cause consumer harm. The question is whether TRU has the ability to prevent entry that could result in lower prices. (Carlton 32:7034/9-14; Scherer 22:5024/1-14.)

458. Even if market power as a seller were necessary, TRU has such power. (Scherer (CX-1822) ¶ 28, 22:5025/16-20.)

459. A key in determining whether TRU has the power to raise price is whether TRU's prices vary according to the degree of competition it faces. TRU concedes that its prices are highest where it has the least competition. (Goddu 31:6951/19-22, Dep. (*CX-1651*) at 174.)

460. [ ]

461. Professor Carlton's reliance on industry concentration data at the national level is misplaced. [ ]

462. [ ]

463. [ ]

464. TRU argues that entry into toy retailing is easy. [ ] This evidence shows, however, that it is difficult to enter as a significant competitor on a

national basis. [ ] Business documents from the manufacturers and TRU describe a consolidated industry. (CX-1043-K-M; CX-1031.) In a 1995 speech, the CEO of TRU explained the difficulties of succeeding in the toy business (CX-1031-C):

> [T]o be successful in the toy business, because of the extreme seasonality, you need unique expertise in systems, logistics, warehousing, buying, human resources that takes a long time to develop and if rushed leads to disaster as we have seen in the U.S. as evidenced by Child World and Lionel which at one time did over $1BB combined and both went bankrupt and have been liquidated and Toy City in Canada, formerly part of the #1 toy retailer in Canada, and which is now out of business.

465. I find that TRU has market power. TRU has raised barriers to entry into toy retailing by the warehouse clubs. (Scherer 22:4974/4-23.)

DEFENSES

A. Economic Defenses

466. TRU argues that its conduct was justified as an effort to protect against free-riding. Free-riding does not justify TRU's conduct in this matter. (Scherer 3:5068/1 - 5070/11.)

467. [ ] (Scherer (*CX-1822*) ¶ 57 (citing Griliches, "The Search for R&D Spillovers," 94 Scandinavian J. Econ. 29-47 (1992 Supp.).) Without them, economic progress would grind to a halt. Paul M. Romer, "Endogenous Technological Change," 98 J. Pol. Econ. no.2, part 2, p. S89.

468. [ ]

469. TRU may provide spillover benefits for third parties, but it also takes advantage of uncompensated spillover benefits that are provided by others in the economy. TRU locates near shopping centers so as to benefit from the traffic without having to pay the higher shopping center rents. (Scherer 23:5073/9 - 5074/17.)

1. Advertising

470. TRU argues that the clubs free-ride on its advertising. In the toy industry, the manufacturer is primarily responsible for generating the demand for toys through television advertising. (Spencer 9:1866/7-10; Amerman 17:3738/8-17; Weinberg IH (*CX-1662*) at 48/21-25.) Consumer demand is driven primarily by the manufacturer's advertising efforts, not TRU's. (CX-773-J; CX-1053.)

471. TRU advertises price of toys for sale in TRU stores. (Spencer 9:1866/23-25.) The TRU's price image toys, with the lowest margins, are selected by manufacturer promotion, not TRU promotion. (Goddu 30:6594/6 - 6596/2.)

472. TRU receives compensation from the manufacturer for advertising. [ ]

473. [ ]

474. [ ] TRU's senior vice-president of advertising felt that TRU received more in advertising allowances than it spent on advertising. (Spencer 9:1867/7-14.)

475. Toy manufacturers spend 8% of their total sales dollars on advertising. (CX-1624-Z-11.) This 8% for all manufacturers understates the spending for manufacturers who advertise their products, since it includes manufacturers who do not engage in any advertising. Hasbro's advertising expenditures are much higher, some divisions with advertising expenditures of 19.3% of total sales. (CX-88.)

476. [ ]

477. Professor Scherer corrected errors in the Carlton regression and concluded [ ] (Scherer (*CX-1831*) ¶ 6-8.)

478. [ ]

479. Professor Scherer reasonably relied on testimony from deposition testimony from buyers. (Scherer (*CX-1831*) ¶ 8.) [ ]

480. Demand for toys is mostly created by manufacturer advertising, not advertising by TRU. TRU benefits from its own advertising and promotional efforts. TRU is compensated for promotional expenses that benefit the manufacturer. There is no evidence connecting the clubs to any free-riding on TRU advertising. There is no evidence that TRU advertising generates sales at warehouse club stores.

2. In-store promotion

481. TRU is like a warehouse selling toys. Like Wal-Mart, Kmart, and the clubs, TRU does not provide service in demonstrations or informed sales personnel. TRU stores are like the chain discounters and clubs in lack of personal service. [ ]

482. TRU's Goldstein acknowledged that TRU provides "limited service" today, and even less in 1992. (Goldstein 36:8242/18--8243/1.)

483. TRU's low service is [ ] In a New York Times article ("Lost in Toyland," March 31, 1996, at 3, 12) (CX-807), TRU's service was described as follows:

> "I don't know a single retailer about which I hear as many complaints as TRU," said Barry Bryant, an analyst at Rodman & Renshaw and the father of a 3-year old son. "You never know where anything is, and there is no one to help. . . . All of these things combine to create a uniquely unpleasant shopping experience for the parent."
>
> The supermarket style of selling playthings has always been the TRU trademark. Shoppers squeeze through charmless, colorless aisles, and pick through rows of [toys] displayed often without care or accessibility.

Merchandise is often piled so high it is impossible to reach. . . . And if a sales clerk can be unearthed, chances are his or her job is to stock, not to serve. . . . By offering a giant selection with very low prices and plenty of inventory, TRU has been able to get away with this no-frills, service short shopping experience.

484. [ ]

485. Because TRU sells products that require little service, TRU competes on price, as well as selection. (CX-1052.)

3. Showroom

486. TRU argues that its around-the-year stocking policy helps manufacturers identify items that are selling well, facilitating production planning, and that the warehouse clubs free-ride by observing what toys TRU is buying, thereby identifying the "hot items" (Scherer (*CX-1822*) ¶ 63.)

487. The warehouse clubs attend toy fairs, decide what will sell, and order merchandise near the same time as the rest of the trade. The clubs place most of their orders in the springtime (March and April) when it is still uncertain which toys would be the "hot" toys for the upcoming Christmas season. (Hilson 20:4424/10-4426/16; Moen 4:611/2 - 613/14; Halverson 3:349/7-11; Jette 5:1006/12-1007/4; CX-113; CX-748-A-B; CX-816; CX-930; CX-1265-D; CX-1385; CX-1387-A-B; CX-1664; *Okun 13:2809/3-10*, 14:2939/8-12.)

488. The clubs selecting toys to purchase cannot consider other retailers' sales or advertising of products because their purchasing decisions are made early in the season before the toys are for sale in other retailers; with older toys, sales history from prior years is not reliable because what sells from one year to the next can be totally different. The clubs rely on their own perception of the toy, and on the manufacturers' promotional plans: television advertising was key in creating demand. However, there is no way to know in advance whether a toy will sell well. (Halverson 3:351/1-2, 3:352/20 - 353/12; Hilson *20:4581/4 - 4582/10, 20:4582/14-21, 20:4585/21 - 4586/23*.)

489. TRU is compensated in part for the risks it takes stocking new items by manufacturers' discounts for those that turn out to be "duds." (Scherer (CX-1822) at ¶ 63c.) TRU is compensated by the manufacturers with extended "dating" terms that allow it to delay payment until December for merchandise it received earlier in the year. (Spencer 9:1873/19-21, 1874/22-25.)

490. TRU is not a toy showroom upon which the clubs can free-ride. TRU is not a showroom such as high ticket automobile or furniture show rooms; TRU is more like a supermarket. (CX-1034-B, D; CX-1051-C; CX-1031-C.)

4. Year-round full line.

491. TRU benefits from its full-year, full-line coverage. Taking product early, TRU reduces the risk of being out-of-stock when a product becomes hot and in short supply. [ ] (CX-1586-B; CX-1597-A; CX-1044.)

492. By buying early and monitoring sales TRU has an advantage over other retailers in identifying what products will be "hot." (Lazarus 24:5351/18 - 5352/16, Lazarus Dep. (CX-1654) at 55-56; Verrecchia 7:1457/18-1458/3.)

493. TRU buys and takes delivery of merchandise early in the year to get the merchandise onto its shelves at the time that the consumers want the merchandise. (Scherer 22:4906/2-7.) [ ]

494. For the toys that make TRU a "full-line" toy supermarket -- the non-promoted toys. [ ] (Scherer (*CX-1822*) ¶18; Butler 25:5569/7-14.)

495. The toy industry is seasonal. Manufacturers traditionally ship, and retailers sell, most toys during the fourth quarter. [ ]

496. That the clubs sell a high percentage of toys in the fourth quarter is of little importance. (*RX-621* at 28 (Table 7) (62-64% for clubs; 56-57% for TRU); CX-723-C.)

497. Prior to 1996, TRU carried between 15,000 and 18,000 SKUs. TRU reduced the number of SKUs by one third, to around 10,000 to 11,000 SKUs. (Goddu Dep. (*CX-1651*) at 218/3 - 222/5; Goddu 30:6576/1-4; 6578/6-13; Goldstein 36:8265/12 - 8266/9; CX-994.)

498. Fewer SKUs carried by TRU is not related to free riding nor does it imply a reduction in output. (Scherer 23:5063/1-12.) [ ]

5. Compensation

499. Dating terms enable TRU to carry a full line of toys for most of the year. (CX-1012; CX-1611.)

500. TRU convinced the manufacturers to produce toys for delivery earlier in the year in return for TRU paying later. (Lazarus 24:5353; 5362 - 5363.)

501. [ ]

502. [ ]

503. Manufacturers also give TRU warehouse, early buy, early ship discounts or other allowances to compensate TRU for purchasing product early. (CX-1730.) When a manufacturer wants TRU to take more product earlier than planned, TRU charges the manufacturer an additional warehousing fee. (Spencer 9:1876/15-21; CX-1730; CX-548.)

504. [ ]

505. A Mattel briefing paper preparing for a meeting with TRU stated that the extended dating and other allowances compensate TRU for taking product early (CX-686-B):

- In some respects, you are our warehouse, but be aware that we pay you for the privilege through:
  - A dating program that pays a great amount.
  - Policy allowances.
- You might not want to hear it, but it's the truth.... You are our most expensive customer.
- Other accounts accept significant quantities early and are paid less benefits, less discounts, and with no extended dating.

506. [ ]

507. [ ]

508. [ ]

509. If a toy continues not to sell manufacturers provide additional allowances to TRU. [ ]

510. [ ]

511. TRU's standard contract contains a "Most Favored Nation Clause" whereby if a TRU competitor receives a lower price after TRU purchases the product during the same calendar year, TRU gets the benefit of the lower price. (CX-l030-F.)

512. [ ]

513. [ ] If TRU advertises the product and it does not sell as expected, TRU charges the manufacturer. (Spencer 1874/2 - 1875/10.)

514. TRU is the most expensive customer for Mattel and Hasbro. (CX-686-B; CX-7-A.) [ ]

515. [ ]

516. [ ]

517. TRU is or can be compensated for costs and risks it assumes by ordering a broader product line earlier in the year. TRU gains price concessions from manufacturers through direct wholesale price reductions, or better dating terms. TRU is compensated for carrying toys not carried by the clubs.

6. Benefits to TRU

518. TRU receives other benefits for taking in product early. TRU takes in product early as a trade-off for hot product later in the year. (Lazarus 24:5364.)

519. TRU receives a disproportionate share of hot products. [ ]

7. "Hot" Toys

520. TRU places most of its orders for the Christmas season in the spring, and receives some product early in the year, and some as the year progresses. TRU, like all retailers of toys, adjusts its order as the year progresses, increasing orders for toys that are selling well, and decreasing or canceling orders for toys that are not. The clubs place their orders soon

after TRU places its orders. At the time that the clubs place their orders, neither the clubs nor the manufacturers know which toys will become hot.

8. "Free-Ride"

521. TRU accounted for 48% of the toy industry's retail advertising support from January through May of 1994, while Wal-Mart accounted for 2%. [ ]

522. [ ] I find no significant difference between Wal-Mart and the clubs in terms of advertising.

523. The chain discounters have done little warehousing. They operate on a just-in-time system, like the clubs. (Okun 13:2815 - 2817/12.)

524. TRU provides a greater level of services for manufacturers than any other of the national chains, including Wal-Mart, Target and Kmart, by taking product earlier, carrying a fuller line, carrying less-popular or non-promoted toys, advertising year-round, test-marketing products, avoiding knock-off products, and promoting manufacturer brands. (Goldstein 36:8252/18 - 8259/5.)

525. If free-riding were the true rationale, one would expect to see similar restrictions on the clubs in other countries. However, no such restrictions exist in Canada. From 1990 to the present, Costco Canada has purchased regular line toys from Mattel, Hasbro, Lego, Irwin Toys (both a manufacturer and distributor, 5:942/11-12), V-Tech, Tyco, Today's Kids, Little Tikes, Binney & Smith and Playmates. (Nickel 5:922/9-16.) The Canadian arms of Mattel, Hasbro, Binney & Smith, Lego, Video Tech, Tyco and Playmates all marketed and sold independently of their parent companies. (Nickel 5:922/25 - 924/2, 967/21 - 969/24, 972/21 -975/25, 977/7-14.)

526. TRU may have less market power in Canada than in the United States. (CX-1648-T, V (Zeller's in Canada is "about as tough a competitor in the toy business as we have in the world").) The absence of restraints in Canada supports the view that the restraints are market power driven rather than efficiency driven.

9. Overall costs and benefits

527. TRU's economic expert, Professor Carlton, did not attempt to quantify whether TRU was adequately compensated for its "showroom" functions. (Carlton 32:7021/15 - 7022/11.)

528. TRU's Thomas Reinebach created a chart for purposes of this litigation that shows his estimates of the net costs to TRU of providing services to manufacturers. I find his calculations fail to substantiate the existence of any significant free-rider problem.

529. Mr. Reinebach calculated [ ] This includes actual costs for advertising and markdowns, derived from TRU business documents, as

well as estimates for the costs [ ] Mr. Reinebach testified that the manufacturers provide allowances to TRU related to these services. [ ] Reinebach 40:8881/3-12.)

530. [ ] This equals about 1.6% of TRU's 1995 sales revenues. (Reinebach 8881/23 - 8882/9.) [ ]

531. [ ]

532. TRU also benefits from taking product early. Mr. Reinebach did not account for such benefits.

533. I find that whatever free-rider issues may exist are insubstantial, and outweighed by the competitive harm caused by the TRU campaign against the warehouse clubs.

B. Other Defenses

534. The respondent alleges that prior to the Commission's vote to issue the complaint in this case an unidentified Commission employee provided non-public information to the Wall Street Journal; that this leak of information influenced the vote of the Commission to issue the complaint; that the leak was a federal crime; and that the complaint should be dismissed because it was issued as a result of criminal conduct by Commission employees.

535. The evidence introduced by the respondent was a copy of a Wall Street Journal article dated May 21, 1996, concerning the investigation in this case (RX-776) and a copy of a June 4, 1996, letter from the Director of the Commission's Bureau of Competition to counsel for the respondent indicating that the respondent's allegations were being brought to the attention of the Commission's Inspector General. (RX-915.)

536. The Wall Street Journal article does not indicate that anyone at the Commission was the source of information for the story; it describes its sources as "people familiar with the situation" and specifically states that "an FTC spokeswoman declined to comment." (RX-776.) The Bureau Director's letter notes that the news article "does not demonstrate that the source or sources [for the article] included any Commission employees" and notes that the existence of the investigation had earlier been reported in the press based on information attributed to "industry executives." (RX-915 at 2.) During the course of the trial the respondent stipulated that "virtually everybody in the industry" was aware of the FTC's investigation as of February 1994. (33:7469/17-24.)

537. I find that the record evidence does not show that any Commission employee provided any person with any non-public information concerning the Commission's investigation in this case. The respondent has failed to substantiate the factual allegations in its affirmative defense.

REMEDY

538. There is no evidence that the respondent TRU has discontinued its warehouse clubs policy. The respondent asserts that its warehouse club policy is legal and justified by the needs of its business. (43:9390/2-15.)

539. Some toy manufacturers who joined in the TRU campaign against the warehouse clubs have recently relaxed their earlier restrictions on sales of products to the clubs; other toy manufacturers continue to apply the restrictive sales practices that they adopted pursuant to their concert of action with TRU. These include both Mattel and Hasbro, the two largest toy manufacturers.

540. The relief contained in the order is reasonably necessary to remedy the effects of the respondent's conduct. Each of the provisions addresses conduct that might be used by the respondent to perpetuate the restraint.

541. Among the remedial provisions is one which, for five years, would prohibit the respondent from communicating to any supplier that it may discontinue purchasing toys because the supplier sells to toy discounters. (III.E.) This provision is reasonable to "fence in" a respondent that has orchestrated an extensive concert of action with toy manufacturers to restrict toys to a competing channel of trade.

542. Executives of toy manufacturers that participated in the TRU campaign commented negatively on the foregoing provisions of the order. (Owen 6:1166/4 - 1170/6; Verrecchia 7:1446/12 - 1447/21; Wilson 26:5705 -5707/16; Barad 35:7870/12 - 7871/13.) I find that this testimony should be given little weight. The premise of the respondent's questions to these witnesses presumed that during the 5-year "fencing in" period the respondent would be permitted to continue to refuse to deal with suppliers who sold to the clubs, but could not inform the suppliers of the reason for such a decision. (6:1166/25 - 1167/12.) The order prohibits respondent from making a purchase decision. The order does not prohibit the respondent from communicating with suppliers about issues other than the matter of the suppliers' sales to toy discounters like the clubs.

543. I find that entry of the order is necessary to cause the respondent to discontinue the challenged conduct and to dissipate the anticompetitive effects of the existing restraint. Entry of the order is in the public interest.

LEGAL ANALYSIS

In the early 1990's, TRU was the largest toy retailer in the United States. Toy manufacturers depended on TRU with its 20% of national retail toy sales. TRU's principal competition came from chain discounters Wal-Mart, Kmart and Target. An aggressive, low-margin retailer, Wal-Mart, forced lower retail toy prices.

Another new factor stirred price competition in the retail sale of toys. The warehouse clubs ("clubs"), operating at lower margins than the chain discounters, were expanding their toy operations. TRU acted to meet this competition. TRU announced to toy manufacturers that it would refuse to carry toys that the clubs carried. The question is whether TRU agreed with the manufacturers, and orchestrated agreement among them, to limit their sales of toys to the clubs.

During the late 1980's and early 1990's, toy manufacturers were losing retail outlets at the same time that the clubs were expanding their toy departments. In 1990, Mattel's chief executive officer, John Amerman, instructed his staff to be aggressive in new channels of distribution, especially the clubs. In a September 1991 Mattel document, Fred Okun, Mattel's senior vice president, wrote, "This is one of the fastest growing channels of distribution in the country. As a public company we owe it to our shareholders to maintain our business by selling this class of trade." Other major toy manufacturers felt the same.[13]

Toy retailer concentration increased.[14] The other national chain toy stores, Lionel Leisure and Child World, were in financial distress, leaving TRU difficult to replace.[15] TRU accounted for 30% of the sales of major manufacturers including Mattel, Hasbro, Tyco, Little Tikes, and Fisher-Price.[16]

TRU viewed the clubs as a competitive threat. TRU feared that the clubs' prices could hurt the TRU price image.[17] The clubs' mark-up was only 10% -- which is lower than the Wal-Mart mark-up and lower than the TRU mark-up of 30%. The difference between club prices and TRU prices was "embarrassing."[18] An internal TRU analysis projected that by 1997, the warehouse clubs would have between 6 - 8 % of the U.S. Toy market.[19]

In 1990, TRU threatened to stop buying from Mattel if Mattel supported the clubs.[20] At Toy Fair 1990, Mattel gave TRU its commitment to move the clubs away from regular line product.[21] This first agreement is a vertical agreement between TRU, the largest toy retailer, and Mattel, the largest toy manufacturer. The clubs had been buying regular line product

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13 CX-78 (Hasbro); CX-1670 (Fisher-Price); CX-483 (Little Tikes).

14 CX-136-G; CX-523.

15 Verrecchia 7:1549/13 - 1550/1; Okun 13:2664-65; Owen 6:1159/1-2.

16 Scherer (CX-1822) at ¶ 13. Exh. 1.

17 CX-1576-B.

18 Weinberg IH (*CX-1662*) at *206/10-19*.

19 CX-1070-C.

20 CX-529; F. 120.

21 CX-530; F. 119.

from Mattel. After Mattel agreed to move the clubs away from regular line product, only half of Mattel's club sales were from the regular line. However, this reduction was not sufficient for TRU.

In late 1991 and early 1992, TRU told its main suppliers it did not want them to sell products to the clubs, and that it would not purchase products sold to the clubs. In response, Mattel and Hasbro both agreed not to sell hot toys to the clubs after being assured by TRU that their prime competitors would not do so.[22] TRU conveyed to each major manufacturer the *quid pro quo* (this for that) offered by that manufacturer's competitors, and vice versa. Each would stop selling to the clubs if its competitors would.

After Mattel stated that it would go along based on competition doing the same, TRU approached Hasbro. In late 1991, TRU told Hasbro that TRU would not carry products Hasbro sold to the clubs.[23] Hasbro, like Mattel, worried about being at a competitive dis-advantage. Hasbro indicated that it wanted a level playing field if it were to restrict its sales to the clubs. At a conference between Hasbro and TRU, a meeting of the minds was reached. Hasbro agreed not to sell promoted products to the clubs after it learned from TRU that Hasbro's competitors, including Fisher-Price and Mattel, had agreed not to sell.[24]

TRU assured Hasbro that there would be a level playing field, and that Hasbro's competitors were going along.[25] Hasbro's CEO Alfred Verrecchia said in substance that because Hasbro's competitors had agreed not to sell promoted product, Hasbro therefore agreed to a similar restraint.[26]

TRU found that the clubs were still carrying competing toys, and that these toys were lower priced. TRU established a more restrictive policy. TRU gained agreements from the manufacturers to sell no regular product at all to the clubs, regardless of whether it was hot. At Toy Fair in 1992, companies communicated their commitments to restrict the clubs, and TRU monitored compliance.[27] Manufacturers also monitored compliance.

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22 CX-532-A; Goddu IH (*CX-1658*) at *276/1 - 277/11; 278/22-24*; F. 125.

23 Owen 6:1107/14-16, 1108/1-5.

24 Inano 16:3334/21 - 3335/5, 3343/17-22. Other Hasbro officials confirmed that TRU's Goddu told them that Fisher-Price and other manufacturers would not be selling in-line promoted products to the clubs. Owen 6:1132/6 - 1134/17; Verrecchia 7:1393/5-13, 23-25, 8:1394/1-4; F. 177.

25 Verrecchia 7:1393/5-14, 1393/23-25, 1394/1-4; Owen 6:1132/6 - 1134/17; F. 179.

26 Inano 16:3335/15-20; F. 177.

27 TRU shopped the clubs. Just after Toy Fair 1992, TRU contacted manufacturers whose products were found in the clubs. (CX-913). The TRU shopping report shows agreements between TRU and manufacturers. The document shows how TRU went far beyond Colgate, F. 101, CX-913-B, the third party entry down, refers to Hasbro's Puppy Surprise: "Shipped early. No more will be shipped to warehouses." Further down Mattel's Barbie Dream House: "Will not sell again." Under that there is an assurance from Mattel with respect to Totally Hair Ken that Mattel did not sell it to the clubs. A reference to Birney & Smith notes: "Per Brent Blaine, understood our concern. Going forward they will offer special packs only for '93." At the bottom of (CX-913-C) is a Playskool reference: "They were

Thus, the record shows that after Toy Fair conversations in February 1992, TRU contacted manufacturers to discuss the status of the agreements. These conversations show that TRU sought and received commitments. TRU sought assurances from Tyco and Fisher-Price that they would not sell to the clubs. Both Tyco and Fisher-Price worried about competitors. Both companies agreed with TRU that the clubs would be restricted.

Other manufacturers also joined. TRU agreed with Little Tikes, Tiger, Sega, Video Tech, and Today's Kids in 1993 and 1994. These agreements prevented competition between TRU and the clubs over toys that are the "lifeblood" of the industry.[28] The agreements involved much of the toy industry. Mattel and Hasbro accounted for 35% of national toy sales in 1994.[29]

AGREEMENTS

A. Vertical Agreement

To meet the competition of the clubs, TRU could have announced a unilateral policy by TRU and a refusal to deal with suppliers that did not comply.[30] The issue is whether TRU went further, entering agreements with each manufacturer.[31]

To rely on the Colgate doctrine,[32] a firm must "content itself with announcing its policy ... and [follow] this with a simple refusal to have business relations with any [persons] who disregarded that policy."[33] Having announced its policy, the firm must "rely on individual self-interest to bring about general voluntary acquiescence" with its policy.[34] It can not go beyond that and take the affirmative action of asking for or inducing acquiescence to its policy.

TRU first communicated to its suppliers that it would not purchase hot product carried by the clubs, and then that it would not purchase any products carried by the clubs. TRU and the manufacturers reached an

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under the impression that less important items could be sold to clubs. We informed them if so, perhaps at the expense of selling us these goods."

28 Goddu 23:6572/9-20.

29 CX-1669-C.

30 *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *FTC v. Raymond Bros. - Clark Co.*, 263 U.S. 565 (1924).

31 That the distribution policy was on advice of counsel is not relevant. *United States v. Champion Int'l Corp.*, 1979-2 Trade Cas. (CCH) ¶ ¶ 62,862, 78,989-991 (D. Or. 1979) ("Before their convictions under the Sherman Act, none of the defendants even knew their actions were unlawful .... Even their lawyers, all honorable and ethical people, believed defendants' bidding practices were lawful.")

32 *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

33 *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960).

34 *Id.*, at 46-47.

agreement when TRU sought acquiescence from the manufacturers. *Monsanto*, 465 U.S. 752, 766 n.9 (1983). TRU asked the manufacturers how they planned to respond, and the manufacturers gave their acquiescence.

1. Manufacturers' acquiescence

TRU monitored and communicated with its suppliers regarding compliance. TRU's Roger Goddu, the executive vice president who was responsible for TRU's club policy, informed toy manufacturers "that we had no intention of buying product that was carried by the clubs." Goddu testified that he would then ask the manufacturers what their intentions were with respect to selling to the clubs.[35] To avoid future meetings, TRU sought immediate commitments.[36] TRU contacted manufacturers whose product appeared in TRU shops of the clubs.[37] The pressure from TRU to gain agreements continued through 1992 and 1993.[38]

TRU policed its program by "shopping" the clubs or by learning from manufacturers what their competitions were selling in the clubs.[39] When TRU learned that Mattel, Hasbro or any other manufacturer was selling new or promoted individual toys to the clubs, TRU officials would call the offending company to complain and would threaten to stop buying those products.[40] TRU's threats resulted in manufacturers agreeing not to sell certain toys to the clubs. The conversations were described in a memo prepared by Roger Goddu,[41] summarizing contacts made by Goddu and his four divisional vice presidents, and sent to TRU's then CEO, Charles Lazarus. Excerpts from this memo use the language of vertical agreement. This document, and the Goddu testimony, show that TRU asked for and received acquiescence from its suppliers regarding restrictions on sales to the warehouse clubs. TRU describes how Hasbro, Mattel, Today's Kids, Huffy, Tyco and others communicated acquiescence to TRU. TRU reached vertical agreements with its suppliers.

Mattel -- Mattel "committed to Toys "R" Us that we would do our best not to sell [clubs] regular line merchandise."[42] This agreement was reaffirmed in an October 1991 meeting in which Michael Goldstein, chief operating officer of TRU, stated that TRU was "going to allocate open-to-

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35 Goddu IH *(CX-1657)* at 130/20-25; Goddu IH *(CX-1657)* at *125/19-21.*

36 Goddu IH *(CX-1657)* at *209/21-23*; F. 63.

37 Lazarus IH *(CX-1660)* at *55/12-21.*

38 Owen 6: 1148/6-16.

39 Goddu IH *(CX-1657)* at *128/11 - 129/5.*

40 Goddu IH *(CX-1657)* at 124/12 - 125/21.

41 Goddu 30:6572/20 - 6574/13; CX-913-A-F; F. 101.

42 CX-530-B.

buy based on who agreed not to support the clubs."[43] John Amerman, the CEO of Mattel said that Mattel "would not sell the clubs the same items we were selling to them," and that "this was based on the fact that competition would do the same."[44] Mattel executives later informed TRU that Mattel could not completely stop selling to the clubs, but in January 1992, a Mattel memo noted that "We've been able to negotiate to do exclusive items only [customized product for the clubs] so that there would be no direct competitive threat to TRU."[45]

At a February 27, 1992 meeting with TRU, Mattel agreed not to sell the clubs "hot" product, not to ship to clubs items that Mattel could not supply to TRU,[46] and to give TRU a right of first refusal on special club packs.[47] These were the points on which TRU sought acquiescence.[48]

At Toy Fair 1992 Mattel "showed [TRU's] Van [Butler] and Peter [Spencer] all of our club specials.... We offered each and every one to TRU on a 'right of first refusal' basis."[49] After Toy Fair 1992, Mattel representatives met with Roger Goddu who was "adamant that Mattel should not offer first year promoted stand alone items to the clubs. He was also comfortable with combinations of product that we were going to offer."[50] A Mattel memo dated July 1992 states that if Mattel shipped a particular product to the clubs, "arguably we are violating the spirit of our agreement."[51] Mattel's sales of open stock toys to the clubs dropped from over $10 million in 1991 to zero in 1993.[52]

Little Tikes -- During the early 1990's, under the influence of its parent corporation Rubbermaid, Inc., Little Tikes modified its earlier strategy that had limited distribution of its large molded plastic toy products. By early 1993, Little Tikes had begun to sell its open stock products to warehouse clubs.[53]

At a meeting with Little Tikes executives at the 1993 Toy Fair, TRU's Goddu said that if Little Tikes was going to start selling products to the

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43 CX-532-A; F. 124.

44 CX-532; F. 125; F. 126.

45 CX-540; F. 133.

46 CX-541; F. 143.

47 CX-541; F. 143.

48 CX-1681.

49 CX-550-A; F. 139.

50 CX-550-A.

51 CX-550-B.

52 CX-574.

53 DePersia *10:2260/10 - 2261/3*; CX-1533-D; F. 268.

clubs, TRU would contemplate dropping the products.[54] Little Tikes' president told TRU that Little Tikes intended to sell warehouse clubs only low-priority, discontinued and near-discontinued products, and value-packs. He assured TRU that "we do not plan to sell regular products to Costco in the future."[55]

The Little Tikes president told Goddu that not selling to Costco "will create a major problem with Rubbermaid" because Costco had threatened to discontinue buying Rubbermaid products if Little Tikes did not sell regular line products to Costco. He told Goddu "I may need [your] help."[56] At the invitation of TRU, in early April 1993, the chairman of Rubbermaid and executives from Little Tikes attended a meeting at the TRU corporate offices where the warehouse clubs were discussed. At that time, TRU was one of the largest customers of the entire Rubbermaid corporation.[57] Little Tikes sold [ ] as much in dollar volume to TRU than all of Rubbermaid combined sold to Price Costco.[58]

During the meeting Little Tikes again acquiescenced to the TRU policy: "Little Tikes sales strategy to warehouse clubs in the future will be to sell value packs, as well as discontinued and near-discontinued products."[59] The handwritten notes of Rubbermaid's chairman reflect that there was "agreement" and "understandings" on the distribution issues discussed.[60]

After the April meeting, a Little Tikes' memo to the sales force listed products that could be offered for sale to warehouse clubs for the fall of 1993. The memo indicated that combination packs of Little Tikes items were the "only products that are available to the clubs at present."[61] A TRU executive concluded that Little Tikes "for the most part did not have product in the clubs or anything that was first line product"[62] until late 1994, when TRU shopping reports showed Little Tikes' first-line product being sold to the clubs.[63] TRU wanted a clarification of Little Tikes' club

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54 Goddu 30:6713/23 - 6714/15; CX-509; F. 269.

55 CX-509-A; F. 271.

56 CX-509-A; F. 271.

57 CX-1533-C; CX-1514-C; Schmitt 11:2282/1 - 2283/5; DePersia 10:2161/20 - 2162/14.

58 *CX-1533-C*; CX-514-C.

59 CX-509-B; DePersia 10:2177/13-22; F. 275.

60 CX-1519; F. 275.

61 CX-1520-A-C; F. 277.

62 Goldstein IH *(CX-1659)* at *110/11-14, 114/21-24.*

63 Goddu IH *(CX-1658)* at *313/6 - 314/16.*

policy because Little Tikes management had changed.[64] In January 1995, at the invitation of TRU, the chairman of Rubbermaid and the new management at Little Tikes again met with senior executives of TRU.[65] The meeting reaffirmed the understandings from the April 1993 meeting concerning Little Tikes' dealings with warehouse clubs.[66]

Hasbro --In early 1992, after being informed by TRU that Mattel and Fisher Price had agreed not to sell promoted product to the clubs, Hasbro committed to TRU that it would not sell new and promoted individual product to the clubs.[67] Later in 1992, the president of its Playskool division explained its policy of selling only special packs to the clubs to Roger Goddu as a "trial balloon." Mr. Goddu indicated to him that this policy was satisfactory.[68] As a result of the agreements, Hasbro sales of toys to the clubs from its Hasbro, Playskool, Playskool Baby and Kenner Divisions decreased from [ ] in 1991 to [ ] in 1993.[69]

Tyco -- Tyco began selling toys to the warehouse clubs in the late 1980's. The clubs purchased individual toy products from open stock.[70] In 1991, TRU approached Tyco on the issue of Tyco's sales to the clubs. Tyco wanted to sell to the clubs because their competition did.[71] TRU asked Tyco what their plans for the clubs would be.[72] At a luncheon meeting with TRU executives during Toy Fair in 1992, Tyco unveiled their new "25 item" policy to TRU.[73] Under Tyco's 25 item policy, if the clubs purchased 25 SKUs, the clubs could buy regular line product.[74] However, the policy contained exceptions for Tyco customers (other than warehouse clubs) that did not typically purchase a minimum of 25 items.[75] Since the clubs could not purchase so many different products from one manufacturer because of their limited selection of toys, Tyco's plan was acceptable to TRU.[76]

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64 Schmitt 11:2325/10 - 2326/1, 2327/11 - 2328/5; F. 280.

65 Schmitt 11:2328/15-20, 2333/13-21; F. 281.

66 Schmitt 11:2328/15-20, 2333/13-21; Goddu IH *(CX-1658)* at *316/11-16*; F. 281.

67 Inano 16:3335/15-20; F. 177.

68 Owen 6:1136/20 - 1141/14.

69 CX-448; CX-447-E; F. 212.

70 Grey 14:2993/13-19; CX-1420; CX-1424; CX-1263-64; F. 235.

71 Goddu IH (CX-1658) at 271/23 - 272/22, 273/24 - 274/3; Goddu 30:6876/20 - 6877/13; F. 239.

72 Goddu 30:6677/6-8; F. 236.

73 Goddu IH *(CX-1675)*, at *177/6-8*; F. 238.

74 CX-1418; F. 240.

75 CX-1418; CX-1667; Grey 14:3006/18 - 3009/1; F. 241.

76 Lazarus IH *(CX-1660)* at *169/3 - 170/12*; F. 242.

The 25 item policy was a commitment not to sell to the clubs.[77] Ken Shumaker, the Tyco sales representative to TRU, referred to it as the "no ship" policy.[78] Playtime told TRU it "will not offer any merchandise to warehouse clubs that is bought by TRU. This will make our policy exactly the same as Tycos."[79] By Toy Fair in February 1993, Tyco had a special line of products for the warehouse clubs, ignoring the 25-item minimum. Tyco's warehouse club line was similar to that of other major toy companies.[80]

Tyco's subsidiary Playtime acquiesced in TRU's efforts to restrict sales of products to the warehouse clubs. In 1992, TRU contacted Playtime concerning the Super Saturator (water gun) sold to TRU and discovered by TRU for sale in warehouse club stores. The Playtime executive assured TRU that Playtime would only sell the clubs special items, or items that TRU did not carry.[81]

In the spring of 1993 respondent discovered another Playtime product carried by TRU (a toy gun called the "Thunderstrike" that shot foam rubber balls) was sold in the warehouse clubs.[82] TRU met with Playtime[83] and received a confirming letter from Playtime which stated: "I want to apologize for misunderstanding the Toys R Us desire to merchandise their stores in a different manner than the Price Clubs. To confirm the meeting we had, Playtime will not offer any merchandise to Warehouse Clubs that is bought by Toys R Us. This will make our policy exactly the same as Tyco's."[84]

A Playtime executive later presented a warehouse club version of the Thunderstrike to TRU, in a larger package and a different color with more foam balls, which would cost more to the clubs than the standard version. TRU told Playtime that the reconfigured product was acceptable.[85] By 1993, the Tyco policy was essentially identical to that of other major manufacturers: a commitment to TRU not to sell identical product to the clubs.

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77 CX-1633-D; F. 242.

78 Weinberg 34:7715/18 - 7716/5; F. 242.

79 CX-914; F. 256.

80 CX-1412-B; Grey 14:3027/22 - 3029/12.

81 Weinberg 34:7719/7-22; CX-913-C; F. 254.

82 Weinberg IH *(CX-1662)* at *119/9-13*; Moen 4:655/18-24; CX-1414-B; F. 255.

83 Weinberg IH *(CX-1662)* at *169/10 - 170/4, 172/12-16*; F. 256.

84 CX-914-A.

85 Weinberg 178, 184; F. 257.

Fisher-Price -- Before merging with Mattel in 1993, Fisher Price was the third largest toy manufacturer in the U.S.[86] Fisher-Price's regular line was sold to the clubs without restriction in the late 1980s.[87] At the 1989 Toy Fair, TRU told Fisher-Price that TRU might not carry the same products being sold in competing clubs.[88] TRU stated its policy and asked how Fisher-Price was going to deal with the clubs.[89] The answer can be inferred.

In 1991, Price Club's toy buyer asked Fisher-Price what it had to do to get product other than combo packs. Price Club would buy more SKUs, take delivery earlier, and warehouse products.[90] When Fisher-Price salesman John Chase asked his supervisor how he should respond, he was told "don't tell them you can't sell because Toys "R" Us is pressuring, just make up a reason, tell them anything, but don't tell them you can't sell them because we're not allowed to because [of] Toys 'R' Us."[91]

A TRU shopping report showed products of Fisher Price found in Price Club.[92] On the report were written the words "Byron, you promised this wouldn't happen."[93] This is direct evidence of agreement between Fisher-Price and TRU: a promise from Fisher Price to TRU that they would not sell certain products to the clubs.[94] After this event, Fisher-Price sold only special and combination packs to the clubs.[95]

Fisher-Price was concerned with what its competitors were doing.[96] In 1992, Fisher-Price representatives saw a TV-promoted Playskool product in the Price Club.[97] The CEO of Fisher-Price telephoned TRU to see if "they'll take care of it."[98] Fisher-Price was informed by TRU that Playskool

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86 Cohen 35:7926/9-17; 35:7926/7-8; F. 216.

87 Chase 8:1645/5-18; F. 217.

88 Cohen 35:7937/12-21, 35:7938/6-13; F.218.

89 Cohen 35:7792/10-19; Weinberg 34:7732/8 - 7733/19, 34:7629/1; Weinberg, CX-1662-Z-73; F. 218.

90 Chase 8:1655/10-15; F. 221.

91 Chase 8:1657/1-7; Cohen *35:8094/25 - 8095/5*; F. 221.

92 Chase 8:1660/16 - 1661/5; F. 222.

93 Chase 8:1661/4-5; F. 222.

94 At Toy Fair 1992, TRU informed Hasbro that Fisher-Price had agreed not to sell promoted product to the clubs. (Inano 16:3334/21 - 3335/5; Owens 6:1132/6 - 1134/17; Verrecchia 7:1393/5-14, 23-25, 8:1394/1-4.

95 Chase 8:1661/6-8; F. 222.

96 Goddu *(CX-1658)* at *328/25 - 329/2*; F. 226.

97 Chase 8:1661/6-8; F. 226.

98 Chase 8:1666/14-16; F. 226.

wasn't "going to get away with it, that Toys "R" Us is going to take care of it." (Chase 8:1666/18 - 1667/1.)

Other manufacturers -- TRU sought and received acquiescence from Tiger, Today's Kids, Huffy, Video Tech, and Binney & Smith.[99]

Tiger -- After Tiger Electronics was informed by TRU of its club policy, Tiger's president, Randy Rissman committed that Tiger would not sell any product to the clubs.[100] Tiger vice president Roger Shiffman asked Mr. Goddu whether it would be permissible for Tiger to sell older product and combo packs. Mr. Goddu specifically "OK'D sales of Skip It (5 yrs. old) and HHG's [hand-held games] in multi-pack with high price point."[101] Tiger complained to TRU when it saw one of its competitor's products in the warehouse clubs.[102] Mr. Goddu responded that the company (Yes, Inc.) would be punished in the future if it continued.[103]

Video Tech -- Video Tech ("VTech") sold regular product to the clubs through the 1992 Christmas season.[104] After VTech "promised" TRU that they would not sell to the clubs.[105] VTech's sales of regular line product to the clubs became virtually non-existent.[106]

Today's Kids -- At a meeting between Today's Kids and TRU, Mr. Goddu asked Today's Kids about their sales to the clubs. TRU told Today's Kids president that TRU would delay taking action against Today's Kids upon the "understanding" that Today's Kids would get back to TRU and tell TRU its plans regarding sales to the clubs.[107] Today's Kids got back to TRU and "said they didn't want to sell the clubs any product."[108]

Huffy -- When TRU discovered Huffy product in the clubs identical to that carried by TRU, it complained to Huffy. Huffy responded by committing not to sell identical product to the clubs.[109]

Binney & Smith -- After TRU called Binney & Smith to complain about finding product in the clubs, TRU reported, "Per Brent Blaine

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99 Lazarus IH *(CX-1660)* at *71*; Goddu IH *(CX-1657)* at *79-80*, (*CX-1658)* at 379-80; Weinberg IH *(CX-1662)* at *146-56*; CX-2.

100 CX-814; F. 302.

101 CX-814.

102 CX-811; F. 304.

103 Shiffman 10:2026/7 - 2028/13; F. 305.

104 Walter 28:6087/21-24; F. 314.

105 CX-1318; F. 314.

106 CX-1310; CX-1738.

107 Goddu IH *(CX-1657)* at *167/11-14*; F. 290.

108 Goddu IH *(CX-1657)* at *168/19 - 170/12*; Goddu 30:6729/9-22; F. 291.

109 Goddu *(CX-1658)* at *380/18 - 381/6*; CX-913-C; F. 354.

[director of national account sales for Binney & Smith], understood our concern. Going forward they will offer special packs only for '93."[110]

2. Advance approval

Manufacturers agreed to notify TRU in advance of toys they planned to ship to the clubs. The manufacturers would sell to the clubs only those toys about which TRU had no objection. Mattel, Tyco, Little Tikes, and Tiger gave TRU advance approval.

Mattel, at the Toy Fair 1992, provided TRU with a right of first refusal over toys being sold to the clubs.[111] Mattel agreed to ship only specials to the clubs and not hot/allocated first year product.[112] If Mattel shows TRU a product and TRU does not order it, Mattel would be "free" to sell it to the clubs.[113]

Little Tikes informed TRU of products "that we think we can sell the clubs that should not be a conflict."[114] TRU's CEO, Michael Goldstein, testified: "That if they were going to sell anything to the clubs they would tell us about it before hand so we had the opportunity to pass on the item and not buy the particular item."[115]

3. Colgate

TRU agreed with suppliers that they would not supply toys to the cubs that were carried by TRU. Manufacturers agreed to submit products for TRU's review to ensure that these products would not cause a competitive conflict. This exceeded the limitations of the Colgate doctrine.[116] When TRU discovered companies selling to the clubs, TRU sought and received assurance that use the language of "agreement" and "commitment." Several manufacturers agreed to allow TRU to preview their club selections. Where TRU learned that product had found its way to a club, TRU contacted the manufacturer and sought renewed acquiescence, which the manufacturers provided. This is evidence of vertical agreement, and not a Colgate announcement of a unilateral policy by TRU.

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110 CX-913-C; CX-2; F. 101; F. 236.

111 Leighton *15:3267/21 - 3268/6, 3269/3 - 3271/2, 3272/8-18*; F. 138; F. 139.

112 CX-626-A. Mattel personnel collected information on product of Mattel's competitors that was appearing in the clubs so that it could be brought to TRU's attention. CX-626-B.

113 CX-550-A.

114 Goddu 311-12.

115 *Id.*; F. 274.

116 *Parke Davis*, 362 U.S. at 45.

B. Horizontal Agreement

TRU orchestrated a horizontal conspiracy among its suppliers. The major manufacturers knew that TRU was contacting the other manufacturers with the same proposal and that concerted action was invited. Each also knew that unanimous action was necessary;[117] manufacturers did not want to be singled out and put at a competitive disadvantage. The evidence shows that "compliance with the proposals involved a radical departure from the previous business practices of the industry,"[118] which for the major toy manufacturers had been to actively pursue sales to the warehouse clubs as an innovative and rapidly growing new channel of toy distribution. Here, the manufacturers told TRU they went along with the plan because their competitors were going along with the plan. TRU informed the major manufacturers that their competitors said they were only selling to the clubs because their competitors were. TRU communicated acquiescence to their competitors, and the manufacturers participated in policing other manufacturers who violated the agreement.

1. Manufacturers' interest

Major manufacturers were reluctant to restrict sales to the warehouse clubs, being concerned with their competitor's sales to the clubs.[119] The manufacturers felt pressure to be in the clubs because their competitors were selling to the clubs.[120] The manufacturers did not want to give up sales and were also concerned that their competitors would gain share at their expense.[121] The manufacturers did not want their competitors to sell to the clubs if they could not.[122] The competition between the manufacturers with respect to the clubs was intense. The manufacturers told TRU that they were in the clubs because their competitors were there. This information was transmitted among the manufacturers by TRU.

Mattel, Hasbro, Tyco, Little Tikes, Fisher-Price and others expressed to TRU concern with how their competitors were reacting. Manufacturers wanted assurance from TRU that their competitors were subject to the same

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117 *Interstate Circuit v. United States*, 306 U.S. 208, 222 (1939).

118 *Ibid.*

119 Goddu IH *(CX-1658)* at *276*; Goldstein IH *(CX-1659)* at *59/13-17*; Lazarus (CX-1654) at 72, 181-82; F. 82.

120 Lazarus *(CX-1654)* at 62; F. 83.

121 Lazarus IH *(CX-1660)* at *127/12-14*; Goddu IH *(CX-1657)* at *272-73*; Okun *13:2651/14-25.*

122 Lazarus 24:5443/9-10; F. 97.

rule.[123] They informed TRU that they wanted a level playing field to avoid being placed at a competitive disadvantage.[124]

Because of the incentives to sell to the clubs, Mr. Verrecchia, the CEO of Hasbro, believed that the agreements would not hold, and that Hasbro would be able to sell to the clubs again. (Inano 16:3335/15-20.) Mr. Verrecchia put into place a regular club shop to determine whether Mattel or other competitors were selling regular line product to the clubs. These shops began after the restrictions. (Verrecchia 7:1365/18 - 1366/1, 7:1373/16-20.) Hasbro complained the most frequently about competitive product in the clubs.[125] Mattel, Fisher Price and others also complained when regular line product from their competitors was found in the clubs.[126] And when Mattel heard rumors that Hasbro and Tyco might be selling regular line to the clubs, the president of Mattel's boy division instructed that the clubs be shopped so that the information could be brought to TRU's attention.[127] The manufacturers explained to TRU that they did not want to be prevented from selling regular line product to the clubs without assurance that their competitors were similarly excluded.[128]

Manufacturers also were concerned that if they were the only one selling to the clubs, they could be easily disciplined by TRU. (Moen 4:648/24 - 649/4, 651/17-23.) TRU had a greater ability to replace a manufacturer than the manufacturer did to replace TRU.[129]

2. Coordinated response

Respondent tried to obtain a coordinated response from manufactures by assuring them that they would not be placed at a competitive disadvantage because TRU was applying its policy to their competitors. Respondent told each major manufacturer that its competitors were only selling to the clubs because it was.[130] Mr. Lazarus told manufacturers that TRU was talking to each manufacturer about its club policy, so that they would know there was going to be a level playing field.[131]

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123 DePersia 10:2149/15 - 2151/4; Goddu 30:6679/20 - 6680/13; F. 87, *et seq.*

124 Goldstein 36:8157/23 - 8158/4.

125 Goddu IH *(CX-1658)* at *329/23-24*; Goddu 30:6701/13-18.

126 Goldstein IH *(CX-1659)* at *59/10-17, 61/17-22*. Goddu IH *(CX-1658)* at 328/18 - 329/29; Weinberg 34:7628/15 - 34:7629/1; CX-811; Shiffman 10:2017-7-18; 2018/3-16, 2021/24 - 2022/7, 2026/3-6.

127 CX-626-B.

128 Goddu 31:6877/11-13.

129 CX-486-B; CX-1141.

130 Goldstein 36:8157/23 - 8158/4.

131 Lazarus 24:5440/5-10, 5442/14-16; Goddu 30:6679/20 - 6680/4, 31:6871/11 - 6878/1, 6880/7 - 6883/3.

The manufacturers did not act out of independent self-interest. The manufacturers did not focus on the clubs' taking advantage of others' promotion of the toys ("free-riding"); rather, they required assurances that their competitors would go along. The absence of efficiencies is demonstrated by the fact that the manufacturers feared that the restrictions would place them at a competitive disadvantage unless adopted by rivals.

TRU coordinated its policy with the manufacturers. The manufacturers all were aware that TRU was communicating its policy to everyone and that uniformity was contemplated. And everyone knew that without unanimity, regular line product sales to the clubs would recommence.[132]

3. Manufacturers would go along

A Mattel memo on the October 1991 meeting between high officials of Mattel and TRU, shows that Mattel's CEO, John Amerman, told TRU's CEO, Charles Lazarus, that Mattel "[W]ould not sell the clubs the same items we were selling them," and that "this was based on the fact that competition would do the same."[133] Mr. Goddu recalled that all of the major toy companies told him that they would stop selling to the clubs if their competitors would do the same. He understood that the major manufacturers, when they said that they were only selling to the clubs because their competition was selling to the clubs, actually meant that they would get out of the clubs if their competition got out.[134]

4. *Quid Pro Quo*

During conversations with manufacturers, respondent did not simply explain a Colgate policy announcing that it would refuse to deal with manufacturers selling to the clubs. Nor did it merely inform manufacturers that they would be treated equally. Instead, TRU passed the implied *quid pro quo* (they will stop if you stop) from manufacturer to manufacturer.[135] These communications by TRU ensured that the "conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds." *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946).

5. TRU's assurances

Respondent used the acquiescence of one manufacturer to obtain the acquiescence of another. After Mattel agreed not to sell to the clubs the same products "based on the fact that competition does the same" (CX-

132 *Interstate Circuit*, 306 U.S. at 222.

133 CX-532-A.

134 Goddu IH *(CX-1658)* at *271-72.*

135 Goddu IH *(CX-1658)* at *276/63 - 277/11.*

532), TRU told Hasbro that Mattel had agreed.[136] Mr. Goddu indicated that he passed on assurances of compliance from one manufacturer to another: "We may have indicated to one supplier that his competitor is going to do nothing but warehouse club packs and, you know, 'you should do the same.'"[137]

When TRU asked it not to sell certain products to the clubs, Little Tikes asked what its main competitor in the clubs (Today's Kids) was going to do. Mr. Goddu informed Little Tikes that Today's Kids "was going to start doing less business with the warehouse clubs."[138] Whereupon Little Tikes committed to restrict its sales.

Like each of the major manufacturers, Tyco discussed its competitors with TRU.[139] Respondent pressured Sega and Nintendo to not sell any products to the clubs.[140] Mr. Lazarus and Mr. Goddu told Sega that TRU had convinced Nintendo to stop selling product to the clubs as part of TRU's effort to convince Sega to do the same.[141]

6. Policing the agreement

Manufacturers complained to respondent about sales by their competitors to the clubs. During July and August 1992, TRU conveyed complaints from Mattel to Hasbro and Fisher-Price and back again.[142] At one meeting on July 17, 1992, TRU told Mattel that its competitors, including Hasbro, were upset about Mattel product appearing in the clubs.[143] Mattel assured TRU that it was not selling regular line product to the clubs.[144] Later that same day TRU met with senior executives from Hasbro.[145]

On August 10, 1992, using internal Hasbro memos detailing the extent to which Mattel and other Hasbro competitors were selling to the clubs,[146]

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136 Verrecchia 7:1393/5-14, 23-25, 1394/1-4; Owen 6:1128/5 - 1129/25, 1132/6 - 1135/9; Inano 16:3333/12 - 3335/7; F. 114.

137 Goddu IH *(CX-1658)* at *279.*

138 DePersia 10:2147/7-14, 2147/18-24, 2150/3-12, 2150/25 - 2151/4. Today's Kids' sales to warehouse clubs fell from $8 million in 1993 to zero in 1994. *CX-902-A.*

139 Goddu IH *(CX-1658)* at *271/19 - 272/13, 273/24 - 274/3.*

140 Moen 4:692/15 - 693/18. TRU does not account for as high a percentage of Sega or Nintendo sales as it does for sales by traditional toy manufacturers. (Scherer (CX-1822) at Exh. 1.)

141 CX-1776; Kalinske 12:2490/7-25, 2491/24 - 2492/2.

142 Lazarus IH *(CX-1654)* at *141.*

143 CX-1772; Amerman *17:3795/5-12; 3800/7 - 3802/9, 3806/24 - 3808/4*; Lazarus 24:5451/4 - 5452/18.

144 Amerman *17:3802/10 - 3804/14.*

145 CX-1772; CX-1773-B; Lazarus 24:5448/13-16.

146 CX-1633; Goddu 30:6689/13 - 6690/10.

TRU met with Mattel to discuss its sales to the clubs.[147] The clubs found it increasingly difficult to obtain regular line product from Mattel and Hasbro.[148]

TRU promised to "take care of it" after Fisher-Price representa-tives complained about Playskool product they found in Price Club.[149] After Tiger complained about finding a competitor's product in the clubs, Mr. Goddu told the offending manufacturer "don't do it again or God knows what."[150] TRU facilitated horizontal agreements among the manufacturers.[151]

7. Manufacturers contacted each other

Manufacturers discussed with each other their responses to the TRU policy. A Fisher-Price representative wrote: "After discussions with other vendors at the Lounge show, I believe the industry is backing away from the clubs. Kenner and Playskool in particular were adamant that they would not be shipping key SKUs to the Clubs, at least not yet."[152] A Fisher-Price representative spoke to a Little Tikes' regional manager to find out if Little Tikes had experienced any repercussions from TRU about products it offered to the clubs.[153]

Hasbro and Tyco discussed their policies relating to the clubs. In May 1992, Richard Grey, president of Tyco, discussed with Allan Hassenfeld, chairman of the board of Hasbro, how to respond to TRU. Both later adopted identical policies.[154]

8. Summary of agreement

As a result of respondent's conduct, by 1995, the five top manufacturers of popular toys, and many other manufacturers complied with TRU's policy restricting toy sales to the clubs; the conspiracy included much of the toy manufacturing industry. The manufacturers agreed, reluctantly, to go along with the plan as long as there was a level playing field; that is, as long as

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147 Leighton *15:3291/2 - 3294/24.*

148 Halverson 3:414/14 - 415/9; Moen 4:619/10 - 621/22.

149 Chase 8:1666/4 - 1667/1.

150 Shiffman 10:2027/10-14.

151 Complaints about competitor's sales to the clubs generally related to the most immediate competitors. Hasbro, Tyco and Mattel were most interested in learning from TRU what each other's plans were. Little Tikes was concerned most with Today's Kids. Sega was most interested in Nintendo. Tiger complained about its closest competitor. Goddu IH *(CX-1658)* at *276/8-16* (Mattel and Hasbro); Goddu IH *(CX-1657)* at *228/24 - 229/15* (Sega); DePersia 10:2149/15 - 2151/4 (Little Tikes); CX-811 (Tiger).

152 CX-684-B.

153 CX-563.

154 Grey 14:3011/8 - 3013/4; F. 245; F. 259; F. 213.

their competitors also acquiesced so that they were not at a competitive disadvantage. Respondent used its buying power to organize and coordinate this understanding.

The horizontal agreement was not initiated by the manufacturers to fix prices. It involved price nonetheless. It was initiated by TRU, which was concerned that its image as a price discounter would be eroded. Pressure from TRU, and the orchestration of assurances between key manufacturers, resulted in a horizontal agreement restricting sales to the clubs.

The agreement cut off the club's supply of TV-advertised toys, and eventually stopped the sale to the clubs of any individual toy carried by TRU. Respondent permitted the manufacturers to sell specially bundled "packs" of individual toys that consumers could not readily compare to the products on TRU's shelves. The packs had to be submitted to TRU for advance approval. The horizontal agreement facilitated by TRU is *per se* illegal. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960).[155]

The agreement here -- manufacturers changing their distribution policy to deny warehouse clubs products based on respondent's assurances that competitors would do the same -- is also a boycott.[156] The vertical agreements were entered into only if there was an assurance that other manufacturers would forgo that method of competition as well. Mattel and the other manufacturers entered agreements with TRU "based on the fact that competition would do the same." Under the *per se* rule the TRU conduct violates Section 5 of the FTC Act.[157]

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[155] In Parke Davis, a drug manufacturer led a horizontal agreement among its retail customers (drug stores) not to advertise prices below its suggested retail prices. The Court described the conduct of Parke Davis, as the instigator of the horizontal agreement. *id.* at 46:

> First it discussed the subject with Dart Drug. When Dart indicated willingness to go along the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescence in the program. Having secured those acquiescences Parke Davis returned to Dart Drug with the report of that accomplishment. Not until all this was done was the advertising suspended and sales to all the retailers resumed. In this manner Parke Davis sought assurances of compliance and got them, as well as the compliance itself. It was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy.

[156] In *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959), the Supreme Court held *per se* illegal a group boycott. Broadway-Hale, a retailer of appliances in Los Angeles, orchestrated an agreement with ten appliance manufacturers. The target was Klor's, a discounter located next door to Broadway-Hale. The appliance manufacturers agreed among themselves and with Broadway-Hale not to sell to Klor's or to sell only at discriminatory prices. *Id.* at 209. The Supreme Court held that "[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category" of conduct that is *per se* illegal. *Id.* at 212.

[157] Violations of Sherman Act §1 are within the scope of "unfair methods of competition" that violate Section 5 of the FTC Act. *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95 (1953); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941). Conduct far short of the campaign orchestrated by TRU here would likely be held to violate Section 5. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966) (section 5 includes incipient violations of antitrust laws).

C. Proof of Agreement

Witnesses from respondent and the manufacturers denied any vertical or horizontal agreements, contending that TRU and the manufacturers all acted independently and unilaterally. "Little weight can be given to testimony which is in conflict with contemporaneous documents." *United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1948); *Adolph Coors*, 83 FTC 32, 185 (1973).

Respondent argues that the restrictions varied over time and by manufacturer, so that the requisite common design or understanding is missing. This argument is unpersuasive. The fact that the agreements changed over time and that additional manufacturers were added as time passed does not negate the finding of agreement. It relates to anticompetitive effect.

Respondent argues that there can be no agreements because formal contract law requirements are missing. An antitrust agreement does not need to meet the Uniform Commercial Code.[158] Agreements to fix prices where parties were free to change their minds whenever they wanted are agreements nonetheless. "No formal agreement is necessary to constitute an unlawful conspiracy."[159] For an agreement under the antitrust laws, all that is required is a meeting of the minds.

D. Rule of Reason

1. Non-price vertical restraint

If the respondent's conduct was solely vertical and not motivated by price competition, such non-price vertical restraints of trade are governed by the rule of reason. *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977). Vertical restraints limiting the ability of retailers to compete in selling products of the same brand can be pro-competitive. While vertical restraints may diminish intrabrand competition, interbrand competition could offset any potential anticompetitive effects. *Sylvania*, 433 U.S. at 54-55.

Respondent argues that its discussions with manufacturers of its policy concerning the clubs was governed by *Sylvania*, *Monsanto*,[160] and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), protecting communication between manufacturers and dealers. The Supreme Court recognized that communication may be necessary to ensure efficient distribution. Complaints from one dealer to the manufacturer about another dealer may serve a legitimate function. In the absence of market power, competition with other manufacturers in the same industry

158 *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987).

159 *American Tobacco v. United States*, 328 U.S. 781, 809 (1946).

160 *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

will prevent any anticompetitive effects from the dealer complaints about another dealer on the same brand.[161] The communications at the heart of this case, however, are not dealer complaints about one brand. Here, manufacturers complain to respondent about other manufacturers, eliminating interbrand competition. By recognizing the possible pro-competitive efficiency of communication between a manufacturer and a dealer, the Court did not take conspiracy out of the antitrust laws.

Once there is proof that a vertical restraint adversely affects competition, respondent must show that the restraint in fact has a pro-competitive effect.[162] Respondent argues that its policy prevents free-riding by the clubs. But, as shown later in this opinion, TRU fails to establish free-riding at retail. TRU is already compensated by toy manufacturers for the retailing "services" on which it claims the clubs are free-riding. The fact that manufacturers required assurances that their competitors would go along so they would not be placed at competitive disadvantage, shows that the restraints were not in the manufacturers' independent, unilateral self-interest. The anticompetitive purpose and effect of vertical non-price restraints and the lack of pro-competitive justifications make them illegal under the rule of reason.[163]

2. Purpose of the restraint

The objective of TRU's limitations on sales by toy manufacturers was to suppress price competition and exclude competitors. The policy was to keep merchandise out of the clubs, and to make sure that the price of merchandise that was in the clubs was not directly comparable to TRU's price.[164] TRU approved packs for the clubs because they prevented the consumer from making price comparisons and finding TRU's prices were higher than the clubs' prices.[165]

3. Competitive effects of the restraint

The campaign worked. The clubs had been viewed in the same class as Wal-Mart in setting the lowest prices for the toy industry,[166] and during

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161 *Monsanto*, 465 U.S. at 762.

162 *Graphic Products Distributors v. Itek Corp.*, 717 F.2d 1560, 1576(11th Cir. 1983); *United States v. Brown University*, 5 F.3d 658, 669 (3d Cir. 1993) ("burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective.").

163 *Eiberger v. Sony Corp.*, 622 F.2d 1068 (2d Cir. 1980)(vertical restraint by manufacturer of dictation equipment with 12% share unlawful where the agreement restricted intrabrand competition but did not promote interbrand competition).

164 Goddu 31:6840/20 - 6841/7.

165 Goddu IH *(CX-1657)* at *215/19 - 216/8*; Lazarus IH (*CX-1660*) at *271/1-25*; Nakasone IH (*CX-1661*) at *165/5 - 166/24*.

166 CX-1576-B.

1992 were "a strong competitive force."[167] But by mid-1993, TRU no longer viewed the clubs as significant competition.

The downward pressure on pricing was eliminated. Consumers who would have bought toys at the clubs now paid 10-20% higher prices at other retailers.[168] The special packs available to the clubs, were less attractive to consumers, and cost more. Clubs that purchased popular individual toys from diverters, raised their costs. Added costs were generally passed on to consumers who bought toys at the clubs.[169]

The effects of TRU's conduct have been on TV-promoted items that had been carried by both TRU and the clubs. Roger Goddu called TV-promoted product the "lifeblood of the industry." It was these "lifeblood" products that the clubs sought and were denied so that TRU could preserve its price image. Toy prices to consumers were higher than they would have been in the absence of the agreements.[170]

By 1993, the major manufacturers of TV toys sold only special packs to the clubs -- or they did not sell to the clubs at all. Respondent's conduct suppressed information that consumers needed to make informed price comparisons.[171] The foreclosure succeeded in inhibiting the growth of the warehouse clubs, a promising entrant into toy retailing.[172] The clubs, like Wal-Mart, set the lowest prices for the toy industry,[173] but were rendered less effective competitors. Respondent made no showing that this anticompetitive effect was offset by any increase in interbrand competition.

The anticompetitive effects caused by respondent's conduct are the best evidence of its market power. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986). Those effects "can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects."[174] Here, TRU's ability to bring about a sharp turnaround in the major manufacturers' dealings with the clubs (a "radical departure from the previous business practices of the industry.")[175] not only is a strong

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167 CX-1618.

168 Weinberg IH *(CX-1662)* at *205/10-16, 206/24 - 211/22*; Nakasone IH *(CX-1661)* at *42/13 - 45/9*.

169 Ojendyk 18:3999/8 - 4002/1.

170 Goddu 30:6616/19-23.

171 *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 463 (1986).

172 Scherer (CX-1822) at ¶ 54.

173 CX-1576-B.

174 "[W]hen a court finds actual anticompetitive effects, no detailed examination of market power is necessary to judge the practice unlawful." *International Ass'n of Conference Interpreters* ("AIIC"), Dkt. No.9270 (Feb. 19,1997) at 33-34.

175 *Interstate Circuit*, 306 U.S. at 222.

indicator of its market power, but also proves the ultimate question of anticompetitive effects.[176]

4. Market power

a. Retail market power

Respondent's share of all toys sold nationally in 1992, was [ ][177] However, retailing is local from the consumer's perspective.[178] TRU focuses on densely populated urban areas. TRU calculated its share among toy retailers in 30 local markets in 1990: TRU's share was over [ ][179] In 1993, TRU adjusted its national market share figures to account for the fact that "we reach geographically about 65% of the toy dollars in the U.S.A."[180] This consists of consumers within a 30 minute drive of a TRU store. Using this measure, TRU's market share was 32%.

Major toy manufacturers refer to TRU as dominant. TRU refers to itself as dominant.[181] Market shares are used as a predictor of market power and anticompetitive effects: in this case, however, the anticompetitive effects are apparent, and TRU exercises market power as a buyer and as a seller of toys.

b. Leverage

Market power exists if Toys "R" Us can exert leverage over the manufacturers. Leverage exists when the manufacturer cannot find a ready substitute.[182] A retailer has sufficient bargaining power to cause anticompetitive effects, when the retailer (1) has "hard-to-replace distribution skills or facilities," (2) is a multibrand retailer that could threaten to drop one brand in favor of another, or (3) "accounts for such a large volume of business that his replacement would involve substantial disruption that would not be outweighed by retaining a smaller complained-against dealer."[183]

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176 *California Dental Ass'n*, Dkt. No. 9259 at 25 (March 25, 1996).

177 CX-1039-E; CX-1040-A.

178 Scherer (CX-1822) at ¶ ¶ 24-28.

179 Chicago (42%), Detroit (44%), Los Angeles (41%), New York (43%), San Francisco (46%), Seattle (35%), and Washington. D.C. (43%). CX-1577-B.

180 CX-1576-A, D.

181 On October 21, 1991, Mr. Goldstein, TRU's CEO, stated: "Toys R Us is dominating the toy industry and is gaining market share." CX-1040; CX-1048; CX-1042-G-I.

182 *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 476 n.23 (1992) (*citing* F.M. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 16-17 (3d ed. 1990)); *California Dental Assn.*, Dkt. No. 9259 at 30.

183 VII Areeda, *Antitrust Law* ¶ 1457-C 3 at 171.

TRU's share of the sales of the major toy manufacturers is high. TRU is usually the largest customer for the major traditional (non-video) toy manufacturers.[184] In 1994, TRU purchased [ ] of Mattel's toys, [ ] of Hasbro's toys, [ ] of Little Tikes' toys, and [ ] of Tyco's toys.[185] TRU accounts for [ ] of Fisher-Price's sales.[186] Conversely, each manufacturer accounts for a relatively low percentage of TRU sales. In 1994 TRU accounted for over [ ] of Little Tikes sales, but Little Tikes accounted for only [ ] of TRU's sales. In 1994, TRU accounted for over [ ] of Tyco's sales. Tyco accounted for under [ ] of TRU sales. Mattel and Hasbro account for more of TRU's sales [ ] but still below the share for which TRU accounts of their sales.[187] This gives TRU additional leverage over the manufacturers.

Respondent's national market share does not account for the geographic distribution of its stores across the country. Toy retailing is local,[188] and because TRU has high local market shares in major metropolitan areas, this adds to its buyer power. To be present in many metropolitan areas, the manufacturer must have TRU distribution.[189] In the New York metropolitan area, TRU had [ ] of retail toy sales. Its high market share in many important local retail markets shows market power.

In 1995 Wal-Mart accounted for 14% of the toy market, Kmart (8%), Target (6%), and Kay-Bee (4%), with the other retailers in the 1-2% range or less.[190] The manufacturers' dependence on TRU increased when Lionel Leisure and Child World went out of business, leaving TRU as the only remaining full line national toy chain.[191]

It would be very difficult for a manufacturer to replace respondent as a customer.[192] Wal-Mart and Kmart, who are already promoting and selling as many toys as they can, could not absorb a [ ] increase in toy sale volume by adding another shift.

It would be difficult for manufacturers to produce products without TRU. For promoted product, a manufacturer has to generate volume to support the TV advertising, and TRU's distribution is needed to reach that

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184 Okun(Mattel) *13:2608/22-2609/1*; Owen (Hasbro) 6:1102/13-17, 1159/1-2; CX-1272 (Tyco); DePersia (Little Tikes) *10:2256/8-10, 2257/15-16*; Cohen (Fisher-Price) 35:7926/18-7927/4.

185 Scherer *(CX-1822)* at Exh. 1; F. 504.

186 Cohen 35:7927/2-4.

187 CX-1141; CX-486-B.

188 Scherer 23:5160-61.

189 Shiffman 10:*2249/12 - 2250/6*, 2001/21 - 2002/1.

190 F. 5.

191 Verrecchia 7:1549/13 - 1550/1; Okun *13:2664-65*; Owen 6:1159/1-2.

192 Okun *13:2813/22 - 2814/1*; Owen 6:1151/3-10; Verrecchia 7:1412/19-22.

volume. And for many basic products, TRU is almost the only purchaser.[193] The manufacturers also depend on TRU's international sales. Nearly half of Mattel's and Hasbro's sales are now outside the United States. The dollar volume at risk by alienating TRU is more substantial when these international sales are included.

Hasbro documents refer to their dependence on TRU.[194] A Tiger Electronics VP for Sales wrote "I am very worried about our future business as a whole for the following reasons:***(2) TRU dictating to Tiger and becoming even a bigger percentage of our business due to not selling and broadening our account base."[195] A Fisher-Price memo discusses the Fisher-Price desire to reduce dependence on TRU.[196]

When TRU makes decisions regarding retail price, sales goals and incentive bonuses, it ignores "mom-and-pop" stores and focuses on its significant competitors.[197] TRU faced no significant competition in [ ] markets during 1994.[198] TRU's prices are highest where they have the least competition.[199] TRU has market power as a seller.

DEFENSES

A. Respondent's Legal Argument

Respondent relies on *Elder-Beerman Stores v. Federated Department Stores, Inc.*, 459 F.2d 138 (6th Cir. 1972). Plaintiff there alleged vertical conspiracies (involving the leading department store in Dayton, Ohio and numerous suppliers to boycott the second largest department store) and a horizontal conspiracy *per se* unlawful under Klor's. Each of the three opinions of the court rejected the horizontal conspiracy on a mere showing that the suppliers were aware that others were being coerced into vertical agreements. The "majority" opinion concluded that the record was "devoid" of any evidence of a group boycott,[200] the two concurring/dissenting opinions similarly held that there could be no horizontal conspiracy without evidence that the suppliers "consulted with or agreed with each other"[201] or

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193 Owen 6:1153/1-17; 1154/10 - 1155/2.

194 CX-444; CX-158-S-U; Owen 6:1158/9 - 1159/13.

195 CX-813.

196 CX-648-A-B.

197 During various time periods, TRU included the following retail operations as competitors for the purpose of its knock-off calculations: [ ] CX-950-A; CX-970; CX-1003; CX-1014; CX-1017.

198 CX-1014-A.

199 F. 459.

200 *Elder-Beerman*, 459 F. 2d at 146 n.11.

201 *Id.* at 155.

"any communication or agreement between them."[202] None of the opinions required communication directly between the competitors; an agreement or meeting of the minds, whether reached directly or through an intermediary, was sufficient. Judge Kent explained that the conspirators did not even need to know "the number of people involved"; they simply had to know that "other persons would be performing illegal acts in furtherance of the conspiracy."[203] Judge Miller explained that the conspirators need not have knowledge of the actual conduct of the co-conspirators or even the "existence of their co-conspirators." The court did not find that "evidence of communication among the suppliers" was required.[204]

Respondent also cites *Toys "R" Us, Inc. v. R.H. Macy & Co.*, 728 F. Supp. 230 (S.D.N.Y. 1990). In Macy, the court found no *per se* violation where two manufacturers of children's swimwear bowed to pressure from Macy's not to deal with Kids "R" Us.[205] Although there was some communication between the two manufacturers, there was "no evidence that Backflips and Little Dippers made any agreement with each other about not selling to Kids. Each company acted independently of the other in response to pressure by Macy."[206] There was no evidence that manufacturers expressed concern about being placed at a competitive disadvantage, that Macy made it a point to assure its suppliers that it would apply its policy across the board so that none would be placed at a competitive disadvantage, or that either manufacturer made its participation contingent upon the other going along. The Macy decision was probably the impetus behind the TRU conduct at issue here; however, TRU crossed a line that Macy did not by orchestrating an agreement among the manufacturers and by using market power that Macy did not have.

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202 *Id.* at 163.

203 *Id.* at 146.

204 Respondent also relies on *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589 (1st Cir. 1993). There, an HMO required its participating doctors to sign agreements whereby they received greater compensation if they agreed not to participate with other HMOs. The court noted that if the doctors had agreed among themselves not to provide services to competing HMOs, and the agreement was "devoid of joint venture efficiencies," the conduct might be *per se* illegal. *Id.* at 594. There was no evidence that doctors indicated that they would not participate unless the HMO forced other doctors to go along, or that the doctors feared being at a competitive disadvantage. In short, the court found no evidence of a horizontal agreement; rather, the facts disclosed merely a series of vertical agreements.

205 TRU did not prevail because TRU's complaint, filed prior to Sharp, relied on the theory that it was *per se* unlawful for Macy's to extract alleged vertical agreements from two children's clothing suppliers to stop selling certain merchandise to plaintiff's Kids "R" Us discount operation. Deciding the case after Sharp had been handed down, the district court held under Sharp that the *per se* rule was inapplicable. In any event, TRU did not present evidence that a restriction on only these two manufacturers could have any anticompetitive effect.

206 *Macy*, 728 F. Supp. at 232-33, 236.

B. Free-Rider and Efficiency Justifications

Respondent argues that the procompetitive nature of its conduct offsets anticompetitive effects. TRU must show that its conduct was (a) procompetitive or (b) that it was reasonably necessary to meet the competitive problems.[207]

TRU's free-rider argument focuses on its investment in creating hits for the industry in its "showroom." TRU's contemporaneous documents concerning the development of its campaign against the clubs refer to neither preventing "free-riding," nor the showroom issue. TRU's campaign was directed solely at the clubs, which threatened TRU with the lowest prices, with smaller selections than TRU, focusing on the more popular toys, on a more seasonal basis, with little advertising outside of the Christmas season. TRU shifts many retailing functions to toy manufacturers. TRU's dating terms with major toy manufacturers provide that payment for shipments it receives earlier in the year is not due until December. The cost of advertising and product promotions is born mostly by TRU's suppliers, not TRU.

The vertical agreements by the manufacturers did not help them compete more effectively against other manufacturers. Manufacturers agreed after being assured that other manufacturers would forgo selling open stock to the clubs, not in order to achieve efficiencies in distribution in each manufacturer's own individual, independent self-interest.

Toys are less susceptible to free-riding than higher cost goods where services are provided by the retailer.[208] Consumers are unlikely to obtain services from TRU and then travel to a club to purchase the product.

1. TRU advertising

In the toy industry the manufacturer generates demand for products through television advertising.[209] Consumers are informed by the manufacturer's advertising efforts, not TRU's. TRU on the other hand advertises availability and price of toys for sale in its stores.

Respondent receives compensation for this advertising. The manufacturers pay TRU to appear in TRU advertisements. In 1994, TRU spent [ ] million for advertising, and received [ ] million in compensation. Its net cost of advertising was [ ] As a percentage of net sales, TRU's net advertising expenditures were [ ] [210] In 1993, TRU

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207 *Graphic Products Dist. v. Itek Corp.*, 717 F.2d 1560, 1576, 1577 n.31 (11th Cir. 1983).

208 *Sylvania*, 433 U.S. at 55.

209 Spencer 9:1866/7-10; Amerman 17:3738/8-17; Weinberg IH *(CX-1662)* at 48/21-25.

210 CX-1012.

reported that "We are getting vendor funding for all the roto advertising - it's essentially free."[211]

Toy manufacturers spend over 8% of sales dollars on advertising.[212] This figure includes manufacturers that do not engage in advertising. Mattel and Hasbro, the two largest manufacturers, spend a higher percentage of sales on advertising. Demand for toys is created in advertising by the manufacturer, not by TRU. TRU benefits from its own advertising and promotional efforts. There is no evidence that TRU advertising generates sales at warehouse club stores.

2. TRU in-store promotion

Respondent's stores resemble warehouses. Like Wal-Mart, Kmart, and the clubs, TRU does not provide demonstrations or informed sales personnel.[213] TRU characterizes itself as a low to non-existent service provider.[214]

3. TRU's year-round full line

Respondent carries more toys year-round than the clubs or other toy retailers. TRU argues that this service saves manufacturers warehouses, smooths manufacturer production, and lowers costs to consumers; that it bears risk by obtaining product early in the season before hot toys are known; that TRU in fact helps create hot toys; that its compensation for providing this service is threatened by club sales, and the clubs learn which toys are hot based on the TRU efforts, and then free-ride on that information.

Respondent benefits from its full-year, full-line coverage. This is not just a cost to TRU. By taking product early, TRU reduces the risk of being out-of-stock, especially when a product becomes hot and is in short supply. TRU's full-line gives it an advantage over competitors with fewer toys.[215] TRU has higher profits on less popular items.[216]

Respondent contends that the clubs order after winners and losers are determined. The clubs place most of their orders in the spring when it is uncertain which toys will be the "hot" toys for the Christmas season. The clubs' offer to carry toys all year did not change the manufacturers' refusal

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211 CX-967-C.

212 CX-1624.

213 TRU's low service reputation is reported in consumer surveys (CX-917-A-D) and is well known to the public. New York Times article ("Lost in Toyland," March 31, 1996, pp.3, 12) (CX-807).

214 Goldstein IH *(CX-1655)* at *36/20-23*; Lazarus 24:5356/11-22.

215 CX-1586; CX-1597-A; CX-1611-F.

216 Scherer *(CX-1822)* ¶ 18.

to sell the clubs identical toys.[217] The toy industry is seasonal. Manufacturers ship, and retailers sell most of the toys during the fourth quarter. Many promoted toys are not even available until then. (CX-1624.)[218] That the clubs sell a high percentage of toys in the fourth quarter is of little importance. There is little variation in seasonality between the warehouse clubs and TRU.[219]

Respondent argues that it is not compensated for carrying inventory early in the year and promoting new toys. TRU receives compensation from the manufacturers which reduces this risk. [ ] [220] This compensates TRU for warehousing product early.[221] Manufacturers give respondent warehouse, early buy, early ship discounts or other allowances for purchasing early.[222] In 1994, TRU received [ ] in merchandising allowances. This covered TRU's early purchases and warehousing expenses, as well as compensation for endcaps, sidecaps, and register lane placement. Dating terms enable TRU to carry a full line of toys all year.[223] Respondent has leverage to negotiate favorable terms.[224] If TRU buys products early in the year that do not sell by late in the year, TRU obtains cost markdowns, credits, extended dating terms, redating, consumer coupons, and free goods. TRU received [ ] million in markdown allowances in 1994.[225] If a toy still does not sell after the first markdown allowance manufacturers provide additional allowances to TRU or further extend the dating. Respondent is also compensated by manufacturers for promotions. And it receives a disproportionate share of hot, allocated product.[226] It is compensated for ordering more toys earlier in the year. It gains price concessions from manufacturers. It is compensated for carrying toys not carried by the clubs.

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217 CX-1664.

218 In 1992, Parker Brothers sold 72% of its toys in the 4th quarter, Milton Bradley 69%, and Tyco 64%. Toy sales and shipments are heavily skewed to the 4th quarter. In 1994, Mattel sold nearly 62% of its product in the 4th quarter; Hasbro sold almost 70% of its games and puzzles. (CX-139-K.)

219 *RX-621*, Table 7 at 28 (62-64% for clubs; 56-57% for TRU).

220 [ ]

221 CX-686-B.

222 CX-1730; CX-1012.

223 CX-1012; CX-1611.

224 CX-683-A-E.

225 CX-1012.

226 CX-530-A; *CX-530-D*; CX-527-A-B; CX-533-A (". . . Toys R Us is receiving a disproportionate share of our quotas."); CX-5; CX-10-A-B; CX-444-B; CX-200.

4. "Hot" toys

Respondent argues that it orders toys earlier than the clubs, and that the clubs order only toys identified as "hot" by its efforts. TRU places most of its orders for the Christmas season in the spring, and receives some toys early in the year, and some later. The clubs order soon after TRU. At the time that the clubs order, neither the clubs nor the manufacturers know which toys will be hot.

5. Other retailers

Toy manufacturers offer their full line of toys to Wal-Mart, Kmart and drug stores and supermarkets which do not carry the manufacturers' full lines or advertise nearly to the extent TRU does.[227] TRU's free-rider argument cannot justify its conduct targeted at the warehouse clubs. Despite the similarities between warehouse clubs and other discount retailers, respondent did not pressure the manufacturers regarding Wal-Mart or other retailers. The TRU campaign was not directed at "free-riding" by the clubs on TRU's retailing functions.

6. Canada

Respondent has expressed concern to manufacturers that their products were being carried by the clubs' stores in Canada and the United Kingdom.[228] However, TRU was unsuccessful in Canada. TRU has less leverage in Canada, due to another retailer (Zellers), "about as tough a competitor in the toy business as we have in the world."[229] If free-riding were the true rationale, the manufacturers would cut-off the clubs in Canada as they have at TRU's behest in the United States. This has not occurred.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, Toys "R" Us, Inc.

2. Respondent Toys "R" Us, Inc. ("TRU") is a corporation doing business under the laws of Delaware, with its office at 461 From Road, Paramus, New Jersey.

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227 Mr. Goldstein, vice-chairman and CEO of TRU, testified that respondent provides more services for manufacturers than any other of the national chains, including Wal-Mart, Target and Kmart, by taking product earlier, carrying a fuller line, carrying less-popular or non-promoted toys, advertising year-round, test-marketing products, avoiding knock-off toys (imitations), and promoting manufacturer brands. (36:8252/18 - 8259/5.) TRU accounted for [ ] of the toy industry's retail advertising from January through May of 1994, while Wal-Mart accounted for [ ]. (CX-1732; CX-155.) Wal-Mart does not advertise heavily, and instead, offers low prices. This policy is similar to that used by the warehouse clubs. (CX-137-B.)

228 Nakasone IH *(CX-1661)* at 84, 90, 118; Goldstein IH *(CX-1659)* at 102-04.

229 CX-1648-T.

3. TRU is a corporation, within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, as amended.

4. TRU's acts and practices are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act.

5. Respondent engaged in agreements, contracts or combinations with toy manufacturers constituting unfair methods of competition, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

6. TRU's importance as a distributor of toys has given it market power over toy manufacturers.

7. Since 1989, TRU used its market power to gain agreements or understandings with suppliers relating to toy sales to the clubs. These agreements or understandings included:

(a) The suppliers agreed not to sell to the clubs the same toys that TRU carried;

(b) TRU and the suppliers agreed upon toys that could be sold to the clubs. These were "club specials" consisting of pack of items, differentiated from regular open stock items. The club specials could not be readily price-compared to products sold by TRU, cost more, and raised the clubs' prices to consumers; and

(c) The suppliers agreed to advise TRU in advance of club specials that the suppliers wanted to sell to the clubs.

8. Some major manufacturers were reluctant to give up their sales of individual toys to the clubs so long as their competitors were selling those products to the clubs. TRU then facilitated agreements or understandings among competing manufacturers to achieve substantial unity of action among them relating to their dealings with the clubs.

9. The agreements or understandings facilitated by TRU between competing manufacturers are *per se* unlawful.

10. The agreements or understandings between toy manufacturers and between TRU and toy manufacturers were not a legitimate effort to protect TRU and the manufacturers from "free-riding" by the warehouse clubs.

11. The purpose and effect of the agreements or understandings between toy manufacturers and between TRU and toy manufacturers was to restrain competition among toy retailers and among toy manufacturers.

12. The respondent has unreasonably restrained competition.

(a) Retail price competition has been restrained, and toy prices to consumers are higher than they would have been;

(b) Competition among toy manufacturers in the distribution of toys to TRU's competitors has been restrained;

(c) The clubs' costs were increased, which impeded the growth of a new method of toy distribution in its incipiency; and

(d) Information that would enable consumers to make informed price comparisons has been suppressed.

13. The agreements or understandings between the manufacturers and between TRU and the manufacturers tend substantially to reduce output and restrain competition. None of these agreements or understandings is supported by a cognizable or demonstrated efficiency or other procompetitive justification. As a result, under a rule of reason analysis, these agreements or understandings constitute an unreasonable restraint of trade.

14. The acts or practices of TRU prejudice and injure the public. The acts or practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. These acts or practices are continuing.

15. TRU has failed to demonstrate that the complaint of the Commission herein was issued without reason to believe that TRU had violated the Federal Trade Commission Act or that the complaint was issued as a result of any legal insufficiency.

16. The order is in the public interest to remedy the violation of law and is necessary to bring to an end the challenged conduct and to dissipate the anticompetitive effects of the restraint.

ORDER

I.

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

B. "*Toy discounter*" means any retailer of toys, including but not limited to membership retail outlets such as Price-Costco, Sam's Club, and BJ's Wholesale Club, that sells toys at discounted prices.

C. "*Toys and related products*" means any product that is sold by respondent.

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

II.

It is ordered, That respondent, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the actual or potential purchase or distribution of toys and related products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

A. Continuing, maintaining, entering into, and attempting to enter into any agreement or understanding with any supplier to limit supply or to refuse to sell toys and related products to any toy discounter.

B. Urging, inducing, coercing, or pressuring, or attempting to urge, induce, coerce, or pressure, any supplier to limit supply or to refuse to sell toys and related products to any toy discounter.

C. Requiring, soliciting, requesting or encouraging any supplier to furnish information to respondent relating to any supplier's sales or actual or intended shipments to any toy discounter.

D. Facilitating or attempting to facilitate agreements or under-standings between or among suppliers relating to limiting the sale of toys and related products to any retailer(s) by, among other things, transmitting or conveying complaints, intentions, plans, actions, or other similar information from one supplier to another supplier relating to sales to such retailer(s).

E. For a period of five years, (1) announcing or communicating that respondent will or may discontinue purchasing or refuse to purchase toys and related products from any supplier because that supplier intends to sell or sells toys and related products to any toy discounter, or (2) refusing to purchase toys and related products from a supplier because, in whole or in part, that supplier offered to sell or sold toys and related products to any toy discounter.

Provided, however, that nothing in this order shall prevent respondent from seeking or entering into exclusive arrangements with suppliers with respect to particular toys.

III.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date on which this order becomes final, mail to each of its suppliers and employees who have purchasing responsibilities a copy of the Commission's complaint and order in this matter, along with a letter from respondent's chief executive officer stating that its suppliers can sell whatever products they wish to retailers, and that respondent will not take any adverse action for selling toys and related products to retailers in whole or in part due to the retailer's retail prices or price policies;

B. Within ten (10) days after the date on which any person becomes an employee of respondent with purchasing responsibilities for toys and related products, or a director, officer, or management employee of respondent, or a new supplier of respondent, provide a copy of this complaint and order to such person; and

C. Require each employee, director, or officer to whom a copy of this complaint and order is furnished pursuant to subparagraphs III A and B of

this order to sign and submit to Toys "R" Us, Inc., within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the complaint and order; (2) represents that the undersigned has read and understands the complaint and order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject Toys "R" Us, Inc. to penalties for violation of the order.

IV.

It is further ordered, That respondent shall:

A. Within sixty (60) days after the date on which this order becomes final, and annually thereafter on the anniversary of the date this order becomes final, and at such times as the Commission may by written notice to the respondent require, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order;

B. Maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with suppliers of respondent relating to any aspect of actual or potential purchase or distribution of toys and related products, and records pertaining to any action taken in connection with any activity covered by paragraphs II and III of this order; and

C. Notify the Commission at least thirty (30) days prior to any change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

V.

It is further ordered, That this order shall terminate twenty(20) years after the date on which this order becomes final.

OPINION OF THE COMMISSION*

BY PITOFSKY, *Chairman*:

INTRODUCTION.

Boiled down to essentials, this case is about how Toys "R" Us ("TRU"), the largest toy retailer in the United States, responded to a new type of competition in toy retailing posed by wholesale clubs ("clubs"), an innovative class of discount retailers. Instead of meeting this new competition in the market place, TRU communicated with all the toy

* Note: [ ] indicates *in camera* information has been redacted.

manufacturers that supplied both TRU and the clubs, and induced many suppliers to agree -- with TRU and each other -- either that they would not sell to the clubs at all, or more usually that they would sell on disadvantageous terms and conditions. TRU's goal was to prevent consumers from comparing the price and quality of products in the clubs to the price and quality of the same toys displayed and sold at TRU, and thereby to reduce the effectiveness of the clubs as competitors.

We find that TRU's conduct violates Section 5 of the FTC Act.[1] In doing so, we do not intrude on the right of a trader *unilaterally* to announce terms on which it will deal with suppliers, even if those terms disadvantage a rival. That is a company's long-recognized right under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), reaffirmed by the Supreme Court in 1984 in *Monsanto Co. v. Spray-Rite Servs. Co.*, 465 U.S. 752 (1984). What a firm cannot do is (1) agree with each of its suppliers not to sell or to sell on discriminatory terms to particular objectionable rivals, and (2) organize a boycott of suppliers to put its rivals at a disadvantage. A finding of illegality is amply justified here. First, TRU's purpose was to eliminate a form of competition that many consumers prefer; second, TRU and the toy manufacturers both had "dominant" market power; and third, the effect was harmful to competition and consumers.

TRU's principal defense is that it provided valuable services to consumers that the clubs did not provide, and that it was only by saving on those services that the clubs could unfairly underprice TRU. The problems with that explanation, the so-called "free-rider defense," are many: (1) TRU's claimed services are not the type on which a "free-rider" defense is typically based; (2) TRU was compensated fully or in large part by toy manufacturers for all significant services it provided; and (3) TRU presents no evidence, beyond speculation, that the clubs' "no-frills" approach did or would drive valuable services out of the market place -- an essential element of the "free-rider defense."

If a large toy retailer can engage in the actions pursued by TRU, then any large retailer in any sector of retailing could do the same, foreclosing competition in what has been over the years the highly competitive, open and efficient retailing sector of the United States economy. Indeed, a remarkable irony of this case is that if the law were as TRU contends -- if a large incumbent or group of incumbent retailers could cut off or encumber a new or innovative entrant's source of supply by exercising market power against suppliers -- then TRU, itself an innovative marketer resented by larger and less dynamic incumbents a generation ago, could have been denied an opportunity to compete on the merits and win in the market place.

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[1] 15 U.S.C. § 45.

I. DISCUSSION OF FACT.

A. The Toy Industry.

Hundreds of companies around the world make thousands of different toys. Overall concentration among toy manufacturers is low: the top ten firms in 1993 produced about half of the industry's output. RX 215 at 4.[2] Smaller firms come and go, while the big toy makers, such as Mattel and Hasbro, introduce many new products every year. Toy manufacturing is a fashion industry, driven by hit products, and characterized by rapid change among the top-selling toys. Toy sales are seasonal, with the industry's production schedule geared toward the year-end, holiday season. New products are introduced at the industry's annual "Toy Fair"[3] in February and are promoted over the course of the year in anticipation of the fourth quarter, when 60% of yearly toy sales occur. RX 877 (Carlton) at 19; RX 143-G; RX 621-L.

Toys are highly differentiated products. As a result, not all toy products are good substitutes for one another. IDF 12. A child whose dearest wish is to own a G.I. Joe or Barbie doll is unlikely to be satisfied by the latest Parker Brothers board game. Thus, while *all* the toy companies compete with each other to a considerable extent, competition is most intense between and among companies offering products that are close substitutes for one another. For example, many Mattel products compete with Hasbro toys; Little Tikes' closest rival is Today's Kids, another maker of large plastic toys; and Fisher Price is a close rival of Hasbro's Playskool division.

Most toy manufacturers' revenue is generated by a handful of top-selling items. RX 877 (Carlton) ¶ 40. A successful product can turn a small company into an overnight success, but a few large firms lead industry sales year in and year out. Hasbro and Mattel are the largest toy manufacturers, each selling in recent years four times as many toys as the next largest

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[2] The following abbreviations are used in citations to the record:

CX = Complaint Counsel's Exhibit, referenced by number and by page if applicable;
RX = Respondent's Exhibit, referenced by number and by page if applicable;
References to the trial transcript are made using witness name, page, and lines (Goddu 6681/15-21);
References to investigational hearing or deposition transcripts included in the trial record as exhibits are made using exhibit number, the witnesses' name, and transcript page and lines (CX 1658 (Goddu) at 271/23--272/22);
References to expert direct testimony, which was presented in written form and admitted into the record as exhibits, are made using the exhibit number, expert's name and relevant page, paragraph, or exhibit, *e.g.*, CX 1822 (Scherer) ¶ 54;
RPFF = Respondent's Proposed Findings of Fact, referenced by finding number;
IDF = Initial Decision Findings, referenced by finding number;
App. Br. = TRU's Appeal Brief; Answering Br. = Complaint Counsel's Brief;
Reply Br. = TRU's Reply Brief.

[3] Toy Fair is an annual event at which toy manufacturers and distributors gather in New York City. New toys are introduced, and many purchase orders are placed. TRU, the clubs, and all of the toy manufacturers discussed in this opinion attend Toy Fair.

traditional toy[4] makers. RX 877 (Carlton) Ex. 4. Little Tikes and Tyco (before it was acquired by Mattel in 1997) occupied spots three and four. These top firms purchase by far the most television toy advertising. CX 1822 (Scherer) ¶ 53.

The charts below list the 1993 market shares of the top ten manufacturers of all traditional toys and the top fifteen makers of all toys including video games, as calculated by the NPD Group.[5] Where available, 1992, 1994 and 1995 shares have also been listed. The NPD Group's estimates are consistently lower than other market share estimates in the record.[6] By any measure, the total market share of just the top four manufacturers of traditional toys falls roughly between 34 and 45%.[7]

ALL TRADITIONAL TOYS

Manufacturer	1995	1994	1993	1992
Hasbro	11.8%	12.9%	16.0%	14.5%
Mattel	15.6	14.8	10.9	9.7
Fisher Price[8]	*	*	4.7	4.6
Tyco	3.2	3.5	4.5	6.0
Little Tikes	2.8	2.9	3.6	3.6
Lego	1.9	1.8	2.3	2.5
Playmates	0.8	1.0	1.8	2.3
Hallmark (Binney & Smith)	2.3	2.0	1.6	1.4
Tiger Electronics	1.2	1.2	1.4	1.2
Ertl	1.0	0.9	1.3	1.0

ALL TOYS INCLUDING VIDEO GAMES

Manufacturer	1995	1994	1993	1992
Hasbro	10.0%	10.6%	12.6%	11.6%
Mattel	13.3	12.1	8.4	7.7
Sega	3.8	5.9	7.4	5.1
Nintendo	3.9	3.8	7.0	7.9
Fisher Price	*	*	3.6	3.6

[4] Traditional toys means all toys except for video games. Sega and Nintendo, which are the largest manufacturers of video games, have been the nation's third and fourth largest toy companies in recent years, each selling about half as much as Hasbro or Mattel. RX 877 (Carlton) Ex. 2.

[5] The NPD Group, an industry consultant, keeps separate market share statistics for manufacturers of traditional toys, excluding video games, and for all toys, including video games. Both parties' expert economists relied on NPD data.

[6] Mattel estimated its 1994 share of traditional toys at 18%, and its and Hasbro's combined share of traditional toys at 35%. CX 1669-C. This compares to the NPD Group's calculation of a share of 14.8% for Mattel and 12.9% for Hasbro. The NPD's broad product market may include products Mattel does not deem relevant competition.

[7] VTech and Today's Kids are two other toy manufacturers discussed in this opinion. Neither was among the top fifteen firms in the all toys market in 1993. In recent years, each has accounted for about 1 to 1.5% of the all toys market. CX 1230.

[8] Fisher Price was acquired by Mattel in 1993.

Tyco	2.7	2.9	3.5	4.8
Little Tikes	2.4	2.4	2.8	2.8
Lego	1.6	1.5	1.8	2.0
Acclaim	1.1	2.0	1.6	0.7
Playmates	(no data)	0.8	1.4	1.9
Hallmark (Binney & Smith)	2.0	1.6	1.2	1.1
Tiger Electronics	1.1	1.0	1.1	0.7
Electronic Arts	1.3	1.6	1.0	0.7
Ertl	(no data)	0.8	1.0	0.8
Kransco	(no data)	(no data)	0.9	1.2

Sources: RX 215; RX 877 (Carlton) Ex. 2; RX 621 at 8; CX 1230 at I, J, K.

B. Toy Retailing.

The development of category-killers -- national chains of large, specialized, discount stores -- is one of several waves of retail innovation that have swept this country (and much of the world) since the Second World War. Charles Lazarus, the founder of TRU, entered the toy retail business in 1948; he opened the first store bearing the name Toys "R" Us in 1954; his emerging chain included 50 stores by 1974, at which point TRU quickly grew into a national chain. CX 1830 (Scherer) ¶ 14. Today, TRU operates about 650 United States stores and roughly 300 stores in other countries. IDF 2. Recently, Wal-Mart and other "hypermarket" chains -- meaning large discounters that stock an extremely broad array of products -- have challenged older discount chains like TRU by offering lower prices across their many lines of products, including toys, through efficient purchasing, distribution and in-store operations.

TRU offers an assortment of about 11,000 individual toy items throughout the year. No other toy retailer carries as many toys. Amerman 3625/8-9; Goldstein 8110/4-8; Reinebach 8674/4-5. TRU stores are typically 45,000 square feet (similar in size to a large food supermarket), and are located primarily in the suburbs outside major metropolitan areas. Goddu 6973/11-13. TRU rose to its current position as the largest toy retailer in the United States in part by offering a larger selection of toys than any other retailer at the lowest prices. Like a food supermarket, these "toy supermarkets" employ few salespeople and offer few services; consumers are assumed to know what they want. CX 1822 (Scherer) ¶ 6; Goldstein 8242/18-8243/1. Thomas Kalinske, who has held management positions at Mattel and Sega, testified that he once reminded Charles Lazarus that, when TRU first started to succeed, "most of the existing toy trade ... hated the fact that companies like Mattel were supporting him" and felt that Mattel "shouldn't sell to Toys "R" Us, because they were cutting prices too much . . . ." Kalinske 2516. TRU was, at this point in its history, able to distinguish itself from other toy outlets through lower prices and

wider selection. Today, TRU still strives to offer competitive prices, but it is TRU's broad range of toys that gives it a distinct competitive advantage.

1. TRU is a very large buyer and seller of toys in the United States and the world.

TRU sells about 20% of all the toys sold in the United States, counting areas where it does not have stores. RX 877 (Carlton) ¶ 13. TRU calculates that its average share of toy sales in the geographic regions within a 30 minute drive of a TRU store is 32%. CX 1822 (Scherer) ¶ 27c (discussing TRU 312284-287). In many major metropolitan areas, TRU's share is significantly higher: a June 21, 1990 study by TRU estimated local market shares of between 35 and 49% in 18 metropolitan areas; and, in eight other cities plus Puerto Rico, TRU's share was equal to or greater than 50%.[9] Among the cities in which TRU's share exceeds 40% are some of the largest urban areas in the United States, including Los Angeles, Chicago, and New York. Complaint Counsel's expert economist testified that the appropriate antitrust market is likely to be smaller than the entire metropolitan area in many large cities, so TRU's estimates may actually understate its market power with respect to sales to consumers in these areas. CX 1822 (Scherer) ¶ 24.

TRU buys about 30% or more of the large, traditional toy companies' total output, and is usually their most important customer.[10] As the ALJ found, toy manufacturers would have great difficulty replacing TRU. IDF 433. A Tiger Electronics Vice President of Sales wrote in 1994 that he was worried about his company's future business because of "TRU dictating to Tiger and becoming even a bigger percentage of our business ...." CX 813. Even the very largest traditional toy manufacturers, which were the most important of TRU's suppliers, felt a regrettable but growing dependence on TRU. Hasbro was worried about "increasingly powerful retailers." IDF 444 (citing CX 136-G). A Hasbro executive testified that Hasbro could not find other retailers to replace TRU. Owen 1151/3-10. Mattel's CEO explained

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[9] TRU's estimate of its share fell between 35 and 49% in these cities: Bakersfield, California 45.47%; Bowling Green, Kentucky 36.59%; Chicago, Illinois 41.98%; Detroit, Michigan 44.40%; Elmira, New York 48.78%; Harrisburg, Pennsylvania 36.21%; Hartford, Connecticut 35.01%; Los Angeles, California 41.01%; Lubbock, Texas 35.31%; New York, New York 43.88%; Philadelphia, Pennsylvania 39.57%; Reno, Nevada 41.84%; Richmond, Virginia 35.09%; Sacramento, California 48.28%; San Diego, California 44.74%; San Francisco, California 46.41%; Washington, D.C. 43.35%; Youngstown, Ohio 35.55%.

In these cities TRU estimates its share exceeded 50%: Gainesville, Florida 55.58%; Lafayette, Indiana 75.90%; Las Vegas, Nevada 53.85%; Lima, Ohio 88.47%; Miami, Florida 54.27%; Peoria, Illinois 53.64%; Salisbury, Maryland 51.48%; Utica, New York 54.15%. TRU also estimated its share of toy sales in Puerto Rico at 50%. *See* CX 1577.

[10] The electronic toy makers, like Sega and Nintendo, which have other retail outlets including computer game stores, are an exception to the statement that TRU is invariably the most important outlet.

that "[TRU] is 30 percent of our business, so that would be a very big number to put [in]to other accounts that are already committed to what they [feel] is correct...." Amerman 3618. Even TRU recognized the large degree to which its suppliers had become dependent upon TRU. In a speech delivered in preparation for the 1990 Toy Fair, a TRU executive explained: "The key to increased profitability [for TRU's suppliers] in the 90's will be doing more business with Toys R Us since most of the expansion in the toy industry, at retail, will be taking place in Toys R Us stores in the U.S. and throughout the world." CX 1650-E.

2. Retail prices of toys vary widely in different retail channels.

Retail margins enjoyed by different types of retailers vary widely. Department stores and other "traditional" toy stores sell toys for about 40% to 50% above their cost. TRU's average margins are close to 30% above cost, but there is significant variation across the range of products sold. Wal-Mart and the other similar discounters, such as K-Mart and Target, mark-up toys and other products by about 22% over cost. IDF 6; CX 1822 (Scherer) ¶ 5, 7. The clubs sell at mark-ups as low as 9% at Costco and as high as 14%, the highest margin at Pace. IDF 38. As a group, the clubs sell product at average gross margins -- the difference between the cost of merchandise and its selling price -- of between 9 and 12%. IDF 16.

Wal-Mart is generally acknowledged as the price leader among discount retailers of toys. Wal-Mart carries an inventory of between 3,000 to 4,000 toys (about a third as many as TRU), and as a rule Wal-Mart and similar discounters tend to carry the newer and more popular toy products. Although TRU does not always match Wal-Mart prices, it does sell items also available at Wal-Mart and the other discount chains at mark-ups lower than its average margin. CX 1822 (Scherer) ¶ 19, 20.[11] Maintaining a low "price image" is important to TRU. IDF 40. As one TRU document declared: "We are constantly aware of competitive pricing and are truly scared of being beaten." CX 1034-C.

Products sold *only* by TRU (and not by other discounters) are sold at significantly higher margins. On these items, TRU's only competition is traditional retailers, which sell at margins of 40 to 50%. IDF 6. TRU commonly sells these products at mark-ups as high as 39%. Even accounting for differences in sales volume, TRU makes the most money from the 4,000 moderately popular products in the middle of the line of about 11,000 items that it currently carries. CX 1822 (Scherer) ¶ 19, 20. This is a key fact about TRU's business strategy. TRU offers competitive

[11] A 1992 comparison by TRU of prices for 115 identical items showed that the Wal-Mart price was lower than that at TRU for 61 items, higher for another 24 and the same on 30 others. Other studies show that Wal-Mart prices are between 5 and 8% lower than TRU prices for identical goods. CX 1822-C (Scherer) ¶ 7 (discussing TRU 006689-92).

prices on the top-selling 100 to 500 products to attract customers to its stores, who then often purchase additional, less popular toy products that sell for higher prices relative to costs. *Id.* While these top selling products are not "loss leaders," they sell on much thinner margins at prices only slightly higher than Wal-Mart's. *Id.*

Although TRU's general price structure is consistent across the country, TRU varies the prices charged for some toy products to meet local competition. TRU creates so-called "price version charts" to estimate the degree of competition in a particular region. Goddu 6555/19 - 6558/5. These geographic areas, which TRU calls Areas of Dominant Influence ("ADIs") correspond roughly to newspaper circulation areas, because TRU uses the ADIs to determine the prices it advertises in local newspapers. Goddu 6556/6-23. There are about 200 ADIs for the United States. *Id.*; CX 992. In adjusting regional prices, TRU considers the strength and the number of the national discounters, such as Target, K-Mart and Wal-Mart, that are in the area as well as regional discounters, such as Hills or Caldors. Goddu 6527/11-19. The greater the level of competition, the lower the advertised price for promoted toy items. Goddu 6951/19-22. Since 1996, moreover, individual TRU store managers have been given the authority to lower the prices charged on specified popular toys to meet the prices of retailers in their immediate area. Goddu 6942/1-21.

TRU has continued to profit from its own unique strength of being a full-line toy discounter by charging greater retail mark-ups for its broad line of moderately popular products. Other specialized toy outlets were not able to profit from this strategy as effectively as TRU. Lionel Leisure and Child World, two toy discounters similar to TRU, went bankrupt in the early 90's, at which point TRU's principal remaining competition became Wal-Mart, Target, K-Mart, and other general merchandise discounters.[12] Goddu 6517/7-10.

C. The Warehouse Clubs.

Warehouse clubs are a recent retail innovation. The first warehouse club was founded in 1976. By 1992 the warehouse club chains, Sam's Club, Pace, Price Club, Costco, and BJ's, operated about 600 individual club stores. IDF 17. Subsequent acquisitions have reduced the major club chains to three: Price/Costco, Sam's, and BJ's. *Id.* In June of 1992, TRU estimated that 238 of its 497 then-existing stores in the United States were within five miles of a club. CX 912-A; IDF 391. Clubs, moreover, were within or near

[12] KayBee Toys, a discounter, is still in business but its market share is less than 5%. RX 877-M (Carlton). KayBee carries only 1,000 different toys, significantly fewer than Wal-Mart. RPFF 16.1 Regional discount chains such as Fred Meyer, Caldors, Ames, Hills, Bradlee's, Service Merchandise, and Shopko sell varying amounts of toys within a mix of general merchandise. These small chains have had less of an effect on retail toy prices than the national chains, which, other than the clubs, generally offer the lowest retail prices.

the regional ADIs of almost all of TRU's 1992 stores -- 486 of 497. CX 1823. This is not surprising since ADIs, which are designed to be the same size as the circulation area of local newspapers, such as the *Los Angeles Times*, are often significantly larger than five miles. In other words, if TRU lowered its prices on newspaper-advertised toys just in localities defined by the ADIs to meet club prices, then 97.8% of TRU's stores would have been affected by the adjustment.

Clubs employ a different business model than other discount outlets. The clubs sell only to members, who pay an annual fee of about $30 for the opportunity to shop at the club. Sinegal 147/24-148/17; Zarkin 4784/1-2. Clubs target consumers who want to buy merchandise at low prices but are willing to forgo plentiful sales staff or other services. Ingene 9042/16-22; Sinegal 149/11-150/1.

Clubs offer the lowest prices of any retail store. As the President of Price/Costco testified, "[a]lmost invariably our presence in the community is going to have a tendency to drive prices down." IDF 38; Sinegal 200/10-12. The clubs are able to offer low prices by reducing operating costs and increasing the rate of inventory turnover. Club stores are located in areas where real estate is inexpensive. Club buildings are large (100,000 square feet or more, about the size of an airplane hangar) and sparsely decorated, typically employing industrial lighting and plain steel shelving. RX 894 (Buzzell) at 13; Ingene 9045/15-9046/3; Sinegal 156/23-157/11. Clubs are staffed with few employees. Checkout lanes have a single person operating the scanner and cash register, and customers pack their own purchases. Zarkin 4806/24-4807/16; RX 894 (Buzzell) at 14-15.

Another significant area of savings involves the clubs' techniques for handling and displaying merchandise. The clubs purchase products packed on shipping pallets, which can be lifted by forklifts so that boxes do not need to be moved individually, and pre-marked with computerized codes that can be read easily by the scanners at checkout lanes. Sinegal 157/13-21; Zarkin 4806/11-4807/3, 4809/9-15. To reduce freight costs, vendors ship goods to centralized distribution centers and these goods typically are dispatched to individual club stores the same day that they are received. Zarkin 4809/16-4810/8. Merchandise arriving at club stores is delivered directly to the sales floor and displayed on the pallets on which it was shipped by the vendor. Sinegal 157/12-21; Zarkin 4809/24-4810/6. This process eliminates significant labor costs and delay attendant to packing, unpacking, marking, and displaying goods on traditional racks and shelving. Sinegal 157/22-159/6.

The first club stores sold only to small business customers, such as restaurants, but by the late 1980s, sales to individuals had become common. RX 894 (Buzzell) at 8-9. While the mix of business and individual members varies among the warehouse club chains, Zarkin 4791/15-

4792/17, by 1992 individual customers accounted for at least half of all club sales. CX 178-C; CX 96-D. As the clubs attracted more individual customers, they began to carry a wider variety of products and compete with a larger range of retail outlets. Sinegal 207/25-208/11; Zarkin 4789/22-24. In addition to toys, the clubs carry food products, electronics, appliances, jewelry, cameras, video and audio recordings, books, hardware, housewares, sporting goods, automotive parts, office supplies, health and beauty aids, apparel, and seasonal goods. Sinegal 147/13-21; Zarkin 4789/11-15. Although some manufacturers have restricted the merchandise they offer to clubs, or refused to sell to clubs at all, these suppliers, as the ALJ found, usually "choose not to distribute in any discount or mass merchant channel, not merely warehouse clubs." IDF 25.

The clubs seek to offer name-brand merchandise. As one warehouse club executive put it, "generally speaking, by selling a branded product at a great price, that equals the best value." Zarkin 4797/15-16. Clubs also utilize an inventory strategy whereby the mix of non-food products changes regularly. Zarkin 4788/18-4791/14, 4794/1-18. This creates a "treasure hunt" atmosphere, meaning that customers can visit the same store often and always search out new bargain products. Sinegal 151/4-152/13. The BJ's club, for example, stocked between 50 and 150 toy items at any time, but over a full year carried 300 different toy items. IDF 32; Hilson 4417/23-4419/11. Costco carried 100 toy items at Christmas and as few as 15 at other times, but still offered its customers a total of 400 different toys over the whole year. Moen 615/5-616/20.

D. Toy Sales at the Clubs.

Since at least the end of the 1980s, toys have been a part of club offerings. Clubs sell toys at the same margins that they sell other products. The clubs attend the annual Toy Fair and other industry events, and generally place their orders between March and May for delivery in August or September. IDF 33. This is consistent with the practice of Wal-Mart and the other general merchandise, discount chains. IDF 487.

During the late 1980s and early 1990s, warehouse clubs could select and purchase from the toy manufacturers' full array of products. Clubs bought both the ordinary merchandise that was sold to all classes of retailers and customized products that were specially designed for the club class of trade. IDF 34; Halverson 357/3-359/12; Moen 606/8-22. Warehouse clubs sometimes worked with toy manufacturers to develop certain specially-packaged products that were intended to meet the clubs' business objectives of offering unique products that consumers wanted and recognized as valuable. For example, warehouse clubs purchased combination (or "combo") packs containing multiple inexpensive toys, such as Matchbox or Hot Wheels cars, Moen 606/23-608/22; Halverson 358/2-

22, or complementary products, such as a radio-controlled car with a battery. IDF 34; Hilson 4575/11-20.

The ALJ found, however, that clubs did not always, or even usually, prefer combo packs. IDF 35. Costco's toy buyer testified that regular products were generally preferable to combo packs because combo packs could make it difficult for consumers to compare the club's offerings to those sold by other retailers. Moen 608/9-22. The buyer for BJ's, the warehouse club with the most extensive toy selection, testified that club customers generally resisted purchasing toys in combo packs. Such packs could be perceived as designed to force the customer to buy a second unwanted product in order to obtain the one the customer's child wanted. Hilson 4573/15-4575/7. Pace's toy buyer also felt that combo packs needed to contain obvious, extra value to generate demand among club shoppers. Until roughly 1991, only 15-20% of Pace's toy selection was combo packs. Halverson 358/19-359/21.

Sam's carried the least extensive inventory of toys of the major warehouse clubs, reflecting Sam's unique business strategy among the clubs. Jette 996/2-997/22. Instead of demonstrating value by offering well-known, branded products at lower prices, Sam's targeted higher-income customers with products that were different from those available through other discount channels. As a result, Sam's sold larger quantities of combination packs than the other clubs. Jette 998/22-1001/7. Even at Sam's, however, 50 to 60% of the toy items offered were regular line products rather than combo packs. Jette 1001/18-1002/13.

Like all large retailers, clubs attempted to purchase toy items that they believed would sell well. Hilson 4580/14-23; Jette 1003/2-20. As the ALJ found, however, the clubs did not carry primarily best-sellers, even before TRU implemented its policy. Of the 310 toy products sold by clubs in 1991, only 11% were among the top 100 selling products and only 27% were among the top 500. IDF 37; Ingene 9078-79/20. The ALJ also found that, in deciding whether products are likely to sell well, club toy buyers relied on their own assessments of a product's characteristics, the strength of the product brand, and the manufacturer's planned advertising in support of the product. IDF 36; Halverson 352/4-353/18; Hilson 4581/4-4582/13; Jette 1003/12-1004/16. Warehouse club toy buyers testified that they typically did not make product selections based on other retailers' advertising plans or sales experience, since information on such matters, if available to them at all, was not available at the time they made their own purchasing decisions. Hilson 4582/14-21; Halverson 354/5-19; Jette 1004/17-23.

The effect of preventing the clubs from selling products identical to those carried by TRU will be discussed at pp.561-64, *infra*.

E. TRU's Club Policy.

By 1989, TRU senior executives were concerned that the clubs presented a threat to TRU's low-price image and its profits. IDF 52. TRU knew that consumers form opinions about a store's relative prices based on a few visible items. TRU referred to these products as "price image" or "price sensitive" items. IDF 43; CX 1077. As discussed, TRU had already lowered the prices of these popular items to meet Wal-Mart's challenge, but the clubs' marketing strategies threatened to bring prices even lower.

Contemporary analysis in the late 1980s predicted that the clubs would continue to grow at an accelerated rate. According to a May 1989 analysis prepared by Goldman, Sachs that was found in TRU's files:

> [W]e continue to regard the warehouse club industry's prospects as quite bright .... [Price Company's] skills as a merchant and an operator are unsurpassed .... [W]e also believe that the combination of value and merchandise excitement offered by warehouse clubs is simply being discovered by more and more shoppers (indeed, we think the incremental business being garnered by warehouse clubs is coming largely from retail, as opposed to wholesale, customers, one of the principal themes of this report) ... Over the past year, we have perceived an unmistakable tilt in the warehouse club business toward the retail component of the business ... We continue to believe that this retailing revolution has <u>much</u> further to go, and the tilt to retail simply means that warehouse clubs are becoming an increasingly important competitive factor for traditional retailers in nearly every merchandise category.

CX 1632 C-R (emphasis in original). Similarly, McKinsey & Company estimated for the Food Marketing Institute in 1992 that the number of warehouse clubs would grow from 450 in 1991 to 950 over the following ten years. CX 1743-J. The Allen Levis consulting firm estimated in 1992 that the number of warehouse club stores would grow from 425 in 1990 to 875 in 1995, with warehouse club sales rising from $24 billion to $77 billion. CX 178-E.

In 1989, TRU executives, including Chairman Lazarus, Vice-Chairman Goldstein, and President of Merchandising Goddu, began to formulate a response to club competition. They viewed the clubs' toy prices as "predatory." IDF 47; CX 1658 (Goddu) at 351/23-352/1. Based on "shops"[13] of clubs other than Sam's, TRU learned that the clubs carried approximately 120-240 items in competition with TRU, priced as much as 25 to 30% below TRU's prices for the same items. IDF 48. According to TRU President Nakasone, the difference was "embarrassing." CX 1661 (Nakasone) at 35/3-11.[14] TRU feared that clubs would surpass even Wal-

[13] Here, "shops" and "shopping" refer to a market research technique whereby a researcher visits the clubs and gathers information about their toy inventory and prices.

[14] Asked whether the clubs could hurt TRU, Lazarus testified:

A: Sure they could hurt us. Yeah.

Q: How so?

Mart as the downward price leader in the toy retail business. IDF 51, 53; Goddu 6615-16/12 ("[W]e were concerned that in the eyes of the customer [the clubs] would be recognized as being a price leader ...."). As the ALJ found, TRU also predicted that the clubs would sell 6 to 8% of the retail toys in the United States by 1997. IDF 54; CX 1070.

In 1989 and 1990, TRU began to discuss clubs with some of its suppliers, including Mattel, Hasbro, and Fisher Price. TRU made various general representations about not buying from manufacturers that sold to clubs. IDF 120 (Mattel), 171 (Hasbro), 218 (Fisher Price). TRU first attempted to set forth a written policy regarding the clubs in about late 1990. CX 957. The initial plan called for suppliers to treat the clubs and TRU differently for many different product categories (for example, video game accessories were only to be sold to clubs in packs of three or more items, batteries in packs of 24 or more, and candy in packs three to four times greater than weights TRU sells). *Id.* This was quickly abandoned as too complicated. IDF 59.

Thereafter, TRU renewed negotiations with its suppliers.[15] Prior to and at Toy Fair (February) 1992, TRU informed manufacturers of a new club policy. Goddu, who took the lead in negotiations with TRU's suppliers, drafted the new plan in a document, dated January 29, 1992, which provides:

- No new or promoted product unless entire line is carried.
- All specials and exclusives to be sold to the clubs should be shown first to TRU to see if TRU wants the item.

A: By selling that product for a price that we couldn't afford to sell it at. Simple economics.

* * *

Q: Well, did the club[s] sell enough toys that this could affect your -- the price levels?
A: It could affect our reputation for sure. How much they could sell, I don't know.
Q: What do you mean your reputation?
A: Our reputation for being a low -- being a low cost seller of toys. Our reputation is the biggest selection at the lowest prices.

Lazarus (CX 1660) at 30/14-17, 46/20-47/2.

[15] During this period -- in 1992 -- TRU acknowledged that club price competition was affecting its business and took steps to respond. TRU created a complete listing of stores that competed with warehouse clubs, specifically noting the number of TRU stores located within a five-mile radius of warehouse club. CX 912-A. This document was circulated, on June 4, 1992, to TRU's top officers, including Chairman Lazarus, CEO Goldstein, President Nakasone, and Goddu. CX 912-A. Also during 1992, TRU lowered its prices for several high-profile products by as much as 20% to match club prices and avoid "damaging perhaps [TRU's] price image with the customer." IDF 56. TRU also lowered its expectations for the performance of TRU stores that competed directly with a club outlet. IDF 57. TRU regularly calculates an index rating the level of competition faced by each of its stores. CX 1822 (Scherer) ¶ 27b. This index allows TRU to evaluate the performance of its store managers without unfairly punishing those who operate stores in more competitive areas. Among other things, end-of-the-year performance bonuses were based on the competition index. *Id.* In December of 1992, TRU included clubs located near TRU stores when it calculated its index. CX 1618. TRU explained this decision by noting that "[w]arehouse clubs have been a strong competitive force this season." *Id.* Clubs were *withdrawn* from later competition indices in 1993 -- after TRU's club policy was put into effect -- because clubs were then thought to have "no significant . . . impact on TRU stores." CX 1058.

- Old and basic product should be in special packs.
- Clearance/Closeouts are OK providing (sic) TRU is given first opportunity to buy this product.
- No discussion about prices.

CX 1681. TRU met with each supplier to explain and discuss this policy. After asserting its club policy, TRU asked each manufacturer individually what it intended to do. As a result of these discussions, TRU realized this second iteration of its club policy also would prove difficult to enforce because, among other reasons, there was confusion about what constituted "a new or promoted product." CX 913-C (noting the misunderstanding of Hasbro's Playskool Division that "less important" items *could* be sold to the clubs).

A prolonged and extensive period of negotiations between TRU and the toy manufacturers, which is described *infra* pp. 548-60, followed TRU's announcement of its club policy. TRU and its key suppliers eventually worked out a compromise whereby each manufacturer agreed with TRU that it would sell to the clubs only highly-differentiated products (either unique, individual items or "combo" packages of two or more toys) that were not offered to any other outlet including, of course, TRU. The details often varied from toy manufacturer to toy manufacturer but the core of the arrangement was consistent. The right to review club products described in Goddu's written policy ("specials and exclusives to be sold to the clubs should first be offered to TRU") continued to apply.

Through its announced policy and the related agreements discussed below, TRU sought to eliminate the competitive threat the clubs posed by denying them merchandise, forcing the clubs' customers to buy products they did not want, and frustrating consumers' ability to make direct price comparisons of club prices and TRU prices.[16]

The frequency, intensity and duration of negotiations leading to agreements between TRU and the various manufacturers, and among some of the manufacturers, was unusual. Set out below is a review of

[16] By late summer of 1992, the clubs recognized that the toy orders they had placed earlier in the year were not being filled. In about August of 1992, Costco, BJ's and Pace sent letters to Mattel and other toy manufacturers complaining about the claimed "shortages" and threatening litigation. CX 1688 (Pace); CX 1330 (BJ's); CX 748 (Costco). Mattel responded by creating a "task force" to address the club issue. CX 553-B; Amerman 3693/6-13. In its memorandum establishing the task force, Mattel acknowledged that its "marketing independence was compromised in 1992 by uninvited communications from Toys R Us." CX 553-A. In late December 1992, Mattel's general counsel promulgated the formal club policy, which essentially stated the terms of the agreement Mattel had entered with TRU earlier in the year, *i.e*, Mattel will offer only differentiated product to the clubs. RX 476; CX 688; Okun 2800/3-6. Mattel has followed this policy ever since. IDF 163; Okun 2805/7-11; Barad 7917/22-7918/16. Likewise, Hasbro, in June of 1994, issued a formal written statement that it would sell only differentiated product to the clubs. CX 243. This too merely stated the policy Hasbro had already adopted and followed for a year. The policy statement is dated after Hasbro received the Federal Trade Commission's letter of February 7, 1994, requesting documents for the investigation of this case. IDF 213; Verrecchia 1620/3-1622/14.

negotiations and agreements between TRU and its principal suppliers, and then of negotiations and agreements among the principal suppliers.

F. Evidence of Vertical Agreement.

There is direct evidence that TRU reached agreements with at least ten toy manufacturers.[17] By the end of 1993, all of the big, traditional toy companies were selling to the clubs only on discriminatory terms that did not apply to any other class of retailers. This discriminatory policy was TRU's goal, obtained through extend-ed and often heated negotiations with each of its suppliers. TRU began this process with Mattel and other large suppliers, whose agreement was most critical to the plan's success. Having obtained an initial commitment from these companies, TRU turned to the smaller toy companies, which also adopted the requested policy. After the agreements were reached, TRU supervised and enforced each toy company's compliance with its commitment.

For ease of exposition, we have organized the evidence of vertical agreement into four categories, which proceed in roughly chronological order. First, TRU asked for and received an initial verbal commitment from its suppliers; second, at TRU's request, many suppliers presented proposed club products to TRU for its prior approval, or otherwise negotiated with TRU about the appearance or content of club offerings; third, TRU engaged in extended negotiations with its suppliers over compliance with the club policy and often reached new points of agreement with them as the policy was implemented; and fourth, testimony and industry documents contain

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[17] The ten manufacturers are Mattel, Hasbro, Fisher Price, Tyco, Little Tikes, Today's Kids, Tiger Electronics, VTech, Binney & Smith and Sega. While the ALJ found that fourteen toy companies entered vertical agreements with TRU, we find that there is clear and direct evidence of agreement with respect to the ten above-listed companies. In the case of Sega, although TRU did not obtain all the concessions it sought from that supplier, the evidence shows that Sega promised to restrict sales to the clubs in the same manner as the other toy suppliers and then substantially complied with its word. CX 754 (letter from CEO of Sega to Chairman Lazarus promising not to sell new games to the club Sam's). Little Tikes' compliance with its commitment to TRU was fitful as a result of the ongoing disagreement between TRU and Little Tikes' parent company. But Little Tikes did restrict club sales after and as a result of detailed negotiations with TRU. IDF 277.

The only evidence of vertical agreements between TRU and Lego, Just Toys and New Bright, firms that the ALJ found had entered into agreements with TRU, is testimony that the companies were being "strong-armed" or pressured by TRU. IDF 331 (Lego) 359, (Just Toys), 362 (New Bright). The details of the communications between TRU and these companies are not developed in the record. Lego and New Bright restricted club sales for only one year. In view of the extremely strong pattern of evidence in the record showing that TRU aggressively sought agreements from its suppliers, the ALJ concluded that TRU reached agreements with these suppliers too. While this finding is reasonable, it is not necessary to resolve this case. We therefore decline to find that agreements were reached with specific companies without some more direct evidence of agreement.

As this factual discussion illustrates, there is also evidence that Huffy entered an agreement with TRU. Huffy, however, is a manufacturer of bicycles and other sports equipment, and may not be part of the relevant product market. Some evidence with respect to Huffy is included in our discussion primarily to illustrate TRU's pattern of conduct.

many examples of promissory language, indicating that the toy suppliers and TRU believed that they were bound by their commitments to one another. In our discussion, we use the term "commitment" to mean a forward-looking statement about or guaranty of future conduct similar to a promise. Commitments are most easily distinguished from mere statements of fact when, as here, they are made by parties negotiating a change in their course of conduct.

1. TRU sought and received initial verbal commitments from its suppliers.

TRU met individually with each of its suppliers to explain its policy. It did not simply state that policy, but asked the suppliers for express assurances that the supplier understood the proposal and agreed to go along. Goddu explained that this was TRU's purpose in the discussions with its suppliers that occurred during late 1991 and 1992:

Q: But did you want [the toy manufacturers], did you want to find out what their intentions were with respect to selling to the clubs?
A: Absolutely.
Q: And did you directly or indirectly ask them that to find out?
A: Yes.
CX 1657 (Goddu) at 130. Goddu also asked TRU's suppliers to tell TRU in advance about any items they planned to sell to the clubs:
A: [W]hat we tried to communicate was please tell us which items you plan on selling to the clubs.
Q: And when you asked them that, did any of the manufacturers say they would?
A: Oh, absolutely.

CX 1657 (Goddu) at 209. The ALJ credited Goddu's explanation that TRU wanted this commitment in advance to avoid misunderstandings. IDF 63. As Goddu explained: "We're going to find out anyhow. And then we have to have a meeting about that." CX 1657 (Goddu) at 209.[18] Mattel, Hasbro, Tyco, and Little Tikes provide prominent examples of manufacturers giving advance commitments, but in view of Goddu's testimony, the ALJ correctly concluded that the practice was pervasive.

Mattel first promised TRU that Mattel would try to sell the clubs more customized products in 1990. At Toy Fair in February of that year, TRU officials met with Mattel and "threatened to 'review' their support of those manufacturers that overly supported the warehouse clubs." CX 529; Okun 2671/25-2673/14. Mattel committed to "do [its] best" to move the clubs away from its regular line of products. CX 530-B.[19] Two Mattel documents

[18] TRU told Mattel that TRU would support only companies that "agreed not to support the clubs." CX 532-A.

[19] On September 26, 1991, in preparation for a meeting with TRU to discuss, *inter alia*, the clubs (CX 530-A; Barad 8067/15-8068/5; Okun 2626/21-2627/15), a Mattel executive sent a briefing memorandum to the president of Mattel's Girls Division which stated, in pertinent part:

demonstrate that this promise to TRU affected Mattel's business with the clubs. An April 1990 memorandum memorialized discussions between Mattel's then-president Bob Sansone and TRU affirming Mattel's "policy to grow the Wholesale Club business with non-competing SKU's."[20] CX 600-B; Okun 2673/25-2675/20. And, a December 1990 memorandum acknowledges TRU as an obstacle to aggressive pursuit of the club channel of distribution but concludes: "We must acknowledge the TRU issue, but if we give [the clubs] specials we should be ok." CX 595-B; CX 523; Okun 2677/7-2679/1.

These first efforts on the part of Mattel to change the terms on which it dealt with the clubs were not satisfactory to TRU, which asked Mattel to adopt a more rigorous policy. Mattel was one of the first toy manufacturers that TRU approached after developing the written club policy described above. TRU's Chairman Lazarus met with Mattel's CEO Amerman and other high-level executives from the two companies in October 1991. IDF 123. As one participant described it, "Lazarus was coming on very strong .... [I]n effect he was saying he didn't want us to do any business with the clubs." Okun 2684/4-2685/6. As the Mattel employee who summarized the meeting in a Mattel internal memorandum recalled, when TRU asked Amerman whether Mattel would continue to sell to the clubs, Amerman replied that "we [Mattel] would not sell the clubs the same items we were selling to [TRU]." CX 532-A; Okun 2685/11-2686/6. Goddu's recollection differed slightly. He testified that Amerman "made a commitment that they [Mattel] wouldn't sell the clubs any more merchandise," Goddu 6663/6-22, and after further discussions TRU and Mattel "wound up in a situation where ... Mattel ... committed to [sell] only exclusive [items to the clubs]." Goddu 6891/13-6892/14. By either account, Mattel's CEO *committed to* TRU's top officer that Mattel would comply with TRU's club policy.

Hasbro also *committed to* TRU that Hasbro would not sell promoted products to the clubs. On several occasions between late-1991 and mid-1992, TRU met with Hasbro to explain TRU's club policy and to complain about finding particular Playskool toys in the clubs. Owen 1106/5-1108/5. Executives from Hasbro's Playskool division were particularly concerned about the cost of restricting Hasbro's club sales. In preparation for one of

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WAREHOUSE CLUBS

This is one of the fastest growing channels of distribution in the country. As a public company we owe it to our shareholders to maintain our business by selling this class of trade . . . .Two years ago we committed to Toys R Us that we would do our best not to sell them regular line goods. We have reached a point where we are selling them approximately 50% of our volume on a customized basis. We will continue to move in this direction and promise to increase the percentage sold on a customized basis.

CX 530-B (emphasis in original). The commitment referred to in this memorandum was made at Toy Fair in February 1990. IDF 120.

[20] SKU is an acronym for stock keeping unit, which means an individual item carried by a retailer. For example, the board game Monopoly is one SKU at TRU.

the meetings with TRU, a Playskool executive wrote a memo to superiors at Hasbro suggesting that Hasbro "achieve some major concessions [from TRU] if we are to dramatically change the way we approach the Warehouse Clubs." CX 78. At the meeting, which occurred prior to the Toy Fair in 1992, TRU raised the subject of Hasbro's club sales, and Hasbro sought certain benefits from TRU (such as increased shelf space and a limitation on TRU's sale of imitations of Hasbro products). IDF 177-80. Hasbro's President of U.S. Sales and Marketing does not dispute that the meeting involved "some meeting of the minds" and calls it an example of "how we [Hasbro and TRU] do business together." Owen 1121/13-1123/10. During these negotiations, TRU sought a response from Hasbro regarding club sales, CX 1657 (Goddu) at 130/20-25, and Hasbro responded that it would refuse to sell promoted toys to the clubs. Owen 1114/23-1115/5, 1117/6-9. Soon after Toy Fair 1992, TRU grew dissatisfied with Hasbro's commitment not to sell promoted products and wanted Hasbro to adopt a "no identical items" policy like the other manufacturers. Towards this end, TRU kept asking Hasbro officials questions such as "what is your policy going to be, how are you going to deal with this [Hasbro products in the clubs] ... ?" Verrecchia 1502/16-1504/19, 1524/2-9. Hasbro changed its policy, as TRU wished, after checking with TRU about the proposed modification. Owen 1136/20-1141/14, 1143/2-1144/23.

TRU and Today's Kids discussed the clubs at several meetings in 1992 and 1993. Goddu 6733/23-6734/3. At these meetings, TRU said that it would not carry products that the clubs were also carrying, and that it wanted Today's Kids to notify TRU when Today's Kids sold any products to the clubs so that TRU could stop its purchases of those Today's Kids products. Butler 5524/6-5525/1. Today's Kids informed TRU that it would cease club sales, Goddu 6738/5-22, 6739/12-14, but also asked whether, if it did so, TRU would increase its purchases from Today's Kids. Goddu 6729/9-22. After TRU canceled its order for a Today's Kids product that had been sold to the clubs, CX 891, 892, Today's Kids informed the clubs that it would no longer sell to them. Stephens 5985/5-11. TRU later increased its business with Today's Kids by 40%. CX 1657 (Goddu) at 170/13-22; CX 902.

TRU likewise received verbal responses from Tyco and Little Tikes. After TRU explained its policy, Tyco's CEO told TRU he would "get back to" them, Goddu 6677/6-8, and then did so around the time of Toy Fair (February) 1992, when Tyco explained its "25-item" policy to TRU.[21] Grey

[21] Tyco announced it would sell only to customers that purchase a minimum order of $20,000, and that the order must include at least 25 different products from the Tyco line. In addition, to prevent customers from ordering small quantities of some items, Tyco required that the smallest quantity of any item ordered must be at least 20% of the unit count of the highest quantity ordered. CX 1418. As described below, the policy was selectively enforced, so that in practice it applied only to the clubs'

2996/9-2997/9; CX 1657 (Goddu) at 176-177. When TRU raised the warehouse clubs issue with Little Tikes at Toy Fair 1993, Little Tikes told TRU that it would sell the clubs only combination packs or nearly discontinued items. Little Tikes repeated this commitment in conversations thereafter. DePersia 2145/15-2146/9, 2151/13-23; CX 1510. The toy company VTech "promised" TRU at Toy Fair 1992 that it would not sell to the clubs. IDF 314; CX 1318; O'Brien 2426/16-2427/18. Similarly, after meeting to discuss the clubs, the CEO of the electronic game company Sega wrote to Lazarus assuring him that "Sam's Wholesale Club will have old Genesis software bundled with Hardware this fall ...." IDF 339; CX 754.

As a whole, the evidence indicates that TRU did not just announce its policy, but sought a response in every -- or almost every -- instance in which it spoke to a supplier about its club policy.

2. TRU previewed and cleared or rejected the special products offered to the clubs.

After committing to TRU's policy, the toy companies, as TRU had asked them to do, presented examples of their specially-developed "club products" for TRU's preview and clearance before offering them to the clubs. On other occasions, TRU and its suppliers negotiated over the appearance of club packages. As Goddu explained at trial, TRU wanted the special products to be sufficiently differentiated from those it sold to "avoid the customer being able to make direct pricing comparison[s]." Goddu 6635/13-17.

Goddu testified that following the October 3, 1991 meeting between Mattel and TRU, "[t]here was (sic) constant questions [from Mattel] as what if we did this and what if we did that ... an opinion here, an opinion there, and we asked to see the product ...." Goddu 6670/13-6671/7. In February 1992, Goddu met with Mattel executives to discuss Mattel's adoption of the club policy. A Mattel memorandum summarized one of the points of agreement at that meeting: "Agreed to show TRU all [club] specials/exclusives ... they will have a right of first refusal." CX 541. On several later occasions Mattel fulfilled this obligation by presenting for TRU's review examples and photographs of Mattel products intended for the clubs. IDF 152; CX 626-B, 597.[22]

TRU representative Peter Spencer, who screened the club specials of Mattel's Arco subdivision, testified (on cross-examination by TRU) that

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purchases of regular products. Other retailers were exempted from the policy, and the clubs could buy combo or special packs without regard to the policy.

[22] A memorandum prepared by a Mattel manager explained: "[O]ur agreement with TRU is that all of these [club] items will be offered to them as well so we must plan for a presentation to TRU." CX 540.

this was not a conventional right of first refusal, but really a chance for TRU to supervise its suppliers' sales to the clubs:

> I [Spencer] was going to have an opportunity to essentially regulate what was offered to the clubs .... [B]y saying yes you can show it to the clubs, or no you cannot show it to the clubs .... [T]hat exercise was to give a green light on what could be shown to the clubs. It was not a commitment on Toys 'R' Us' part to buy.

Spencer 1960/22-1961/12. Spencer also testified that this sort of involvement in the production and marketing decisions of suppliers was unprecedented. Spencer 1862/20-23.

Spencer's testimony about TRU's preclearance understandings is confirmed by TRU's conduct in other situations. In 1993, TRU found products from Tyco's Playtime subdivision in a club. TRU complained to Tyco, and at a subsequent meeting, Playtime sought TRU's approval of repackaged club versions of the products. After seeing the new packaging, TRU said it would continue to buy the original product from Playtime. IDF 255-258. TRU told Huffy and Today's Kids that changing the color or the name of a product did not sufficiently differentiate it from the same item sold at TRU. Stephens 5959/5-63 (discussing Today's Kids); IDF 355 (discussing Huffy). Goddu told Little Tikes to sell only discontinued items to the clubs because combination packs would not work for its large and expensive products. IDF 274-275; CX 1658 (Goddu) at 310/18-311/6. When Tiger Electronics asked TRU what type of packaging would meet its concerns, Goddu replied that selling to the clubs five year old product in "multipack[s] with high price points" would not hurt Tiger's sales with TRU. IDF 305; CX 811, 814.

In all, TRU either preapproved special club products, or otherwise negotiated over what was acceptable content and packaging for club products with these suppliers: Mattel (above), Fisher Price (IDF 228), Tyco (above), Little Tikes (above), Today's Kids (above; IDF 287), Tiger Electronics (above), Binney & Smith (IDF 325), and Huffy (above).

3. TRU negotiated with the toy companies and reached new points of agreement.

TRU also engaged in extended negotiations to gain compliance with the club policy from reluctant toy manufacturers. In some instances, when breaches of the club policy were detected, TRU and the offending toy firm worked out a remedy to compensate TRU and encourage future compliance or otherwise reached new points of agreement. For example, as mentioned above, when Hasbro changed its policy from "no promoted products" to "special products only," Hasbro informed TRU of the proposed modification, and TRU responded that the new policy was "okay." Owen 1136/20- 1141/14. Little Tikes' parent company, Rubbermaid, wanted Little

Tikes to continue club sales, creating a conflict with TRU. Little Tikes asked TRU for help in negotiating with Rubbermaid, and, in April 1993, TRU and Little Tikes met with Rubbermaid's CEO to "resolve the warehouse club issue." CX 1514-B, C; DePersia 2159/9-2160/7; Schmitt 2283/24-2284/23, 2288/2-7; Goddu 6715/15-6716/9. The two companies agreed that Little Tikes would sell only custom product and near-discontinued toys to the clubs. IDF 273-277.

A dispute during the summer of 1992 over Mattel's Air Pro Hockey is a particularly stark example of the extensive negotiations and the observed commitments between TRU and the manufacturers. Early in 1992, before TRU's club policy was in force, Mattel accepted an order for the popular product Air Pro Hockey from the Pace club. IDF 145. Mattel later tried to steer Pace to a "special" version of this product, which contained extra hockey sticks, but Pace refused. *Id.* After Pace complained that its order had not been delivered on time, Mattel shipped Pace some regular versions of the game. *Id.* TRU found (or found out about) the product at Pace and complained to Mattel. IDF 147. TRU then reduced its price on Air Pro Hockey (almost a 20% markdown) to meet the club prices. *Id.* TRU also put a hold on payment of over $540,000 owed to Mattel in order "to send [Mattel] a message." Weinberg 7692/11-25, 7699/13-22. Eventually, TRU and Mattel reached a settlement in which the two companies agreed to split the cost of TRU's 20% markdown. CX 1810; Weinberg 7706/1-15.

Another episode involving Tyco illustrates how deeply TRU was involved in the details of administering the vertical agreements. As already discussed, Tyco initially adopted a unique club policy: it would sell only to customers who bought significant quantities of 25 different products from Tyco's line. IDF 240. Tyco said this policy favored distributors who broadly supported its line of products. Exceptions were made, however, for every class of distributor that might be affected by the policy but not for the clubs. Grey 3009/2-3010/15. The policy was broadly discussed in the industry. Goddu 6681/19-22. One club, BJ's, assembled a large order that it believed complied with Tyco's policy. Tyco told TRU about BJ's order, which both firms understood as a test of the policy's true purpose. CX 1657(Goddu) at 238/19-24 (Tyco told Goddu that it believed the order was a test of whether Tyco intended to ship product to the clubs under the 25-item policy). Tyco tried to ship BJ's some combination packs in lieu of the regular products BJ's had ordered, and the entire order was never filled. Hilson 4478-79/9, 4506-07. After 1992, no club purchased regular merchandise from Tyco under the "25-item" policy. IDF 252.

4. Documents and testimony used promissory language.

Many documents refer to "agreements" between the toy com-panies and TRU, or use other promissory language to describe their relationship. For

example, after finding its product in the clubs, TRU wrote to a Fisher Price Vice President of Sales, "you promised this wouldn't happen." Chase 1661/4-5. Similarly, a TRU document states that Fisher Price "agreed to stop selling [another item] to the clubs." CX 913-E. With respect to a Hasbro product, TRU noted "we have reached a corporate agreement on the sale" of the item to the clubs. CX 913-F.

While loose language in business documents is not necessarily the equivalent of an agreement, the consistent reference to such words of agreement, promise and commitment shows how far removed this policy was from a unilateral statement by TRU of its policy.[23]

There is, in short, an abundance of evidence of promises, negotiations, compromises, and cooperative conduct with respect to the development, adoption, and enforcement of the club policy.[24]

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[23] The following list contains some additional examples of promissory language found in documents of the toy companies or TRU: CX 530-B (Mattel "committed to Toys R Us to do our best not to sell [the clubs] regular line goods."); CX 540 (Mattel CEO "Amerman committed only a short time ago that we would not do any business with the clubs") (Mattel's "agreement with TRU is that all of these items will be offered to them as well so we must plan for a presentation to TRU."); CX 541 (Mattel "[a]greed to show TRU all specials/exclusives . . . ."); CX 550-B ("If [Mattel] ship[s], for example, our air hockey game to a club then arguably we [Mattel] are violating the spirit of our agreement" with TRU.); CX 1519 (CEO of Rubbermaid, the parent company of Little Tikes, noted "Discussion + Understanding(s) -- LT will offer all value packs first to TRU to create better value + REAL unique differentiation."); CX 1318 ("We [VTech] promised no warehouse clubs at Toy Fair."); CX 913-C ("Per [Binney & Smith's Vice President of Sales], understood our [TRU's] concern. Going forward they will offer special packs only for '93.").

[24] The following is a list of some of the evidence that the ten toy manufacturers entered into vertical agreements with TRU:

1. Mattel.

Initial commitment: CX 529, Okun 2671/25- 2673/14 (At Toy Fair 1990, "TRU threatened to 'review' their support of those manufacturers that overly supported the warehouse clubs."); CX 530-B (Mattel committed to "do [its] best not to sell [the clubs] regular line goods."); CX 532-A; Okun 2684/4 - 2690/4; Barad 7843/18 - 7844/1; Goddu 6663/6-22 (In October 1991, Mattel "said we [Mattel] would not sell the clubs the same items we were selling to them [TRU]."); CX 1658 (Goddu) 271/10-18; CX 1659 (Goldstein) at 87/17-88/7 (TRU's response to Mattel's commitment was "[T]hat's fine. We don't have anything else to talk about.").

Preview and clearance of club products: CX 540; CX 624 (Mattel agreed to show TRU club products before they were sold to the clubs.); Leighton 3267/21- 3268/6, 3269/3-3271/2, 3272/8-18, 3291/2-3295/14; CX 597; CX 626; Spencer 1860/3-1862/17, 1960/22-1961/14 (Mattel made several presentations of its proposed club specials to TRU before offering them to the clubs for the purpose of allowing TRU to regulate what was sold to the clubs.); Spencer 1862/20-23 (A TRU representative charged with previewing club products testified that this practice was unprecedented in his experience.).

Negotiation and new points of agreement: Goddu 6887/17-6888/15; CX 1658 (Goddu) at 282/13-284/12; Barad 7894/7-7897/20; CX 1659 (Goldstein) at 100/17-101/17; Goldstein 8266/25-8268/22 (After the October 3, 1991 meeting, Mattel told TRU's Goddu that Mattel would get back to TRU to "work this thing out." Mattel and TRU's Goldstein then agreed that Mattel would sell only special products to the clubs.); Goddu 6670/13-6671/7; Goddu 6891/13-6892/14 (Following the October 3, 1991 meeting, there were "constant questions" from Mattel, and Mattel later "committed [to sell] only exclusive[items to the clubs]."); Okun 2735/24- 2739/6; CX 541 (At a February 27, 1992 meeting, Mattel affirmed to TRU that Mattel would not sell "hot product[s]" to the clubs and that TRU would have a right to preview club products.); Amerman 3802/10-3804/14 (In July 1992, Mattel's CEO Amerman assured TRU's Chairman that Mattel was not shipping first line merchandise to the clubs.); Weinberg 7692-93/6, 7697-7706; CX 1808; CX 1810 (TRU withheld payment for a product that Mattel had sold to the clubs in violation of promises to TRU, and then agreed to a settlement of the disputed

debt in which TRU and Mattel split the cost of the markdown).
Promissory language: CX 530-B (Mattel "committed to [TRU] that we [Mattel] would do our best to sell [the clubs] regular line goods."); CX 540 (Mattel's "agreement with TRU is that all of these items will be offered to them as well . . . ."); CX 541(Mattel "[a]greed to show TRU all specials /exclusives"); CX 550-B (if Mattel were to "ship . . . our air hockey game to a club then arguably we [Mattel] are violating the spirit of our agreement [with TRU]."); Okun 2725/19-2726/5 ("TRU . . . came away thinking that there was an agreement . . . .").
2. Hasbro.
Initial commitment: CX 78 (In January of 1992, Playskool advised that Hasbro should "achieve some major concessions [from TRU] if we are to dramatically change the way we approach the Warehouse Clubs."); Owen 1122/4-1123/10 (TRU and Hasbro discussed the clubs and other topics at a meeting during or about Toy Fair 1992. A Hasbro officer said that the meeting involved "some meeting of the minds" and was an example of how two companies "do business together."); CX 1657 (Goddu) at 130/20-25; Owen 1112/15-1115/5, 1117/6-9; Inano 3335/15-20; Butler 5535/5-9 (TRU sought a response from Hasbro regarding club sales, and Hasbro responded that it would refuse to sell promoted toys to the clubs).
Negotiation and new points of agreement: Verrecchia 1502/16-1504/19 ("During 1992, TRU kept asking Hasbro officials questions such as "what is your policy going to be, how are you going to deal with this [Hasbro products in the clubs] . . . ?"); Owen 1136/20-1144/23 (Starting in 1993, Hasbro changed its policy as TRU wished after checking with TRU to see if the proposed change was acceptable to TRU.).
Promissory language: CX 913-F ("We [Hasbro and TRU] have reached a corporate agreement on the sale of this item to the club stores.").
3. Fisher Price.
Initial commitment: Cohen 7992/10-19; Weinberg 7732/8-7733/19; CX 1662 (Weinberg) at 97/1-5 (In 1990 or 1991, TRU stated its policy and asked Fisher Price "how are you going to deal" with the clubs.); CX 1657 (Goddu) at 206/12-207/20 (Prior to Toy Fair (February) 1992, Goddu told Fisher Price that specially-configured products could be sold to the clubs.); Inano 3334/21-3335/5; Owens 1132/6-1135/8; Verrecchia 1393/5-1394/4 (At Toy Fair 1992, TRU informed Hasbro that Fisher Price had agreed not to sell promoted product to the clubs.); RX 256 (Fisher Price began to sell only specialized products to the clubs in 1993 and thereafter).
Preview and clearance of club products: Chase 1678, 1680/5-6 (At Toy Fair 1993, Fisher Price executives stopped the sale of a club combo pack, which was insufficiently differentiated from the similar regular product, because the product was a "sensitive item" for TRU.)
Negotiation and new points of agreement: Chase 1660/15-1661/5 (In September 1991, TRU sent to Fisher Price's Vice President for Sales a copy of a TRU shopping report showing Fisher Price products found in Price Club. The words "Byron [the Vice President], you promised this wouldn't happen" were written on the report.); Chase 1661/6-8 (After this event, Fisher Price imposed an extra level of review on products to be sold to the clubs and limited its sales to special and combination packs.); CX 913-E; Cohen 7970-74, 7997-98 (When a Fisher Price employee, in violation of the club policy, sold a regular product to a club in order to meet a sales volume target, TRU complained to Fisher Price. A TRU record of Fisher Price's response to its employee's error states that Fisher Price "agreed to stop selling this item to the clubs.").
Promissory language: Chase 1660/16-1661/5 ("Byron, you promised this wouldn't happen."); CX 913-E ("agreed to stop selling this item to the clubs.").
4. Tyco.
Initial commitment: CX 1657 (Goddu) at 176-177/17; Goddu 6677/6-8; Grey 2996/9-2997/9 (TRU told Tyco that club sales were not in Tyco's or TRU's best interest, and Tyco's CEO Dick Grey responded that he would think about what TRU had said, promising "we'll get back to you." In a subsequent meeting, Tyco told TRU about its 25-item policy.).
Preview and clearance of club products: Weinberg 7716/22-7724/9; CX 1662 (Weinberg) at 169/10-172-16, 177/18-178/4 (In 1993, TRU complained to Tyco's Playtime division after it found a top-selling toy in the clubs. At a subsequent meeting, Playtime sought TRU's approval of a repackaged version of that toy for sale to the clubs. After viewing the newly repackaged toy, TRU said it would continue to buy the original version of the toy.).
Negotiation and new points of agreement: CX 1657 (Goddu) at 238/19-24; CX 808; Hilson 4505/5-4507/13; Weinberg 7738/8-7739/4 (Tyco reported to TRU an order from the club BJ's, which complied with Tyco's 25-item policy. Tyco told TRU that Tyco believed the BJ's order was a test of whether

Tyco intended to ship any regular products to a club under the 25-item policy.); Moen 651/17-652/9 (TRU put pressure on Tyco to sell combination packs to the warehouse clubs.); CX 913-D; Weinberg 7719/7-22 (In April 1992, TRU contacted Tyco's Playtime division in order to "remind" them of TRU's policy after its products were found in the clubs. Playtime responded that the products that offended TRU's policy had been shipped to the clubs prior to the start of Tyco's policy, and that, in the future, Playtime would ship only special products to the clubs.).

Promissory language: CX 914-A (From a letter to TRU: "To confirm the meeting we had, Playtime will not offer any merchandise to Warehouse Clubs that is bought by Toys R Us. This will make our policy exactly the same as Tyco's.")

5. Little Tikes.

Initial commitment: DePersia 2145/15-2146/9, 2151/13-23; CX 1510 (When asked by TRU's Goddu, Little Tikes told TRU that it would only sell the clubs combination packs or nearly discontinued items. Little Tikes repeated this commitment in conversations thereafter.)

Preview and clearance of club products: CX 1658 (Goddu) at 310/18-311/6 (Goddu told Little Tikes to sell only discontinued items to the clubs, because combination packs would not work for Little Tikes' large and expensive products.).

Negotiation and new points of agreement: CX 1510; DePersia 2159/9-2164/10; Schmitt 2283/24-2284/23, 2288/2-7, 2291/16-2297/18; Goddu 6715/15-6717/1; CX 1516; CX 1514-B, C; CX 1521 (Baughman file memo); CX 1519 (Schmitt handwritten notes) (Little Tikes' President asked TRU's Goddu for "help" in dealing with Little Tikes' parent company, Rubbermaid, which resisted the adoption of any restrictive policy with respect to the clubs. In April of 1993, representatives of the three companies met and reached agreement on key aspects of the club issue. Little Tikes agreed to sell only value packs, discontinued and near-discontinued items to the clubs.); DePersia 2180/15-2181/3; Hilson 4494/3-9 (During the balance of 1993, Little Tikes limited the products available to the clubs consistent with the "value packs, discontinued and near-discontinued [items]" distribution strategy discussed with TRU at the April 1993 meeting.).

Promissory language: CX 1519 ("Discussion + Understanding(s) - LT will offer value packs first to TRU.").

6. Today's Kids.

Initial commitment: Goddu 6729/9-22, 6733/23-6734/3, 6738/5-22, 6739/15; Butler 5524/6-5525. (In the course of several meetings during 1992 and 1993, Today's Kids informed TRU that it would cease club sales, but also asked whether, if it did so, TRU would increase its purchases from Today's Kids.); Goddu 6739/4-7; CX 891, CX 892 (TRU canceled its order for a Today's Kids product, which was selling well at TRU, because the product had also been sold to the clubs.); CX 913-D (In about June of 1992, Today's Kids told TRU that Today's Kids would sell to the clubs "special items going forward.").

Preview and clearance of club products: Stephens 5960-63 (Goddu told Today's Kids that changing the name of product is insufficient differentiation.).

Negotiation and new points of agreement: Goddu 6739/4-7; CX 1657 (Goddu) at 167/11-168/12 (TRU continued to pressure Today's Kids to further restrict its sales to the clubs, and Today's Kids asked TRU "if we could have more time."); CX 1657 (Goddu) at 167/15-168/12; Goddu 6739/4-11 (Goddu said "you must get back to us because we're not going to let this ... sit the way it is."); CX 1657 (Goddu) at 168/19-170/22; Goddu 6729/9-22; Butler 5526/7-10, 5551/2-7; CX 902 (Later in 1993, Today's Kids replied to TRU, explaining Today's Kids intention of not selling to the clubs at all. Today's Kids also asked again whether TRU would increase its purchases from Today's Kids. TRU increased its business with Today's Kids by 40%).

7. Tiger Electronics.

Initial commitment: CX 809; Shiffman 2008/3-14 (Goddu told Tiger's Vice President that TRU would not buy any products Tiger sold to a club. Tiger's Vice President asked whether the policy also applied to BJ's, and Goddu responded that it applied to any club. The Vice President then wrote an internal memorandum saying Tiger would have to "face up to Pace and not ship them . . . .").

Preview and clearance of club products: CX 811, 814 (When Tiger Electronics asked TRU what type of packaging would meet its concerns, Goddu replied that selling to the clubs five year old product in "multipack[s] with high price points" would not hurt Tiger's sales with TRU.); CX 814; Shiffman 2044/21-2045/9 (Goddu invited Tiger to review Tiger's club strategies with him and get approval in advance, even for specific individual products and packaging.)

Negotiation and new points of agreement: CX 814; Shiffman 2033/12-2045/9 (In January 1994, Tiger's Vice President met TRU's Goddu to get more information on TRU's club policy and to learn what products Tiger could sell to the clubs without jeopardizing its sales to TRU. Goddu told Tiger that

G. Evidence of Horizontal Agreement.

TRU worked for over a year and surmounted many obstacles to convince the large toy manufacturers to discriminate against the clubs by selling to them on less favorable terms and conditions. *See supra* pp. 548-60. The biggest hindrance TRU had to overcome was the major toy companies' reluctance to give up a new, fast-growing, and profitable channel of distribution, and their concern that any of their rivals who sold to the clubs might gain sales at their expense. TRU's solution was to build

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he would let Tiger "off the hook" by permitting Tiger to sell a five-year-old product called Skip-It, as well as hand-held games "in multipack with high price point" to the clubs. This agreement was less restrictive than one previously discussed.).

Promissory language: CX 811 ("I understand that with regard to hot new product, television items, high profile items, etc., the only way these can be sold to the clubs is through very 'creative' packaging.")

8. VTech.

Initial commitment: CX 1318; O'Brien 2426-32/19; Goddu 6866/17-23 (VTech "promised" TRU at Toy Fair 1992 that it would not sell to the clubs.).

9. Binney & Smith.

Initial commitment: CX 1662 (Weinberg) at 148/19-149/18; CX 913-C; Weinberg 7614/8-7617/8 (TRU's Weinberg contacted Binney & Smith's Vice President of Sales after TRU found regular Binney & Smith product in a club.); CX-913-C; Weinberg 7666/15-7667/21 (A contemporaneous TRU memorandum noted with reference to this meeting: "Per [the Vice President], understood our concern. Going forward they will offer special packs only for '93. Commitments already made for '92.").

Preview and clearance of club products: Blaine 6421/1-6423/17; CX 1662 (Weinberg) at 162/1-164/5 (In December 1992, TRU previewed a series of prototype samples of warehouse club products, and informed Binney & Smith that its plans were acceptable to TRU.).

Negotiation and new points of agreement: CX 2 (Binney & Smith wrote to TRU on December 21, 1992: "Our intent is to differentiate our product offering to Membership Clubs from that sold through our traditional retail trade channels. We will do this with larger sets and multi-packs that move the clubs to higher price points. In addition, we will alter contents to present the club customer with a non-comparable value."); Blaine 6436/16-6438/14 (TRU called a third meeting with Binney & Smith in October of 1993. Just as in the prior meeting, Binney & Smith brought samples of its club products, however TRU apologized, saying someone on its staff had made a mistake and that TRU had no problem with Binney & Smith's warehouse club offerings.)

Promissory language: CX 913-C ("Per [Binney & Smith's Vice President of Sales], understood our [TRU's] concern. Going forward they will offer special packs only.").

10. Sega.

Initial commitment: CX 754; Kalinske 2475/3-9, 2476/11-23, 2540/17-20; CX 1658 (Goddu) at 387/1-388/6. (In a fall 1991 meeting, TRU's Lazarus asked Sega's CEO what Sega's policy was with respect to selling its Genesis products to the clubs. Sega initially explained to Lazarus that it was not selling any Genesis product to the club Sam's, but when he learned this was incorrect, the CEO of Sega wrote to Lazarus apologizing and assuring TRU that "Sam's Wholesale Club will have old Genesis software bundled with Hardware this fall."); CX 1658(Goddu) at 389/2-11 (Sega told TRU it only sells old product to the clubs.).

Negotiation and new points of agreement: CX 1657 (Goddu) at 229/7-15 (Goddu repeatedly spoke to Sega about product in the clubs that was identical to the product carried by TRU.) CX 1660 (Lazarus) at 123/21-124/2. (Sega complained to TRU that Nintendo's products were in the clubs.); CX 1659 (Goldstein) at 57/18-59/3 (TRU's Goldstein said that, when confronted about new Sega products found in club, the CEO of Sega said "he would look into it and this is not what he wanted to happen. And he would see what he could do to make sure it doesn't happen in the future."); CX 1657 (Goddu) at 231/15-22; Kalinske 2511/21-2512/6 (In response to TRU complaints, Sega assured TRU that it was only selling the clubs hardware "packouts," *i.e.*, hardware bundled with software.).

a horizontal understanding -- essentially an agreement to boycott the clubs -- among its key suppliers. This boycott agreement had its roots in TRU's first conversations with Mattel in October of 1991, but, as TRU's top executives consistently testified, the horizontal agreement grew and became a crucial feature of the implementation and enforcement of the club policy across most of the industry. The testimony from TRU's top officers describes TRU's pattern of conduct with its suppliers, and this and other evidence demonstrates that, at a minimum, Mattel, Hasbro, Fisher Price, Tyco, Little Tikes, Today's Kids, and Tiger Electronics agreed to join in the boycott on the condition that their competitors would do the same. Several were particularly concerned about their closest competitors; all were concerned about the behavior of competitors generally. With the cooperation of the toy manufacturers, TRU also monitored and policed the horizontal agreement after it was in place.

When TRU raised its club policy with the toy companies in late 1991 and 1992, the policy met with resistance. Lazarus testified that the manufacturers were not happy about it:

> Q: Did any of the manufacturers, when you were presenting your policy, you said the responses were varied, did any of them express unhappiness to you concerning the policies?
> A: Yeah, I think they wanted to do all the business they could do. Right.
> * * * *
> Q: I think you also mentioned that some others, correct me if I am wrong, did not seem happy about it.
> A: I don't think any of them were happy. I think I can characterize no one as being happy.

Lazarus (CX 1660) at 72/9-14, 181/24-82/3.

The toy companies were afraid of yielding a potentially important new channel of distribution to their competitors. Small changes in sales volumes have a significant effect on toy manufacturers' overall profits, CX 1822 (Scherer) ¶ 17, 18, and no retail channel other than the clubs offered similar opportunities for rapid growth. For example, Mattel's sales volume to the clubs increased by 87% between 1989 and 1991. CX 574; Okun 2652/22-2653/19. Much of this growth was a result of Sam's emergence as a toy buyer, but sales to BJ's, Costco and Pace also increased at a rapid rate. By comparison, Mattel's overall sales grew by approximately 10% during this period. CX 530-E; Okun 2634/20-2636/4. A 1991 Lego memorandum said "clubs may be the most important new format development in retailing in the past century." CX 487-B. A Fisher Price report called the "opportunity for growth ... phenomenal." CX 698-B. Based on this and other evidence, the ALJ found that toy suppliers in the late 1980s and early 1990s saw the clubs as a new outlet of potentially great importance. IDF 64, 65.

When TRU introduced its club policy, the toy industry was looking to expand -- not restrict -- the number of major retail toy outlets. As already mentioned, Child's World and Lionel Leisure had recently fallen into bankruptcy. The few remaining national retailers comprised a large and growing share of the toy manufacturers' customers at wholesale. TRU was the biggest buyer and consistently the source of the greatest concern. Toy manufacturers' documents show that the toy companies were worried about the increasing concentration among toy retailers and sought alternatives to reverse the trend towards concentration. A 1993 VTech memorandum began: "Objective: To regain sales with the warehouse clubs in order to reduce our dependence on Toys R Us." CX 1318. Mattel was also on the lookout for new outlets to replace those it had recently lost. A December 1990 memorandum from Mattel CEO Amerman to his staff summarized his view of Mattel's place in this quickly changing retail environment: "The constriction in the number of traditional retail outlets that carry toys is going to become a bigger and bigger problem as time passes." CX 523. Noting the clubs' rapid growth rate, Amerman told his staff that he wanted to be much more aggressive in pursuing the club channel of distribution so Mattel would not be as dependent on TRU and the other traditional retail outlets. CX 523; Okun 2624/19-2625/14. Mattel's Vice President of Sales testified that "our hope was that we could figure out a way to have them [the clubs] expand their business and become more like a traditional toy account ...." Okun 2652/1-4.

The club policy that TRU wanted to enforce ran squarely against the independent business strategies of its suppliers. TRU asserts that each toy manufacturer cared about competitor responses only to be sure that its competitors were subject to the same rule or policy. (Reply Br. at 17.) To the contrary, the record shows that a uniform, joint reaction to TRU's policy was a necessary element of each manufacturer's decision to restrict sales to the clubs. Each was simply unwilling to go forward with the proposed policy alone. Indeed, Goddu testified that it was "frustrating to [TRU] that [its suppliers] would always talk about ... their competition" and resisted making "*a decision on their own independent of what their competition did.*" Goddu 6877/4-13 (emphasis added).

1. TRU built a horizontal agreement among its suppliers to overcome their reluctance.

Toy manufacturers were unwilling to limit sales to the clubs without assurances their competitors would do the same. IDF 68, 75. Discrimination against the clubs simply would not happen without that additional element of horizontal coordination. For example, even after Amerman promised that

Mattel would comply with TRU's club policy,[25] other executives at Mattel did not believe it could afford to give up selling to the clubs on the same terms it sold to other outlets. These executives voiced their concern to TRU. IDF 129, 130. Fisher Price, likewise, said that "if their competitors [were] going to exploit [the club] channel of distribution, then they have to pay attention to it." CX 1658 (Goddu) at 328/18-329/2. And Hasbro made it clear to TRU that "[Hasbro] cannot sit by idly" if its competitors sold product to the clubs. CX 1658 (Goddu) at 273/12-15. According to TRU executives Lazarus and Goddu, virtually all of the manufacturers separately told TRU that they did not want to be prevented from selling regular line product to the clubs without assurances that competitors would also abstain. Lazarus 5443/6-10; CX 1657 (Goddu) 272-73.

Lazarus, Goldstein, and Goddu all explained that TRU assured the manufacturers that its policy would be applied equally to each of them, and told many of the major manufacturers that their closest competitors were only selling to the clubs because they were too. IDF 77-80; Lazarus 5441/5-5442/16; Goldstein 8157/23-8158/4; Goddu 6679/20-6680/11. This alleviated the manufacturers' concern about losing market share to a competitor that sold to the clubs. In Goddu's words, TRU, during its meetings and conversations with the manufacturers, communicated the message "I'll stop if they stop" from manufacturer to competing manufacturer. IDF 84; CX 1658 (Goddu) at 276-80.

Goddu testified that he relayed concerns from toy firm to toy firm about whether all (or at least their most direct rivals) would commit to TRU's policy. Mattel and Hasbro are specifically mentioned, but Goddu also said that these conversations "were always present" in TRU's negotiations with its suppliers:

> ... I do recall on a general basis us always acknowledging to a vendor that, you know, their competitor would say, "He's there because you're there." We had that conversation ongoing. Because they would always tell us, "I'm only there because my competitor is there." And we would say, "Well, he keeps saying he's only there because you're there."
>
> So in that sense, you know, in response to your question, that conversation was always present, and, again, it was one of the amusing aspects. We kept saying nobody wants to take, you know, responsibility here and is always pointing the finger to the other guy. And they're all saying, "You wouldn't be there if the other guy wasn't there."
>
> Q. Did you have those conversations with Mattel and Hasbro?
>
> A. Oh, yes.
>
> Q. And when you had these conversations with Mattel and Hasbro, in the conversation with Mattel did Hasbro come up in the context that you just discussed?

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[25] As discussed below, this promise itself was based on the fact that the competition would do the same. CX 532.

A. In that context, yes. * * *
Q. And did the same situation occur when you talked to Hasbro about Mattel?
A. Yes.
CX 1658 (Goddu) at 276/23-77.

Goddu clarified that TRU engaged in these conversations with all the key toy manufacturing firms. "We communicated to our vendors that we were communicating with all our key suppliers, and we did that I believe at Toy Fair 1992. We *made a point to tell each of the vendors* that we spoke to that we would be talking to our other key suppliers." CX 1658 (Goddu) at 278 (emphasis added).[26] Goddu also said: "We may have indicated to one supplier that his competitor is going to do nothing but warehouse club packs, and, you know, 'You should do the same.'" *Id.* at 279. As the ALJ found, "Goddu understood each of the major manufacturers when they said that they were only selling to the clubs because their competition was selling to the clubs, and that they would get out of the clubs if their competition got out." IDF 83.

As we will now discuss, the specific evidence of TRU's discussions with the large toy manufacturers corroborates the accuracy of Goddu's description. Conversations about the adoption of the club policy between TRU and its suppliers were frequent and constant. They were conducted by other top-level executives at TRU in addition to Goddu. CX 1659 (Goldstein) at 59/13-17; IDF 77 (discussing Lazarus' testimony that he told TRU's suppliers that TRU was talking to each of them, so they would know they were on "a level playing field").[27] Overall, documents and testimony connect at least seven firms -- Mattel, Hasbro, Fisher Price, Tyco, Little Tikes, Today's Kids, and Tiger Electronics -- to these conversations in which TRU discussed rivals' conduct with respect to TRU's club policy.[28] In light of Goddu's broad admission that TRU intentionally employed this method of bargaining with all of its "key suppliers," there is reason to conclude that the discussions were more widespread than the direct

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[26] Little Tikes General Manager summarized for his files the contents of a telephone conversation with Goddu in 1993, noting among other things: "I asked why Roger [Goddu] had raised the warehouse club issue so strongly at our Toy Fair meeting? He said they were discussing it with everyone." CX 1510.

[27] Mattel's Okun mentioned Van Butler, Melody Young, and Peter Spencer as other people at TRU who may have complained to Mattel when its products were found in the clubs. Okun 2784/7-9.

[28] TRU aggressively used this kind of back-and-forth bargaining in its efforts to get Sega and Nintendo to agree to cease entirely distributing their product through the clubs. TRU's efforts with Nintendo were not successful, since Nintendo never adopted any kind of restricted distribution policy with respect to the clubs. Sega met TRU halfway by agreeing to adopt the same "special packs only" policy as the traditional toy companies. TRU did not think that club combo packs, which generally included video games and video game players, differed sufficiently from similar electronic game products sold at TRU. TRU's efforts to bring Sega and Nintendo into agreement illustrate the pattern of conduct described herein. IDF 340, 345.

evidence indicates. As the ALJ found, the toy manufacturers "were aware that TRU was communicating its policy to the other manufacturers and that without unanimity, regular line product sales to the clubs would recommence." IDF 80.

A Mattel memorandum summarized the October 3, 1991 meeting at which Mattel's CEO promised Lazarus that Mattel would comply with TRU's policy: "I believe we said we would not sell the clubs the same items we were selling to [TRU]. *This was based on the fact that competition would do the same.*" CX 532-A (emphasis added). Having obtained this guarantee from Mattel, TRU used it to induce others to join the conspiracy.

Hasbro's Director of Account Development testified that he recalls his supervisor telling him that at or just before Toy Fair in February 1992, TRU had met with Hasbro's competitors, including Mattel and Fisher Price. The Hasbro executive said: "because our competitors had agreed not to sell loaded [*i.e.*, promoted] product to the clubs, that we would ... go along with this, that he didn't believe that it would stick, meaning that ... somebody would break and sell promoted product to the clubs, at which time the door would be open to us." IDF 177; Inano 3334/2-3335/20. The executive further testified that TRU told him the other major manufacturers were going along with the policy, IDF 179, and that he had been assured by TRU that Hasbro would not be singled out. Verrecchia 1376/13-20. Hasbro's President of Sales and Marketing, Owen, similarly testified that in or about 1992 Goddu told him Tyco, Little Tikes, Mattel, and Fisher Price were all taking a similar position with respect to sales to the clubs. Owen 1128/5-1133/3. These statements were all made in the course of TRU's negotiations over Hasbro's policy toward the clubs. Owen admitted that these other companies' policies were of interest to Hasbro, at least in part, because Hasbro did not want others to gain sales volume that was unavailable to Hasbro. Owen 1131/3-15. As already mentioned, Fisher Price told TRU that Fisher Price would have to "pay attention" to the club "channel" if rivals did so. CX 1658 (Goddu) at 328/18-329/2. Finally, Little Tikes' Vice President of Sales for North America testified that, when he asked if his close competitor, Today's Kids, was selling to the clubs, Goddu told him that Today's Kids would be getting out of the clubs as well. The Little Tikes Vice President understood this as an assurance. DePersia 2147/7-2148/6, 2150/25-2151/3.

Notwithstanding Tyco's "25-item policy" (which actually functioned to prevent sales to the clubs, *see supra* note 21), TRU also encouraged Tyco to develop combination packs for the clubs to bring it in line with the other toy companies. Costco buyer Michelle Moen testified that TRU urged Tyco to develop special packs for sale to the clubs like the other toy manufacturers were doing, and told other manufacturers that Tyco would sell special packs to the clubs. Moen specifically mentioned Mattel and

Hasbro. Moen 651/17-652/9. Tyco's CEO Grey acknowledged that after the development of combination packs in mid-1993, the "approach in the [Tyco club] line is similar to that which other major toy companies have." CX 1412-B; Grey 3027/22-3029/12. Tyco sold the special club packs without regard to the 25-item policy previously announced. TRU's conduct in this instance illustrates that substantial uniformity of club policies across the toy industry was key to the continued success of the plan.

Direct communications between representatives of different toy companies about TRU's policy also demonstrate the toy manufacturers' anxiety over having to respond to TRU without knowledge of what their competitors would do. The CEOs of Hasbro and Tyco discussed their respective club policies early in 1992. IDF 189. Tyco's CEO explained his company's 25-item policy, and Hasbro's CEO said that Hasbro was still working on a company-wide response. *Id.* According to Fisher Price records, a Hasbro division representative told Fisher Price that Hasbro was "adamant that they would not be shipping key [items] to the [c]lubs, at least not yet." IDF 224. And, a Fisher Price representative asked a Little Tikes regional manager if he had experienced any repercussions from TRU for selling products to the clubs. IDF 227.

2. After the initial boycott agreement was in place, TRU organized a related agreement to enforce the boycott.

When asked if TRU ever indicated to a supplier that other, specific companies were going along, Goddu explained:

> A. We may have indicated to one supplier that his competitor is going to do nothing but warehouse club packs and, you know, "You should do the same."
> Q. Who was that?
> A. I can't recall which one. I mean *we might use that as a ploy or a tactic to encourage them* to, you know, develop an intelligent distribution policy, but more or less, to get off the dime, you know. "You really ought to do these combo packs." *I mean we're talking to everybody and we're being told in a general sense that, you know, that's the way so and so's going.* Not necessarily any one special vendor. I wouldn't have ruled out that we did that.

CX 1658 (Goddu) at 279 (emphasis added). This "ploy or tactic" illustrates another reason the boycott agreement helped TRU to get its suppliers to adopt a distribution policy squarely contrary to the business strategy they favored only a year earlier. The horizontal agreement not only allowed TRU to overcome its suppliers' reluctance to restrict sales to the clubs, but TRU turned their apprehensions to its own advantage. As the ALJ found, for fear of reprisals from TRU, the toy companies did not want to be caught selling to the clubs when their competitors were abstaining. IDF 77.

TRU requested and then passed complaints about breaches of the boycott agreement from one supplier to another when regular product was

found in the clubs. TRU's President testified: "I would get phone calls all the time from Mattel saying Hasbro has this in the clubs or Fisher Price has that in the clubs .... So that occurred all the time." CX 1659 (Goldstein) at 59. Goddu explained that, on the many occasions he received these calls, he would "always thank them and tell them we would follow up ...." Goddu 6929-6930. Lazarus also admitted that these conversations took place. IDF 193; Lazarus 5452/12-18. TRU would speak to the offending firm and even assure the complainant that the offending firm would be brought into line. IDF 226. Violations of TRU's club policy were thus detected and punished, serving to enforce the horizontal agreement. IDF 91, 95. The toy companies participated in this exchange of complaints, which was frequent and continued over lengthy periods, effectively making their competitors' compliance a part of their agreements with TRU.

In the summer of 1992, TRU made a forceful presentation of Hasbro's complaints to Mattel. IDF 148. Hasbro told TRU about various Mattel regular products that Hasbro found in the clubs. These sales violated TRU's club policy and Mattel's promise not to sell the same products to the clubs that Mattel was selling to TRU. On July 17, 1992, TRU's Lazarus and Mattel's CEO Amerman met, and TRU communicated reports from Hasbro and other competitors of Mattel that Mattel was selling product to the clubs. CX 1772; Amerman 3795/9-3796/20, 3800/7-3801/25, 3806/24-3808/4. Amerman assured Lazarus that Mattel was not shipping "first line" merchandise to the clubs. Lazarus confirmed that he "could have" mentioned Hasbro as one of Mattel's competitors who had complained to TRU at the meeting. Lazarus 5451/4-5452/18. Mattel thereafter ceased filling orders from the clubs that it had accepted earlier in the year. Later on the same day (July 17), Lazarus met with Hasbro's CEO Allan Hassenfeld. CX 1772, 1773-B; Lazarus 5448/13-16.[29]

Mattel also passed on to TRU complaints about Hasbro products sold in the clubs. TRU's Goldstein testified that either Mattel's Girls' Division President Barad or CEO Amerman complained to him "probably" more than once that Mattel had found some Hasbro products in the clubs. CX 1659 (Goldstein) at 59/10-17, 61/17-22.

The ALJ correctly found that "relaying Hasbro's complaints about Mattel to Mattel, as well as Mattel's complaints about Hasbro to Hasbro,

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[29] There is other testimony and documentary evidence of TRU facilitating communications between Hasbro and Mattel. Following the July 17 meeting with Hasbro, TRU received confidential, internal Hasbro memoranda dated from June 30 to July 31, 1992, which reported information about Mattel's, Hasbro's, and other competitors' sales to the clubs. CX 1633.

On August 10, Goddu transmitted this information to TRU's CEO and other top executives. The same day, some of these TRU officials met with Mattel to review the products Mattel planned to ship to the clubs. CX 1633; Goddu 6689/13-6690/10; Leighton 3291/2-3294/24. And just two days later, on August 12, Goddu had a conversation with a Hasbro division president during which Goddu passed on to Hasbro a conversation he had with Mattel executives, including Amerman, concerning the warehouse clubs. CX 1612.

informed each manufacturer that the other one was willing to go along with TRU's club policy if its chief competitor stopped selling regular line products to the clubs and this behavior by TRU facilitated horizontal understandings among the toy manufacturers." IDF 149.

Another example concerns Fisher Price and Hasbro's Playskool division. John Chase, the Key Account Manager for Fisher Price, and his supervisor saw Playskool products in a club in November of 1992. Chase recalls his supervisor placed a telephone call to TRU, and the supervisor reported to Chase that Playskool was not "going to get away with it, that Toys "R" Us is going to take care of it." Chase 1666/14-1667/1. Playskool was the subject of many complaints in the fall of 1992. In August, Goddu had warned Playskool Vice President for Sales George Miller to cease club sales or TRU "wouldn't still buy [Playskool's] basic product." IDF 200. Later in the year and after hearing from Fisher Price, TRU called Miller to TRU's main office. IDF 201. As Miller later described the incident, TRU "took him to the shed." Chase 1673/17-23. Thereafter, Playskool improved its compliance with the club policy. Likewise, a Today's Kids document shows that it knew TRU was taking action with respect to a Tyco toy even before TRU spoke to Tyco. CX 874.[30]

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[30] In addition to the testimony from TRU's officers, particularly persuasive since TRU was the communications hub and initiator of the boycott strategy, that (1) the toy manufacturers were unhappy about TRU's club policy, (2) that they resisted any restrictions on their sales to clubs, and (3) that they would adopt the policy only if they were assured that their competitors would go along, the record also contains evidence of horizontal agreement specific to each of the seven toy companies. The following is a compilation of some of that evidence, organized by individual toy manufacturer:

1. Mattel.

CX 532-A-B; Barad 7891/4-18; Okun 2698/17-2699/1, 2693/14-2695/22; CX 1658 (Goddu) at 276/8-279/21 (Mattel's promise to restrict its sales to the clubs "was based on the fact that competition would do the same."); CX 1772; Lazarus 5451/4-5452/18; Amerman 3795/5-12, 3800-3808/4 (On July 17, 1992, TRU's Chairman Lazarus told Mattel's CEO Amerman that TRU had received reports from Mattel's competitors, including Hasbro, complaining that Mattel was shipping product to the clubs, and Amerman reaffirmed Mattel's commitment to restrict club sales.); CX 1772, 1773-B, 1774 (TRU met with Hasbro later that day.); CX 1659 (Goldstein) at 59/10-17, 61/17-22; CX 1658 (Goddu) at 276/17-277/25 (TRU's Goldstein and Goddu testified that Mattel complained about Hasbro products found in the clubs.); CX 626; Amerman 3844/22-3847/12 (The President of Mattel's Boys' Division suggested in a memorandum that Mattel should ascertain what its competition was shipping to the clubs so that the matter could be raised with TRU at the appropriate time.); CX 1612 (In August of 1992, Goddu had a conversation with a Hasbro Division President, during which Goddu passed on to Hasbro a prior conversation he had had with Mattel executives, including Amerman, concerning the warehouse clubs.); CX 1658 (Goddu) at 276/17-277/25 (Goddu testified that there were many such conversations concerning Mattel and Hasbro.); Moen 651/17-652/9 (TRU used Tyco, Hasbro, and Mattel's compliance with the special club packs policy to pressure each of the three companies to continue its compliance with the policy.).

2. Hasbro.

Inano 3333/12-3335/5, 3343/17-22; Owen 1132/6-1135/9; Verrecchia 1391/22-1393/14, 1393/23-1394/41; CX 1810 (At Toy Fair 1992 and on other occasions, TRU told Hasbro that Mattel and other manufacturers had agreed not to sell promoted product to the clubs.); Inano 3333/12-3343/22; CX 1630-A, B; Halverson 428/17-430/4; Owen 1129-1134; Verrecchia 1393/5-14, 1393/23-25, 1394/1-4 (At or just before Toy Fair 1992, a Hasbro executive came from a meeting with TRU and told a subordinate that TRU had met with several of Hasbro's competitors, including Mattel and Fisher Price, and that they had agreed not to sell promoted products to the clubs. Because Hasbro's competitors had

agreed not to sell promoted product to clubs, Hasbro said it would not do so, but when another company sold promoted product to the clubs "the door would be open for us."); CX 1658 (Goddu) at 273 (Hasbro made it clear to TRU that Hasbro would not "sit by idly" if its competitors sold product to the clubs.); Verrecchia 1385/7-25, 1376/16-1377/12 (Hasbro wanted to ensure that TRU's policy was being applied to Hasbro's competitors.); Verrecchia 1485/19-1486/4; Owen 1128/5-1131/2 (TRU assured Hasbro that it was talking to the major manufacturers about the clubs and that it was establishing a policy that it was going to apply to all of TRU's vendors.); CX 180, 309, 363, 47-50, 336; Verrecchia 1366/6-1367/21, 1374/13-1376/20, 1489/13-23; Lazarus 5451/14-5452/18; CX 1660 (Lazarus) at 141/4-8; Amerman 3795/9-3796/20, 3800/7-3801/25, 3806/24-3808/4; CX 1659 (Goldstein) at 62-63 (Hasbro monitored its competitors' sales to the clubs, and aggressively and frequently complained to TRU when it found violations.); CX 1658 (Goddu) at 329/23-24, 276/12-277/25; Goddu 6701/13-18 (Goddu testified that Hasbro complained more about its competition selling in the clubs than other manufacturers.); Grey 3011/12-3013/4 (In May of 1992, Hasbro's CEO discussed with Tyco's CEO what each company was doing or not doing with respect to the clubs.); CX 1772; 1773-B; Lazarus 5448/13-16; CX 1774 (TRU met separately with Mattel and Hasbro on July 17 1992.); CX 1633 (Following the July 17, 1992, meeting with Hasbro, TRU received confidential internal Hasbro memoranda dated from June 30 to July 31, 1992, reporting sales to the clubs by Mattel and other Hasbro competitors.); CX 1612 (On August 12, 1992, Goddu had a conversation with a Hasbro Division President during which Goddu passed on to Hasbro a conversation he had with Mattel executives, including CEO Amerman, concerning the warehouse clubs.); Moen 651/17-652/9 (When Tyco developed special club packs, this was communicated by TRU to Mattel and Hasbro.); CX 684-B; Cohen 8015/3-23 (A Fisher Price record shows that a Hasbro Division Representative told Fisher Price that Hasbro was "adamant they would not be shipping key [items] to the clubs, at least not yet.").

3. Fisher Price.

CX 1658 (Goddu) at 328/18- 329/29 (Goddu testified that Fisher Price was concerned because "if their competitors are going to exploit the club channel of distribution, then they [Fisher Price] have to pay attention to it."); Weinberg 7628/15- 7629/1 (TRU's Vice President Weinberg testified that Fisher Price complained to him about Playskool [Hasbro] products that Fisher Price found in the clubs.); TRU's Response to Complaint Counsel's Proposed Finding of Fact 278 (TRU admits that Fisher Price complained from time to time and that its particular concern was Hasbro's Playskool Division.); CX 563 (A Fisher Price representative spoke to a Little Tikes' regional manager to find out if Little Tikes had experienced any repercussions from TRU about products it offered to the clubs.); CX 684-B; Cohen 8015/3-23 (Fisher Price notes from Toy Fair 1992 state that Hasbro's Kenner and Playskool representatives told Fisher Price that their company was "adamant that they would not be shipping key skus to the Clubs, at least not yet.").

4. Tyco.

CX 1658 (Goddu) at 271/23-272/22, 273/24-274/3; Goddu 6876/20-6877/13 (TRU's Goddu testified that Tyco had an ongoing concern about "having to be in the clubs because their competition was there."); Inano 3345/2-3347/4; CX 532; CX 553 (Tyco knew of Mattel's club policy before it was formally announced.); Moen 651/17-652/9 (TRU urged Tyco to adopt the same policy as the other large toy makers by developing special club packs, and told other manufacturers that Tyco would sell such packs to the clubs.); CX 1412-B; Grey 3027/22-3029/12 (Tyco's CEO acknowledged, in 1993, that Tyco had adopted the same policy as its competitors.); Grey 3011/12-3013/4 (In May 1992, Tyco's CEO and Hasbro's CEO discussed their companies' policies regarding sales to clubs.).

5, 6. Little Tikes and Today's Kids.

DePersia 2146/10-2147/6, 2148/7-22 (When confronted by TRU about stopping or restricting sales to the clubs, Little Tikes executives asked about other manufacturers' sales to the clubs and asked specifically whether TRU's policy also would be applied to Today's Kids.); DePersia 2214/23-2215/3 (Little Tikes was concerned that Today's Kids might take away market share from Little Tikes.); DePersia 2147/7-14, 2150/3-12 (Goddu responded that Today's Kids would be "getting out of the business" of selling to the clubs.); DePersia 2147/18-24, 2150/25-2151/4 (A Little Tikes Sales Vice-President understood that Goddu had spoken with Today's Kids and that the response was a reassurance of Little Tikes' concerns.); Goddu 6726/2-11, 6727/8-12, 6730/20-6732/2, 6738/5-6739/25 (Goddu had spoken to Today's Kids about TRU's policy, and Today's Kids had told Goddu it would slow or discontinue sales to the clubs.); CX 874 (A Today's Kids memorandum lists several Mattel and Tyco-Playtime products sold by clubs, and states that Today's Kids knew that TRU was taking these items from its shelves. The memo is dated a week before TRU met with Tyco regarding these products.).

7. Tiger Electronics.

H. Effect of the "No-Identical-Items" Policy.

TRU's initial position was that the toy manufacturers should not "overly support" the warehouse clubs. CX 529. That position was modified to agreements not to sell "hot products" to the clubs and to specially package other products for the clubs.Eventually (and primarily as a result of negotiations with Mattel),[31] these first agreements changed into new agreements from and among the toy companies not to sell any of the same products to the clubs that the toy manufacturers sold to TRU. Thus, the focus on hot products was dropped in favor of a uniform policy of offering the clubs only goods that were significantly differentiated from those carried at TRU. Toy companies like Tyco also agreed to develop a special line of differentiated products for the clubs if they had not already done so. These special lines were comprised of combination packs, but in a few instances individually packaged toys were redesigned to make them visually distinct from the items sold at TRU and other traditional retailers. As discussed above, TRU supervised the policy by reviewing and approving many club products before they were offered to the clubs.

The no-identical products policy met TRU's goals. TRU wanted to prevent toy manufacturers from competing with each other to sell products to the clubs, CX 1658 (Goddu) at 276/23-277/25; Kalinske 2488/20-2489/3, 2491/19-2492/6, to prevent consumers from making direct price comparisons between products sold by TRU and products sold by the clubs, Butler 5560/13-24; Goddu 6635/7-21, and to prevent the clubs from competing with TRU. Okun 2684/15-2685/6.

TRU approved of the sale of special packs to the clubs because special packs make it difficult for customers to compare the prices at different retail outlets. Asked whether a customer could compare the price of an individual toy with that of a club pack, TRU's Goddu answered:

the objective was that the consumer not be able to do it easily. And if, can I give you an example on that? If Sunshine Barbie individual doll is found everywhere at $9.99 and then the warehouse clubs sell Sunshine Barbie and two little friends with it and the warehouse clubs sell that for $14.99 or $16.99, the customer doesn't

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Shiffman 2016/18-2017/1 (Tiger's Executive Vice-President got the "impression" from his initial conversation with TRU's Goddu that TRU's club policy would apply to all manufacturers in the industry.); CX 811; Shiffman 2017/2-2028/13 (After agreeing to restrict its own sales, Tiger wrote TRU a letter complaining about a competitor's product in a club.); CX 811 (Tiger said that it had not sold any such easily-comparable products to a club, but that Tiger could sell such products "if we had known that it was acceptable to you.").

[31] IDF 130 ("[Mattel's] Barad testified that she also called TRU's Michael Goldstein within a few days of the October 3, 1991 meeting, in order to tell him that she knew what Amerman had said, but that Mattel could not stop selling everything to the clubs because Mattel already had outstanding commitments to them and what Mattel really wanted to do was to sell special packs to the clubs .... During this phone call, Goldstein also indicated to Barad that selling special packs to the clubs was acceptable to TRU.").

really know the value of the little dolls. I mean, it's hard to say is that worth -- are the other retailers competitive or not competitive at $9.99 relative to that version being $14.99? Will you get more product? So those were the objectives, you know, so that they're not easily comparable. Those were always our objectives.
CX 1657 (Goddu) at 215/22-16/8.

Most special packs were less popular with customers than individually packaged items. Lazarus believed that consumers would not want combination packs, and he knew he did not want them for TRU. Lazarus 5431/16-5433/10. The policy also raised the average prices of toys available at the clubs, even when consumers saw no improvement in value. For example, both Mattel and Hasbro, as a matter of policy, would not produce a club combo pack that would sell for a lower price at a club than any one of the items sold alone at other retailers. IDF 394, 395. A 1993 Mattel memorandum describing problems with the Barbie Gift Sets developed for the clubs illustrates the point:

> The biggest complaint the clubs have is that there is no perceived value to the Barbie gift sets. They attempt to sell the gift sets at $14-$18, while the traditional retailers sell the regular line feature Barbie for $11-$16. Their [the clubs'] customer sees only the doll and sees them as being higher priced. This also creates a problem for their entire department which a consumer could view as being higher priced.

CX 592. The memorandum also says that "putting costumes with a doll and calling it a gift set does not work. They sell costumes for as little as 75 [cents] each ... and we're charging them $2-$4. No value." *Id.* While not all combination packs fared as poorly as these Barbie Gift Sets, the problem they created was pervasive.

The ALJ correctly found that TRU halted a pattern of rapid growth of toy sales at the clubs. IDF 368, 375. In just the year before the boycott, clubs' share of all toy sales in the United States grew from 1.5% in 1991 to 1.9% in 1992. But, toy sales by the clubs fell steadily to 1.4% by 1995 after the boycott took hold.[32] CX 1822 (Scherer) Ex. 4a.

The boycott hobbled individual clubs toy business. Costco's experience is illustrative. While its overall growth on sales of all products during the period 1991 to 1993 was 25%, Costco's toy sales increased during the same period by 51%. IDF 385; CX 1745-Z-9. But, after the boycott took hold in 1993, Costco's toy sales *decreased* by 1.6% despite total sales growth of 19.5%. *Id.* While there is no assurance that Costco's toy business would have continued to grow at an annual rate of 25% or more, TRU's policy clearly took the wind out of Costco's sails. This change reflects the sudden loss of supply of key toy products. In 1989, over 90% of Mattel toys

[32] The clubs's overall sales of all goods grew at an annual rate of 26.4% in 1991, 22.8% in 1992, 10.8% in 1993, 3.9% in 1994, and 5% in 1995. CX 1824. Professor Buzzell, a marketing expert called by TRU, testified that the sales volume of all clubs grew at an average annual rate of 48 % from 1985 to 1988 and of 24.3 % from 1988 to 1992, before slowing to an annual rate of 6.5 % from 1992 to 1995. RX 894 (Buzzell) at 21-22.

purchased by Costco and the other clubs were regular items, but this number fell to zero in 1993. CX 1822 (Scherer) ¶ 51. The clubs' share of the 100 most popular toys from all manufacturers dropped by more than half between 1992 and 1995. Most of Costco's 1995 sales were video products, so the reduction in popular traditional toys was even greater. CX 1822 (Scherer) Ex. 5, 6a.

The reversal of the clubs' success as toy retailers can also be seen by examining toy manufacturers' sales to the clubs. For example, the sales volume of Fisher Price to Price Club dropped from around $6 million in the late 1980s to approximately $220,000 in 1993. Chase 1775/14-1776/6. Sales to the clubs by Hasbro, including its Playskool, Playskool Baby, and Kenner divisions, declined from $9.5 million in 1991 to $3.2 million in 1993. IDF 212; CX 448; CX 447A-E; Owen 1294/2-5. Mattel's sales to all clubs, which grew at about 50% annually in both 1989 and 1990, dropped from over $23 million in 1991 to $7.5 million in 1993.[33] IDF 165. From 1991 to 1993, Tiger Electronics sold the clubs regular products, and its sales to the clubs climbed from $273,000 to $3.5 million, at which time clubs accounted for 2.5% of Tiger's sales. IDF 301; CX 1756-C. But after Tiger adopted TRU's policy in 1994, club sales dropped to less than $32,000. IDF 309.

Most significantly, competition would have driven TRU to lower its prices had TRU not taken action to stifle the competitive threat posed by the clubs.[34] In turn, if TRU lowered its prices, other retailers would have been forced to do so as well. IDF 392. Several industry witnesses expressed this view. Goddu thought that the clubs were going to force down toy prices at all retailers, in the same way that Wal-Mart had done. Goddu 6616/19-23. A Binney & Smith executive believed that the prices charged by the warehouse clubs would become the prevailing market price.Blaine 6372/12-16. The ALJ also found that, because clubs carry many less popular items at prices substantially lower than TRU's, TRU would have lowered prices for toys beyond the top 100 to 250 best-selling items to protect its price image. IDF 405.

If TRU had matched the clubs' prices by reducing its average margin on its five hundred best-selling products from 20.5% (TRU's average margin on the top 500 toys) to 9% (Costco's average margin), its customers would have saved $55 million per year.[35] CX 1822 (Scherer) ¶ 58. By the

[33] Mattel's sales of regular product to clubs dropped from about $17 million in 1991 to zero in 1993, and during the same period sales of custom product grew from $6.7 to $7.5 million. IDF 165.

[34] Indeed, TRU *did* lower its prices for several items when clubs were able to sell the *same* items at a substantially lower price. *See supra* p.547.

[35] Of course, if TRU lowered the prices on fewer than five hundred items to meet club competition -- which in fact it was more likely to do -- this number would be lowered accordingly.

same token, TRU's policy raised the costs of toys at the clubs, obstructing their advantage as the lowest price outlet. This too weakened their effectiveness as competitors to the advantage of TRU and the injury of consumers.[36]

I. Evidence of "Free-Riding."

TRU provides several services that might be important to consumers. These include advertising, carrying an inventory of goods early in the year, and supporting a full line of products. But the evidence indicates that the manufacturers compensate TRU for advertising toys, storing toys made early in the year, and stocking a broad line of each maker's toys under one roof. Given TRU's hard bargaining with the toy companies over prices and other terms of sale, and due to the industry's desire to support TRU, TRU has consistently been able to extract subsidies, discounts, and other concessions from the toy companies that enable TRU to provide the services the toy industry wants.

TRU does not purchase "image advertising" designed to boost the demand for toy products generally. Television advertising, for example, is paid for entirely by the toy companies. IDF 470; CX 1822 (Scherer) ¶ 60. TRU advertises in local newspapers, and via catalogs, to promote the availability and prices of products in TRU stores. IDF 471. There is no reason to believe that the small amount of local advertising by TRU boosts sales at nearby club stores. IDF 480. To the contrary, Professor Scherer convincingly demonstrated that, if anything, TRU's local advertisements lower toy sales at its competitor stores in the same area. CX 1831 (Scherer) ¶ ¶ 1-10.

Toy manufacturers also pay TRU for its local ads. A 1993 TRU memorandum states that advertising is vendor-funded and calls it "essentially free." CX 967-C.[37] TRU's cost calculations confirm this statement. TRU's calculations do not indicate the amount of advertising expenditures in 1993, but do show advertising allowances of more than

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[36] In an effort to show that TRU's pricing is already constrained in local markets by competition from Wal-Mart and the other national discounters, TRU's economist, Professor Carlton, performed a regression equation comparing the number of local competitors to the prices charged for *all* of the toys at TRU stores and found a very small (1-2%) relationship between the number of local competitors and prices charged by TRU. Complaint Counsel's expert, Professor Scherer, responded that Carlton erred in using the average price of all toy items, because TRU only adjusts its prices on the top several hundred items to meet price competition from other discounters. Reinterpreted to measure not average price, but only the prices of the top 100 to 250 items, Carlton's analysis shows pricing differences of between 5.08 and 7.08% for top-selling items at locations where TRU stores compete with Target, Wal-mart or other discounters. If allowed to continue, head-to-head price competition with the clubs was likely to lower toy prices further in the 238 or more areas where TRU stores compete with club outlets. CX 1830 (Scherer) ¶ ¶ 10, 11.

[37] According to Spencer, a TRU toy buyer, TRU's Senior Vice President of Advertising repeatedly explained that TRU received more in advertising allowances than it spent on advertising. Spencer 1867/7-14.

$183 million from toy manufacturers. CX 1012. In 1994, TRU spent $199 million on advertising-related expenses and received compensation in excess of $198 million. *Id.* TRU's net cost of advertising was $750,000, or 0.02% of total sales. In 1995, TRU's calculations show that it spent about $263 million on advertising and was paid a bit more than $225 million, roughly 90% of its costs. TRU projected that 1996 payments would cover 95% of advertising costs. CX 1009. Advertising, in short, was a service the *toy manufacturers* provided for TRU and not the other way around.

Manufacturers also compensate TRU for storing the goods that it buys before the Christmas selling season. Most often compensation is made by extremely favorable "dating," meaning delay in the date payment is due for goods received over the year. TRU's Chairman Lazarus explained dating:

> it's financed in large part by the manufacturers who build extra margin into the price and then give "dating." You buy now; you pay later. Because you don't sell evenly throughout the year. That was and is the premise. They [the toy companies] build the price margin into it so they can produce 12 months a year. Without this dating, I never would have been able to afford the inventory.

CX 1611-C (emphasis in original). TRU is the only toy retailer that pays for all of its Mattel inventory on [ ], even if products are purchased in January of that year. [citation redacted]. By comparison, Wal-Mart is required to pay within 90 days of shipment. *Id.* Mattel documents describe this late payment deadline as compensation for storage services. CX 686-B. When Playskool shipped an order of products unexpectedly early (late June), Playskool agreed to lower the price of the shipment by an amount equal to four months' storage costs. CX 1730. TRU's records show that manufacturers routinely paid TRU credits for warehousing services. CX 1012.

TRU is compensated for supporting the toy companies' full line of products. TRU receives a disproportionately large supply of hit products in short supply. In 1992, for example, TRU got 40 to 50% of Mattel's "hot" products while it sold only 29% of Mattel's total output. CX 530-D. A 1990 letter from Mattel to TRU explained, TRU "is receiving a disproportionate share of our quotas .... [W]e will continue to provide the maximum possible support to insure a great sell-through." CX 533-A. "Great sell-through" means that TRU, by stocking hit product unavailable at other toy retailers, is able to sell additional toy items to the customers who come to TRU stores to purchase the hit products. In other words, even though TRU's margins are lower for "hit" products, TRU is able to profit from its access to hits by also selling some less popular products to the customers who come to its stores to purchase hits. CX 1822 (Scherer) ¶ 20. Thus, liberal access to scarce products compensates TRU for its full-line stocking service to the toy industry. A 1990 Tonka (Hasbro) memorandum reports: "Tonka has fulfilled its obligation to provide 'more than a fair share' of hot

product to TRU (including the 8,000 ... Wrestling Buddies that [were] bound for other retailers)." CX 5.

The toy companies also give TRU post-sale discounts ("markdowns") on the prices paid for slow-moving products. In this way, if TRU is burdened by an unsuccessful product it carries, the manufacturer pays a large part of the cost. Kenner (Hasbro) document states that TRU "murdered us" on Kenner-funded markdowns on products that flop. CX 10 A, B. Many documents in the record memorialize discounts extended to TRU when products did not sell as well as expected: for example, a 1992 Mattel memorandum titled "Toys 'R' Us -- Special Pricing" records granting TRU well over $1 million in free goods in compensation for "special discounts" on slow-moving items; and a 1994 memorandum suggests that Mattel, as "done in the past," should fund discount coupons for twenty-eight items overstocked at TRU. CX 556, 584-A; IDF 507 (listing documents). TRU's standard purchase contract includes a most favored nation clause to guarantee that it pays no more than the lowest price in the industry. CX 1030-F.

There is no evidence that club competition without comparable services threatened to drive TRU's services out of the market or harm consumers. TRU's *only* illustration of its claim that it was forced to change (or even considered changing) its marketing policy as a result of purported free-riding involves a decision in 1996 to cut back the average inventory in TRU stores from approximately 16,000 to 18,000 units to about 11,000 units. Goddu 6574/22-25. Based on the record, it is difficult to connect this TRU marketing change to "free-riding" or even competition by the clubs. TRU's executive in charge of these changes testified that the reduction in the number of units in its inventory was an effort to create a cleaner looking shopping floor. Goddu 6576. Studies undertaken by the company prior to the decision to cut back on inventory all related that decision to consumer preferences for a less crowded store, not to free-riding issues. Goddu 6574-75.[38]

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[38] Competition with Wal-Mart caused TRU to lower prices and "to give the customer a better in-store shopping experience." Goddu 6523-24. TRU decided to reduce the number of products in its inventory in an effort to create a cleaner looking shopping floor. Goddu 6574/16-25. Three studies were undertaken to find the optimal number of items for TRU; all recommended 9,000, as additional items do not register in the eyes of consumers. Goddu decided to cut his inventory to about 10,000 and ended up with an inventory of a little less than 11,000. Goddu testified that any greater inventory reduction would cause TRU to lose its distinct edge. He speculated that if TRU attempted any inventory cut greater than the one he made TRU would "close [its] doors." Goddu 6578. TRU documents echo Goddu's conclusion, "[o]ur broad selection continues to be a strong competitive defense versus virtually all of our competitors. We must leverage this as much as possible." CX 1586-B. And, "[m]ost competitive stores that you go into, you often can't find what you want, which gives us an enormous marketing opportunity particularly in the current environment." CX 1611-F. Professor Scherer concurred with Goddu's evaluation: "I don't think that [a $55 million] loss in profit would lead to a significant change [in TRU's stocking policy] because for Toys "R" Us not to pursue the policy it has pursued with such great success would be to undermine the basis of its success." Scherer 4919/3-7. Scherer also observed that TRU lost money on the 6,000 or so slow-moving items that it cut from its

No contemporaneous document suggests that TRU was concerned about "free-riding" when it developed its club policy.

J. Before TRU's Policy Was Implemented, Almost All the Toy Companies Sold to All Retail Outlets Including Warehouse Clubs.

Most toy companies are saturation retailers, meaning that they seek sales whenever and wherever possible. Toys are sold at supermarkets, pharmacies and convenience store gas stations. To the extent that the toy industry needed costly services from any of its retail outlets, it traditionally has chosen to pay for these services itself through one of the several methods described earlier. There is no evidence that a toy company, prior to TRU's policy announcement, ever restricted the distribution of its toy products in an effort to preserve or enhance the quality of its retailers' services. Two small companies, Little Tikes and Lego, restricted the clubs to custom or discontinued products prior to 1992 (when the TRU policy was announced). IDF 262, 330. There is no indication why Lego in the late 1980s limited the clubs to old products, but Lego began to sell regular products to BJ's in the early 1990s. Little Tikes was motivated by product prestige. IDF 262-65. Little Tikes' founder believed his company's image would be eroded if products were sold at steep discounts in clubs and similar outlets, and therefore declined to sell to the clubs. *Id.* All other toy companies (and eventually Little Tikes, after it was purchased by Rubbermaid) courted the clubs and other new channels of distribution.

No toy company document before 1992 even hints that "free-riding" by one toy retailer on the efforts of another could be a problem in the industry. On the contrary, before 1992 all the big toy companies (Mattel, Hasbro, Fisher Price, Tyco, etc.) actively searched for new low-cost distributors and aggressively sought to expand toy sales to and through the clubs.[39]

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inventory in 1996, but that the remaining stock is profitable for TRU. Scherer 4921/9-22.

[39] Several toy manufacturer witnesses testified that they *did* view the clubs as free-riders, even before they were confronted by TRU. The ALJ did not credit this testimony, in some instances expressly dismissing these witnesses as not credible. IDF 296 (Today's Kids executive's testimony not credible), 316 (VTech executive's testimony includes "much post hoc rationalization"). Other testimony of this kind was inconsistent with specific evidence in the rest of the record. For example, Fisher Price's Senior Vice President of Sales gave several reasons why Fisher-Price decided to restrict club sales in 1990 prior to any request from TRU, including the desire to protect the margins of its core retail customers. Cohen 7955, 7960-61. But these statements were contradicted by a 1990 memorandum showing that Fisher-Price planned to sell both regular product and special packs to the clubs that year. RX 280. TRU attempted to rely on a 1993 document, RX 256, for corroboration of the Fisher Price executive's testimony. Cohen 7948/8-22.

Obviously a 1993 document is not as reliable as contemporaneous documents with respect to a decision purportedly made in 1990. TRU's reliance on this 1993 document underscores the weakness of TRU's contemporary evidence on this point. *Cf. United States v. U.S. Gypsum, Co.*, 333 U.S. 364, 396 (1948) (where antitrust defendants' trial "testimony is in conflict with contemporary documents, we can give it little weight.").

All of the manufacturers' testimony giving independent reasons why they decided to discriminate

against the clubs is also contradicted by the consistent testimony from TRU's own officials that the club

II. DISCUSSION OF LAW.

Set out below is a discussion of fact and law demonstrating, first, the existence of vertical agreements between TRU and at least ten toy manufacturers, and second, the existence of horizontal agreements among at least seven toy manufacturers. We then turn to an application of substantive legal standards to these agreements.

The boycott organized by TRU and the toy manufacturers could be declared illegal *per se* under the Supreme Court's decision in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). For a number of reasons, we choose not to rely primarily or exclusively on *Klor's,* but rather find a violation on alternative grounds. First, the boycott is illegal *per se* because it demonstrates all the characteristics that the Supreme Court set forth in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), as a predicate to applying *per se* rules. Second, the boycott is illegal under a full rule of reason analysis because the anticompetitive effects clearly outweigh any possible business justifications. Third, the vertical agreements between TRU and each toy manufacturer, entered into *seriatim* with clear anticompetitive intent, violate Section 1 of the Sherman Act.

A. TRU Entered Unlawful Vertical Agreements With at Least Ten Toy Manufacturers.

TRU entered vertical agreements with at least ten toy companies, including all of the large, traditional toy manufacturers, not to deal with clubs except on discriminatory terms that limited the clubs' ability to compete.

Contrary to TRU's assertions, the doctrine of *United States v. Colgate & Co.*, 250 U.S. 300 (1919), does not protect TRU's conduct. *Colgate* and its progeny protect unilateral conduct from antitrust liability under Section 1 of the Sherman Act. For example, when a manufacturer states a distribution policy -- typically a suggested retail price -- and then refuses to deal with any distributor that does not comply, no "agreement" between the manufacturer and distributor can be inferred from the manufacturer's actions. This is so even if all of the manufacturer's dealers comply out of fear of losing a key supplier. In the present case, the distribution policy was announced by a large distributor, and it was the manufacturers that had to

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policy was difficult to implement. As quoted above, TRU's Chairman Lazarus said that *none* of the toy manufacturers was happy about TRU's club policy.

We thus agree with the ALJ's decision to reject this line of testimony, which was self-serving, unsupported, and directly inconsistent with the rest of the evidence showing that virtually all toy manufacturers viewed the clubs' emergence as toy retailers as a *positive* development for the industry which was thwarted by uninvited pressure from TRU.

decide whether to comply. Were these the only facts, the participants would still be entitled to *Colgate* protection. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (reaffirming *Colgate*); *FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565, 573 (1924). But they are not.

TRU overstepped the bounds of *Colgate* repeatedly and in several different ways. TRU's goal was to work out arrangements whereby the toy manufacturers would sell to the clubs only on discriminatory terms, thereby diminishing the clubs' ability to compete effectively with TRU. *Colgate* would protect this policy, if it had been confined to an announcement, followed by firms making independent business decisions. But that is not what occurred. First, TRU asked toy companies for an express response -- yea or nay -- after it told them of its policy, *see supra* pp. 542-45; second, it engaged in extended negotiations with companies that were reluctant to adopt the restraint, and worked out agreed-upon compromise solutions, *see supra* pp.545-46; third, it asked to, and in fact did, preview and clear products developed for the clubs to assure that they were sufficiently differentiated from its own, *see id.*; fourth, on at least one occasion, a supplier agreed to split the cost of a discount that TRU offered after a toy company breached the policy by selling a product to a club, and TRU elected to meet the club's lower price, *see supra* p. 547; fifth, on other occasions, TRU invited toy manufacturers to police compliance by competitors and, when toy companies complained about competitors' sales to the clubs, TRU called meetings with the firms violating the agreement to demand again that they cease club sales, *see supra* pp. 557-59. On the last point, the fact that toy manufacturers asked for enforcement of TRU's policy perhaps would not be enough, without more, to form an agreement. *See Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989). We need not resolve that issue because the systematic give-and-take of negotiations between TRU and the various manufacturers went well beyond the simple announcement of a policy followed by terminations if that policy was not followed.

The parties constantly described their arrangements as "agreements," "promises," "understandings" and like terms, *see supra* pp. 547-48 & note 23, -- all indicating a conscious commitment to a common plan or scheme.

Recent case law interpreting *Colgate* demonstrates why TRU's conduct and the toy suppliers' responses evidence agreements. The *Colgate* doctrine was discussed at length in *Monsanto*. 465 U.S. at 761-63. In *Monsanto*, the Court addressed the question of the type of evidence that a plaintiff must present to create an issue for the trier of fact in an action for vertical price fixing. *Id.* at 760-64. The Court rejected the proposition that complaints by one party in the distribution network to another (most often the manufacturer) about a price cutter, followed by termination of the price cutter, could alone amount to adequate evidence of an agreement. *Id.* The

proper test, the Court concluded, was that a plaintiff must produce "direct or circumstantial evidence that reasonably tends to prove that the manufacturers and the others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)). This test was alternatively stated with a focus on the refutation of independent business justification: "There must be evidence that tends to exclude the possibility that the manufacturer and the nonterminated distributors were acting independently." *Id.* In this case, there is no question that complaint counsel presented evidence tending to exclude the possibility of independent action under the standard of *Monsanto*.

In *Monsanto*, the Court found "substantial direct evidence of [an unlawful agreement] to maintain prices" where Monsanto advised a discounting dealer other than the one terminated that it would not receive adequate supplies if it continued discounting; Monsanto, frustrated by the dealer's continued discounting, complained to the dealer's parent company, which then instructed its subsidiary to comply; and the dealer later informed Monsanto that it would comply. *Id.* at 765.[40]

The record here contains similar evidence (and more) of agreement. TRU asked its suppliers to comply with its policy, and they responded with commitments; most agreed on the understanding that all would do the same; and when some did not do as they had promised, TRU engaged in often-protracted negotiations with the "non-complying" manufacturer. Indeed, the presentation of packages of club products to TRU to determine whether they were acceptable to TRU, and the subsequent offer of products to the clubs only after content and packaging were deemed acceptable to TRU, went well beyond any evidence of "a conscious commitment to a common scheme" found in *Monsanto*. *Id.* at 764 (quoting *Edward J. Sweeney & Sons,* 637 F.2d at 111). Finally, in the case of Little Tikes, TRU employed exactly the same tactic as did Monsanto -- it complained to

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[40] The Court also found more ambiguous, but nonetheless adequate evidence of a vertical agreement to create a question for the trier-of-fact in the following newsletter sent by a Monsanto distributor to its retail clients:

> In other words, we are assured that Monsanto's company-owned outlets will not retail at less than their suggested retail price to the trade as a whole. Furthermore, those of us on the distributor level are not likely to deviate downward on price to anyone as the idea is implied that doing this possibly could discolor the outlook for continuity as one of the approved distributors during the future upcoming seasons. So, none interested in the retention of this arrangement is likely to risk being deleted from this customer service opportunity. Also, so far as the national accounts are concerned, they are sure to recognize the desirability of retaining Monsanto's favor on a continuing basis by respecting the wisdom of participating in the suggested program in a manner assuring order on the retail level "playground" throughout the entire country. It is elementary that harmony can only come from following the rules of the game and that in case of dispute, the decision of the umpire is final.

Monsanto, 465 U.S. at 766.

Rubbermaid, Little Tikes' parent company. As in *Monsanto*, Little Tikes, instructed by its parent to comply, told TRU that it would do so.

Judge Posner's opinion for the Seventh Circuit in *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987), much like *Monsanto*, supports the finding of agreements here. Isaksen was a distributor of wood burning stoves. The defendant-manufacturer, Vermont Castings, distributed a list of suggested retail prices, but did not require its dealers to sell at those prices. Isaksen sold stoves at deep discounts, and, as a result, Vermont Castings was "bombarded" with complaints from its other dealers. Isaksen testified that Vermont Castings threatened to "mix up" his orders if he did not raise prices.[41] About a year after this threat, Isaksen raised prices and brought a Sherman Act Section 1 action alleging an illegal price maintenance agreement. Isaksen prevailed with the jury, but the district court set aside the verdict.

The Seventh Circuit found sufficient proof of vertical agreement to create a jury question based on (1) the manufacturer's threat that orders would be "mix[ed] up" if the discount dealer did not raise its prices and (2) the dealer's subsequent price increase. *Isaksen*, 825 F.2d at 1163-64. The court found that the manufacturer stepped beyond *Colgate*-protected conduct when it *asked* its dealer to raise prices and the dealer complied. *Id. Colgate* protects announced conditions followed by termination, but does not insulate *negotiations* with recalcitrant suppliers or dealers. In Judge Posner's words, after the supplier has asked its dealer to adopt a specific policy, the acceptance could be "implicit, or signified by conduct in lieu of promissory language." *Id.* at 1164. *Monsanto* has been similarly interpreted in other circuits. For example, in *Big Apple BMW v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), the Third Circuit reversed a grant of summary judgment for the defendant because the plaintiffs were able to produce evidence tending to show that the defendant's purported independent business justifications for the challenged conduct were a pretext. *Id.* at 1374-80; *see also McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 328 (8th Cir. 1986) (holding jury could conclude that a supplier and its dealer entered into an agreement to terminate a second dealer where, *inter alia,* the supplier subsequently reported the termination to the first dealer).

United States v. Parke, Davis & Co., 362 U.S. 29 (1960), examined and held illegal a pattern of conduct analogous to that engaged in by TRU. Parke, Davis, a pharmaceutical company, sought an agreement from retail druggists to maintain prices and, when retailers resisted, modified its requirement and sought a discontinuance of price advertising. Parke, Davis

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[41] TRU's behavior in holding up payment for a shipment from Mattel, followed by Mattel's compliance with the scheme to discriminate against the clubs, *see supra* p. 547, involves similar conduct.

negotiated first with one and then other retailers, obtained assurances that price advertising would be discontinued, and eventually brought all retailers into line. The Supreme Court explained that a manufacturer that actively negotiates with its distributors in this manner goes "far ... beyond the limits of the *Colgate* doctrine." 362 U.S. at 46.[42] Except for the fact that the instant case involves a retailer seeking assurances from its suppliers (rather than the other way around), this precedent squarely covers the precise conduct at issue here.

TRU cites three post-*Monsanto* lower court cases in support of its view that "courts of appeals have consistently ruled that a manufacturer's communication to a complaining retailer of its decision not to deal with a competing retailer in response to the complaining dealer's demand is insufficient to establish agreement under the standard set forth in *Monsanto*." (Reply Br. at 32.) TRU believes that these decisions protect TRU's conduct in this case. We disagree. It is true that in both *Garment Dist., Inc. v. Belk Stores Servs., Inc.*, 799 F.2d 905 (4th Cir. 1986), and *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988), dealers complained to a manufacturer about a rival price cutter and, following those complaints, the price cutter was terminated. But TRU's conduct went beyond simple complaints to toy manufacturers about low prices at the clubs and each manufacturer's simple response that it was no longer dealing with the clubs. Rather, TRU negotiated with suppliers about the terms on which they would sell to the clubs, reviewed and agreed to assortments of products that could be sold to the clubs on terms acceptable to TRU, and then negotiated about and policed compliance by companies caught in violation of its policy. The decisions TRU cites lack such additional proof of conspiracy that is present here, which as in *Parke, Davis* goes "far beyond" the manufacturer's communication of its policy to its dealers in response to complaints, and subsequent cut-off.

TRU also relies on *H. L. Hayden Co. v. Siemens Medical Sys., Inc.*, 879 F.2d 1005 (2d Cir. 1989), and particularly that portion of the opinion in which the Second Circuit found that Siemens did not overstep its *Colgate* rights when it said to a group of complaining full service dealers that it was "working on the problem" presented by a discount mail-order dealer. It was undisputed that the full service dealers had complained about free-riding by the mail-order outlet and also clear that the mail-order outlet really was a free-rider, providing none of the presale, point-of-sale and post-sale services that the manufacturer desired from its distributors. The court of appeals emphasized that the "correct standard" requires evidence that tends to exclude the possibility of independent action by the manufacturer in response to distributor complaints. *Id.* at 1014. Except for the complaints,

[42] The Court's analysis is quoted at p. 576, *infra*.

there was no evidence of agreements between the manufacturer and dealers, and there was also clear evidence of a "negative impact" upon Siemens' reputation and its ability to protect its distribution system arising from the mail-order outlet's "free-ride" on services. *Id.* The single comment by Siemens -- that it was "working on" the mail-order problem -- was insufficient to persuade the court that termination of the mail-order price cutter was not an independent decision by the manufacturer. *Id.* at 1016. Similarly, if each toy manufacturer had responded to TRU's complaints by saying only that it was "working on the problem," and later cut-off or discriminated against the clubs, we would not conclude that there was a "conscious commitment" to a common plan between TRU and each manufacturer.

This case does not present a similarly close call. We do not see how extended negotiations to change distribution policies, requests for and the granting of assurances of compliance, splitting the cost of a discount TRU offered to meet a competitor's low price, or presenting products for preview and agreed-upon clearance by TRU can in any way be understood as unilateral decision making by the toy manufacturers.[43]

B. TRU Organized a Horizontal Agreement Among the Toy Manufacturers.

The record demonstrates that TRU organized and enforced a horizontal agreement among its various suppliers. Despite TRU's considerable market power, key toy manufacturers were unwilling to refuse to sell to or discriminate against the clubs unless they were assured that their competitors would do the same, *see supra* pp. 552-53. To overcome that resistance, TRU gave initial assurances that rival toy manufacturers would commit to comparable sales programs, *see supra* pp. 553-57; TRU representatives then acted as the central player in the middle of what might be called a hub-and-spoke conspiracy, shuttling commitments back and forth between toy manufacturers and helping to hammer out points of shared understanding, *see supra* pp. 557-59; toy manufacturers' commitments were carefully conditioned on comparable behavior by rivals, *see id.*; and, after the discriminatory program was in place, TRU and the toy manufacturers worked out a program to detect, bring back into line, and

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[43] There is no question that parties, though reluctant, may be pressured into antitrust agreements against their will or better judgment. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139-40 (1968); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614 (7th Cir. 1997); *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967, 972-73 (7th Cir. 1995) (citing cases); *Kohler Co. v. Briggs & Stratton Corp.*, 1986-1 Trade Cas. (CCH) ¶ 67,047, at 62,416-17 (E.D. Wis. 1986). *See also* 6 Phillip E. Areeda, *Antitrust Law* ¶ 1408, at 39 (1986). *Cf. Lorain Journal Co. v. United States*, 342 U.S. 143, 152 (1951) (discussing unwilling compliance in the context of § 2 of the Sherman Act). TRU has not advanced any argument that the toy companies' hesitation prevents a legal conclusion that agreements were reached.

sometimes discipline, manufacturers that sold to the clubs, *see supra* pp. 557-59.

TRU's witnesses (principally Lazarus and Goddu) testified that *all* toy manufacturers resisted TRU's proposed sales policies and insisted on assurances that rivals would fall into line. The ALJ found that fourteen toy manufacturers were part of the horizontal conspiracy. While that may be true, we are inclined to include only those toy manufacturers that required assurances that rivals would sell on discriminatory terms to the clubs, and that were satisfied with TRU's assurances that such uniform policies would be adopted. Evidence of that exchange of commitments -- not necessarily direct communications among the toy manufacturers but clearly through the intermediation of TRU -- is present with respect to Mattel, Hasbro, Fisher Price, Tyco, Little Tykes, Today's Kids, and Tiger Electronics.

The ALJ's conclusion that TRU built a horizontal agreement finds strong support in *Parke, Davis,* 362 U.S. 29, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), and *Ambook Enters. v. Time, Inc.*, 612 F.2d 604 (2d Cir. 1979). The evidence also reveals all of the elements required to find a hub-and-spoke conspiracy in legal contexts other than antitrust. And finally, TRU organized a horizontal agreement to enforce the club boycott which is similar to that held illegal in *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

1. The ALJ's finding of horizontal agreement finds strong support in Parke, Davis, Interstate Circuit, and Ambook.

a. Parke, Davis.

In *Parke, Davis*, the government challenged vertical price fixing agreements between *Parke, Davis* and several drug stores. In its discussion of just how far Parke, Davis had strayed beyond the unilateral conduct permitted by *Colgate*, the Court described an agreement that Parke, Davis had orchestrated among its retailers:

> First [Parke, Davis] discussed the subject with Dart Drug. When Dart indicated willingness to go along the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescence in the program. Having secured those acquiescences Parke Davis returned to Dart Drug with the report of that accomplishment. Not until all this was done was the advertising suspended and sales to all the retailers resumed. In this manner Parke Davis sought assurances of compliance and got them, as well as the compliance itself. It was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy.

Parke, Davis, 362 U.S. at 46. The Court then turned to a review of "agreement" law in a broader context:

It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies his competitors will also. But if a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping--a valuable feature in itself--by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act.

Id. at 46-47.[44] As the Court indicated, if Parke, Davis' distributors had met and each said that it would stop advertising prices if the others did so as well, there would be no doubt that a horizontal agreement had been reached. It is equally true that if the toy manufacturers had met and collectively committed that they would not sell, or sell only on discriminatory terms, to a class of customers such as the clubs, the law would recognize this as an agreement. Thus, when TRU engaged in "shuttle diplomacy" and brokered both agreement and compliance, it achieved the same objective.

Just as TRU's conduct was almost identical to the conduct condemned as a vertical agreement in *Parke, Davis*, TRU's conduct was also similar to Parke, Davis' behavior in orchestrating a horizontal agreement not to advertise prices. TRU's actions of shuttling commitments between toy manufacturers allowed the manufacturers to come into an agreement with each other. The manufacturers did not have to meet to hammer out a horizontal agreement. Their conscious commitment was extracted and then communicated each to each by TRU.

TRU was not content to rely on its suppliers' assessment of their individual business interests when it asked them to adopt restrictions on distribution through the clubs. Just as Parke, Davis used Dart's willingness "as a lever to gain [its competitors'] acquiescence in the program," 362 U.S. at 46, TRU used Mattel's promise -- itself "based on the fact that the competition would do the same" -- to gain a commitment from Hasbro and then others. There is similar evidence of *express*, interdependent commitments among at least seven major toy manufacturers. *See supra* pp. 553-59 & note 30. Their subsequent decisions to enter the proposed boycott were made despite the fact that it might have been a competitively foolish thing to do as an individual matter, or that others might gain if it was -- or proved to be

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[44] The Supreme Court in *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 735 (1988), removed any doubt that *Parke, Davis* found both vertical price fixing agreements and a separate and related horizontal conspiracy to refrain from price advertising by characterizing the latter agreement as horizontal.

-- a mistake. As in *Parke, Davis*, the boycott was presented to TRU's suppliers in "competition-free wrapping." *Id.* at 47. Due to this, the agreement ultimately obtained was in all likelihood different from, and more stable than, any agreements TRU would have obtained had it negotiated separately with each supplier, and had each not requested and received assurances about the behavior of its rivals. TRU would not have gone to the trouble of conducting these negotiations and working out the horizontal agreements if it believed it could have enforced its will without them.

b. Interstate Circuit.

A sensible reading of *Interstate Circuit*, 306 U.S. 208, an important Supreme Court case on proof of horizontal agreement, supports our analysis here. Interstate Circuit[45] wrote identical letters to eight competing film distributors, naming all the distributors as addressees in each letter. As a condition for the exhibition of movies in its first-run theaters at an evening price of at least 40 cents, Interstate Circuit asked the distributors to impose two restrictions in their contracts for the exhibition of such films: (1) subsequent-run evening exhibitions of "A" movies must be at an admission price of at least 25 cents, and (2) first-run, evening exhibitions of "A" movies may not be part of a double feature. 306 U.S. 216-17 & n.3. There was no evidence of direct communication among the distributors, but each met separately with representatives of Interstate Circuit to discuss the demands made in its letter. *Id.* at 218. Each distributor eventually acceded to Interstate Circuit's request, except that each declined to adopt the restrictions in Austin, Galveston and the Rio Grande Valley. *Id.* at 219. No witnesses from the distributor defendants testified to offer explanations as to why these "far-reaching changes" were introduced with such uniformity. *Id.* at 223. The Supreme Court affirmed the district court's finding that Interstate Circuit and the national movie distributors had violated Section 1 of the Sherman Act, and upheld the injunction against enforcing their illegal agreement or continuing their conspiracy.

In a famous passage, the Court concluded that there was horizontal agreement between the national film distributors as well as agreement with Interstate Circuit:

> Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors . . . .
>
> There was risk, too, that without agreement diversity of action would follow.

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[45] Interstate Circuit was one of two affiliated chains of Texas movie theaters under common management. Both chains, and the individuals who served as their President and General Manager, were named as defendants. For convenience, we refer to all movie exhibitor defendants as "Interstate Circuit."

Id. at 222.

We agree with Professor Areeda's analysis that it would be a mistake to give the Court's sweeping language in *Interstate Circuit* the broadest construction it could support. 6 Areeda, *supra* note 43, ¶1426b, at 162. Not every unanimous action taken in response to an invitation -- even where a uniform response is sought or preferred -- constitutes an agreement. If that were the law, a simple price increase, followed by parallel price increases by competitors, could be characterized as a horizontal agreement. Subsequent cases make clear that parallel conduct alone does not constitute antitrust agreement. *See, e.g., Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954); *Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102, 108-10 (2d Cir. 1975). This may be true even where, as with oligopoly pricing, there is some indication that success in raising price requires a uniform response. *See, e.g., Pevely Dairy Co. v. United States*, 178 F.2d 363, 369 (8th Cir. 1949). However, we also agree with Professor Areeda that, on a full examination of the facts and analysis of *Interstate Circuit*, the finding of horizontal agreement was entirely justified there, and note that the same logic requires a similar finding here.

The Court in *Interstate Circuit* discussed a host of factors before concluding that, viewed in context, the evidence supported the district court's finding that the national film distributors had entered into agreement with one another. 306 U.S. at 221-27. By its letter, Interstate Circuit literally addressed its invitation to all of the film distributors. *Id.* at 222. Each knew that the others were asked to make the same choice. Their later course of conduct was a dramatic change that was not only far-reaching and complex, but also difficult and costly to undo because prices were set at 25 cents by contracts lasting for a year or more. *Id.* at 224. This change lacked any convincing explanation or business justification because the high-level officials, who would have been in a position to explain the distributors' actions, did not testify to explain the reasons for their companies' change of course. *Id.* at 223. Finally, the distributors' decisions to accede to Interstate Circuit's requests were "interdependent" in nature, that is they made economic sense only if each had reason to believe the others would go along. *Id.* at 224-25. Thus, in the passage just quoted, the Court explained that "[e]ach was aware ... that without substantially unanimous action with respect to the restrictions ... there was risk of a substantial loss of the business and good will ...." *Id.* at 222. Together these facts and circumstances suggested to the Court that -- more likely than not -- the movie distributors responded to Interstate Circuit's request in a concerted fashion. Subsequent cases, following scholars and other lower court

judges,[46] have emphasized that interdependence is crucial if an antitrust agreement is to be inferred from circumstantial evidence.

A similar, and in some respects stronger, set of facts is present here, and the same inference of conspiracy is appropriate. As in *Interstate Circuit*, there was an invitation clearly addressed to all of the participants in the proposed conspiracy. Like the listing of all the film distributors as addressees in the letter sent by Interstate Circuit, TRU, in Goddu's phrase, "made a point of telling" its suppliers that its club "policy" was to be extended to each and every one of them. Each therefore knew that the others were asked to make a similar decision.

The changed conduct that followed here, like that in *Interstate Circuit*, was far-reaching, complex, and, by its nature, costly to implement. As Professor Areeda explained, "[t]he principle is clear: if rational defendants would not act without mutual assurances of common action, then the act proves that such assurances took place." 6 Areeda, *supra* note 43, ¶ 1426, at 161 (1986).[47] Toy manufacturers began to produce customized lines of product for sale to the clubs, even though doing so imposed extra costs on the manufacturers with no perceived benefit to their club customers. Sales to club customers dramatically declined, and the goodwill of the suppliers fell to the point that by mid-1992 several clubs threatened suit. *See supra* note 16. By early 1993, toy manufacturers had adopted policies of discriminating against the clubs, policies that manufacturers vowed to follow indefinitely. This was an unusual and controversial measure in an industry that had no history of imposing such formalized restraints on toy manufacturers' business discretion. *See supra* pp.567-68.

These far-reaching and expensive changes are made more suspicious by their lack of convincing explanation or justification. Changes in business strategy do not generally need to be explained or justified. But when the pattern of evidence -- as here -- strongly suggests that the change was likely the result of some kind of agreement, the trier of fact may properly ask why a party acted as it did. The inability to offer a plausible explanation creates another reason to think that the change in fact resulted from an agreement. The Court in *Interstate Circuit* drew an inference of conspiracy from the failure of the distributors' executives to explain what they had done. Here, TRU and some toy company executives testified about "free-rider" problems, and the toy companies hinted at such problems after the clubs threatened to sue them in 1992. But no toy company mentioned a free-rider problem before TRU extended its unwelcome invitation to boycott the

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[46] *See, e.g., Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446-47 (3d Cir. 1977); *Ambook Enters. v. Time, Inc.*, 612 F.2d 604 (2d Cir. 1979); Donald F. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 663 (1962).

[47] As discussed below, we do not have to infer "that such assurances took place" as the Court did in *Interstate Circuit*, because there is *direct* evidence that assurances were solicited and given.

clubs. As we discuss in detail below, *see infra* pp. 601-08, the free-rider explanation for discrimination against the clubs is simply a pretext. *Cf. Rossi v. Standard Roofing Inc.*, No. 97-5185, 1998 U.S. App. LEXIS 21911, *81-85 (3d Cir. September 9, 1998) (holding that reliance on pretextual excuses to justify boycott of a price-cutting retailer, combined with other circumstantial evidence, supports inference of agreement).

Professor Areeda noted that the parallel behavior of the national movie distributors in adopting both of Interstate Circuit's requests in four cities but rejecting them in Austin, Galveston, and the Rio Grand Valley was highly suspicious. 6 Areeda, *supra* note 43, ¶ 1426, at 159. The Court naturally questioned how a simple request for terms of sale across Texas could have been converted into a common policy everywhere but Austin, Galveston, and the Rio Grande Valley without the movie distributors discussing the matter among themselves or through Interstate Circuit. If the record required us to draw inferences, we might likewise find it "highly suspicious" that an initial promise from Mattel not to support the clubs changed to a commitment identical to that of Hasbro and Fisher Price not to sell "hot" or advertised products to the clubs, and then changed again to a policy that "no identical product" will be sold to the clubs, at which point all of the major toy companies developed special lines of similarly highly-differentiated products for sale to the clubs. It is difficult to imagine this course of events taking place without direct communications among the toy manufacturers or indirect communications through TRU. But in this case, it is not necessary to draw an inference of conspiracy from entirely circumstantial evidence, because there is testimony, which is supported by significant documentary evidence, that these communications *did* occur and that TRU in fact acted as the "hub" in a conspiracy to disadvantage the clubs by inducing all the key suppliers of toys to adopt parallel restrictions on club sales.

Finally, just as the facts and broader context of *Interstate Circuit* indicated that the decision to adopt Interstate Circuit's suggestions was interdependent -- *i.e.*, that uniformity was necessary for all to profit -- there is likewise every reason to think that the boycott here was the result of such interdependence. Recent cases have reaffirmed the requirement of interdependence for any finding of antitrust agreement particularly when based on circumstantial evidence. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 589-97 (1986); *Bogosian*, 561 F.2d at 447. It has been alternatively described as a "motivation to conspire" or an apparent "benefit from the agreement." *See First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 278-80 & n.16 (1968).

In *Interstate Circuit*, the existence of agreement was the best explanation for what occurred. Even putting aside the unique facts of that case, the proposed restrictions on price ("25 cent minimum admission

price") and output ("no double features") were not likely to benefit the film distributors unless a substantial number of them went along. No sensible competitor enters contracts by which it agrees to charge a price greater than the market will support in the absence of market power *and* without a strong assurance that rivals will do the same. The eight film distributors that did just this in four Texas cities collectively distributed about 75% of all of the "A" movies in the United States. Thus, in the passage we have quoted the Court commented: "each [movie distributor] was aware ... that without substantially unanimous action with respect to the restrictions ... there was risk of a substantial loss of the business and good will ...." 306 U.S. at 222.

The success of the club boycott similarly depended on having a substantial and significant number of participants. If only one company -- or even several companies collectively selling a small share of all toys -- had joined, the boycott would not have worked. Instead, the toy manufacturers that agreed to the boycott would have lost sales, while their rivals that continued to sell all of their products to the clubs would have gained this business to their own benefit. This risk attended any toy company that decided unilaterally to cut off the clubs. And for this reason, they all clearly told TRU that they were unwilling to make a decision on their own.

TRU offers some theoretical speculation as to why interdependence was not present, *i.e.*, that a toy manufacturer might be pleased to see a competitor ignore TRU's demands and threats because the manufacture could gain favor with TRU. There is little doubt that, after the boycott was in place, efforts to curry favor at the expense of a rival helped TRU to police and maintain the initial agreement. But TRU's speculation that this was a motive for the adoption of the boycott agreement in the first place is refuted by the evidence. TRU's own executives, from Lazarus to Goddu, with admirable clarity, explained that the toy manufacturers were simply unwilling to comply with TRU's demand unless they were confident that competitors would do the same.

In two respects, proof of agreement here is even stronger than *Interstate Circuit*. First, we have clear evidence that TRU engaged in a kind of commercial "shuttle diplomacy" -- communicating back and forth among toy suppliers the message "they'll stop if you'll stop" -- that was only probable in *Interstate Circuit*. And because there is direct evidence of actual agreements reached by this method of negotiation, we do not need to rely entirely on inferences to find agreement with respect to Mattel, Hasbro, Tyco, Fisher Price, Little Tikes, Today's Kids, and Tiger Electronics. Second, the record here contains clear statements that the "club policy" was squarely *contrary* to the independently determined business interests of the toy manufacturers. The toy companies were keenly interested in expanding their club sales in part to reduce reliance on TRU.

Action against unilateral interest suggests agreement even more strongly than actions that are simply unexplained or curious.

c. Ambook.

The Second Circuit's decision in *Ambook,* 612 F.2d 604, also supports our analysis. In *Ambook*, a plaintiff advertiser challenged the dual rate card system adopted by many media companies, *e.g.*, Time Magazine, New York Times, and hundreds of other magazines and newspapers. *Id.* at 607-09. The media firms had adopted a uniform policy of charging advertisers a full rate when they placed the ad directly with the publication, but granted a uniform 15% discount when they placed the ad through an advertising agency. *Id.* at 607-09. Plaintiffs claimed that the dual rate card system (and specifically the uniform 15% discount) was the consequence of an illegal agreement under Section 1 of the Sherman Act. *Id.*

The Second Circuit concluded that a jury could have found that the uniform policy adopted by the media with respect to price was the result of agreement. *Id.* at 614-18. It emphasized two points relevant here: first, there was no evidence to show what legitimate business reason would have led the media to discriminate in favor of ads placed through advertising agencies; and second, there was evidence that the ad agencies had placed pressure on the media not to give discounts when the ad agencies were bypassed. *Id.* The appellate court found that a reasonable fact-finder could conclude that the uniform program of discriminating against ads that were placed directly was not the result of individual decisions but rather of an agreement that publishers went along with "only because of sloth or fear of reprisal." *Id.* at 618.

The evidence of agreement in the present case is stronger because we *know* -- and need not infer -- that the toy manufacturers initially thought discrimination against the clubs was not in their own independent interests, that combo packs and other discriminatory devices made no independent business sense, and that the manufacturers were pressured or coerced into adopting roughly uniform policies. We appreciate that the toy manufacturers' discriminatory policies were not *identical* (as in *Ambook*), but they were sufficiently uniform to serve TRU's anticompetitive purpose.

Given all these factors, we agree with the ALJ that the record demonstrates that there was a horizontal agreement among the identified toy companies, orchestrated by TRU, to deal with the clubs in a discriminatory fashion.

2. TRU also organized a horizontal agreement to enforce the boycott.

As we saw earlier, TRU, with the cooperation of various toy manufacturers, acted as a clearinghouse of information about firms not abiding by the terms of the horizontal agreement, and TRU also acted as the enforcement arm of the boycott. *See supra* pp. 553-59. This collateral

enforcement agreement, which could be considered either as part of, or separately from, the boycott agreement itself, is similar to conduct declared illegal in *United States v. General Motors Corp.*, 384 U.S. 127, 140-41 (1966). In *General Motors*, the government challenged a group boycott that included General Motors ("GM") and several trade associations of its car dealers in the Los Angeles area. The Government established that GM had reached agreements with all of its dealers not to resell GM cars to a group of automobile discounters. GM then invited its dealers to survey each other's compliance with these agreements. The dealers' trade associations created a joint investigating committee and hired automobile "shoppers" to test whether resold GM cars still were being offered by the discounters. The dealers' associations then "supplied [this] information to General Motors for use by it in bringing wayward dealers into line." *Id.* at 140-41. Several dealers were persuaded by GM and the dealers' associations to repurchase at a loss cars that they had sold to discounters in violation of their promises to GM. *Id.*

Observing that the agreement to enforce the boycott of the automobile discounters was very similar to the agreement in *Parke, Davis*, the Court commented on the obvious interdependence of the dealers' collective efforts to police their group boycott:

> As Parke Davis had done, General Motors sought to elicit from all the dealers agreements, substantially interrelated and interdependent, that none of them would do business with the discounters. These agreements were hammered out in meetings between nonconforming dealers and officials of General Motors' Chevrolet Division, and in telephone conversations with other dealers. It was acknowledged from the beginning that substantial unanimity would be essential if the agreements were to be forthcoming. And once the agreements were secured, General Motors both solicited and employed the assistance of its alleged co-conspirators in helping to police them. What resulted was a fabric interwoven by many strands of joint action to eliminate the discounters from participation in the market, to inhibit the free choice of franchised dealers to select their own methods of trade and to provide multilateral surveillance and enforcement. This process for achieving and enforcing the desired objective can by no stretch of the imagination be described as "unilateral" or merely "parallel."

General Motors, 384 U.S. at 144-45.

While the toy companies did not band together and jointly hire professional shoppers to enforce the club boycott, there is no question that TRU "both solicited and employed the assistance of its" suppliers "in helping to police" each other. "What resulted was a fabric interwoven by many strands of joint action to eliminate the discounters [the clubs] from participation in the market, to inhibit the free choice of [toy manufacturers]

to select their own methods of trade and to provide multilateral surveillance and enforcement." *Id.* at 144.[48]

3. Under the general principles used to evaluate allegations of hub-and-spoke conspiracy, TRU's suppliers entered an agreement.

The relationship between TRU and its suppliers is an example of a hub-and-spoke conspiracy. *See Blumenthal v. United States*, 332 U.S. 539 (1947); *cf. Kotteakos v. United States*, 328 U.S. 750 (1946). In such conspiracies, a "hub" firm has separate relationships with individual or separate groups of other firms and these "spoke" relationships (often vertical conspiracies in their own right) are connected into a horizontal conspiracy by a unifying "rim." *Blumenthal* concerned a conspiracy to sell whiskey at prices in excess of those set pursuant to the Emergency Price Control Act. The Supreme Court reasoned that even though several conspirators lacked knowledge of the identity of a key co-conspirator, the proof was still sufficient to find action in accordance with a criminal conspiracy to evade price controls:

> All knew of and joined in the overriding scheme. All intended to aid the owner [of the whiskey] ... to sell the whiskey unlawfully, though the two groups of defendants differed on the proof in knowledge and belief concerning the owner's identity. All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end, to aid in disposing of the whiskey. True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan. He thus became a party to it ....

Blumenthal, 332 U.S. at 559.

Although *Blumenthal* and *Kotteakos* are criminal cases, the concept of hub and spoke conspiracy is also accepted in civil antitrust. *Interstate Circuit*, which we have discussed at length, is perhaps the most prominent example, but there are many lower court decisions as well. *E.g.*, *Impro Prods., Inc. v. John B. Herrick*, 715 F.2d 1267, 1279 (8th Cir. 1983); *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 459 F.2d 138, 146-47 (6th Cir. 1972); *cf. Mylan Labs., Inc. v. Akzo N.V.*, 770 F. Supp. 1053, 1066 (D. Md. 1991); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 627 F. Supp. 105, 111 (S.D. Iowa 1985). In *Impro,* the Eighth Circuit stated that to demonstrate a hub and spoke conspiracy in a civil antitrust matter, it must be shown:

> (1) that there is an *overall*-unlawful plan or "common design" in existence; (2) that knowledge that others must be involved is inferable to each member because of his

[48] *See also* the Third Circuit's decision in *Rossi,* 1998 U.S. App. LEXIS 2191, at *53-61, *70-75, *77-81, which concluded that there was sufficient evidence of vertical and horizontal antitrust agreements to avoid summary judgment because, among other evidence, defendant retailers (1) pressured or threatened manufacturers not to deal with a price-cutting competitor, (2) set up a monitoring system, and (3) reported detected breaches of the boycott to a key manufacturer.

knowledge of the unlawful nature of the subject of the conspiracy but knowledge on the part of each member of the exact scope of the operation or the number of people involved is not required, and (3) there must be a showing of each alleged member's participation.

715 F.2d at 1279 (quoting *Elder-Beerman,* 459 F.2d at 146-47). These elements of a hub and spoke conspiracy are evident here. Each manufacturer was told of the nature and the goal of TRU's plan and each knew others were involved. They adopted TRU's anticompetitive purpose by joining the boycott and by developing special club packs that would not force TRU to lower its retail toy prices to meet lower club prices.

4. TRU's arguments against finding a horizontal agreement are without merit.

TRU offered several arguments against the application of *Parke, Davis*, *Interstate Circuit*, *Ambook,* or *General Motors* here. Many of its points have been disposed of by our discussion above,[49] and we now address those that remain.

TRU's essential argument is that it was entitled to demand that each of its suppliers discriminate against the clubs to prevent their free-riding -- or even simply to retain TRU's business -- and those toy manufacturers that did discriminate would not necessarily have entered into a horizontal agreement. Thus, TRU posits that each could have independently decided to discriminate for its own business reasons, in which case the conduct would be protected by *Matsushita* and other similar cases cited by TRU. *See, e.g., Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1010-14 (3d Cir. 1994).

Even if we accept the validity of that contention for the sake of argument, that is not what happened here. There is evidence that at least seven toy manufacturers did not act independently. According to TRU's own witnesses, the manufacturers uniformly resisted TRU's ultimatum *until* each could be assured that rivals would behave in the same way. Unless

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[49] TRU argues, for example, that the manufacturers did not benefit from the alleged agreement. While the boycott primarily advanced the economic interest of TRU, the manufacturers did benefit from the horizontal boycott agreement by not having to respond unilaterally to TRU's proposal. While most -- if not all -- of the toy companies disliked having to choose between what they saw as two bad options -- (1) sell to TRU and restrict club sales, or (2) sell to the clubs and risk retaliation from TRU -- the decision was made easier by the horizontal agreement which took the sting out of reducing sales to the clubs. From the manufacturers' point of view, the boycott was the second-best alternative, but that does not mean the toy manufacturers did not benefit from the agreement.

TRU also argues that there is no direct evidence of horizontal conspiracy. By that, TRU means there is no evidence of *direct* horizontal conspiracy, because, as in *Parke, Davis* and *Interstate Circuit*, the agreement was initiated and organized by TRU as the hub and facilitator. There is direct evidence of an agreement -- through TRU as organizer and coordinator -- which makes this case stronger than *Interstate Circuit.* There is also some evidence of direct communications between the toy companies, although none alone proves the existence of an agreement.

that condition assuring uniform action was satisfied, discriminatory action against the clubs would not occur. TRU therefore embarked on its missions of "shuttle diplomacy," reassuring each toy manufacturer that rivals would fall into line. It was only after assurances were exchanged that the toy manufacturers, overcoming their natural inclination to sell through all potential outlets, became willing to discriminate against the clubs. At that point, a "conscious commitment to a common scheme" was perfected, and a uniform, clearly interdependent, course of conduct came into being. *Monsanto,* 465 U.S. at 764 (internal citation omitted); *see also Parke, Davis,* 362 U.S. at 46-47; *Interstate Circuit*, 306 U.S. at 221-27.

Several of TRU's other arguments are similarly based on theories that are inconsistent with the record. First, TRU claims that this analysis "ignore[s] the choice posed by TRU." (Reply Br. at 14.) TRU argues that the allegation of horizontal conspiracy is "based on the fallacy that toy manufacturers were able to enjoy unrestrained sales of their product to both [TRU] and the warehouse clubs." *Id.* (emphasis in original). It further argues that when the toy companies were forced to make a choice, it was "entirely logical" to pick TRU. *Id.* TRU was the most important customer, and the clubs were comparatively small fish. A manufacturer might even hope that its competitors would forgo TRU in favor of the clubs, thereby leaving more TRU shelf space for itself.

As is clear from our discussion, TRU's speculations run against the weight of the evidence. Mattel, Hasbro, and other key suppliers initially were not sure whether TRU would be able to "force" them to chose between it and the clubs. TRU's announcement of its new policy began a period of aggressive and sustained negotiations, the results of which were uncertain. TRU enjoyed significant bargaining power, but Mattel also knew that TRU would be reluctant to refuse to stock popular Mattel products. To paraphrase Mattel's CEO, TRU needed Mattel as much as Mattel needed TRU. Hasbro likewise first dragged its feet, and when it finally adopted TRU's policy, promised only to adhere to that policy as long as its competitors did so. Had TRU not resorted to the organization of a horizontal boycott agreement (as it immediately perceived the need to do), the club policy very well may have failed.

The ALJ found clear evidence that specific toy manufacturers would not go along unless their rivals -- certainly those rivals that were their most direct competitors -- did the same. *See supra* pp.553-56. TRU's suggestion that toy manufacturers inquired only about rivals because they were "curious" or because they wanted to know that the "same rule was applied to all" does not hold up in the face of evidence that the toy manufacturers did not adopt the "club policy" until they knew or had been assured of the others' responses. TRU's suggestion that any manufacturer would have been

pleased to see a rival continue to sell to the clubs while it abstained is not supported by the evidence.

TRU argues that language in *Monsanto* and *Sharp* protects the communications at issue here from serving as a basis for a finding of agreement.[50] We do not believe those decisions addressed the pattern of conduct here, much less sanction the systematic organization of a boycott. Those cases addressed, in the context of an allegation of vertical price fixing, only communications from a dealer to a single supplier about the practices of another dealer, or other dealers, in the same brand of merchandise. Such conversations are a far cry from those at issue here -- *i.e.*, a dealer telling its suppliers about their rivals' business decisions for the purpose of encouraging those suppliers to adopt an agreement with the dealer and between and among rival manufacturers of different product brands.

If TRU merely had complained to the toy companies about the clubs' low prices -- thereby drawing their attention to a threat (perceived by TRU) to the toy distribution system -- these complaints would have been similar to those in *Sharp* and *Monsanto*. Even if TRU only told each of its suppliers that it also was complaining to the others, it would be more difficult to infer that their later adoption of a restrictive policy was concerted. But TRU did more. TRU told each of its suppliers what *their* rivals (not its own as in *Sharp* or *Monsanto*) were doing, suggested they do the same and, on that basis, extracted mutual commitments from many of them.

The toy suppliers committed to TRU's policy (gave in, really) only after they were assured others would do the same. There is, therefore, no reason to think the toy suppliers were using information gathered by TRU to evaluate their distribution practices in view of their own best interest. We do not think the Supreme Court's solicitude for communications up and down the supply chain of a manufacturer of a single brand of products can be stretched to cover negotiations between interbrand competitors conducted by their shared distributor for the purpose of obtaining a horizontal agreement among them. This pattern of conduct is also different from the common situation in which a dealer bargains with several suppliers to achieve the lowest price, or other favorable terms of sale. There, the dealer is playing one supplier against the other to gain a lower price, but here, the dealer is bringing the two together to obtain an outcome that would be impossible in a competitive market of firms making independent decisions.

TRU also argues that the finding of horizontal agreement is improper because substantial unanimity was never achieved. While it is true that not all of the many hundreds of toy companies adopted TRU's policy, and also

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[50] *Monsanto* and *Sharp* hold, *inter alia*, that dealer complaints about another dealer's prices followed by termination is not sufficient evidence of a vertical price-fixing conspiracy to give the case to a jury. *See Sharp*, 485 U.S. at 722, 731; *Monsanto*, 465 U.S. at 763-64.

that the compliance of some firms that did agree occasionally wavered, we do not think that this defeats the evidence of agreement.[51] Ten of the largest (other than Nintendo) and most important toy makers all adopted essentially the same policy, and most substantially complied with that policy from approximately early 1993. The large, traditional toy companies follow this policy to the present. *See supra* note 16. The evidence that the agreement was in some instances unstable does not undermine the existence of the agreement, but rather is likely an indication that the agreement was against the individual business interests of the toy suppliers, tempting some of them to cheat until caught and disciplined.

TRU cites two circuit court cases, *H.L. Hayden Co.*, 879 F.2d 1005 (2d Cir. 1989) (*see* discussion *supra* p. 573-74), and *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190 (6th Cir. 1982) in further support of its claim that its conduct was permissible. (Reply Br. at 24.) TRU's reliance on these cases is misplaced, and indeed the cases reveal the weakness of TRU's argument on this record. *H.L. Hayden* concerned steps taken by a single manufacturer to address *bona fide* free-rider problems in its system of distribution. *H.L. Hayden Co.*, 879 F. 2d at 1014. In view of these strong independent reasons for the manufacturer's actions, both the district court and the Second Circuit found the very slight evidence of concerted conduct insufficient to support a finding of agreement. *Id.* at 1016.

Davis-Watkins Co., 686 F. 2d 1190, presents a pattern of facts very similar to that in *H.L. Hayden Co.* Amana was a manufacturer of microwave ovens accounting for 11 to 18% of that market. *Id.* at 1193. From the outset, Amana insisted that its distributors provide substantial pre-sale, point of sale, and post-sale services including advertisements, in-store demonstrations by sales staff, explanations and warranty service. *Id.* at 1195. Plaintiff SMC was a showroom catalog business that provided few, if any, of those services. *Id.* Competing dealers complained to Amana, which refused to sell to SMC and also took steps to prevent other dealers from transshipping to it. *Id.* at 1194-95. But SMC was a true free-rider. Moreover, the court found no evidence that the dealer complaints were coordinated, or that Amana adopted transshipping restrictions for reasons other than to serve its own, independent marketing strategy. *Id.* at 1199. There was, unlike this case, no evidence that any party was coerced into discriminating against SMC, or that any party sought to coordinate behavior vertically or horizontally. Many cases similarly decline to find non-price vertical or horizontal restrictions where all parties pursue their own legitimate business interests. *See* discussion and cases cited *supra* pp. 577-83; *see also Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534

[51] Little Tikes, for example, sold to Costco on several occasions despite Little Tikes' commitment to TRU, and some of the smaller companies like Lego restricted their sales to the clubs for only a short period.

F.2d 1036, 1043 (2d Cir. 1976) (finding a pattern of denials of credit explained by independent interest of defendants to minimize losses from default); *Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 395 (5th Cir. 1976)(finding that independent self-interest explained rivals' similar decisions to replace the plaintiff with a customer offering them more favorable terms).

In conclusion, none of TRU's objections dissuades us from our conclusion that, in addition to entering vertical agreements with ten or more toy companies, TRU also organized a horizontal agreement among at least seven key toy manufacturers. Direct evidence indicates that these seven toy companies joined the conspiracy with the knowledge and assurance that the others would go along. Although other toy manufacturers similarly discriminated against the clubs, they may have done so only because of their agreements with TRU -- not with each other. Finally, TRU and the seven toy manufacturers entered a horizontal agreement to enforce the boycott agreement.

C. The Agreements Could Be Considered Per Se Illegal Under the Klor's Rule.

In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the Supreme Court held that Klor's, an independent appliance distributor, had successfully pled a *per se* violation of section 1 when it alleged that a rival distributor enlisted several suppliers to boycott Klor's. *Id.* at 212-13. *Klor's* came to the Supreme Court following the grant of a motion for summary judgment for the defendant. *Id.* at 210. The Court reversed, based primarily on the allegations of the complaint. *Id.*

Klor's had alleged that Broadway-Hale, a department store chain, orchestrated an agreement with and among ten appliance manufacturers to sell to Klor's only on highly-unfavorable terms or not to sell to it at all. *Id.* at 209. Klor's was an appliance store in Broadway-Hale's neighborhood. *Id.* at 208. The Court noted that the combination "takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products." 359 U.S. at 213. It held that the allegations, if proved at trial, merited *per se* condemnation because Broadway-Hale would have arranged a "wide combination consisting of manufacturers, distributors and a retailer." *Id.* The Court distinguished this from the "case of a single trader refusing to deal with another, or even of a manufacturer and a dealer agreeing to an exclusive distributorship." *Id.* at 212.

This case presents *Klor's,* not on the pleadings but rather after the development of an unusually complete record. The ALJ found that, like Broadway-Hale, TRU entered vertical agreements with each of its key suppliers to disadvantage its rivals, the clubs. He further found that TRU

organized a horizontal agreement among key suppliers to the same purpose and effect -- to disadvantage the clubs. Under the Supreme Court's *Klor's* decision, TRU's conduct would be *per se* illegal.

If *Klor's* is still good law -- it is after all a Supreme Court decision that has never been overruled and indeed has been cited with approval in many subsequent decisions[52] -- it would be dispositive and our analysis would be complete. Nevertheless, we elect not to rely exclusively, or even primarily, on the *Klor's per se* rule.

We are reluctant to apply the *Klor's per se* rule for several reasons. First, the Supreme Court has made it clear that it will not apply *per se* rules mechanically. When there is adequate reason, *per se* rules have been bypassed with respect to price fixing,[53] and boycotts,[54] and have been eased and clarified in connection with tie-in sales.[55] Some lower courts have speculated that the Supreme Court would not reaffirm a broad interpretation of *Klor's* today.[56] Also the Supreme Court has recognized that manufacturers can terminate dealers and restrict channels of distribution in order to diminish the adverse impact of "free-riding"[57] -- a theory that was little known when the Supreme Court in *Klor's* found a violation without according any opportunity to the defendants to explain their business behavior.

Finally, in *Northwest Wholesale Stationers*, a boycott case decided 26 years after *Klor's*, the Supreme Court observed that the question of which types of "group boycotts" merit *per se* treatment is "far from certain" and that "care" is necessary in defining the category of concerted refusals to deal that mandate *per se* condemnation. 472 U.S. at 294. The Court offered a list of factors that must be taken into account before "group boycotts" can justifiably be treated under the *per se* doctrine. *Id.* It is to that mode of analysis and those factors that we now turn.

D. "Group Boycotts" That Merit Summary Condemnation: The Northwest Wholesale Stationers Approach.

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52 The Court has cited *Klor's* as authoritative at least four times in recent years. *See Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 332 (1991); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 452 n.9 (1990); *Sharp*, 485 U.S. at 734; *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293, 294 (1985).

53 *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 16-24 (1979).

54 *Northwest Wholesale Stationers*, 472 U.S. at 293-98.

55 *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11-18 (1984).

56 *See, e.g., Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1089-90 (6th Cir. 1996); *United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781, 788 (7th Cir. 1981).

57 *Sharp*, 485 U.S. at 724-25; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977).

The Court in *Northwest Wholesale Stationers* looked to *Klor's* and other cases to provide guidance as to which collective refusals to deal constitute *per se* unlawful group boycotts, and found that they generally displayed four common factors. *Id.* As the Court described them:

> Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." Sullivan, *supra*, at 261-262. *See, e.g., Silver, supra* (denial of necessary access to exchange members); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961) (denial of necessary certification of product); *Associated Press v. United States*, 326 U. S. 1 (1945)(denial of important sources of news); *Klor's, Inc., supra* (denial of wholesale supplies). In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, *Silver, supra*; *Radiant Burners, Inc., supra*, and frequently the boycotting firms possessed a dominant position in the relevant market. *E.g., Silver, supra; Associated Press, supra; Fashion Originators' Guild of America, Inc. v. FTC*, 312 U. S. 457 (1941). *See generally* Brodley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1523, 1533, 1563-1565 (1982). In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.

Northwest Wholesale Stationers, 472 U.S. at 294. We conclude from the evidence in this case that each of the factors suggested by this passage is present. The same approach to boycott analysis was followed by the Third Circuit in *Rossi v. Standard Roofing Inc.*, No. 97-5185, 1998 U.S. App. LEXIS 21911, *28-33 (3d Cir. September 9, 1998). The purpose of the group boycott agreement was anticompetitive, in that it was designed to disadvantage competitors of one of the participants; the firms involved were dominant in their markets; the boycott cut off access to products and relationships needed for the boycotted firms to compete effectively; and lastly, the practice was not justified by plausible arguments that it enhanced overall efficiency. We consider each of these factors in turn below.

1. Intent: Purpose of disadvantaging competitors.

The primary (if not the only) purpose of the agreements that TRU obtained with and between its suppliers was to disadvantage a group of new entrants in the toy retailing market. Those new entrants -- the warehouse clubs -- were obviously competitors of TRU and thus in a "horizontal" economic relationship to it. The agreed-upon practices reduced direct price competition between the clubs and all other toy outlets, including TRU. The toy manufacturers committed to TRU to sell only highly differentiated products to the clubs, which in turn would usually be resold by the clubs at

retail prices higher than the closest comparable toy at TRU. As TRU's Goddu explained, what made special packs and other custom products acceptable to TRU was that customized products could not readily be compared with the products sold at TRU and other retailers. *See supra* p. 561-62. TRU's suppliers understood that this was the purpose of the policy to which they subscribed.

Customized products also tended to raise the cost of toys to the clubs and the prices of toys to consumers who bought toys at the clubs. This too redounded to the benefit of TRU (and other traditional discounters), which no longer had to worry that their reputation as "the" or "a" low-price toy retailer might be eroded. The savings generated by the clubs' innovative method of retailing would not be recognized by the market if their average cost of goods was both higher than that of other retailers and greater than the value that customers placed on the products available at the clubs. Putting the point plainly, TRU wanted the clubs to run the race carrying extra weight.

2. Market dominance.

Preliminarily, we note that it may not be necessary to demonstrate market power under the *Northwest Wholesale Stationers* approach, which examines behavior from several perspectives before deciding whether it is appropriate to attach a *per se* label. Ordinarily, market power is a proxy for competitive effects. Where evidence of actual competitive injury is available and there is no plausible justification, it may not be necessary to demonstrate market power. As the Supreme Court observed:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61 (1986) (quoting 7 Areeda, *supra* note 43, ¶1511, at 429).[58] Anticompetitive injury is evident here, *see* discussion of effect *infra* pp. 609-14, and the claimed competitive virtues do not exist. *See* discussion of free-rider issues *infra* pp. 601-08.

Notwithstanding the above, TRU does have market power as a purchaser and seller of toys. As in all market power assessments, it is necessary to look not just at market share statistics, but at the industry

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[58] *Accord Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 477 (1992) (holding that "[i]t is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so."); *NCAA v. Board of Regents*, 468 U.S. 85, 110-11 n.42 (1984) (recognizing that "where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary."). *See also Chicago Prof'l Sports Ltd. v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992).

characteristics that give those statistics meaning. In this light, the following discussion considers TRU's market position, first as a buyer, and then as a seller, of toys.

To measure market power, it is necessary to define relevant product and geographic markets and then to look at barriers to entry. There seems little room for dispute on this record that the relevant geographic market in which TRU buys (*i.e.*, competition among toy manufacturers for the business of toy retailers) is national, and the relevant geographic markets in which TRU's sells (*i.e.*, competition for the business of individual consumers) are local. Toy retailers generally do not search for supplies outside of the United States, and toy customers shop in relatively local areas -- usually a city and its environs.[59] CX 1822 (Scherer) ¶ 24.

The record supports the conclusion that the relevant product market is all traditional toys. Under that interpretation, electronic toys would be excluded, largely because they tend to sell in a different and higher price range, have different characteristics, are used with special complementary products, and tend to be sold in a wider variety of outlets than traditional toys. IDF 346 (discussing Sega's ability to find other outlets for its products). We do not linger on the point because inclusion or exclusion of electronic toys makes little or no difference to the result in this case.[60]

Barriers to entry into toy manufacturing are moderate, although there does appear to be a trend toward concentration among the makers of the most well-known branded toys. Brand name recognition, existing manufacturing facilities, and economies of scale mean that, while many entrepreneurs can and do introduce a single successful toy, none is able to

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[59] In its briefs to the Commission, TRU has argued that local, retail markets were not pled in the initial complaint. This argument is misguided. Power in local retail markets is encompassed by the allegation of market power. Compl. ¶ 4 ("TRU's importance as a provider of distribution to manufacturers of toys and related products has given it the ability to exercise market power over those manufacturers, and TRU has exercised this power."). Retail market power is routinely evaluated in such markets, as the many dozens of supermarket mergers investigated by the Commission demonstrate. *See, e.g.*, *Vons Companies, Inc.*, 111 F.T.C. 64 (1988). The issue, moreover, was actually litigated in front of the ALJ. Indeed, TRU's expert economist, Professor Carlton, offered a regression equation based on competition in various local markets in an effort to disprove TRU's local retail power. RX-877 (Carlton) ¶ 238-248.

TRU correctly points out that the market power allegation in this case differs from that in the Commission's recent enforcement action challenging a merger between Staples and Office Depot, two chains of office supply superstores. *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997). TRU notes that local markets were pled with specificity in that case. (Reply Br. at 53 n.38.) The complaint in *Staples* addressed *only* the likely effects of the proposed merger on the combined entity's local market power as a seller of office supplies. The power of Staples and Office Depot as *buyers* of office supplies was not an issue. By contrast, TRU's power on *both* the buying and the selling side is relevant to the antitrust analysis of the boycott allegation in the Commission's Complaint. The allegation of market power was therefore stated more generally. The significance of both local and national markets was understood by the parties and their experts since both kinds of power were vigorously litigated below.

[60] When possible, we have included market share statistics for both traditional toys and the broader all toys (including electronic toys) market.

enter the market on the same scale and with the same scope of products as Mattel or Hasbro. Barriers to entry into toy retailing -- at least at the level of a national chain like TRU, Wal-Mart, Target, or K-Mart -- are high. IDF 464; CX 1830-G (Scherer) ¶14 (testifying that timely entry on a meaningful scale is unlikely). Among discount retailers selling toys exclusively, moreover, the pronounced trend is toward exit rather than entry into the market.

a. TRU's dominance as a buyer and seller of toys.

TRU's market share is extraordinarily high for a retailer and, due to several other distinctive factors discussed below, this large percentage share understates TRU's actual market power. While not a monopolist or a monopsonist, TRU enjoys a dominant position in buying and selling toys.

As noted in our discussion of fact, *see supra* pp.531-33, TRU is the largest retail buyer of toys in the United States and in the world. At the time it orchestrated its program of inducing toy manufacturers to discriminate against the clubs, it purchased about 20% of toys sold at wholesale in the United States. That percentage share is deceptive because it includes areas of the United States where TRU is not present. In just the localities that it serves (and where toy manufacturers depend on it for distribution), TRU buys and resells 32% of all toys sold. In many local areas (where retail competition is focused) its market share is much higher. In 18 metropolitan areas, it accounts for 35% to 49%, and in eight other cities plus Puerto Rico, its share was greater than 50%. Cities where its market share exceeds 40% include Los Angeles, Chicago, and New York. TRU is invariably the largest customer for traditional toy companies' output. As we have discussed, toy company executives describe TRU as irreplaceable. *See supra* p. 532-33.

TRU's extraordinarily high market shares for the retail sector in fact understate its true dominance as a purchaser and seller of toys for a number of reasons. First, TRU purchases such a great share of all toys and of each toy manufacturer's output that no other retailer could make up for lost sales volume should TRU decide to terminate its relationship with the supplier. *See supra* pp.532-33. Second, TRU maintains a uniquely broad inventory. No other discount retailer carries nearly as many toys. For many toy manufacturers, TRU is the only large buyer of some of their older or low volume toy products. These toys significantly affect the manufacturer's overall profitability. Third, TRU, which operates 300 stores in 20 countries outside the United States, is by far the largest United States toy retailer operating in overseas markets. This is an important ingredient in TRU's influence over manufacturers. For example, half of Mattel's and Hasbro's revenues are derived from foreign sales. CX 1822 (Scherer) ¶16. Fourth, without TRU's support, many toy manufacturers will not pay for an effective marketing campaign, because the manufacturers believe they

cannot attain the necessary volume of sales if products are not sold at TRU.[61]

Last, and of great importance in explaining why TRU was so successful in organizing its boycott, is that TRU, as a very large multi-brand retailer, has the ability to amplify its own market power by playing favorites -- or even threatening to play favorites -- among its suppliers. This is a source of market power that is not available to single-brand retailers (*e.g.*, an Exxon station or Whirlpool distributor). With multi-brand dealers, a rejected or disfavored product's shelf space will be given to that product's closest substitute with little (if any) loss to the dealer. As a result, the manufacturing firm suffers a significant loss of sales and may lose even more in relative terms because its competitors will prosper as a result. Thus, a multi-brand dealer can shift from one product to another without incurring any cost, but manufacturers more often find it expensive to replace their large distributors. Sometimes, as here, this may be impossible for a manufacturer to do at all within a reasonable period of time. This potential for added market power of a multi-brand retailer is persuasively described in 8 Areeda, *supra* note 43, ¶ 1648C, at 535-37. TRU can also exercise subtle forms of discrimination short of termination. For example, it can deny companies the highly valued shelf space positions at the end of an aisle or at the front of a store. Areeda explains how this can create dealer favoritism even when retail markets are unconcentrated:

> [S]ubtle exertions of dealer power are possible when dealers handle the brands of several manufacturers. If some manufacturers restrict intrabrand competition, the dealers might, without horizontal agreement or coordination, disfavor the brands of manufacturers who do not. If dealers have and exercise such power, rival manufacturers may be forced, one by one, to adopt similar restraints.

Id. at 535. As a single, dominant, multi-brand retailer, TRU is similarly able to use its power to enforce collusion among its various suppliers. Of course, multi-brand dealers are not always able to exercise this potential source of power. The presence of a strong competitor which offers the manufacturers adequate substitute distribution for their products would be expected to check any attempt to exercise this power. For example, the toy retailer Zeller's appears to be such a competitor for TRU in Canada.

The very toy manufacturers that joined TRU's boycott in the United States never similarly restricted their distribution of toys in Canada. This

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[61] TRU's importance as a retailer is so great that it often could squelch an item before the item made it to the market. This power is aptly illustrated by an incident involving Just Toys. Just Toys introduced what it believed was a promising new toy. When TRU found the item for sale at several BJ's club stores in the New York City area, TRU canceled its order for the product. Just Toys thereafter canceled its advertising plans for the product, despite its belief that the item could have been a successful product. Without TRU's support, Just Toys was unwilling to risk the expense of an advertising campaign. IDF 360.

comparison of the United States to Canada provides another indication that the U.S. boycott was a result of TRU's power as a dealer of toys in the United States and not some legitimate business purpose. The Canadian branches of Mattel, Hasbro, Tyco, and Binney & Smith all market their products independently of their U.S. affiliates. Nickel 922/25-924/2, 967/21-969/24, 972/21-975/25. Costco Canada has always been able to purchase from these companies a full line of toy products, even though the toy manufacturers' U.S. affiliates were restricting toy sales to Costco U.S. and the other clubs in this country. Nickel 920/20-922/16. In sum, the boycott orchestrated by TRU took hold only in the United States, where TRU is unchallenged as the only full-line, national, discount toy retailer. TRU's documents indicate that it occupies a weaker position as a toy outlet in Canada due to fierce competition from Zeller's. CX 1648-T,V (stating that Zeller's in Canada is "about as tough a competitor in the toy business as [TRU has] in the world").

TRU's claim that its suppliers were convinced of the wisdom of its policy in the United States, and therefore acceded to its proposals, is undermined by the failure of those same suppliers to take similar steps in Canada where traditional toy outlets similar to those in the United States also met new club competition. A reasonable conclusion is that the successful boycott in the United States was a result of a powerful dealer's ability to negotiate with suppliers that had nowhere else to turn, because in Canada, where they could turn to Zeller's, no restraint was imposed. *See* 8 Areeda, *supra* note 43, ¶1648(E), at 539 (suggesting that "selective" adoption of a restraint in only certain markets may help prove that the restriction was a result of dealer coercion). While other differences in market conditions might also explain the result, TRU has not offered any reason that withstands scrutiny.[62]

The evidence is clear -- indeed, TRU does not really contest the point -- that TRU had sufficient market power to induce the toy manufacturers to bend to its will with regard to their sales to the clubs. That such a wide range of toy manufacturers, all with serious reservations about the wisdom of discriminating against the clubs on toy sales, fell in line when TRU asserted its demands is proof in itself of TRU's extraordinary power to coerce its suppliers.[63]

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[62] TRU explains the failure to implement a similar boycott in Canada by noting that "[i]n Canada, unlike the United States, product shortages are rare and popular toys need not be rationed." (App. Br. at 79 n.37.) There are several problems with this expedient explanation: (1) the club policy does not address the issue of shortages, IDF 60; CX 1681; CX 1651(Goddu) at 49/5-13 (stating that shortages were not the reason for the club policy); (2) the free-riding justification advanced by TRU, if valid, applies whether or not shortages are a problem; and (3) according to the witness from Costco Canada, toy products sometimes *are* in short supply in Canada. Nickel 964/8-20.

[63] Professor Areeda remarks:

> Dealers cannot force an unwilling manufacturer to restrict intrabrand competition to their advantage unless they possess some power over him. Of course, there is no better demonstration

b. The toy manufacturers' dominance.

Turning to the point of view of the clubs, the "dominance" they cared about was not just the ability of TRU to orchestrate a boycott, but the combined market power of the various toy manufacturers who entered into the boycott orchestrated by TRU. We have already seen that those toy manufacturers accounted for roughly 40% of all toy sales in the United States. *See supra* pp. 530-31. That figure understates their significance since, as the leading toy manufacturers and principal television advertisers, they accounted for a far larger proportion of the "hit" toy products that lead consumers to shop at a particular outlet.

Another way to look at TRU's and its suppliers' market power is to examine the effect of the boycott on the clubs. As noted earlier, the clubs' combined market shares increased steadily until 1992, and reliable observers predicted that the increase would continue. *See supra* pp. 538-41. Club sales reached a high of 1.9% of the toy market in 1992 and then, after TRU introduced its policy, steadily declined to 1.4% of the market by 1995. We will address more fully the effect of TRU's policies on the clubs and on the marketplace at pp. 609-14, *infra*. The significant point here is that the participants in the boycott clearly had enough market power to retard the clubs' ability to continue to compete.

TRU challenges the ALJ's conclusion that TRU and the toy manufacturers had market power by arguing that there is no evidence that TRU had the power generally to curtail output and raise price in the marketplace, or evidence that overall output actually was curtailed and overall prices raised. There are several problems with this argument. First, there is little question that the boycott of the warehouse clubs that TRU organized *could* and *did* lower output by avoiding a decrease in toy prices by TRU and TRU's non-club competitors. *See infra* pp. 561-64. TRU, which lowered prices in 1992 to meet club prices, found that those price cuts were no longer necessary after the boycott limited club access to toy products. Second, in pressing its argument, TRU confuses the concept of *monopoly* power (which except in extraordinary circumstances does not exist at market share levels below 60% or 70%) with *market* power under the rule of reason (which may occur at lower percentage levels). Thus, TRU's argument ignores the clear directive in *Northwest Stationers* that courts should examine whether the boycotting firms possess "a dominant position," language that traditionally has required market shares in the 30%

of power than its exercise. Suppose, for example, that a manufacturer explicitly declared that distribution restraints would be inefficient but nevertheless adopted them after dealers threatened, "Restrain intrabrand competition or we cease handling your product." The resulting restraint could then readily be attributed to dealer power and fairly judged unreasonable. Few cases will be so clear.

8 Areeda, *supra* note 43, ¶ 1604 (g), at 65-66 (footnote omitted). This is precisely what happened here.

range, not the 60 or 70% range. A requirement that a boycott violation could be found only where the boycotting firms hold 60% or more of the market and all by themselves can curtail output and raise price, in effect would read Section 1 out of the Sherman Act. Only monopolization or conspiracies to monopolize would be actionable. *See Eastman Kodak*, 504 U.S. at 481 ("Monopoly power under § 2 requires, of course, something greater than market power under § 1."); *Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951, 967 (10th Cir. 1990) ("Market and monopoly power only differ in degree -- monopoly power is commonly thought of as 'substantial' market power.") Many rule of reason cases find "market power" at less than the monopoly level. *See, e.g., Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1301, 1303-05 (9th Cir 1982). *See also Rossi*, 1998 U.S. App. LEXIS 21911, at *17-18 (reversing summary judgment for defendants and remanding for trial where defendant manufacturer, who along with retailers allegedly was part of a boycott of a price-cutting retailer, accounted for 38% of sales in a local geographic market); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 667 (7th Cir. 1987)("Without a showing of special market conditions or other compelling evidence of market power, the lowest possible market share legally sufficient to sustain a finding of monopolization [or substantial market power] is between 17% and 25%.")(citation omitted); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1373 (5th Cir. 1980)("When the cooperating group possesses sufficient market power that a nonmember can no longer compete effectively with members, the restraint must be found to have sufficient adverse competitive impact to violate Section 1.").

TRU argues that non-price, vertical restrictions cannot be found illegal without a showing of substantial market power. (Reply Br. at 52-58.) TRU cites exclusive dealing, exclusive territory, and dealer termination cases. *See, e.g., Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1161, 1165 (9th Cir. 1997) (exclusive dealing); *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 525, 528-29 (4th Cir 1989) (exclusive territories); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 294, 297-98 (5th Cir. 1981) (dealer termination). Characteristically, manufacturers with 30% or so of a market do not violate the antitrust laws when they impose non-price vertical restraints because customers of those manufacturers can turn to the other 70% of the market for a source of supply. Yet even in this area, it is hornbook law that exclusive dealing contracts that tie up 40% or more of the supply in a relevant antitrust market can create cognizable competitive problems.[64] *See*

[64] *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380 (7th Cir. 1984), a decision of the Seventh Circuit authored by Judge Posner, requires a showing only that one significant competitor was excluded from the relevant market and that there is a likelihood the exclusion will raise price:

> The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself. *See Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*,

Herbert Hovenkamp, *Federal Antitrust Policy*, 389-90 (1994)("Exclusive dealing is still condemned where the shares exceed 40% or so."). TRU accounted for more than 30% of toy purchases in areas of the country where it did business, and 40 to 50% in many cities. And of course, TRU's boycott ultimately affected the supply of toys representing about 40% of the market. Finally, TRU and the toy manufacturer boycotters had more market power than bare numbers suggest.

Exclusive dealing and other non-price vertical cases, moreover, are easily distinguished from the boycott orchestrated by TRU. For example, many of the exclusive dealing cases involved short term contracts, usually a year or less in duration and often terminable at will. The boycott orchestrated by TRU was not limited in duration and, if effective, would go on indefinitely. More important, there are substantial efficiencies, consistently recognized by the Supreme Court, flowing from exclusive dealing and other non-price vertical restrictions. As Justice Frankfurter explained in the majority opinion in *Standard Oil Co. v. United States*, 337 U.S. 293, 306-07 (1949) ("*Standard Stations*"), exclusive distribution arrangements remove substantial uncertainties, aid planning and reduce costs, permitting investments that might not otherwise occur. *See also Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 12 (1984)(discussing business justifications for tie-in sales); *id.* at 40-42 (O'Connor, J., concurring); *Sylvania*, 433 U.S. at 54-55 (discussing business justifications for territorial and customer allocation).

But as we will show in our discussion of TRU's justification or defense, there are no efficiencies to the boycott orchestrated by TRU.

3. Terminating access to a necessary supply or relationship.

TRU does not really contest the proposition that its "club policy" was designed to and had the effect of denying the clubs "a supply ... necessary to enable [the clubs] to compete." *Northwest Wholesale Stationers*, 472 U.S. at 294. The whole point of its club policy was to deny the clubs

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682 F.2d 660, 663-65 (7th Cir.1982). Hence a plaintiff must prove two things to show that an exclusive-dealing agreement is unreasonable. First, he must prove that it is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition. Second, he must prove that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition; he must show in other words that the anticompetitive effects (if any) of the exclusion outweigh any benefits to competition from it.

Id. at 394.

While *Roland Mach.* addressed an exclusive dealing case rather than an orchestrated boycott, the central points that it made are still valid -- there must be exclusion of a significant competitor and that exclusion must have a likely anticompetitive effect that outweighs any business justification. Here, the warehouse clubs were increasingly significant competitors that were denied the opportunity to compete effectively in the market, their exclusion (as we will show in the next section) had a marketplace effect, and (as we will show in the final section) there was no credible business justification for the boycott.

product, or at least product in a form capable of being compared to TRU's products, in order to eliminate price competition. The sharp decline in club toy sales, and consequent decline in price pressure on TRU, demonstrates that TRU did not miscalculate.

The clubs' competitive advantage over other retailers is their low prices, and TRU's policy denied the clubs toy products necessary to engage in price competition. As club executives testified, *see supra* p. 536, clubs seek to carry branded products that their customers will recognize. Their objective is to offer well-defined values, and this is most easily achieved if customers know the value of the product and its price at other retail outlets. TRU's policy denied the clubs access to precisely that class of toy products.

TRU's club policy also imposed costs on the clubs and unavoidably added to shoppers' perceptions that warehouse club inventory tends to be irregular and limited, or characterized by cumbersome and over-sized products. Finally, the policy led to a denial of the clubs' preferences (as buyers from the manufacturers) and of consumers' preferences (as shoppers at the clubs) for a kind of service they preferred and that would have been provided but for TRU's intervention. *See Indiana Fed'n of Dentists*, 476 U.S. at 462 ("The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand."); *cf. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 606 (1985)("[T]he evidence supports a conclusion that consumers were adversely affected by the elimination of the 4-area ticket .... [S]kiers demonstrably preferred four mountains to three.").

The drop in toy sales by the clubs demonstrates the importance of full and non-discriminatory access to toy products. As discussed above, *see* pp. __, TRU's boycott halted a pattern of rapid growth of toy sales at the clubs. While the clubs' share of all toy sales in the United States was growing rapidly before the boycott, toy sales at clubs fell steadily from 1.9% of all U.S. toy sales in 1992 to 1.4% in 1995. Equally important, many (if not most) of the toys that continued to be sold by clubs did not threaten TRU's own prices.

4. The boycott lacked a business justification.

TRU has offered only one business justification for its conduct. It claims that the clubs were "free-riders" that took advantage of services provided by TRU, and that the continued presence of these "free-riders" would have the long term adverse effect of driving these services out of the marketplace. It argues that it therefore was justified in urging toy manufacturers to curtail the ability of the clubs to compete with TRU.

Free-rider concerns arise where there are two classes of competing distributors; one group provides services valued by some consumers, while

the other does not but usually charges lower prices. It is now well-recognized in antitrust jurisprudence that a manufacturer can take steps to eliminate free-riding when it is likely to drive services valuable to the manufacturer and consumers out of the marketplace and reduce overall consumer welfare. It is also well accepted that a retailer providing services may urge a manufacturer to eliminate free-riding by terminating the free-riding retailer or taking other action to curtail the problem. *See Sharp,* 485 U.S. at 731; *Sylvania*, 433 U.S. at 54-55.

The simple fact that two sets of distributors elect to adopt different sales formats -- one high-service and the other no-frills discounting -- is insufficient to establish free-rider concerns. As pointed out by Judge Easterbrook, one of the scholars most responsible for calling attention to the validity of a free-rider defense, "[w]hat gives this the name *free*-riding is the lack of charge. When payment is possible, free-riding is not a problem because the 'ride' is not free." *Chicago Prof'l Sports*, 961 F.2d at 675.

a. Dealer compensation cures any free-rider problems.

As we will discuss below, several of the services that TRU points to do not really raise free-rider concerns because they are services that provide advantages only to the toy manufacturers, not to the clubs or any other retailers. But even if they do, the concerns evaporate because TRU is compensated for the services, and there is no threat that the services will be driven from the market. In the words of Professor Scherer, "[s]ufficiency of incentive [to continue the beneficial activity], not the absolute elimination of [positive] spillovers, is the appropriate test for judging whether vertical restraints are necessary when spillovers are shown to exist." CX 1822-Z-8 (Scherer) at 33; IDF 468.

There are at least three ways a distributor can be compensated for valuable services that it provides. First, the consumer may pay separately for the service. That is feasible, for example, when an automobile dealership provides excellent post-sales servicing at a separate price from purchase of the car, thereby leaving the customer with a good opinion of the dealer and the manufacturer of the car. But consumer compensation is often not feasible. For example, it is not practical to charge customers separately for access to a showroom or pre-sale advertising. *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 592 (7th Cir. 1984)("[V]irtually no one will pay to consume advertising."). A second, theoretically elegant possibility is for a group of dealers who do not supply the service to pay full service dealers roughly the amount the first group benefits from the services. *See White Motor Co. v. United States*, 372 U.S. 253, 270-72 (Brennan, J. concurring)(discussing use of pass-over payments between distributors as an alternative to exclusive territories).

Pass-over payments from one set of dealers to another are possible but often extremely difficult to negotiate. Neither of these techniques was used to compensate TRU in connection with the services it claims to provide.

A third technique for compensating dealers for their investments in services that advance consumer welfare is much more common and practical. The manufacturer might decide that the services are important to its long-term market success, but prefer to keep both types of dealers. It may therefore elect to pay the high service dealers an amount roughly equal to their investment. In effect the manufacturer, once it recognizes that the services are valuable to consumers and therefore to its reputation, has a choice. It can either cut off or discriminate against those distributors that fail to provide the service, or continue to do business with those dealers because it believes it is in its interest to do so, but ensure that others continue to provide the service by paying for it. Cooperative advertising programs, whereby manufacturers of trademarked goods pay all or part of the expenses of dealer programs for advertising the manufacturer's product, are the most common example.

The fact that compensation to the high service retailer eliminates free-rider problems was emphasized by Judge Easterbrook in *Chicago Prof'l Sports*, 961 F.2d at 675, and by Judge Posner in *General Leaseways*, 744 F. 2d at 592. General Leaseways challenged the exclusive, territorial divisions imposed by an association of full service, over the road, commercial truck leasing firms. 744 F. 2d at 590. Members of the association provided each other's trucks with repair services at a reasonable rate, allowing them to receive repair services over a geographic scope comparable to that of a national company. *Id.* at 589-90. The association defended the exclusive territories as a restraint on would-be free-riders who might try to take advantage of the association's reasonable rates. *Id.* at 592. However, the court rejected this defense as too speculative, noting that the association's "members ... charge each other for emergency repair service[s]" they provide -- a kind of compensation by barter. *Id.* The Court did not stop to examine whether the compensation from dealer to dealer was exactly the right amount. It was sufficient that it ensured the continuation of the beneficial activity.

Chicago Prof'l Sports concerned a challenge to the NBA's rule that so-called television "superstations" (nominally-local television networks carried by national cable systems) could carry no more than 20 basketball games a season. 961 F. 2d at 669. The NBA attempted to justify its rule as a necessary constraint on free-riding by member teams on the NBA's promotional efforts. The Seventh Circuit again rejected this argument explaining that, because the NBA and its members are in an ongoing, contractual relationship, payment may be made for benefits conferred by

the NBA; the court supported this point with a comparison to the relationship between two retailers:

> What gives this the name *free*-riding is the lack of charge. Retailer # 1 does not charge the customer for a valuable service; Retailer # 2 does not pay Retailer # 1 for delivering this service. Put the retailers in a contractual relation, however, and they could adjust their accounts so that the person providing a valuable service gets paid. When payment is possible, free-riding is not a problem because the "ride" is not free. Here lies the flaw in the NBA's story. It may (and does) charge members for value delivered.

Chicago Prof'l Sports, 961 F.2d at 675.[65] *See also NBA v. Motorola, Inc.*, 105 F.3d 841, 854 (2d Cir. 1997)(rejecting claim of free-riding as unsupported by the evidence).

b. TRU's free-riding claims are atypical.

Before turning to TRU's specific contentions, it is useful to note that the services that TRU claims are exploited by others are not the "classic" services that the courts have been increasingly willing to protect. Free-riding is most often a problem for manufacturers and distributors of expensive, complex goods. For example, promotion, demonstration, and explanation of complex products are services most vulnerable to free-riders; customers visit the full service retailer to learn about products and then buy them somewhere else. *See generally Sylvania,* 433 U.S. at 54-56; Richard Posner, *Economic Analysis of Law*, 295-97 (4th ed. 1992). If a product requires installation or extensive service, customers may buy it at a low-cost discount outlet and then take it to the full service dealer for post-sale servicing. The second dealer may incur significant costs to see that it is properly installed, used, and maintained. *See, e.g., H.L. Hayden Co.*, 879 F.2d at 1014.

By contrast, toys are usually simple and inexpensive products. They generally do not require demonstration and do not require significant installation or maintenance. TRU's method of retailing, moreover, is built on the assumption that customers (or perhaps their children) know what they want when they come to the store. TRU does not dispute that it provides no customer services such as product demonstration or installation assistance. There are few if any sales people in a TRU store available to guide or advise shoppers. There was no evidence in the record that anyone

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[65] Both *Chicago Sports and General Leaseways* dealt with fact situations in which the compensation could be paid (*Chicago Sports*) or actually was paid (*General Leaseways*) by a horizontal competitor of the parties supplying the services. But the fact that payment is made vertically by a manufacturer to a dealer should make no difference. While some discounters may receive an advantage they did not pay for, that advantage is not the critical issue if the focus is on the welfare of consumers, as it should be in sensible antitrust enforcement. The point is rather that services valued by consumers will be preserved in the marketplace, and not driven out by so called "free-riders."

sought demonstration or explanation of a toy product at TRU and then purchased the product at a club.

c. TRU was compensated for any services it provides.

Turning now to TRU's specific contentions, it argues that it provides three important and costly services that are not provided by the clubs but that advance the club's interests: (l) TRU advertises products in catalogs and newspaper inserts (called rotos) regularly over the year; (2) it provides a year-round, full-line, industry showroom, which generates sales information and marketing guidance for the toy industry; and (3) it accepts inventory early and regularly over the course of the year, saving the toy manufacturers warehousing costs and permitting steady, less costly production schedules. The record indicates, however, that TRU's services largely benefit the manufacturers and that TRU is compensated generously for any costs incurred in providing these services.

Advertising can raise legitimate free-rider problems if one group of distributors commits resources to promotional efforts and another group, spending no resources, enjoys some of the benefits. *See* discussion of *General Leaseways*, *supra* pp. 601-02. But it is the toy manufacturers who finance advertising in this market. Television advertising is paid for entirely by the toy manufacturers. *See supra* p. 564. As to catalogs and newspaper inserts, the bulk of these expenses -- over 99% in one year and more than 90% in several other years under review -- was paid by the toy manufacturers. A 1993 TRU memorandum called advertising "essentially free," and a former TRU employee testified that in some instances advertising allowances actually exceeded the amount TRU spent for advertising. *See supra* note 37.

TRU argues that its large showrooms and year-round display of toys create hits and generate valuable information on sales trends. This argument does not hold up under analysis. "Creating hits" -- *i.e.*, hot products that are sold in great volume -- obviously does not apply to the overwhelming majority of products on the shelves of toy retailers. Toy stores do not stock the boardgame Monopoly because TRU's earlier display made it a hit. With respect to other products there is little reason to believe that a "large showroom" is a major influence on consumer demand. Products become hits because of the quality of the toys, word-of-mouth reactions, and heavy television advertising. Even if the presence of a particular toy at TRU is a factor among many in creating "hit" toys, TRU is compensated indirectly for any part it plays in the production of hit products by receiving a disproportionately large share of those products. As shown in our discussion of facts, the evidence convincingly shows that (1) TRU gets a lion's share of the hot and promoted products, and (2) more than any other retailer, TRU is granted post-sale discounts from its

suppliers on products that do not meet sales expectations. *See supra* pp. 566-68. These two methods of compensation reward TRU for carrying a full line of products and compensate TRU for whatever small part it may play in generating hit products for the toy industry. The important point is that there is no reason to expect that TRU will cease carrying hit products in its unusually broad year-round inventory because the same products are carried by the clubs with a narrower range of offerings.

The marketing surveys that TRU prepares before the annual Toy Fair may, as TRU claims, help manufacturers identify probable hits and plan advertising expenditures. But TRU overlooks the facts that the toy companies create the products and pay for the advertising that helps a promising product become a hit. TRU can be compensated for any market research it does for its suppliers, and the evidence shows that it is compensated by several of the methods just mentioned. In other words, "reimbursed" market research for a manufacturer by a dealer is not the kind of service that has been recognized as creating free-rider problems by other dealers that justify exclusionary restraints.

As to TRU's claim that it accepts inventory early in the course of the year, permitting toy manufacturers to save warehousing costs, the evidence again clearly shows that TRU is paid for this service. Warehousing, moreover, is far from the type of dealer services at issue in the case law on free-riding. It is largely the toy manufacturers and TRU, not the clubs or any other rival of TRU, that benefit from the use of TRU's warehouse space. TRU is allowed to pay later for the delivery of goods (described by several toy manufacturers as compensation for storage services), and receives a disproportionately large share of hit products and generous post-sale discounts for slow-moving inventory. *See supra* pp. 565-66.

Even assuming that the various services provided by TRU were valuable to manufacturers and consumers, there is no evidence that the clubs' failure to provide those services (or Wal-Mart's and K-Mart's for that matter) had, or was likely to have, the effect of driving those services from the market. TRU did argue that "free-riding" by Wal-Mart had forced TRU to reduce the number of items it carried and, if competition from the clubs were not curtailed, that inventory reduction might have to occur again. (Reply Br. at 74-75.) But the claim that inventory reduction was a consequence of no-frills price competition by the clubs and therefore was a justification for organizing a boycott against the clubs does not hold up. The decision to cut back on inventory did not occur until 1996 -- a full four years after the clubs' market share peaked and TRU introduced its club policy. According to Goddu, the TRU executive in charge of the policy change, the inventory reduction resulted primarily from competition from Wal-Mart, not from free-riding by Wal-Mart. Goddu testified that the

purpose of the reduction was to create a cleaner looking shopping floor and less cluttered stores. *See supra* note 38.

TRU argues that services remained in the market only because of its policy of inducing toy manufacturers to restrict sales to the clubs. (Reply Br. at 75.) That argument would be far more persuasive if there was any indication, prior to the time TRU's policy was implemented, that any services were on the decline. There is also no indication in the documents -- either those produced by the toy manufacturers or TRU -- that any party had the slightest concern, before the clubs threatened to sue TRU under the antitrust laws, that the clubs were free-riders that endangered the continued availability of any services that consumers valued.[66]

d. Significantly less restrictive alternatives were available.

Another reason why TRU's policies do not qualify under *Northwest Stationers* is that TRU could have achieved its purported objectives through policies and conduct that restricted competition far less than a boycott among suppliers of its club rivals. Consequently, the boycott cannot be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." 472 U.S. at 294.

TRU's essential argument is that its advertising, other forms of promotion, and large year-round inventory, "created" hit products. According to TRU, the clubs observed TRU's activities and then elected to carry only those hit products in the Christmas season. Other services pointed to by TRU involved the accumulation of market data which was communicated to the toy manufacturers so that they could predict proper levels of production for the last part of the year.

TRU could have adopted policies, however, that fell well short of orchestrating arrangements whereby products identical to those carried by TRU would not be provided to the clubs. If TRU's concern was that club purchases would prevent TRU from receiving all the "hit" products it needed during the Christmas season, it could have asked for assurances that it would receive an adequate supply of "hit products." This would protect TRU's alleged position as the industry hit-maker without eliminating clubs as effective competitors on the vast majority of toys. Instead, TRU adopted a policy that all products -- new and old, hit and non-hit products -- could be sold to the clubs as long as they were part of a combination pack that could not be compared easily to TRU product prices. This disconnect between purpose and policy indicates that elimination of effective price competition was TRU's true motivating concern. TRU claims that compensation for the services provided -- advertising, inventory, marketing

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[66] *Cf. Eastman Kodak*, 504 U.S. at 485 n.33 (rejecting a free-riding defense when there is no evidence that manufacturer-imposed restrictions are necessary to induce competent and aggressive retailers to make the investment of capital and labor necessary to distribute the product).

data -- was not adequate in light of its investment in those services. But TRU, as the largest toy retailer in the United States, could have bargained harder with toy manufacturers for compensation instead of organizing a boycott of the clubs. To the extent the adequacy of compensation is addressed in this record, the evidence is overwhelming that TRU was an exceptionally capable and aggressive bargainer and that TRU received compensation that equaled or exceeded its investment.

e. TRU's free-riding claims are a pretext.

Before TRU introduced its policy of curtailing toy manufacturers' sales to clubs, there is no indication in the documents that any toy manufacturer declined to do business with the clubs because of possible free-riding. Indeed, TRU's suppliers' adoption of the club policy was an abrupt departure from the toy companies' longstanding distribution policies. Few toy manufacturers avoided doing business with discounters, or even with retailers that provided a narrow range of services, nor did they require distributors to carry their full line. The few who did avoid sales to the clubs did so for reasons unrelated to "free-riding." *See supra* pp. 568-69.

Similarly, there is absolutely no evidence -- certainly no contemporaneous document -- that TRU developed and implemented its policy with respect to competition by the clubs because of a free-riding concern. Indeed, the first mention of free-riding within TRU was in the late summer of 1992, when the clubs threatened to sue TRU and its suppliers for discriminatory sales policies. Also, TRU never asked the toy manufacturers to discipline Wal-Mart, Target, K-Mart or other established discounters -- even though they, like the clubs, did not provide services such as early purchasing of inventory, stocking a large number of toy products, and advertising. The difference was that the clubs offered a form of extreme price competition that TRU came to believe it could not tolerate. Although concerns about free-riding often will be difficult to distinguish from generic concerns about "unfair" price cutting, the lack of any more specific, contemporaneous discussion of free-riding, and the focus of TRU's animus on the clubs alone, severely weakens TRU's claimed justification.

We therefore conclude that TRU's claim that concerns about free-riding motivated its policy of orchestrating a boycott against the clubs is a pretext. TRU's real motive was simply to eliminate the increasing competition provided by the clubs, which not only cut into TRU's sales, but threatened its reputation as a low price discounter.

5. Conclusion to Northwest Wholesale Stationers approach.

For all the reasons set forth above, we conclude that TRU's practices satisfy each of the conditions described in *Northwest Wholesale Stationers* as a preliminary to application of a *per se* rule. The boycott orchestrated by

TRU was anticompetitive in purpose and effect, effectuated by participants which, as a group, held a powerful market position, and resulted in denying the clubs products in a format reasonably necessary to allow them to compete effectively. Perhaps most important is the ALJ's finding, with which we thoroughly agree, that there was no plausible business justification for the group's behavior. IDF 533; Initial Decision at 123, Conclusion of Law 10. Looked at from the point of view of consumers, they got nothing at all out of the boycott organized by TRU. Rather, they were denied an opportunity to buy toys at low prices from outlets that many were coming to prefer.

Following the teaching of *Northwest Wholesale Stationers*, we examined market power here and found that the participants in the boycott had substantial market power. Certainly, TRU had little difficulty coercing a substantial number of toy manufacturers to discriminate against the clubs, and the manufacturers as a group suppressed the ability of the clubs to compete effectively. But the Supreme Court stated in *Indiana Fed'n of Dentists*, a boycott case decided one year after *Northwest Wholesale Stationers*, that a finding of market power is not necessary to find illegal a course of conduct leading to "actual detrimental effects." 476 U.S. at 460. The Court concluded that evidence of such effects "can obviate the need for an inquiry into market power which is but a 'surrogate for detrimental effects.'" *Id.* at 460-61 (quoting 7 Areeda, *supra* note 43, ¶1511, at 429. *See also Wilk v. AMA*, 895 F.2d 352, 360-62 (7th Cir. 1990)(holding that a showing of actual adverse competitive effects obviates the need to present detailed evidence of the market definition and market power)(citing and discussing *Indiana Fed'n of Dentists*). That is particularly clear where the boycott prevents economic activity that the market would otherwise produce, *see id.* at 360, and there are no countervailing procompetitive virtues such as the creation of efficiencies in the operation of the market or the provision of goods and services. *Id.* at 361.

That is exactly the situation we have here. There were clear anticompetitive effects, *see infra* pp. 609-14, and no plausible business justification. TRU and its reluctant collaborators set out to eliminate from the marketplace a form of price competition and a style of service that increasing numbers of consumers preferred.

In conclusion, we note that all elements required by *Northwest Wholesale Stationers* to justify application of a *per se* rule are present; even if market power were not present, a violation would nevertheless be found.

E. The Group Boycott Organized By TRU Is Also Illegal Under a Full Rule of Reason Analysis.

Even if TRU's conduct is analyzed under the full rule of reason, its behavior must still be found illegal. The principal additional factors that

must be examined under a full rule of reason -- as opposed to *Northwest Wholesale Stationers'* modified *per se* approach -- are, first, whether TRU's behavior had a significant anticompetitive effect, and, second, whether any such effect is outweighed by legitimate business justifications.

1. The boycott produced anticompetitive effects.

The boycott TRU orchestrated had harmful effects for the clubs, for competition, and for consumers. TRU prevented a decrease in the price paid by many consumers for many toy items, reduced the options available to consumers, and weakened both intrabrand and interbrand competition in the retail toy market.

TRU argues that Complaint Counsel has failed to demonstrate anticompetitive effects. TRU's arguments reduce to an assertion that, because the clubs were small -- accounting for no more than an estimated 1.9%[67] of the United States toy market when TRU's policy went into effect -- TRU was privileged to organize a boycott designed to disadvantage and impose extra costs on them without being accountable for having caused harm cognizable under the antitrust laws. The clubs, according to TRU, were too small to matter. (App. Br. at 69-72; Reply Br. at 64 ("A 'restraint' that leads to 1% of the market being excluded from toys making up 40% of industry sales is barely foreclosure at all ....").) When a similar argument was advanced in *Klor's,* the Supreme Court commented:

> It [the boycott allegation] clearly has, by its "nature" and "character," a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.

Klor's, 359 U.S. at 213 (footnote omitted).

This remark applies with even greater force to the boycott orchestrated by TRU. Far from a single small business, the clubs were growing chains of retailers operating hundreds of outlets nationally and employing a distinctly new and efficient method of distribution. Because the boycott injured the clubs, it also harmed competition, and because competition was harmed, consumer welfare was reduced. Although the antitrust laws protect competition and not competitors, there can be no competition without able competitors. A policy that selectively eliminates effective competitors (or the ones most threatening to incumbent firms) harms the competitive process even though individual firms are the targets.Our discussion of

[67] Mattel estimated the clubs' total share of the retail toys sold in the United States in 1992 at 2.3%. CX 695-L. Although we have no reason to think this estimate is any less accurate than the lower statistic offered by the NPD Group, we have given TRU the benefit of the doubt by picking the lower number for this discussion.

effects looks first at the harm caused to the clubs' toy sales and then at the repercussions of this for consumers.

As noted previously, *see supra* p. 562, club toy sales reached a high of 1.9% of total U.S. sales in 1992, and business observers expected toy sales to continue to grow rapidly. Although club sales generally continued to increase in the next several years, club toy sales declined steadily after the TRU-orchestrated boycott went into effect to 1.4% in 1995. Perhaps there were other factors involved in declining toy sales at the clubs after 1992 (although TRU offered none for the record), but clearly the boycott was a major factor.

Because TRU's policy undermined the clubs' strength as competitors, TRU was not "embarrassed," CX 661 at 35, into lowering prices to meet club competition. As already discussed, in 1992 TRU had set its prices for many items based on price competition from the clubs. After the club policy was established, this was no longer necessary, and TRU was able to avoid similar price cuts thereafter. As explained at p. 563, *supra*, if TRU had reduced its average margin on its five hundred best-selling products to match Costco's average margin of 9%, TRU's customers would have saved $55 million per year. [68] And of course the boycott raised the costs of toys at the clubs, obstructing their advantage as the lowest price outlet to the advantage of TRU and the injury of consumers.

The boycott orchestrated by TRU reduced the range of choices available to consumers and eliminated forms of competition that consumers desired and would have been able to enjoy absent TRU's policy. Club shoppers were not able to buy the products they wanted at the clubs. They either had to buy their second-choice goods (*e.g.*, custom or combo packs of goods) at their first-choice stores (warehouse clubs) or their first-choice goods (*e.g.*, individually packaged branded toys) at their second-choice stores (TRU, Wal-Mart, Target). The Supreme Court has recognized similar restrictions on the forms of competition in the marketplace, and similar hindrances to products or services consumers desire, as anti-competitive effects cognizable under the antitrust laws. See the discussion of *Aspen Ski* and *Indiana Fed'n of Dentists* at pp.600, *supra.*

It is noteworthy that the boycott restrained both intrabrand and interbrand competition in the retail toy market. Thus, we do not face the difficult balancing process of weighing a loss of intrabrand competition (often resulting from non-price vertical restraints) against benefits to interbrand competition. As we have already discussed, Goddu carefully explained that combination packs made it difficult for consumers to compare the prices of products sold at the clubs to the same items at TRU.

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[68] *Cf. FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1082 n.14 (D.D.C. 1997) (recognizing an averted price decrease as an anticompetitive effect).

This is a restraint on intrabrand competition -- that is, on competition between products of the same brand sold at different retail outlets. The fact that intrabrand competition is restricted is not enough to warrant condemnation of a restraint. Vertical restraints ordinarily reduce competition between dealers marketing the same goods for the positive purpose of enhancing competition with respect to similar products of other manufacturers. *See Sylvania*, 433 U.S. at 54; *Sharp,* 485 U.S. at 724-25. But here the boycott did not strengthen competition among the toy companies. Our conclusion that TRU's free-rider justification lacks merit -- that it was merely a pretext for a policy aimed at reducing price competition -- means that the boycott did not serve to protect dealer services that drive the demand for toys to the benefit of toy companies and consumers.

For these reasons, we conclude that actual anticompetitive effects resulted from TRU's conduct, including reduced consumer choice and higher prices.

With respect to cases cited by TRU, we note once again that the company relies almost entirely on exclusive dealing, territorial allocation, customer allocation, and similar non-price vertical distribution cases. Examples of these are cited above, *see supra* p.599. As we noted in examining some of these cases in connection with the existence of market power, those types of cases are different because the Supreme Court has emphasized with respect to each category that there are substantial efficiencies that can be achieved. See the discussion of cases recognizing these efficiencies at p. 600, *supra.* The courts, therefore, are confronted with a difficult trade-off between anticompetitive foreclosure on the one hand and redeeming business justifications on the other. Here, the evidence is overwhelming that there simply were no efficiencies to justify TRU's behavior.

The essential prop to all of TRU's arguments about anti-competitive effect is that a government boycott case must fail if the government does not discharge a burden of demonstrating that, as a result of the boycott, market-wide prices increased or market-wide output diminished. (Reply Br. at 52.) This very issue was addressed and settled by the Supreme Court in *Indiana Fed'n of Dentists*, 476 U.S. at 461-62, where a group of dentists conspired to prevent member dentists from submitting x-rays to dental health insurers so that the insurers could check the validity of requests for payment of benefits. The Court elected a rule of reason, rather than *per se,* approach, in part because the boycott involving x-rays was obviously not intended to harm a competitor -- a purpose that *is present* here. *Id.* at 458-59. In applying a full rule of reason, the Supreme Court addressed the argument that there had been no finding that "the alleged restraint on competition among dentists had actually resulted in higher dental costs to

patients and insurers." *Id.* at 447. The Court explained that a showing of higher prices was not essential to establish the illegality of the restraint:

> A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned *even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.*

Id. at 461-62 (emphasis added).[69]

The case for finding a violation is all the more powerful here where the boycott is not an indirect attempt to interfere with price-setting (through withholding of information), but a direct effort by one retailer to organize a boycott designed to impair the ability of its lowest-priced rivals to continue to offer products and services that consumers desire.

2. The anticompetitive effects far outweigh the claimed justification.

There was no business justification for a boycott that had a pronounced anticompetitive effect. The single justification offered -- the prevention of free-riding -- was a *post hoc* rationalization for a policy with an anticompetitive purpose and effect. The balance under a full rule of reason tips decidedly toward condemnation.

F. Considered Alone, the Vertical Restraints Are Unreasonable Under § 1 of the Sherman Act.

The evidence is clear that TRU, a dominant toy retailer, significantly diminished the ability of the clubs to compete by inducing a substantial number of toy manufacturers to agree to do business with TRU's club rivals only on discriminatory terms. It accomplished its purpose by approaching each of the toy manufacturers *seriatim* and inducing or coercing each to agree to join in its anticompetitive mission. *See supra* pp.541-48 & notes 23, 24. TRU's purpose was to avoid significant price competition from rivals and to deny consumers a form of distribution they prefer. *See supra* p. 591-92. The effect of these joint actions was to injure a group of rivals in the marketplace. S*ee supra* pp.609-14.

We conclude therefore that each agreement in the series of vertical agreements, standing alone, even without the evidence of horizontal agreement among many of the toy manufacturers, violates § 1 of the Sherman Act upon a full rule of reason review.

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[69] The Court had previously articulated this point in *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect."). *Accord Wilk*, 895 F.2d at 360.

A vertical agreement between a retailer (even one as powerful as TRU) and an individual manufacturer, whereby the manufacturer agrees to deal only on discriminatory terms with a competitor of the retailer, would not be treated as illegal *per se*. It is not vertical price-fixing because no specific price, or price level, was agreed to, *see Sharp,* 485 U.S. 717, 731, and each individual vertical agreement is not *per se* illegal as a boycott.

On the other hand, an examination limited to each individual agreement in isolation (TRU agrees with Mattel, TRU agrees with Hasbro, TRU agrees with Tyco, etc.) would blind us to the true anticompetitive nature and effect of TRU's course of conduct. As the Supreme Court instructed in *Continental Ore Co. v. Union Carbide & Carbon Corp*, 370 U.S. 690 (1962):

> plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. "* * * (T)he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten*, 226 U. S. 525, 544 * * *; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it." *American Tobacco Co. v. United States*, 147 F.2d 93, 106 (C. A. 6th Cir.). *See Montague & Co. v. Lowry*, 193 U. S. 38, 45-46.

Id. at 698-99. Along the same lines, the Supreme Court in *Standard Stations*, 337 U.S. 293, found individual, exclusive dealing contracts illegal because of the "widespread adoption of such contracts" in the market. *Id.* at 314.

In the present case, each vertical agreement was entered into against a background in which other agreements were solicited and either achieved or were about to be achieved. The large number of agreements ultimately obtained, and the size and importance of the toy firms that joined them, were essential to the success of the agreements and to the accomplishment of TRU's overall scheme. The collection of separate vertical agreements -- together excluding the clubs from the leading manufacturers of toys, accounting for roughly 40% of U.S. output -- had a profound anticompetitive effect, *see supra* pp. 609-14; the collection of parties entering into separate agreements had substantial market power, *see supra* pp. 592-600; and there was no plausible business justification or efficiency, *see supra* pp. 601-08. Under a full rule of reason, we find that *each agreement* in the series of agreements -- anticompetitive in purpose and effect and lacking plausible justification -- constitutes a violation of § 1 of the Sherman Act. *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 325-29 (1961); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *cf. United States v. National Ass'n of Broadcasters*, 536 F. Supp. 149, 157-169

(D.D.C. 1982); *United States v. American Smelting & Ref. Co.*, 182 F. Supp. 834, 861 (S.D.N.Y. 1960).

G. The Order Crafted By the ALJ Is Reasonable, Appropriate and Necessary to Remedy the Anticompetitive Effects of TRU's Conduct.

Having found that TRU violated the antitrust laws by organizing a boycott agreement to discriminate against the clubs, the ALJ entered an order requiring TRU to cease this law violation and to refrain from similar conduct in the future. This order contains five key elements of injunctive relief. *See* Order ¶ ¶ II.A-E. Because each provision of the ALJ's order is reasonable, appropriate and necessary to remedy the anticompetitive effects of TRU's conduct, we have decided to make final the order he crafted.

Briefly summarized, the order prohibits TRU from continuing, entering into, or attempting to enter into, vertical agreements with its suppliers to limit the supply of, or refuse to sell, toys to a toy discounter. *See* ¶ II.A. The order also prohibits TRU from facilitating, or attempting to facilitate, an agreement between or among its suppliers relating to the sale of toys to any retailer. *See* ¶ II.D. Additionally, TRU is enjoined from requesting information from suppliers about their sales to any toy discounter, and from urging or coercing suppliers to restrict sales to any toy discounter. *See* ¶ ¶ II.B, C. These four elements of relief are narrowly tailored to stop, and prevent the repetition of, TRU's illegal conduct.

TRU challenges the final provision of the order, *see* ¶ II.E, arguing that it would prohibit TRU "from exercising its *Colgate* rights." Paragraph II.E requires TRU, for a period of five years, to cease and desist from:

> 1) announcing or communicating that respondent will or may discontinue purchasing or refuse to purchase toys and related products from any supplier because that supplier intends to sell or sells toys and related products to any toy discounter, or 2) refusing to purchase toys and related products from a supplier because, in whole or in part, that supplier offered to sell or sold toys and related products to any toy discounter.

TRU contends that these provisions would force it to buy products it could not sell and to operate at a loss.

Colgate "rights" merely describe the boundary between concerted conduct that may violate the antitrust laws and unilateral conduct that the law does not forbid. As we have explained, TRU has crossed that boundary repeatedly and in several different ways. *See supra* pp.569-74. It is well settled that once a respondent engages in illegal conduct, the Commission's order need not prohibit merely unlawful conduct, but may "close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). The order may also include such additional provisions as are necessary to "preclude the revival of the illegal practices." *FTC v. National Lead Co.*, 352 U.S. 419,

430 (1957). Indeed, "those caught violating the Act must expect some fencing in." *Id.* at 431.

Paragraph II.E of the order is necessary to prohibit illegal conduct that TRU engaged in under the guise of the Court's decision in *Colgate*. The sorts of communications and the sales restrictions prohibited by ¶ II.E are the means used by TRU to implement and police the illegal restraints of trade. The paragraph is also necessary to correct the effects of the illegal conduct. Although TRU argues that ¶ II.E would require it to operate at a loss, to buy products it does not believe it can sell, or to carry all items stocked by discounters, it does none of these things. TRU will remain free to reject items that it does not believe it can sell profitably, *so long as it makes that decision independent of whether the item is offered to or sold by a discounter*. Similarly, TRU is free to communicate with manufacturers, *so long as the communications do not concern the sale of items to discounters*.

Finally, the order restricts TRU from communicating with manufacturers about sales not only to warehouse clubs, but to all discounters. The practices employed by TRU to restrict sales to clubs could have been applied to restrict sales to other discounters. Such fencing-in is wholly appropriate.

H. TRU's Procedural Objections Lack Merit.

TRU challenges the ALJ's decision to exclude TRU employees (but not its outside counsel) from those portions of the trial at which *in camera* material submitted by TRU's competitors and suppliers was presented. TRU argues that this decision violated its rights under §555(b) of the Administrative Procedure Act ("APA"), which, TRU contends, embodies the Due Process and Confrontation Clauses of the United States Constitution. TRU also argues that the decision conflicts with the Commission's Rules of Practice ("Rules"). Finally, TRU asserts that the ALJ erred by affording *in camera* treatment to certain documents. We review *de novo* the legal issues raised by TRU. We will not reverse the ALJ's decision regarding the *in camera* status of documents unless we find an abuse of discretion. *See General Foods Corp.*, 96 FTC 168, 170 (1980). We find that the ALJ's decision did not violate the APA, the Constitution, or the Commission's Rules. We also find that the ALJ's decision to provide *in camera* treatment to certain material did not constitute an abuse of his discretion.

Neither the Constitution nor §555(b) of the APA mandates the presence of TRU employees during the presentation at trial of *in camera* information. "Whatever else §555(b) guarantees to parties to an administrative proceeding ..., it does not mandate disclosure of significant confidential information to in-house counsel and corporate executives of

a business competitor -- where that information is fully available to outside counsel." *Akzo N.V. v. United States Int'l Trade Comm'n*, 808 F.2d 1471, 1484 (Fed. Cir. 1986). Thus, §555(b), which entitles a party "to appear in person or by or with counsel or other duly qualified representative in an agency proceeding, ... is not blindly absolute." *Id.* (quoting 5 U.S.C. § 555(b)). Although TRU has a strong interest in having its employees present during the trial, that interest may be outweighed by the submitter's need to protect the confidentiality of the information, and by the Commission's interest in assuring that, in the future, parties will be willing to disclose confidential information. *See A. Hirsch, Inc. v. United States*, 657 F. Supp. 1297, 1302 (Ct. Int'l Trade 1987). The ALJ's order properly balanced these competing interests. Thus, the ALJ's decision did not infringe TRU's rights under the APA or under the Due Process Clause of the Constitution. *See Akzo*, 808 F.2d at 1483 (implying that the right to due process does not guarantee in-house counsel access to confidential information).[70]

TRU also asserts that its rights under the Confrontation Clause have been violated. The Confrontation Clause of the Sixth Amendment applies only to criminal proceedings. *Hannah v. Larche*, 363 U.S. 420, 440 n.16 (1960). Accordingly, it has no relevance here.

TRU argues that the Commission's Rules of Practice guarantee its employees the right to be present when *in camera* material is offered at trial. It claims that because "Section 3.45 provides: 'only respondents, their counsel, authorized commission personnel, and court personnel concerned with judicial review may have access' to *in camera* material . . . there was no basis for precluding Toys "R" Us from being present during the trial ...." (App. Br. at 88-89 (emphasis in original).) However, the language of Rule 3.45 is not mandatory -- it merely indicates who *may* have access to *in camera* material. We have never interpreted Rule 3.45 to require that respondents *must* have access to *in camera* material. *See Papercraft Corp.*, 78 FTC 1352, 1408 (1971), *aff'd*, 472 F. 2d 927 (7th Cir. 1973); *see also FTC v. United States Pipe and Foundry Co.*, 304 F. Supp. 1254, 1260 (D.D.C. 1969)(order providing for disclosure of documents only to respondent's counsel is consistent with Rule 3.45).

Finally, TRU fails to demonstrate an abuse of discretion in any of the ALJ's evidentiary decisions. TRU does not object to any specific decision made by the ALJ. Instead, it objects to the number of occasions on which

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[70] TRU argues that *United States v. Lever Bros. Co.*, 193 F. Supp. 254, 258 (S.D.N.Y. 1961), mandates disclosure to corporate personnel. However, the order entered by the court in *Lever Brothers* did not mandate disclosure "except insofar as it may be necessary for consultation with counsel for Lever in order to prepare for and assist in the defense of the action." *Id.* Similarly, the ALJ's order here did not preclude disclosure to TRU employees if TRU made a showing that its defense was being harmed. *See* Order Re *In Camera* Issue, March 5, 1997.

its employees were excluded, and to the fact that its employees were excluded during portions of the testimony given by executives of toy manufacturers.

Because TRU does not challenge any specific *in camera* decision made by the ALJ, we examine the standard that the ALJ applied in reaching his decisions. We conclude that the ALJ applied the appropriate test in evaluating TRU's requests for access to *in camera* information. He balanced TRU's "need for direct access to the confidential financial and business information to adequately prepare its case, the harm disclosure would cause to the parties submitting this information, and the forum's interest in maintaining the confidentiality of the information." Order Re Respondent Seeing *In Camera* Information, May 24, 1997. Further, the ALJ offered to permit TRU's in-house counsel to attend the portions of the trial during which *in camera* information was presented, and further offered to permit TRU to retain an outside expert in order to assist it in evaluating the *in camera* documents. TRU availed itself of neither of these offers. The ALJ also gave TRU's outside counsel the opportunity to interrupt the trial in order to consult with TRU employees (without showing them any *in camera* documents). By presenting TRU with these options, the ALJ amply balanced TRU's interests against the interests of the submitters and of the Commission. Thus, the ALJ applied the appropriate test, and TRU has not identified any abuse of discretion by the ALJ. Accordingly, we decline to reverse any of the ALJ's decisions regarding the treatment of *in camera* documents.

TRU also argues that the Commission should reconsider its decision to issue the complaint, which was allegedly "tainted" 1) because a staff member had an undisclosed conflict of interest, and 2) because Commission staff allegedly leaked information about the investigation to the press. Neither of TRU's arguments gives us reason to do so. First, TRU presents nothing that gives us any reason to doubt any staff member's impartiality. Second, we see no reason why leaks to the press by the staff would affect a Commission determination that there was reason to believe a violation had occurred or that a Commission proceeding was in the public interest. *See, e.g., TRW, Inc.*, 88 FTC 544 (1976). In any event, there is no evidence as to the source of information in press reports that appeared at the time of the issuance of the complaint in this matter. Because Commission investigations frequently necessitate contacts with persons outside the Commission, there usually are many possible sources for press reports. Moreover, it is bare speculation--and nothing more--that the alleged leak had any impact on the Commission's decision to issue the complaint. We have considered TRU's two arguments and find them meritless.

CONCLUSION.

The Commission, for the reasons stated in this opinion, has determined to deny the appeal of respondent TRU and to make final the attached order, which is identical to the order entered by the ALJ.

FINAL ORDER

I.

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

B. "*Toy discounter*" means any retailer of toys, including but not limited to membership retail outlets such as Price-Costco, Sam's Club, and BJ's Wholesale Club, that sells toys at discounted prices.

C. "*Toys and related products*" means any product that is sold by respondent.

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

II.

It is ordered, That respondent, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the actual or potential purchase or distribution of toys and related products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

A. Continuing, maintaining, entering into, and attempting to enter into any agreement or understanding with any supplier to limit supply or to refuse to sell toys and related products to any toy discounter.

B. Urging, inducing, coercing, or pressuring, or attempting to urge, induce, coerce, or pressure, any supplier to limit supply or to refuse to sell toys and related products to any toy discounter.

C. Requiring, soliciting, requesting or encouraging any supplier to furnish information to respondent relating to any supplier's sales or actual or intended shipments to any toy discounter.

D. Facilitating or attempting to facilitate agreements or understandings between or among suppliers relating to limiting the sale of toys and related products to any retailer(s) by, among other things,

transmitting or convey-ing complaints, intentions, plans, actions, or other similar information from one supplier to another supplier relating to sales to such retailer(s).

E. For a period of five years, (1) announcing or communicating that respondent will or may discontinue purchasing or refuse to purchase toys and related products from any supplier because that supplier intends to sell or sells toys and related products to any toy discounter, or (2) refusing to purchase toys and related products from a supplier because, in whole or in part, that supplier offered to sell or sold toys and related products to any toy discounter.

Provided, however, that nothing in this order shall prevent respondent from seeking or entering into exclusive arrangements with suppliers with respect to particular toys.

III.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date on which this order becomes final, mail to each of its suppliers and employees who have purchasing responsibilities a copy of the Commission's complaint and order in this matter, along with a letter from respondent's chief executive officer stating that its suppliers can sell whatever products they wish to retailers, and that respondent will not take any adverse action for selling toys and related products to retailers in whole or in part due to the retailer's retail prices or price policies;

B. Within ten (10) days after the date on which any person becomes an employee of respondent with purchasing responsibilities for toys and related products, or a director, officer, or management employee of respondent, or a new supplier of respondent, provide a copy of this complaint and order to such person; and

C. Require each employee, director, or officer to whom a copy of this complaint and order is furnished pursuant to subparagraphs III. A and B of this order to sign and submit to Toys "R" Us, Inc., within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the complaint and order, (2) represents that the undersigned has read and understands the complaint and order, and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject Toys "R" Us, Inc. to penalties for violation of the order.

IV.

It is further ordered, That respondent shall:

A. Within sixty (60) days after the date on which this order become final, and annually thereafter on the anniversary of the date this order becomes final, and at such times as the Commission may by written notice to the respondent require, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has compiled and is complying with this order;

B. Maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with suppliers of respondent relating to any aspect of actual or potential purchase or distribution of toys and related products, and records pertaining to any action taken in connection with any activity covered by paragraphs II and III of this order: and

C. Notify the Commission at least thirty (30) days prior to any change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

V.

It is further ordered, That this order shall terminate twenty (20) years after the date on which this order becomes final.

Commissioner Swindle concurring in part and dissenting in part.

OPINION OF COMMISSIONER ORSON SWINDLE,
CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission majority's determination that respondent Toys "R" Us, Inc. ("TRU"), entered into a series of anticompetitive *vertical* agreements with various toy manufacturers, and I join in the portions of the Commission's order aimed at proscribing the vertical restraints. In my view, however, the evidence does not support the majority's finding that some toy manufacturers entered into an anticompetitive *horizontal* agreement, and thus I dissent from my colleagues' conclusion that TRU orchestrated such a horizontal combination.

The evidence shows that club stores loomed as a small but growing threat to TRU's status and self-image as the leader in discount toy retailing. By dint of its powerful position as the indispensable retail outlet, TRU

induced a number of key manufacturers to accede to its plan to choke off the supply of desirable toys to the clubs. Pursuant to TRU's vertical agreements with Mattel, Hasbro, Fisher Price, and others, certain manufacturers began to make toys unavailable to the clubs -- or available to them only on economically disadvantageous terms -- and the clubs' once-growing share of toy retailing began to shrink. A new channel of toy distribution that promised deep discounts for consumers was imperiled in its infancy, and TRU was spared downward pricing pressure from the clubs. The evidence suffices to establish that the series of vertical agreements between TRU and certain manufacturers had a significant adverse effect on competition, and I agree with my colleagues that TRU has not presented persuasive business justifications to the contrary.

The argument for a horizontal combination, on the other hand, lacks a firm foundation. As the majority makes clear, each manufacturer that entered into one of the vertical undertakings bowed to TRU's power in the market for toys. The majority opinion, true to the evidence in this case, casts TRU in the unmistakable role of the nation's preeminent year-round, full-line toy retailer--the one customer whose patronage many manufacturers considered essential to survival. It is entirely plausible that particular manufacturers would react to pressure from TRU by deciding -- *on their own* -- to disfavor the club stores. No inference of horizontal agreement is necessary to make sense of the manufacturers' actions.

Ironically, it is precisely the plausibility of the vertical theory and the strength of the evidence underpinning that theory that undercut the majority's finding of a horizontal conspiracy among toy manufacturers. There is strong, clear evidence that TRU entered into a series of vertical understandings with toy manufacturers to cut off supply to the clubs. There is a paucity of evidence -- direct or circumstantial -- that the manufacturers developed among themselves a scheme to boycott the clubs.

In laying out the evidence of a horizontal agreement,[1] my colleagues portray TRU as the communications hub of a conspiracy involving multiple manufacturers. These manufacturers purportedly used TRU to signal to one another their views and intentions about whether -- and under what conditions -- they would sell to the clubs. The majority infers from the record that the manufacturers used their direct *individual* communications with TRU as a mechanism to reach a common plan to boycott the clubs. Pursuant to this supposed scheme, TRU shuttled the manufacturers' fears and concerns back and forth until a horizontal consensus emerged.

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[1] Slip op. at 29 *et seq.*

The majority's view would be more plausible if we had stronger direct evidence[2] showing a meeting of the minds among the manufacturers. But virtually all of the evidence on which my colleagues base a finding of horizontal agreement comes from the mouths of *TRU executives*. With only one inconclusive paragraph of their opinion[3] devoted to evidence of direct manufacturer-to-manufacturer communications, the majority's finding of a horizontal agreement rests precariously on evidence that certain manufacturers asked TRU for assurances that other manufacturers would not renege on a commitment that they had made, not to one another, but *to TRU*.

Given the tension between the vertical and horizontal theories in this case, it is not surprising that the proof of the horizontal case is weak. Consider the vertical story: TRU was the toy retailing leviathan without whose business many manufacturers could not survive. TRU's very indispensability gave each toy manufacturer every incentive--every *unilateral* incentive--to knuckle under to TRU's demands regarding the clubs.[4]

On the other hand, consider the thrust of the horizontal case: that TRU coordinated an agreement among the toy manufacturers to restrict their supply of toys to the clubs. Without convincing evidence of an agreement among the manufacturers, the majority opinion relies on the premise that such an agreement was necessary to execute TRU's scheme. This conclusion disregards the ample reasons that each capitulating manufacturer, *acting on its own*, had to obey TRU. TRU's hammerlock on the manufacturers made a horizontal agreement among the manufacturers simply unnecessary.[5]

The majority places considerable weight on individual manufacturers' efforts to learn from TRU what their competitors might do about TRU's club policy. It seems natural, however, for any manufacturer contemplating a commitment to TRU -- *i.e.*, a vertical agreement -- to want to know its competitors' likely responses to TRU's demands. It seems equally reasonable to expect TRU to try to soothe an apprehensive manufacturer with reassurances about what other manufacturers will do. TRU's efforts to reassure manufacturers that they were on "a level playing field"[6] are

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[2] I recognize, of course, that direct evidence to prove a boycott can be hard to come by, and the law permits us to establish an unlawful horizontal agreement circumstantially.

[3] Slip op. at 33.

[4] *See id.* at 6, 70 *et seq.* for the majority's discussion of TRU's importance as a purchaser from the major toy manufacturers.

[5] My colleagues also assert that TRU's "'club policy' was squarely *contrary* to the independently determined business interests of the toy manufacturers." *Id.* at 57. That is true only if one disregards the great pressure that TRU brought to bear on the manufacturers -- pressure that derived from any rational manufacturer's weighing of the clubs' tiny position in the market against TRU's overwhelming presence. Once the club policy was in place, TRU's formidable power in the toy market clearly made compliance with the policy in each manufacturer's *individual* self-interest.

[6] *Id.* at 31.

consistent with a purely vertical interpretation -- that TRU was trying to coax reluctant manufacturers into agreements *with it*. TRU had to offer "bait" to induce a manufacturer to agree *with TRU* about the club policy, and that "bait" was a comfort level about what other manufacturers would do. The opinion does not convincingly reject the vertical explanation for what occurred.[7]

The majority also says that "the record shows that a uniform, joint reaction to TRU's policy was a necessary element of each manu-facturer's decision to restrict sales to the clubs. Each was simply unwilling to go forward with the proposed policy alone."[8] But in the context of this case, a manufacturer's unwillingness to go forward alone simply indicates its need -- before entering a vertical agreement with TRU -- to ascertain whether TRU planned to apply the same policy to other manufacturers. It does not necessarily show that that manufacturer reached any horizontal understanding with its competitors.

Moreover, the majority implies that each conspiring manufacturer was intent on achieving a uniform response *among all manufacturers*, rather than just among its direct competitors. A toy train probably does not compete with a Barbie doll, and a Barbie probably does not compete with toys for two-year-olds. As my colleagues seem to recognize,[9] a manufacturer of infants' and toddlers' toys is likely to be largely indifferent to whether a manufacturer of older children's toys abides by TRU's policy, and thus a manufacturer is unlikely to care whether toy producers in general arrive at "a uniform, joint reaction to TRU's policy." It taxes credulity to assert that "a uniform, joint reaction" was vital from each manufacturer's perspective.

Other evidence further undermines the theory of a horizontal boycott involving the manufacturers. For instance, when certain manufacturers went back on their commitment to TRU and sold product to the clubs

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[7] Other portions of the majority opinion suffer from similar problems. A Mattel document [ ] does not necessarily prove that Mattel entered into an agreement with any of its competitors. The quoted statement could just as well simply mean that Mattel conditioned acceding to TRU's demands on an understanding that Mattel's competitors would not sell to clubs. Further discussion in the text (*id.* at 31 *et seq.*) shows that TRU ably played manufacturers off against one another but does not necessarily prove that the manufacturers agreed among themselves on a course of action. [ ] Footnote 30 discusses various manufacturers' efforts to monitor what their competitors were doing about the clubs -- efforts that one would expect the manufacturers to undertake in contemplation of bowing to TRU's pressure, irrespective of whether they formed a horizontal agreement.

The opinion's observation that "the toy manufacturers did not adopt the 'club policy' until they knew or had been assured of the others' responses" (*id.* at 62) shows consciously parallel, but not necessarily collusive, behavior. If a manufacturer, *acting alone*, wants the comfort of knowing that TRU is applying the same rule to all manufacturers, then naturally the manufacturer will balk at adopting the club policy until TRU gives it the desired reassurance.

[8] *Id.* at 29.

[9] *Id.* at 2-3.

behind TRU's back, TRU tried to bring these wayward firms back into line with the club policy. If there really was a horizontal agreement to boycott the clubs, why was so much prodding and cajoling on TRU's part necessary to secure obedience? The answer is that the commitments all ran vertically, not horizontally. The glue that held TRU's scheme together was each manufacturer's individual decision not to cross its most important customer's interests.

A recent appellate decision helps illustrate the problems with the majority's finding of a horizontal conspiracy. In *Rossi v. Standard Roofing, Inc.*, No. 97-5185, 1998 U.S. App. LEXIS 21911 (3d Cir. Sept. 9, 1998) -- cited at several points in my colleagues' opinion -- the court of appeals considered plaintiff roofing distributor's allegations that it was the victim of a boycott organized by its direct competitors (and including certain manufacturers of roofing materials). The court of appeals determined that Rossi had presented sufficient evidence against two of its horizontal competitors (Standard Roofing and Arzee Roofing Supply) and against manufacturer GAF Corporation to survive those defendants' motions for summary judgment.

The evidence of horizontal conspiracy in *Rossi* stands in stark contrast to the evidence in the present case. Rossi was a price-cutting distributor who earned the enmity of its direct competitors, including Standard and Arzee. Standard and Arzee instigated and orchestrated the boycott, including persuading key supplier GAF to withhold product from Rossi. The court of appeals describes in detail the substantial proof that Standard and Arzee agreed *between themselves* to design a plan that would remove Rossi as a threat to their pricing equilibrium and prevailed upon GAF to go along with their plan.

In contrast, the evidence against TRU and the toy manufacturers on the horizontal issue is much less substantial. The prime mover behind any plot against the club stores was unmistakably TRU *acting alone*, rather than (as in *Rossi*) the victims' direct competitors acting in concert. *Rossi* would be a good model for finding a horizontal agreement in the present case if, for example, we had evidence that TRU conspired with Wal-Mart, Target, or other retailers to deprive the clubs of desirable toys. But that is not this case. Instead, we have good evidence that toy manufacturers capitulated one-by-one to TRU's threats and pressure, and we have essentially no evidence that the manufacturers reached an agreement among themselves. The inquiries and reassurances between TRU and the toy manufacturers, on which so much of the majority's horizontal conclusion rests, do not suffice to plug this evidentiary gap.

In summary, I agree with my colleagues' condemnation of the vertical restraints in this case. Further, I do not take issue with the principal thrust of the majority's legal analysis. I am simply unable to find a horizontal

boycott on the basis of this evidence. The gaps and ambiguities in the record require that I dissent from the conclusion that TRU orchestrated an anticompetitive horizontal agreement.

IN THE MATTER OF

FAIR ALLOCATION SYSTEM, INC.

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

Docket C-3832. Complaint, Oct. 22, 1998--Decision, Oct. 22, 1998

This consent order prohibits, among other things, the Montana-based association of franchised automobile dealerships from participating in, suggesting, encouraging, or assisting any boycott or threatened boycott of, or refusal to deal with, any automobile manufacturer or consumer. In addition, the consent order requires the respondent to amend its by-laws to incorporate the provisions of this order and to distribute copies of the amended by-laws to each of its members.

Participants

For the Commission: *Shane Woods, Charles Harwood, William Baer, William Layher,* and *Jonathan Baker.*

For the respondent: *R. J. Sewell, Smith Law Firm*, Helena, MT.

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 Fair Allocation System, Inc. (hereafter "respondent") has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Fair Allocation System, Inc. is an incorporated association of franchised automobile dealerships (primarily Chrysler, Plymouth, Dodge, Jeep and Eagle), existing and doing business under and by virtue of the laws of the State of Montana, with a mailing address at P.O. Box 1691, Helena, Montana.

PAR. 2. Respondent was formed by its member dealers as an entity through which its members could communicate with Chrysler Corp. ("Chrysler") concerning Chrysler policies and how those policies might affect respondent's members. Respondent's members were initially concerned about the practices of a competing dealer

whose low prices and Internet advertising were attracting car buyers from a broad geographic area and taking sales from respondent's members. Respondent's members had previously asked Chrysler to reduce the number of vehicles it allocates to this dealer, but Chrysler had refused. Respondent has approximately 25 members, who are generally engaged in the retail sale of new Chrysler, Plymouth, Dodge, Jeep and Eagle automobiles. In addition to new car sales, respondent's members provide service on Chrysler, Plymouth, Dodge, Jeep and Eagle automobiles, including warranty work. Member dealerships are located principally in eastern Washington, northern Idaho and western Montana, where they constitute a substantial percentage of the Chrysler, Plymouth, Dodge, Jeep and Eagle dealerships. In cities and towns along Interstate 90 between Ellensburg, Washington, and Missoula, Montana, for example, seven of 11 such dealerships are members of respondent. Except to the extent that competition has been restrained as alleged herein, respondent's members have been and are now in competition among themselves and with other automobile dealerships.

PAR. 3. Respondent's acts and practices, including the acts and practices alleged herein, are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. Respondent is organized for the purpose of guarding and fostering the interests of its members. Respondent engages in activities that further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. Respondent has been and is acting, or has attempted to act, in agreement, combination or conspiracy with some of its members to restrain trade in the sale of new Chrysler, Plymouth, Dodge, Jeep and Eagle automobiles by threatening to boycott particular models and limit warranty service to particular customers unless Chrysler modifies its system for allocating vehicles to its dealers. Instead of allocating vehicles based on each dealer's total sales volume, as Chrysler does now, respondent demanded that Chrysler allocate vehicles based on each dealer's sales volume from within its local area.

PAR. 6. The purposes or effects of respondent's agreement, combination or conspiracy, or attempted agreement, combination or conspiracy, as described in paragraph five, have been and are, or would be, to restrain competition unreasonably and to deprive consumers of the benefits of competition in one or more of the following ways, among others:

A. By foreclosing, reducing and restraining competition among automobile dealers, including Chrysler, Plymouth, Dodge, Jeep and Eagle dealers;

B. By depriving consumers of local access to particular models of new Chrysler, Dodge, Plymouth, Jeep and Eagle automobiles; and

C. By depriving consumers of local access to warranty work on their Chrysler, Plymouth, Dodge, Jeep or Eagle automobiles.

PAR. 7. The aforesaid acts and practices herein alleged were and are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of respondent Fair Allocation System, Inc. ("FAS"), 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 the respondent with violation of the Federal Trade Commission Act; and

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

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

1. FAS is an incorporated association of franchised automobile dealerships (primarily Chrysler, Plymouth, Dodge, Jeep and Eagle), organized, existing and doing business under and by virtue of the laws of the State of Montana, and has a mailing address at P.O. Box 1691, Helena, Montana.

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*" or "*FAS*" means Fair Allocation System, Inc., its officers, directors, employees, agents and representatives, successors, and assigns, its subsidiaries, divisions, groups and affiliates controlled by FAS, and the respective officers, directors, employees, agents and representatives, successors, and assigns of each.

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

II.

It is further ordered, That respondent, directly or indirectly, or through any person or any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from carrying out, participating in, inducing, suggesting, urging, encouraging, or assisting any boycott or threatened boycott of, or concerted refusal to deal or threatened concerted refusal to deal with, any automobile manufacturer or consumer.

III.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute by first-class mail a copy of this order and the complaint to each of its members;

B. Within sixty (60) days after the date this order becomes final, amend its by-laws to incorporate by reference paragraph II of this order, and distribute by first-class mail a copy of the amended by-laws to each of its members;

C. For a period of ten (10) years after the date this order becomes final, provide each new member with a copy of this order, the complaint, and the amended by-laws within thirty (30) days of the new member's admission to FAS; and

D. Within sixty (60) days after the date this order becomes final, and annually thereafter for a period of ten (10) years on the anniversary of the date this order becomes final, file with the Secretary of the Commission a verified written report setting forth in detail the manner and form in which FAS has complied with and is complying with this order.

IV.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any change in respondent, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in FAS that may affect compliance obligations arising out of this order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

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

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

VI.

It is further ordered, That this order shall terminate on October 22, 2018.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

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

Docket C-3833. Complaint, Oct. 30, 1998--Decision, Oct. 30, 1998

This consent order, among other things, requires Exxon to sell its viscosity index improver (an essential motor oil additive) business to Chevron Chemical Company or another Commission-approved buyer.

Participants

For the Commission: *Philip Eisenstat, Joseph Krauss, William Baer, Leslie Farber,* and *Jonathan Baker.*

For the respondents: *Robert Paul, White & Case*, Washington, D.C. and *Jim Egan, Rogers & Wells*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents Exxon Corporation, The Shell Petroleum Company Limited, and Shell Oil Company, all corporations subject to the jurisdiction of the Commission, have agreed to form a joint venture, in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. THE RESPONDENTS

1. Respondent Exxon Corporation ("Exxon") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, having its principal offices at 5959 Las Colinas Boulevard, Irving, Texas.

2. Respondent The Shell Petroleum Company Limited is a corporation organized, existing and doing business under and by virtue of the laws of England, having its principal offices at Shell Centre, London SE1 7NA, England.

3. Respondent Shell Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, having its principal offices at One Shell Plaza, Houston, Texas.

II. JURISDICTION

4. At all times relevant here, respondents have been, and are now, corporations as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. 44; and at all times relevant herein, the respondents have been, and are now, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and in Section 4 of the FTC Act, 15 U.S.C. 44.

III. THE PROPOSED JOINT VENTURE

5. On or about July 10, 1996, Exxon Chemical Company, a division of Exxon, The Shell Petroleum Company Limited, and Shell Oil Company announced an intention to form a joint venture to own and operate the businesses of Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company, engaged in the development, manufacture, marketing and sale of additives used in the production of fuels and lubricants (the "Joint Venture"). The value of the businesses to be combined in the Joint Venture is around $1.5 billion.

IV. THE RELEVANT MARKETS

A. Relevant Product Market

6. The development, manufacture, marketing and sale of viscosity index improver or viscosity modifiers for motor oil for automobiles and trucks ("VI improver") is the relevant line of commerce within which to analyze the competitive effects of the proposed acquisition.

7. VI improvers are synthetic rubber compounds, either polymers or styrenics, that are blended with refined oil to enhance the viscosity properties of the oil for use in motor oil.

8. The viscosity of a fluid is its internal resistance to flow. The higher the viscosity, the more resistance to flow. Lubricating oils must have enough viscosity to maintain a film of the proper thickness on the surfaces that they are intended to protect. Temperatures affect the viscosity of oil, higher temperatures lowering the viscosity. Motor oil, which is used to lubricate the interior of an engine, must

have sufficient viscosity to adhere to the internal surfaces of the engine even after the engine gets hot and reduces the oil's viscosity. At the same time, motor oil must have low enough viscosity to flow through the engine when the engine is cold, particularly in winter weather.

9. Refined oil by itself does not have both the needed high viscosity when the engine is warm and the low viscosity when the engine is cold. An oil with low viscosity which will flow well at low temperatures will lack the required viscosity to protect the engine at high temperatures. An oil with a high viscosity which will protect the engine at high temperatures will not flow well at low temperatures. The "viscosity index" of an oil is the relationship between the viscosity of the oil at two different temperatures, one low and one high. The higher the viscosity index, the smaller the relative change in viscosity with temperature. VI improvers are added to refined oil by companies that blend and market motor oil to give the resulting motor oil more consistent viscosity across changes in temperature and increase the viscosity index.

10. Consumers rely on motor oil containing VI improver to protect their car engines. There are no economic substitutes for VI improver.

11. Exxon Chemical Company and The Shell Petroleum Company Limited and Shell Oil Company develop, manufacture, market, and sell VI improver.

B. Relevant Geographic Market

12. The relevant geographic area in which to analyze the effects of the Joint Venture in the relevant line of commerce is North America.

13. Automobile and truck engine manufacturers, oil companies that produce motor oil, and companies that produce chemical additives to enhance the performance of motor oil jointly develop industry standards for the minimum performance of motor oil. These industry standards vary in different parts of the world. The VI improver marketed in North America is designed so that when combined with motor oil and other chemical additives, the motor oil will meet industry minimum standards for North America. VI improver marketed in other parts of the world may not allow motor oil to meet the minimum industry standards for North America.

14. The relatively low value to weight ratio of VI improver makes it generally uneconomic to transport VI improver from other parts of the world to North America for use in motor oil.

V. MARKET STRUCTURE

15. As measured by current sales to customers in North America, the relevant market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index (or "HHI") or by two-firm or four-firm concentration ratios. Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company collectively account for over one-half of the sales of VI improver for use in motor oil in North America. The proposed Joint Venture, if consummated, would significantly increase the HHIs in an already highly concentrated market.

VI. ENTRY CONDITIONS

16. Entry into the development, manufacture, marketing, and sale of VI improver requires more than two years. Entry into the VI improver market is difficult and would not be timely to prevent anticompetitive effects in the relevant markets.

17. The development of a VI improver that will enable motor oil to meet the applicable industry standards is very difficult and time consuming. It takes over two years to develop a marketable VI improver product.

18. The economies of scale in the manufacturing of synthetic rubbers of the type that can be used for VI improver require a manufacturing facility that is much larger than is needed to compete in the VI improver market. A new entrant into the market for VI improver must either build a plant for the production of synthetic rubber many times the size that is needed to compete in the VI improver market and simultaneously enter other markets to market the remaining production of the plant, or find an existing supplier of synthetic rubbers who will provide a supply of synthetic rubber of the design needed to make VI improver. Many of the current producers of VI improver have exclusive supply arrangements with suppliers of synthetic rubber to manufacture the synthetic rubber that the producer of the VI improver uses.

19. Building a new manufacturing facility for the production of synthetic rubber of the type that can be used in the production of VI improver is time consuming. It would take over two years to build a new synthetic rubber facility. There are few, if any, producers of

synthetic rubber of the types that can be used for VI improver that do not already have an exclusive supply arrangement with a producer of VI improver that precludes that producer of synthetic rubber from supplying another VI improver producer.

VII. ACTUAL COMPETITION

20. Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company are actual competitors in the relevant lines of commerce in the relevant area.

VIII. EFFECTS OF THE PROPOSED MERGER ON COMPETITION

21. The effect of the Joint Venture, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

A. By eliminating actual, direct, and substantial competition between Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company in the relevant markets;

B. By increasing the likelihood of or facilitating collusion or coordinated interaction between the Joint Venture and the remaining competitors;

C. By increasing the likelihood that customers of VI improver would be forced to pay higher prices; and

D. By reducing innovation, quality, service, and product availability in the relevant markets.

IX. VIOLATIONS CHARGED

22. The proposed formation of a joint venture by Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company violates Section 5 of the FTC Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed formation of a joint venture between Exxon Chemical Company, a division of Exxon Corporation, The Shell Petroleum Company Limited and Shell Oil Company, hereinafter sometimes referred to as the "respondents," and having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that 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, 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 Exxon Corporation is a corporation organized and existing under the laws of the State of New Jersey, having its principal offices at 5959 Las Colinas Boulevard, Irving, Texas.

2. Respondent The Shell Petroleum Company Limited is a corporation organized under the laws of England, having its principal offices at Shell Centre, London SE1 7NA, England.

3. Respondent Shell Oil Company is a corporation organized and existing under the laws of the State of Delaware, having its principal offices at One Shell Plaza, Houston, Texas.

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

A. "*Exxon Corporation*" means Exxon Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Exxon Corporation, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each. For purposes of this order, Exxon Corporation does not include the Joint Venture (as defined below).

B. "*The Shell Petroleum Company Limited*" means The Shell Petroleum Company Limited, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by The Shell Petroleum Company Limited, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Shell Oil Company*" means Shell Oil Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Shell Oil Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "*Respondents*" means Exxon Corporation, The Shell Petroleum Company Limited, and Shell Oil Company, individually and collectively.

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

F. "*Chevron*" means Chevron Chemical Company LLC, a subsidiary of Chevron Oil Company. Chevron is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 6001 Bollinger Canyon Road, San Ramon, California.

G. "*Chevron Agreement*" means the *Purchase and Sale Agreement By And Between Chevron Chemical Company LLC, As Purchaser, And Exxon Chemical Company, A Division Of Exxon Corporation, As Seller, Regarding The Crankcase OCP VII Business of ECC's Paramins Division*, dated May 14, 1998.

H. "*Assets Identified in the Chevron Agreement*" means the assets that Exxon Chemical Company, a division of Exxon Corporation, has agreed to sell, and Chevron has agreed to buy, as embodied in the Chevron Agreement.

I. "*Vistalon*" means the business unit of Exxon Chemical Company whose principal business is the design, manufacture, marketing, and sale of polymers, including, among other products, OCP Polymer for Viscosity Index Improver Applications.

J. "*Joint Venture*" means the joint venture or ventures to be formed between Exxon Corporation, The Shell Petroleum Company Limited and Shell Oil Company pursuant to the *Additives Joint Venture Agreement Among Exxon Chemical Company, A Division of Exxon Corporation, the Shell Petroleum Company Limited, and Shell Oil Company*, dated May 15, 1998.

K. "*Consummation of the Joint Venture*" means the earlier of (1) the closing date of the Joint Venture in the United States or (2) the commencement of joint manufacturing by the Joint Venture anywhere in the world.

L. "Viscosity Index Improver" means products made from polymers or styrenics, including olefin co-polymers, that are added to lubricants, including motor oils, to modify the impact of changes in temperature on the viscosity of the lubricants.

M. "*OCP-based Viscosity Index Improver*" means Viscosity Index Improver products for crankcase applications that are made from olefin co-polymers (OCP).

N. "*OCP Polymer for Viscosity Index Improver Applications*" means commercially viable grades of olefin co-polymer manufactured by Vistalon, a business unit of Exxon Chemical Company, a division of Exxon Corporation, which have utility in Viscosity Index Improvers, including, without limitation, current grades of olefin co-polymers designated Vistalon grades 457, 785, 703, 878P, and 878, MDV 91-9, and Exxelor grades 8900 and 8950.

O. "*Paramins*" means the business unit of Exxon Chemical Company, whose principal business is in the design, manufacture,

marketing, and sale of fuel and lubricant additive products, including without limitation, Viscosity Index Improvers.

P. "*Paratone*" means the OCP-based Viscosity Index Improvers designed, manufactured, marketed and sold by Paramins.

Q. "*Non-public Information*" means material proprietary commercial or technical information related to Chevron's Oronite Division, Vistalon products for OCP-based Viscosity Index Improvers, OCP-based Viscosity Index Improvers, or OCP Polymer for Viscosity Index Improver Applications. Non-public Information does not include: (1) information that falls within the public domain through no violation of this order by any respondent, (2) information to be retained by Exxon Corporation or to be transferred to the Joint Venture as permitted by the Chevron Agreement, (3) the residual knowledge of former Paramins employees who become employees of the Joint Venture, or (4) information relating to OCP polymer to the extent the polymer is used for applications other than Viscosity Index Improver.

R. "*Chevron's Oronite Division*" means the division of Chevron Chemical Company LLC that manufactures and markets lubricant additives worldwide, with principal offices in Houston, Paris, and Singapore.

S. "*Viscosity Index Improver Business*" means Exxon Corporation's business of developing and selling OCP-based Viscosity Index Improvers, and includes all assets used by Paramins in the research, development, manufacturing, marketing and sale of OCP-based Viscosity Index Improvers in North America and Europe, regardless of where the assets are located in the world, and regardless of whether included in the Chevron Agreement, including, without limitation, the following:

1. All trademarks, including the Paratone trademark, brand names, customer lists, vendor lists, catalogs, sales promotion literature, and advertising materials;

2. All research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

3. All inventory of raw materials and finished goods;

4. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with

associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees to the extent that they apply to the Viscosity Index Improver Business;

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

6. All books, records, files;

7. All items of prepaid expense; and

8. A supply of OCP Polymer for Viscosity Index Improver Applications on commercially reasonable terms;

provided that the Viscosity Index Improver Business shall not include (1) any manufacturing facilities owned and operated by either Vistalon or Paramins or (2) Paramins Lube Oil Flow Improver ("Paraflow") and stabilizer ("Parabar") products.

II.

It is further ordered, That:

A. Exxon Corporation shall divest, within 6 months from the signing of this Agreement, absolutely and in good faith, either:

1. The Assets Identified in the Chevron Agreement, to Chevron, in accordance with the Chevron Agreement, prior to the Consummation of the Joint Venture; or

2. The Viscosity Index Improver Business to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, prior to the Consummation of the Joint Venture.

The Joint Venture may be consummated upon the closing of the Chevron Agreement in the United States and in Europe.

B. Pending divestiture of the Viscosity Index Improver Business, Exxon Corporation shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Viscosity Index Improver Business and to prevent the destruction, removal, wasting, deterioration, or impairment of any assets or business of the Viscosity Index Improver Business except for ordinary wear and tear.

C. In the event that the Commission notifies respondents that Chevron is not an acceptable acquirer or that the Chevron Agreement is not an acceptable manner of divestiture, Exxon Corporation must

rescind the Chevron transaction as provided in paragraph ten of this Agreement, and shall:

1. Divest the Assets Identified in the Chevron Agreement to Chevron in a manner approved by the Commission;

2. Divest the Viscosity Index Improver Business to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; or

3. Abandon Consummation of the Joint Venture pursuant to paragraph VIII.B.

D. In the event that the Commission notifies respondents that Chevron is not an acceptable acquirer or that the Chevron Agreement is not an acceptable manner of divestiture, and the respondents consummate the Joint Venture, Exxon Corporation shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as Exxon Corporation has divested all the Viscosity Index Improver Business as required by this order or until such other time as the Agreement to Hold Separate provides.

E. If Exxon Corporation complies with its obligations under this part by selling the assets identified in the Chevron Agreement to Chevron, Exxon Corporation shall comply with all the terms of the Chevron Agreement, including all the ancillary agreements thereto. Respondents shall assure that the Joint Venture complies with the ancillary agreements that purport to bind the Joint Venture.

F. Except as permitted pursuant to the Chevron Agreement or the agreement between Exxon Corporation and the acquirer of the Viscosity Index Improver Business, as approved by the Commission, Exxon shall not sell OCP Polymer for Viscosity Index Improver Applications to other customers including the Joint Venture.

III.

It is further ordered, That:

A. If Exxon Corporation has not divested, absolutely and in good faith and with the Commission's prior approval, the Viscosity Index Improver Business within 6 months of the signing of this Agreement, then the Commission may appoint a trustee to divest the Viscosity Index Improver Business. The trustee shall have all rights and powers

necessary to permit the trustee to effect the divestiture of the Viscosity Index Improver Business and to divest such ancillary assets, and to effect such arrangements, as necessary to assure the viability, competitiveness, and marketability of the Viscosity Index Improver Business so as to expeditiously accomplish the remedial purposes of this order. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Exxon Corporation shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute enforced by the Commission, for any failure by any of the respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, Exxon Corporation shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Exxon Corporation, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Exxon Corporation has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Exxon Corporation of the identity of any proposed trustee, Exxon Corporation shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Viscosity Index Improver Business, and shall have the power to divest such ancillary assets, and to effect such arrangements, as necessary to assure the viability, competitiveness, and marketability of the Viscosity Index Improver Business so as to expeditiously accomplish the divestiture required by this order.

3. Within ten (10) days after appointment of the trustee, Exxon Corporation shall execute a trust agreement that, subject to the prior approval of the Commission (and, in the case of a court-appointed

trustee, of the court), transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission (or, in the case of a court-appointed trustee, by the court) for an additional period not to exceed twelve (12) months; provided, however, the Commission may extend this period for no more than two (2) additional periods.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Viscosity Index Improver Business, or to any other relevant information, as the trustee may request. Exxon Corporation shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph III in an amount equal to the delay, as determined by the Commission (or, in the case of a court-appointed trustee, by the court).

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Exxon Corporation's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner, and to the acquirer or acquirers, as set out in paragraph II.A.2 of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission approves more than one such acquiring entity, then the trustee shall divest to the acquiring entity or entities selected by Exxon Corporation from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Exxon Corporation, on such reasonable and customary terms and conditions as the Commission or a court may

set. The trustee shall have the authority to employ, at the cost and expense of Exxon Corporation, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission (and, in the case of a court-appointed trustee, by the court), of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Exxon Corporation and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's accomplishing the divestiture required by this order.

8. Exxon Corporation shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, recklessness, willful or wanton acts, or bad faith by the trustee.

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

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

11. In the event that the trustee determines that he or she is unable to divest the Viscosity Index Improver Business in a manner consistent with the Commission's purpose as described in paragraph II, the trustee may divest additional ancillary assets of Exxon Corporation and effect such arrangements as are necessary to satisfy the requirements of this order.

12. The trustee shall have no obligation or authority to operate or maintain the Viscosity Index Improver Business.

13. The trustee shall report in writing to Exxon Corporation and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the divestiture.

IV.

It is further ordered, That:

A. Exxon Corporation shall not provide, disclose, or otherwise make available to The Shell Petroleum Company Limited, Shell Oil Company, or the Joint Venture, any Non-public Information.

B. Exxon Corporation shall use any Non-public Information only for the purpose of fulfilling its obligations to supply current and future OCP Polymer for Viscosity Index Improver Applications to the Viscosity Index Improver Business, to Chevron under the Chevron Agreement, or to a purchaser of the Viscosity Index Improver Business; provided that such information may be used internally by Exxon Corporation for analyzing the business performance of Vistalon.

C. The Shell Petroleum Company Limited and Shell Oil Company shall not seek, obtain, or use, directly or indirectly, through the Joint Venture or otherwise, any Non-public Information that originates with Vistalon, Chevron, or the acquirer of the Viscosity Index Improver Business.

Provided that nothing in this order shall prohibit the Joint Venture, Chevron and its successors and assigns, or the acquirer of the Viscosity Index Improver Business and its successors and assigns, from selling Viscosity Index Improver to respondents' finished oil manufacturing and marketing business units, or from exchanging information, as is necessary for such sales, with those business units regarding respondents' use of such viscosity index improver products.

Provided further that nothing in this order shall prohibit Exxon Corporation from selling OCP Polymer for Viscosity Index Improver Applications pursuant to paragraph II.F.

V.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every thirty (30) days thereafter until the divestiture has occurred, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondents intend to comply, are complying, and have complied with their individual obligations, if any, under paragraphs II, III, and IV of this order. Respondents shall include in their compliance reports, among other things that are required from

time to time, a full description of the efforts being made to comply with their individual obligations, if any, under paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties that have contacted respondents or that have been contacted by respondents. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

VI.

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

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representatives of the Commission:

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

B. Upon five (5) days' notice to respondents, and without restraint or interference, to interview officers, employees, or agents of respondents.

VIII.

It is further ordered, That this order shall terminate upon the earliest of:

A. October 30, 2018;

B. Thirty (30) days after respondents (a) abandon the Consummation of the Joint Venture, (b) gives the Commission written notification that respondents have abandoned the Consummation of

the Joint Venture, and (c) withdraw their notification under 16 CFR 803.1 with respect to the Joint Venture; or

C. At any time following ten (10) years after the date on which the order becomes final if Chevron or the purchaser of the Viscosity Index Improver Business has ceased its purchases of OCP Polymer for Viscosity Index Improver from Exxon Corporation.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate Agreement") is by and between Exxon Corporation ("Exxon"), a corporation organized, existing, and doing business under and by virtue of the laws of New Jersey, having its principal offices at 5959 Las Colinas Boulevard, Irving, Texas, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on July 10, 1996, Exxon Chemical Company, a division of Exxon Corporation, The Shell Petroleum Company Limited, and Shell Oil Company announced an intention to form a joint venture to own and operate the businesses of Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company engaged in the development, manufacture, and sale of additives used in the production of fuels and lubricants (the "Joint Venture"); and

Whereas, the Commission is now investigating the formation of the Joint Venture to determine whether it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order, which would require the divestiture of either the Assets Identified in the Chevron Agreement to Chevron or the Viscosity Index Improver Business, the Commission must place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if Exxon Corporation does not sell the Assets Identified in the Chevron Agreement to Chevron, and that if an understanding is not reached, preserving the

status quo ante of the Viscosity Index Improver Business as defined in paragraph I of the Consent Order during the period prior to the final acceptance and issuance of the Consent Order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Joint Venture might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Joint Venture is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Viscosity Index Improver Business, as described in paragraph I of the Consent Order, and the Commission's right to have the Viscosity Index Improver Business continue as a viable competitor independent of the Joint Venture; and

Whereas, if pending a divestiture acceptable to the Commission, it is necessary to hold separate the Viscosity Index Improver Business to protect interim competition pending divestiture or other relief; and

Whereas, the purpose of the Hold Separate Agreement and the Consent Order is to:

1. Preserve, pending a divestiture acceptable to the Commission, the Viscosity Index Improver Business as an ongoing, viable, competitive, and independent entity engaged in the same business in which it is presently engaged;

2. Prevent interim harm to competition pending divestiture and other relief; and

3. Remedy any anticompetitive effects of the formation of the Joint Venture; and

Whereas, Exxon Corporation's entering into this Hold Separate Agreement shall in no way be construed as an admission by Exxon Corporation that the formation of the Joint Venture is illegal; and

Whereas, Exxon Corporation understands that no act or transaction contemplated by this Hold Separate Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Hold Separate Agreement.

Now, therefore, upon the understanding that the Commission has not yet determined whether the formation of the Joint Venture will be challenged, and in consideration of the Commission's agreement that at the time it accepts the Consent Order for public comment it will

grant early termination of the Hart-Scott-Rodino waiting period, Exxon Corporation agrees as follows:

1. Exxon Corporation agrees to execute and be bound by the attached Consent Order.

2. Exxon Corporation agrees that from the date Exxon Corporation, The Shell Petroleum Company Limited and Shell Oil Company consummate the Joint Venture ("Acquisition Date"), Exxon Corporation and the Viscosity Index Improver Business each will comply with the provisions of this Agreement until the day after the divestiture required by the Consent Order has been completed.

3. Exxon Corporation agrees to execute and be bound by the attached Consent Order and to comply, from the date this Hold Separate Agreement is accepted by the Commission for public comment, with the provisions of the Consent Order as if it were final.

4. The terms capitalized herein shall have the same definitions as in the Consent Order.

5. To assure the complete independence and viability of the Viscosity Index Improver Business, and to assure that no Material Confidential Information ("Material Confidential Information," as used herein, means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.) is exchanged between the Viscosity Index Improver Business and Exxon Corporation, The Shell Petroleum Company Limited, Shell Oil Company, or the Joint Venture, Exxon Corporation shall hold the Viscosity Index Improver Business separate and apart on the following terms and conditions:

a. The Viscosity Index Improver Business shall be held separate and apart and shall be managed and operated independently of Exxon Corporation (meaning here and hereinafter, Exxon Corporation and the Joint Venture, excluding the Viscosity Index Improver Business), except to the extent that Exxon Corporation must exercise direction and control over such assets to assure compliance with this Hold Separate Agreement or the Consent Order, and except as otherwise provided in this Hold Separate Agreement.

b. Exxon Corporation will appoint, prior to the Consummation of the Joint Venture, an individual to manage and maintain the Viscosity Index Improver Business who will make no changes to the Viscosity Index Improver Business other than changes in the ordinary course of business. This individual ("Manager") shall manage the Viscosity Index Improver Business independently of the management of Exxon Corporation's other businesses. The Manager shall not be involved in any way in the operations or management of any other Exxon Corporation business.

c. The Manager shall have exclusive control over the Viscosity Index Improver Business with responsibility for the management of the Viscosity Index Improver Business and for maintaining the independence of that business.

d. Exxon Corporation shall not exercise direction or control over, or influence directly or indirectly the Manager relating to the operation of the Viscosity Index Improver Business; provided, however, that Exxon Corporation may exercise only such direction and control over the Manager and the Viscosity Index Improver Business as is necessary to assure compliance with this Hold Separate Agreement and with all applicable laws.

e. Exxon Corporation shall maintain the marketability, viability, and competitiveness of the Viscosity Index Improver Business, and shall not sell, transfer, encumber it (other than in the normal course of business or to assure compliance with the Consent Agreement), or otherwise impair its marketability, viability or competitiveness.

f. Exxon Corporation shall continue to provide the same support services to the Viscosity Index Improver Business as are being provided to such assets by Exxon Corporation as of the date this Hold Separate Agreement is signed by Exxon Corporation.

g. Except for the Manager, employees of the Viscosity Index Improver Business, and support service employees involved in the Viscosity Index Improver Business, such as Human Resources, Legal, Tax, Accounting, Insurance, and Internal Audit employees, Exxon Corporation shall not permit any other Exxon Corporation employee, officer, or director to be involved in the management of the Viscosity Index Improver

Business. Employees of the Viscosity Index Improver Business shall not be involved in any other Exxon Corporation business.

h. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Joint Venture, defending investigations or litigation, or negotiating agreements to divest the Viscosity Index Improver Business, Exxon Corporation, other than employees of the Viscosity Index Improver Business, or support services employees involved in the Viscosity Index Improver Business, shall not receive or have access to, or the use of, Non-public Viscosity Index Improver Business information or any Material Confidential Information about the Viscosity Index Improver Business or the activities of the Manager or support service employees involved in the Viscosity Index Improver Business, not in the public domain.

i. Exxon Corporation shall circulate to all of its Vistalon and Paramins employees involved in the Viscosity Index Improver Business, and appropriately display, a copy of this Hold Separate Agreement and Consent Agreement.

j. If the Manager ceases to act or fails to act diligently and consistently with the purposes of this Hold Separate Agreement, Exxon Corporation shall appoint a substitute Manager.

k. Exxon Corporation shall require the Manager to sign a confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his or her role as the Manager to anyone other than the Commission or, as required in managing the Viscosity Index Improver Business, to the Viscosity Index Improver Business' employees, customers, or suppliers.

l. The Manager shall report in writing to the Commission every thirty (30) days concerning his or her efforts to accomplish the purposes of this Hold Separate Agreement.

6. Should the Commission seek in any proceeding to compel Exxon Corporation to divest any of the Viscosity Index Improver Business, as provided in the Consent Order, or seek any other injunctive or equitable relief for any failure to comply with the Consent Order or this Hold Separate Agreement, or in any way relating to the Joint Venture, as defined in the draft complaint, Exxon

Corporation shall not raise any objection based upon the fact that the Commission has permitted the Consummation of the Joint Venture. Exxon Corporation also waives all rights to contest the validity of this Hold Separate Agreement.

7. To the extent that this Hold Separate Agreement requires Exxon Corporation to take, or prohibits Exxon Corporation from taking, certain actions that otherwise may be required or prohibited by contract, Exxon Corporation shall abide by the terms of this Hold Separate Agreement or the Consent Order and shall not assert as a defense such contract requirements in a civil action brought by the Commission to enforce the terms of this Hold Separate Agreement or Consent Order.

8. For the purposes of determining or securing compliance with this Hold Separate Agreement, and subject to any legally recognized privilege, and upon written request with reasonable notice to Exxon Corporation made to its principal office, Exxon Corporation shall permit any duly authorized representatives of the Commission:

a. During the office hours of Exxon Corporation, and in the presence of counsel, access to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Exxon Corporation relating to compliance with this Agreement; and
b. Upon five (5) days' notice to Exxon Corporation and without restraint or interference from it, to interview officers or employees of Exxon Corporation, who may have counsel present, regarding any such matters.

9. This Hold Separate Agreement shall not be binding on the Commission until it is approved by the Commission.

IN THE MATTER OF

KALVIN P. SCHMIDT

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

Docket C-3834. Complaint, Nov. 3, 1998--Decision, Nov. 3, 1998

This consent order, among other things, prohibits a Minnesota resident, that promoted and distributed computer software and pyramid marketing programs, from participating in any chain letter schemes, pyramid sales schemes or ponzi schemes, and from assisting or providing others with the means to participate in these prohibited schemes.

Participants

For the Commission: *Tara Flynn.*

For the respondent: *Thomas Hagen, Patton, Hoversten & Berg,* Waseca, MN.

COMPLAINT

The Federal Trade Commission, having reason to believe that Kalvin P. Schmidt, individually, and doing business as DKS Enterprises, DS Productions, DES Enterprises, www.mkt-america.com, and www.mkt-usa.com ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Kalvin P. Schmidt is a Minnesota resident who does business as DKS Enterprises, DS Productions, DES Enterprises, www.mkt-america.com, and www.mkt-usa.com. He conducts his business activities out of his home, 911 3rd Street, N.W., Waseca, Minnesota.

2. At all times relevant to this complaint, respondent has promoted, offered for sale, sold, and distributed via the Internet and U.S. Mail, computer software, and computer disks containing the software, designed to perpetuate chain or pyramid marketing programs, such as Mega$Nets and MegaResource.

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.

MEGA$NETS and MEGARESOURCE

4. Since July 1997 or earlier, respondent has induced consumers to participate in Mega$Nets and MegaResource, two chain or pyramid marketing programs. Respondent promises consumers that by participating in these programs they can earn substantial profits. Respondent promotes the Mega$Nets and MegaResource programs on web sites, such as www.mkt-america.com, and in unsolicited electronic mail he sends or causes to be sent via the Internet.

5. Consumers who visit one of respondent's web sites can download copies of software programs that form the basis of the Mega$Nets and MegaResource chain or pyramid marketing programs. Contained within the Mega$Nets software program is a list of five (5) names and addresses. The software program and web sites direct a consumer to send twenty dollars to each of five people listed in the software in order for the consumer to get his or her name placed at the top of the list of names. According to the respondent, upon receiving the money, the five people on the list will send "access codes" to the consumer. These "access codes" then allow the consumer to "unlock" the software, delete the last name on the list, and insert his or her name on the top of the list.

6. The Mega$Nets software program and the respondent's promotional materials instruct the consumer who follows this procedure to perpetuate the scheme by providing the software to others for free. To help the consumer provide the software to others for free, respondent, in his materials, urges the consumer to duplicate the software containing the consumer's name onto disks and then to distribute these disks through the mails. Respondent also urges the consumer to make the software available at a web site that the respondent creates and hosts for the consumer, and that is almost identical to the respondent's own web site. Moreover, respondent encourages the consumer to send unsolicited electronic mail to other persons, referring these persons to the consumer's Mega$Nets web site.

7. MegaResource operates similarly to Mega$Nets. Consumers can download a copy of the MegaResource software from one of the respondent's web sites. When a consumer sends twenty dollars to each of six persons on the list contained in the MegaResource software, the consumer receives "access codes" which "unlock" information contained in the software. The software purportedly

contains information relating to marketing, such as lists of newspapers in which to advertise. Once all the information in the software is "unlocked," a consumer can place his or her name on the list contained in the MegaResource software and duplicate the software for distribution.

8. Respondent leases computer server space from a third party and "hosts" the Mega$Nets and MegaResource web sites he creates for others on this server space -- *i.e.*, the computer files for the web sites are physically located on the computer hard drive of the third party from whom the respondent leases the space.

9. Respondent also composed and sent or caused to be sent hundreds of thousands of unsolicited electronic mail messages via the Internet to consumers directing them to web sites promoting the Mega$Nets and MegaResource programs. These web sites promoting Mega$Nets and MegaResource contained the statements alleged in paragraph 10, below.

10. Respondent has disseminated or has caused to be disseminated advertisements for the Mega$Nets and MegaResource programs, including, but not necessarily limited to, the attached Exhibits A-C. The respondent's web sites contain the following representations:

A. "Mega$Nets is an easy to use yet sophisticated software program to help the average person get in on the fabulous profits being made in the computer networking age. . . . The potential for you to receive a tremendous income within a remarkably short period of time is to [sic] good to refuse!" (Exhibit A).

B. "The potential earnings so far could total $15,000!" (Exhibit B)

C. "The Multiplier Effect
HERE IT BECOMES AWESOME! Your next payment in the 4th position could be $20 times 3125 which is $62,500. Add that to your previous $15,000, and the grand total is $77,500. When the fifth and final position is reached, your name disappears from future duplicated disks. By then your TOTAL INCOME COULD BE $312,500!!" (Exhibit B)

D. "We know people who are making money with MegaResource. Imagine what you can do wirth [sic] an extra $20 or $200 or $2,000 per month -- everyone can use extra money!!" (Exhibit C)

11. Respondent has also created, designed, and disseminated World Wide Web sites for others to promote Mega$Nets and Mega-Resource. These sites contain the Mega$Nets and MegaResource software programs. A Mega$Nets web site designed by the respondent states:

FREE!! FREE!! FREE!! Get a **FREE** webpage just like this one. Just be one of the first 25 people to take advantage of our **MEGA$NETS** program. We will personalize a site for you.... for **FREE!!** (Exhibit A)

A MegaResource web site designed by the respondent states:

"Thanks for visiting the MEGARESOURCE webpage. We are making money -- the EASY WAY!! If you have any questions ..... Please contact me ASAP - We are listed as your agent on your disk you can download for FREE HERE

Email us HERE to reserve your FREE webpage, like this one, and the ability to give out FREE webpages to anyone you want to." (Exhibit C)

FALSE AND UNSUBSTANTIATED EARNINGS CLAIMS

12. Through the means described in paragraphs 4-11, respondents have represented, expressly or by implication, that all or virtually all consumers who participate in the Mega$Nets and MegaResource programs earn substantial amounts of money.

13. In truth and in fact, most consumers who participate in the Mega$Nets and MegaResource programs do not earn substantial amounts of money. Therefore, the representation set forth in paragraph 12 was, and is, false or misleading.

14. Through the means described in paragraphs 4-11, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph 12, at the time the representation was made.

15. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph 12, at the time the representation was made. Therefore, the representation set forth in paragraph 14 was, and is, false or misleading.

MEANS AND INSTRUMENTALITIES

16. By creating and designing for others web sites containing copies of the Mega$Nets and MegaResource software programs, hosting these web sites on the server he leases, and composing and sending unsolicited electronic mail messages to consumers directing them to these web sites promoting Mega$Nets and MegaResource, respondent provided the means and instrumentalities to others, and thereby acted in concert with others or knowingly and substantially assisted others, to engage in the deceptive acts or practices alleged in

paragraphs 4-14, above, in violation of Section 5(a) of the Federal Trade Commission Act.

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

Exhibit A

EXHIBIT A

$Nets Home Page http://www.mkt-america.com/mega/

Visitors have decided to change their Financial Future....$$$FREE$$$

Mega$Nets

BR>*The* FREE! *Software that Pays You Money!*

FREE !! FREE !! FREE!!

Get a **FREE** webpage just like this one. Just be one of the first 25 people to take advantage of our ***MEGA$NETS*** program. We will personalize a site for you....for **FREE!!** If you are one of these first 25 people - you will also receive 25 **FREE** webpages to give away to your first 25 people too – *WOW!!* This will assure total and maximim duplication. Email me HERE to reserve your spot and check the availability of the *"Top 25"* spots. HURRY - Reserve your spot NOW!

MEGA$NETS Step-by-Step Instructions from our Autoresponder HERE

If you Weren't Born Rich,

Didn't Marry Money,

Haven't Won The Lottery...

Here's How To Make It On Your Own!

You are now reading information on an important home-based business concept of the next century! This is a networking breakthrough of enormous proportions! And it is here now and ready to help you earn the kind of income you deserve!

Mega$Nets combines 3 of the most powerful income opportunities of our time ...

- Computers
- Mail Order
- Network Marketing

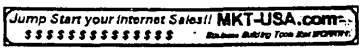
Together, they offer you a home-based business you can work full or part-time. Mega$Nets is an easy to use yet sophisticated software program to help the average person get in on the fabulous profits being made in the computer networking age.

Most of us know that the future is in computers. An estimated 150,000 new people are getting on the INTERNET each WEEK! MEGA-PROFITS will be earned with computers whether you and I are involved or not. So why not get involved NOW? The IBM compatible Mega$Nets software disk normally costs $20 to receive, but for a limited time we are offering the disk for FREE! The potential for you to receive a tremendous income within a remarkably short period of time is to good to refuse! Please

EXHIBIT A

click on the buttons below for more detailed information.

MEGA$NETS Step-by-Step Instructions from our Autoresponder HERE



Welcome to MKT-AMERICA.com

Webspace for immediate rent - Email us HERE

EXHIBIT B

;aSNets Home Page http://www.equishare.com/

Mega$Nets

The FREE! Software that Pays You Money!

If you Weren't Born Rich,

Didn't Marry Money,

Haven't Won The Lottery...

Here's How To Make It On Your Own!

You are now reading information on an important home-based business concept of the next century! This is a networking breakthrough of enormous proportions! And it is here now and ready to help you earn the kind of income you deserve!

Mega$Nets combines 3 of the most powerful income opportunities of our time ... computers, mail order and network marketing. Together, they offer you a home-based business you can work full or part-time. Mega$Nets is an easy to use yet sophisticated software program to help the average person get in on the fabulous profits being made in the computer networking age.

Most of us know that the future is in computers. An estimated 150,000 new people are getting on the INTERNET each month! MEGA-PROFITS will be earned with computers whether you and I are involved or not. So why not get involved NOW? The IBM compatible Mega$Nets software disk normally costs $20 to receive, but for a limited time we are offering the disk for FREE! The potential for you to receive a tremendous income within a remarkably short period of time is to good to refuse! Please click on the buttons below for more detailed information.

How It Works | More Info | Download Now | Feedback

(5)

Exhibit B

08/01/97 15:55:27

EXHIBIT B

Mega$Nets

How it Works!

Here's How it Works

You receive the MEGA$NETS software for FREE (normally you are charged $20 for this) from the person sharing this opportunity with you. Load it into your PC. You will be impressed with the professional appearance of the software and how easy it is to operate! The menu includes access to a complete set of instructions. You also receive separate written and step-by-step instructions, so you do not even need to be familiar with computers!

$ Step 1. The computer will ask you to type in your own name and address. Be sure this information is correct. Once you click to the next screen, your information will be permanently locked into the program. No one can remove it!

$ Step 2. Next you will see the names and addresses of 5 vendors on your screen. Now move to the next screen and click on "Purchase Orders". Your printer will automatically produce a separate Purchase Order for each of those 5 vendors. Simply mail the orders, enclosing a money order for $20 with each. In return for your order and payment, the 5 vendors will each send you a different code number. Your total expenditure is $100; $0 for your original disk and $100 (5 x $20) for your codes.

$ Step 3. Enter these codes into the computer program where it tells you to do so, and now you are able to make copies of your disk. You cannot make copies without these 5 codes. The program will not let you.

$ Step 4. Once you enter the 5 codes, you can now duplicate the disk and sell each duplicated disk to other people who own or have access to a compatible PC. They will want to buy because of the profit potential they too will have! Selling is not difficult. Just show them a copy of the Mega$Nets Software or flyer!

What do buyers do?

When your customers load your duplicated disk, they will be instructed to do the same as you. They will purchase the computer codes they need to unlock their program (just like you did) and begin to duplicate the disk, as many times as they wish!

Before they duplicate, your name and address will have automatically been added into the system as an additional code vendor and one name will have been deleted. This is no different than removing a name from your rolodex. One name is added, one is removed.

EXHIBIT B

aSNets - How it Works http://www.equishare.com/works.html

Back To MegaSNets Home Page

Mega$Nets

Detailed Information

Money Maker

If you sell a minimum of 5 disks for $20 each, you will have back your original $100. (Except for the cost of some blank disks, envelopes and stamps, you're even). If those 5 people sell 5, each one of those 25 disks will list your name and address as a code vendor. 25 people will now send you $20 each along with Purchase Orders generated by their disk (total potential $500). All you do is enter the Purchase Order information into your program and your computer will automatically print out the codes they have purchased from you. (This takes about 30 seconds). Mail the codes to your customers right away! Remember, the sooner they get their codes, the sooner your name will be duplicated again and again!

Now, when those 25 people sell to 5 people each your name will automatically move to the next position on the screen. As one of the five code vendors, 125 people (25 x 5) will each be sending you $20 for your code (which they must have to let them make copies they can sell). That's $2,500 to add to your first $500 . . . which adds up to $3,000 so far. And that's only the start! If the 125 people sell to 5 others each, and your name moves to the 3rd position on everyone's screen, potentially 625 people will be sending you $20 . . .which is $12,500 PLUS the $2,500 you received earlier. The potential earnings so far could total $15,000!

The Multiplier Effect

HERE IT BECOMES AWESOME! Your next payment in the 4th position could be $20 times 3125, which is $62,500. Add that to your previous $15,000,and the grand total is $77,500. When the fifth and final position is reached, your name disappears from future duplicated disks. By then your TOTAL INCOME COULD BE $312,500!!

Do not forget, people must send you $20; otherwise, you will not send them their code. You cannot make up a code. The code they are buying from you is generated by your computer program. Without the code, people CANNOT duplicate their disk. The design of the software will not let them. Also, they cannot generate their own codes. The system is tamper proof; so there is no way people can "break in" without the codes they receive from the 5 people shown on their screen.

You may be asking, "If 5 people sell to 5 people, and those people sell to 5 others and so on, it will not be long before we run out of people. If you earn a half million dollars as a MEGA$NETS computer code vendor, your duplicated and reduplicated disks will have only reached 15,625 people. That's not many when you consider there are millions of people who own or have access to computers in this country alone. That's not even considering the number of computer users there are on a global scale!

Computer Code Vendor

Let's take a minute and truly understand what this business is all about. First of all, it is not an investment. You are purchasing a product; a computer software program with a 100% money back guarantee. Next, you can buy codes that will unlock the program so you can make duplicate disks and sell them. Soon. customers will be requesting codes from you. You become a vendor. You have something your customers need. That's real sales! That's real business! Isn't that what American businesses do every day of the week? Don't they get paid for selling someone a product, a service or just some information?

EXHIBIT B

You don't even have to own a computer!

MEGA$NETS is your entry into the profitable world of computer software mail order! Although it is much easier, you do not have to own a computer to get started. If you don't have access to a computer, there is a popular chain of copy and print stores in most areas offering rental time on their computers for pennies a minute. (You can always buy a computer later with any earnings, right)? The great thing about MEGA$NETS is the program is so "user friendly" most school age children can run it with ease.

Getting Started

For free you will receive the Mega$Nets software on either a 3.5" disk which we mail to you or e-mail or simply download it from this site . Your computer should have at least a 3.5" disk drive (usually known as "A" drive) and of course your hard drive (or "C" drive). Any printer will suffice providing it will print plain text (not PostScript). The easiest way you to "get the ball rolling" and sell 5 disks (which must be your first goal) is to hand out copies of this flyer to people you know who have computers and are interested in starting their own business. Personal contacts are always the most effective and have little or no costs connected with them. But keep in mind, as in any sales business, never promise anyone they will earn a specific income. You can only project potential income as no one knows what anyone else can earn. It's an individual effort.

Can you sell more than 5 Disks?

YES! MEGA$NETS allows you to make as many disks as you wish. The 5 codes you buy have in effect "licensed" you to duplicate as many disks as you want. Need more income? Sell more disks. It is your business. You own the software. You're the BOSS! Remember, if you sell 5 disks and everyone else does the same, you could eventually handle 15,625 MEGA$NETS Purchase Orders in which you send the code they need. MEGA$NETS software makes everything easy for you. It prints out all the codes in a Sales Receipt format with addresses positioned for window envelopes, so you don't even need to type envelopes. Similarly, when you first order your own 5 codes at the start, MEGA$NETS automatically prints out the 5 Purchase Orders with your name and address on them, plus the name and address to whom you are sending it.

No One Can Cheat You!

That's right, it's impossible to cheat MEGA$NETS software. And why would anyone want to try? No names and addresses can be erased to put in the names of "friends", and the software is programmed to generate constantly changing codes that cannot be "guessed". Without the correct codes, nothing works. You are a true computer software vendor and provider of valuable computer information codes that only you can provide for your customers.

The MEGA$NETS Business Systems disk was developed by a professional commercial computer programmer. It looks professional and works professionally. (Some of today's best whiz-kids have tried to a break the system and failed). In addition, MEGA$NETS checks itself for viruses. If it finds any modifications, it will simply refuse to run, so your system is fully protected without damaging your files. The distribution process is similarly safeguarded. By holding a duplicate of the software within itself, MEGA$NETS makes absolutely sure that each copy is the same as the original, but with your personalized information added to it.

Your very own legal Computer Software Company

As we have seen. MEGA$NETS is like any other legal information-driven company. First, you sell the software program which includes valuable marketing information your customers can use for any business. Secondly, as an information vendor, you will be selling valuable computer codes to your

EXHIBIT B

customers. Thirdly, you will be developing a mailing list out of your customers that can help you in promoting other income opportunities you may want to offer. Huge multi-billion dollar worldwide companies do this every hour of the day. MEGA$NETS is no different. We just use network marketing to get the job done. Plus, there are no meetings to attend and no corporate headquarters or hot-shot executives who can change the plan or grab your earnings.

In effect, you are the owner and CEO of your own computer software network marketing company! All you have to do now is purchase your disk and you are on your way to an earnings potential that could bring you It financial independence! Just be ready to handle the volume! You are now in the computer software mail order business. Treat this like a real business and it can earn you the income of a real business! MEGA-INCOME!

Don't Wait. Do It NOW!!!

Back To Mega$Nets Home Page

EXHIBIT C

MegaResource

The Professional Approach....beats the rest "hands down"

The 21st Century way to Financial Freedom

THE  ***Money-Making Software***

Quick

Download

Look at this.....

- *It is NOT an MLM company that may or may not survive.*
- NO monthly purchases, inventory or applications to fill out
- NO sales volume to accumulative, or computer glitches.
- NO matrix to fill or binary to balance.
- NO pre-launch hype or meetings to attend.
- NO waiting to get paid.
- NO company to share your bonuses and commissions with.
- NO preordained pay periods.
- NO company to change policy and procedures midstream.
- NO company to go bankrupt, change their compensation plan, raise the price of their products, hold your commission checks.

- *Unlike the "rest" - we have real products that are useful for everyone*
- We have a "failsafe" method to deliver codes to unlock disks if anyone drops out or disappears
- MegaResource is updated regularly through a website download - no more outdated information or programs
- You can chose just to purchase the information or you can chose to become a distributer and retail products
- *Everyone gets a FREE webpage like this to*
- This is a professional system with live contacts - available for Windows environments
- START TODAY!!

YOU ARE THE SOFTWARE COMPANY!

ANYONE... ANY COUNTRY can participate!

NO U.S. address is required!

You are in the Direct Sales business for *YOURSELF*. You get to *manufacture unique* computer software in a Windows platform and retail products if you chose. It is very sophisticated, yet very *USER FRIENDLY*. The software is extremely EASY to operate and has an *impressive graphic interface and provides complete turnkey* business management support. It performs *ALL* the paperwork for your business complete with Purchase Orders and Sales Receipts. You will have an immaculate paper trail on your business.

You are investing in *YOURSELF* and you earn 100% (not 10%) of the profits.

People are receiving a real product and real value for their dollar - No purchase is required to view the MegaResource system

You don't need to have a computer to do this, just access to one. You don't have to be in business to do this! However if you are, you'll find no better way to promote your program, product or service.

Exhibit C

EXHIBIT C

This Software Disk has a huge information library built in with hudreds of dollars of useful information PLUS MegaResource creates Thousand of *LEADS* for your Primary program. It doesn't compete with any other program ...it enhances and compliments it! And the added Bonus is that you will also have Orders in your mailbox *EVERY DAY*, because Each of the mulituces of Qualified Leads generated by this Software System **PAYS YOU** to send them the info about your Networking program and to provide the valueable information contained on this disk.

HERE'S HOW IT WORKS:

MegaResource is a business that distributes computer software and information. The Author hereby freely offers and agrees to its sale and reproduction through your business. The price for the software is nothing. You have therefore been granted complete copyright and reproduction rights to duplicate and distribute disks.

Everything you need to get started is right here on this page. You hold in your hands the network marketing concept of the next century! This is a networking breakthrough of enormous proportions! It's ready to go and in simple terms, is no different to any other mail order business.

You have NOTHING TO LOSE by checking this out. Download the FREE software below and see for yourself.

Have some FUN! See all the exciting information that will be available - SEE for yourself what MegaResource holds for you and why people are flocking to get this valuable software.

Download the FREE MegaResource software .... and while you are it, fill out the form and join us in this tremendous program.....see if it's for you.

The software will prompt you to type in your own name and address. Be sure this information is correct. Once you click to the next screen, your information will be permanently locked into the program. No one can remove it!

Check out all the different areas and if you decide to get invovived - follow the easy and fast instrcutions to get started ASAP.

HOW MUCH MONEY CAN I MAKE?

As with any program - any earnings are soley dependent upon your efforts and contacts. We never make income claims - but we know many people who are making money with MegaResource. Imagine what you can do witrh an extra $20 or $200 or $2,000 per month - everyone can use extra money!!

YOU get paid directly for the information contained on this disk - people will be sending you money orders to access the valuable information on this disk. The NICE thing

Remember - YOU can sell as MANY disks as you want, at ANY time! Once you have purchased the information, it is YOURS FOREVER! YOU NEVER HAVE TO PAY AGAIN !

(NOTE: no income claims or figures are represented - any income is purely derived from your efforts)

To help you, here are some of the most frequently asked questions:

IS IT LEGAL?

YES?? ... You are setting up 2 genuine trading companies, both buying and selling services and products of value. The products are valuable and are in demand. You open up many helpful and exciting information resources. The software itself will help you by printing all the paperwork, orders and sales receipts. . It's just like paying a registration fee for shareware or

EXHIBIT C

paying for information that will help you.

CAN I CHEAT?

NO! MegaResource has constantly shifting codes and algorithms, encrypting the software and data from tampering. Tampering with the disk results in destruction of the program. There is NO WAY TO SWITCH NAMES. Without the correct codes, nothing works. You are a true Computer Software Vendor and provider of valuable Registration Codes that only YOU can provide for your customers. By holding a duplicate of the software within itself, each program requires registration codes generated from the individual program from which it was spawned.

WHAT ABOUT COMPUTER VIRUSES?

As with any download - we recommend having a Virus Protection Program to check each and every program. MegaResource has been designed to eliminate Virus's.

CAN YOU GIVE OUT MORE THAN 6 DISKS?

YES! MegaResource allows you to make as many disks as you wish. The codes you have in effect "licensed" you to duplicate as many disks as you want. Need more income? Give away more disks. It is your business. You own the software. You're the BOSS! MegaResource software makes everything easy for you. It prints out all the Codes in a Sales Receipt format with addresses positioned for window envelopes, so you don't even need to type envelopes. Similarly, when you first order your own codes at the start, MegaResource automatically prints out the Purchase Orders with your name and address on them, plus the name and address to whom you are sending it. I recommend building at least 10 people wide for starters. The information products are real.

PROGRAM SUMMARY

This program works exactly like every other computer software company. You are generating and selling a software program which is also a valuable lead generation program your customers can use for any business PLUS a valuable information resource product. You also provide Registration Codes to your customers. You will also be developing a marketing list of customers to help you in promoting other income opportunities. Huge multi-billion dollar companies do this every day. This program is no different. It is a unique opportunity to do what the big boys have done for years. Sell software and include flyers for other products. This time the Money Orders come straight to YOU and not through ANYONE else! You don't merely get a "commission"... You get the Whole amount directly before you deliver product.

This is a complete Business on a Disk.

MegaResource is a simple sales and information based business. The program produces all the "paper work" you'll ever need to use. Simple Purchase Orders and product delivery tickets... NO records to keep. It EVEN puts the addresses on the orders so you can use window envelopes and not have to address them!

Your very own Computer Software Mail Order Company and Information products. Effectively a "business on a disk".

Plus, there are no meetings to attend and no corporate headquarters or hot-shot executives who can change the plan or grab your earnings.

You could promote your favorite humanitarian or fund raising cause or charity. You can even use MegaResource ITSELF AS A FUND RAISER... using the MegaResource response system to include information about the charity or cause to thousands of people WHO WILL NOT ONLY SOON HAVE A LOT OF MONEY TO SPEND (and possibly contribute) ... but the cause or charity itself could reap a SUBSTANTIAL FINANCIAL REWARDS as a direct result of distributing the software and information products.

MegaResource combines 4 of the most powerful income opportunities of our time ... COMPUTERS, MAIL ORDER, INFORMATION RESOURCES, and NETWORKING.

EXHIBIT C

The launch of this revolutionary business is right NOW!! This means you are at the very top of a new computer networking mail order business that is going international! And there are no meetings to attend and the whole process takes very little time or expense. MegaResource is Brand new within the last few weeks.

It does not matter what company you are in, everyone needs leads, and EVERYONE will take CASH DAILY over checks on occasion! It is WORKING RIGHT NOW!!!

There is no company to mess this up. Everyone who participates BECOMES THE COMPANY. That is powerful in itself! You are selling a information product and service.

OPEN TO ANYONE AND EVERYONE WORLD-WIDE!

This computerized system ensures that YOU or ANYONE can restart the plan at ANY time, thus avoiding the normal chain of events that makes just a few at the top of the plan extremely rich at the expense of everyone else. Profits are returned directly in line with effort. People will always need information and this business information is in demand.

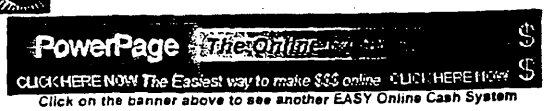
Remember also that helping your customers ACTUALLY SPEEDS UP the rate at which YOU RECEIVE MONEY! The disk you provide to your customer has YOUR details in the AGENTS box and YOU become a vendor when THEY sell the disk to someone else.

Take control of the situation NOW! You have nothing to lose and everything to gain by downloading the FREE software NOW!

Thanks for visiting the MEGARESOURCE webpage. We are making money - the EASY WAY!! If you have any questions .....Please contact me ASAP - We are listed as your agent on the disk you can download for FREE HERE

Email us HERE to reserve your FREE webpage, like this one, and the ability to give out FREE webpages to anyone you want to.

Download the FREE disk here and check it out - what have you got to lose??



Click on the banner above to see another EASY Online Cash System

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, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent for purposes of the order of all the jurisdictional facts set forth in the aforesaid draft 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 respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Kalvin P. Schmidt is a Minnesota resident who does business as DKS Enterprises, DS Productions, DES Enterprises, www.mkt-america.com, and www.mkt-usa.com. He conducts his business activities out of his home, 911 3rd Street, N.W., Waseca, 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

DEFINITIONS

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

1. "*Prohibited Marketing Program*" means a pyramid sales scheme, ponzi scheme, chain marketing scheme, or other marketing plan or program in which a person who participates makes a payment and receives the right, license or opportunity to derive income as a participant primarily from: (i) the recruitment of additional recruits by the participant, program promoter or others; (ii) sales made to or by such recruits or their recruits; or (iii) any other payments made by recruits. A "Prohibited Marketing Program" does not include a marketing plan or program in which the program promoter demonstrates that it has instituted and enforced rules that have the actual effect of insuring that a participant derives income primarily from the sale of goods or services to persons who do not recruit participants into the program.

For purposes of this order, the phrase "goods or services" does not include a membership or opportunity to participate in a sales or marketing program, or access codes or numbers which allow participation in a sales or marketing program.

2. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in

print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. Unless otherwise specified, "*respondent*" shall mean Kalvin P. Schmidt, individually and doing business as DKS Enterprises, DS Productions, DES Enterprises, www.mkt-america.com, and www.mkt-usa.com; and, his agents, representatives, and employees.

4. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, shall cease and desist from engaging, participating, or assisting in any manner or capacity whatsoever in any Prohibited Marketing Program.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any marketing plan or program, or with the promotion, offering for sale, sale or distribution of any good or service, shall not:

A. Represent, expressly or by implication:

1. The income, profits, or sales volume that has been achieved by participants in any marketing program or purchasers of any good or service;

2. The income, profits, or sales volume that may be achieved by participants in any marketing program or purchasers of any good or service; or

3. Any other fact material to a consumer's decision to participate in such marketing plan or program or purchase such good or service

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

B. Make any representation in any manner, expressly or by implication, of specific earnings, profits or sales volume that have been achieved or may be achieved by participants in any marketing program or purchasers or any good or service without also clearly and prominently disclosing (1) the number of persons who earned at least the amount represented, and (2) the percentage of total participants or purchasers who earned at least the amount represented.

III.

It is further ordered, That respondent Kalvin P. Schmidt, in connection with any business owned or controlled, in whole or in part, by him, for five (5) years after the date of issuance of this order, shall maintain and upon request make available to the Federal Trade Commission, for inspection and copying, business records demonstrating his compliance with the terms and provisions of this order, including:

A. All advertisements and promotional materials containing representations concerning actual or possible earnings by participants in any marketing plan or program or by purchasers of any good or service;

B. All materials that were relied upon in disseminating representations concerning actual or possible earnings by participants in any marketing plan or program or by purchasers of any good or service;

C. The income, disbursements, transactions, and use of money by any such business;

D. The name, address, telephone number, and social security number of each person employed by any such business in any capacity;

E. The name, address, and telephone number of each person whom respondent has recruited to participate in any marketing plan or program, or to whom respondent has sold any good or service;

F. All complaints and other communications between respondent and any consumer or any governmental or consumer protection organization; and

G. All documents relating in any way to any conduct subject to this final order.

IV.

It is further ordered, That respondent Kalvin P. Schmidt shall deliver a copy of this order to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

It is further ordered, That respondent Kalvin P. Schmidt, for a period of seven (7) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

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

VII.

This order will terminate on November 3, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

IN THE MATTER OF

EMERSON ELECTRIC CO., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3291. Consent Order, June 22, 1990–Set Aside Order, Nov. 4, 1998

This order reopens a 1990 consent order -- which required the respondents to divest McGill Manufacturing Company's mounted ball bearing business to a Commission approved acquirer -- and sets aside the prior approval provision and related reporting requirements of the order pursuant to the Commission's Prior Approval Policy Statement.

ORDER SETTING ASIDE ORDER

On July 24, 1998, Emerson Electric Co. and its wholly-owned subsidiary Emerson Power Transmission Corp. (collectively "Emerson"), the respondents named in the above-referenced consent order ("Order") issued by the Commission on June 22, 1990, filed its Petition to Reopen and Modify Consent Order ("Petition") in this matter. Emerson asks 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 Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").[1] The Petition requests that the Commission reopen and modify the Order to eliminate the prior approval provision and related reporting requirements set forth in paragraph IX of the Order. The thirty-day public comment period on the Petition ended on September 24, 1998. No comments were received. For the reasons discussed below, the Commission has determined to grant Emerson's Petition.

The Complaint in this matter alleges that Emerson's agreement with McGill Manufacturing Co., Inc. ("McGill") to acquire substantially all of McGill's voting securities violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, by lessening

[1] 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

competition and tending to create a monopoly in the production and distribution of mounted ball bearings in the United States.[2]

The Order required Emerson to divest McGill's Mounted Ball Bearings Business, as defined in paragraph I.F of the Order.[3] On June 14, 1991, the Commission approved Emerson's application to divest McGill's Mounted Ball Bearings Business to VMB, Inc., an affiliate of The Brenlin Group. Under the Order, Emerson is prohibited for a ten-year period from acquiring, without the prior approval of the Commission, more than 1% of the stock or share capital of, or interest in, any concern engaged in the manufacture or sale of mounted ball bearings in the United States; or from acquiring, except in the ordinary course of business, any assets used in any company engaged in the manufacture or sale of mounted ball bearings in the United States.[4]

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.[5] 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."[6]

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

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2 Complaint ¶¶ II-V.

3 Order ¶¶ I.F and II.

4 Order ¶ IX.

5 Prior Approval Policy Statement at 2.

6 *Id.*

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."[7] 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 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."[8] 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.[9]

The presumption is that setting aside the general prior approval requirement of paragraph IX is in the public interest. There is no evidence in the record that suggests that this matter presents any of the circumstances identified by the Prior Approval Policy Statement as appropriate for retaining a narrow prior approval provision, nor is there any indication of the circumstances that would warrant the substitution of a prior notice provision for the prior approval provision. There is nothing to suggest that the respondent would attempt the same or essentially the same merger that gave rise to the original complaint. In addition, it appears likely that future mergers within the relevant market would be HSR reportable. Emerson completed the divestiture required by the Order. Nothing to overcome the presumption having been presented, and because the only remaining obligation under the Order is the prior approval

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[7] *Id.* at 3.

[8] *Id.* at 4.

[9] *Id.*

requirement in paragraph IX and the attendant reporting requirements, the Commission has determined to reopen the proceeding in Docket No. C-3291 and set aside the Order.

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the Commission's order issued on June 22, 1990, be, and it hereby is, set aside as of the effective date of this order.

IN THE MATTER OF

COMMONWEALTH LAND TITLE INSURANCE COMPANY

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

Docket C-3835. Complaint, Nov. 10, 1998--Decision, Nov. 10, 1998

This consent order requires, among other things, Commonwealth Land Title Insurance Company, a Pennsylvania-based corporation, to relocate its operations and to maintain them as a fully functional title plant in competition with First American Title Insurance Company. In addition, the consent order requires that Commonwealth, for ten years, provide prior notice to the Commission before it merges, combines or consolidates its operations with any other title plant serving the District of Columbia.

Participants

For the Commission: *Patrick Roach, Michael Antalics, William Baer, John Simpson,* and *Jonathan Baker.*

For the respondent: *John Graybeal, Parker, Poe, Adams & Bernstein*, Raleigh, N.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent Commonwealth Land Title Insurance Company ("Commonwealth"), a corporation subject to the jurisdiction of the Commission, has engaged in certain conduct that constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and of Section 7 of the Clayton Act, as amended (15 U.S.C. 18); and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act, (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

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

a. "*Respondent*" or "*Commonwealth*" means Commonwealth Land Title Insurance Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its direct and indirect parents, subsidiaries, divisions, groups and affiliates controlled by or under common control with Commonwealth Land Title Insurance Company, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

b. "*First American*" means First American Title Insurance Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its direct and indirect parents, subsidiaries, divisions, groups and affiliates controlled by or under common control with First American Title Insurance Company, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

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

d. "*Title plant*" means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

e. "*Title plant services*" means providing selected information contained in a title plant to a customer or user or permitting a customer or user to have access to information contained in a title plant.

f. "*Commonwealth Washington DC Title Plant*" means the title plant owned by Commonwealth containing information pertaining to real property in the District of Columbia, which was located prior to November 1997 at 1828 L Street, N.W., Washington, DC, including all updates of such information.

g. "*First American Washington DC Title Plant*" means the title plant owned by First American containing information pertaining to real property in the District of Columbia.

h. "*First American Capitol Hill Premises*" means the premises owned or leased by First American at or adjacent to 605 Pennsylvania Avenue, S.E., Washington, DC.

II. THE RESPONDENT

2. Commonwealth is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 1700 Market Street, Philadelphia, Pennsylvania.

3. Commonwealth is, and at all times relevant herein has been, a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

III. TRADE AND COMMERCE

4. The relevant market is the production and sale of title plant services in the District of Columbia. Title plant services are used by abstractors, title insurers, title insurance agents, and others to determine ownership of and interests in real property in connection with the underwriting and issuance of title insurance policies and for other purposes.

5. The relevant market is highly concentrated.

6. There are no commercially reasonable substitutes for title plant services in the relevant market.

7. Entry into the relevant markets is difficult or unlikely to occur at a sufficient scale to deter or counteract the effect of the conduct that is the basis of the complaint.

IV. THE CONDUCT AT ISSUE

8. At all times relevant herein, Commonwealth has been the owner of a title plant containing information pertaining to real property in the District of Columbia and has been engaged in providing title plant services for its own use and for customers and users including abstractors, title insurers and title insurance agents.

9. At all times relevant herein, First American has been the owner of a title plant containing information pertaining to real property in the District of Columbia and has been engaged in providing title plant services for its own use and for customers and users including abstractors, title insurers and title insurance agents.

10. Commonwealth and First American are direct competitors in the production and sale of title plant services in the District of Columbia. There exists no other privately-owned collection of title records for the District of Columbia that is comparable in

completeness, accuracy and ease of use to the title plants of Commonwealth and First American.

11. Beginning as early as 1996 and continuing in 1997, Commonwealth and First American engaged in discussions concerning the consolidation of their title plants in the District of Columbia. In September 1997, Commonwealth and First American executed a letter setting forth their understanding that they would consolidate their respective title plant operations at the First American Capitol Hill Premises. In late November 1997, Commonwealth relocated the Commonwealth Washington DC Title Plant to the First American Capitol Hill Premises, which was also the location of the First American Washington DC Title Plant.

12. Over a period of several months prior to the relocation of the Commonwealth Washington DC Title Plant to the First American Capitol Hill Premises, Commonwealth acted to terminate existing contracts with customers and users of its title plant. Customers and users of both Commonwealth and First American wishing to obtain title plant services after the relocation of the Commonwealth Washington DC Title Plant were required to execute a form "Interim Plant Use Agreement" setting prices, terms and conditions for such services and reciting that the title plant services were jointly provided by Commonwealth and First American pending formation of a joint title plant entity.

13. The prices, terms and conditions for title plant services set in the Interim Plant Use Agreement were the same for customers and users of both Commonwealth and First American. For many users, the price for title plant services was significantly higher under the Interim Plant Use Agreement than under their prior contracts for title plant services. The Interim Plant Use Agreement did not permit some forms of title plant access which had been available to customers and users under their prior contracts for title plant services. Customers and users began to be charged for title plant services under the terms of the Interim Plant Use Agreements beginning in early December 1997.

V. EFFECTS

14. By engaging in the conduct at issue Commonwealth and First American have acted to increase prices and restrict output in the relevant market.

15. The conduct at issue has had the effect of raising, fixing, and maintaining the price, terms and conditions of compensation paid for title plant services in the District of Columbia, in violation Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

16. As demonstrated by the actual effects of the conduct at issue in the relevant market, the effect of a consolidation of the Commonwealth Washington DC Title Plant and the First American Washington DC Title Plant described in paragraph 11, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between Commonwealth and First American in the relevant market; and

b. By increasing the likelihood that Commonwealth and First American, acting in concert, can exercise market power in the relevant market.

VI. VIOLATIONS CHARGED

17. The conduct at issue constitutes a combination, agreement, or understanding between competitors to raise, fix, and maintain the price, terms and conditions of compensation paid for title plant services in the District of Columbia, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

18. The consolidation of the Commonwealth Washington DC Title Plant and the First American Washington DC Title Plant described in paragraph 11, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent, Commonwealth Land Title Insurance Company ("Commonwealth"), a subsidiary of LandAmerica Financial Group, Inc. ("LandAmerica") (formerly known as Lawyers Title Corporation); and the respondent and LandAmerica 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 the respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent, LandAmerica and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent and LandAmerica 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 or LandAmerica that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Commonwealth is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 1700 Market Street, Philadelphia, Pennsylvania.

2. LandAmerica, formerly known as Lawyers Title Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its office and principal place of business located at 6630 West Broad Street, Richmond, Virginia. LandAmerica is the parent corporation of Commonwealth and has agreed to be bound by the order herein as the parent corporation of Commonwealth.

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

ORDER

I.

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

A. "*Respondent*" or "*Commonwealth*" means Commonwealth Land Title Insurance Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its direct and indirect parents, subsidiaries, divisions, groups and affiliates controlled by or under common control with Commonwealth Land Title Insurance Company, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. "*First American*" means First American Title Insurance Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its direct and indirect parents, subsidiaries, divisions, groups and affiliates controlled by or under common control with First American Title Insurance Company, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

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

D. "*Title plant*" means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

E. "*Title plant services*" means providing selected information contained in a title plant to a customer or user or permitting a customer or user to have access to information contained in a title plant.

F. "*Commonwealth Washington DC Title Plant*" means the title plant owned by Commonwealth containing information pertaining to real property in the District of Columbia, which was located prior to November 1997 at 1828 L Street, N.W., Washington, DC, including all updates of such information.

G. "*First American Washington DC Title Plant*" means the title plant owned by First American containing information pertaining to real property in the District of Columbia.

H. "*First American Capitol Hill Premises*" means the premises owned or leased by First American at or adjacent to 605 Pennsylvania Avenue, S.E., Washington, DC.

I. "*Interim Plant Use Agreement*" means an agreement entered into with any customer or user of the Commonwealth Washington DC Title Plant or the First American Washington DC Title Plant, pursuant to which Commonwealth and First American would jointly provide title plant services to such customer or user pending formation of a joint plant entity by Commonwealth and First American.

II.

It is further ordered, That:

A. Respondent shall, no later than the date the agreement containing consent order is signed by respondent, physically segregate all contents of the Commonwealth Washington DC Title Plant located at the First American Capitol Hill Premises from all contents of the First American Washington DC Title Plant.

B. Respondent shall, no later than thirty days after the date the agreement containing consent order is signed by respondent, relocate the Commonwealth Washington DC Title Plant to premises within the District of Columbia that are separate and distinct from the First American Washington DC Title Plant, the First American Capitol Hill Premises, and any other premises in which First American has any direct or indirect interest of any kind. Following such relocation respondent shall operate and maintain the Commonwealth Washington DC Title Plant as a fully functional title plant providing title plant services in competition with the First American Washington DC Title Plant.

C. Respondent shall, no later than the date the agreement containing consent order is signed by respondent, cause to be rescinded all Interim Plant Use Agreements and any other agreements under which respondent purported to or did provide title plant services in the District of Columbia jointly with First American, and shall cease and desist from claiming any right, title or interest pursuant to any such agreements.

D. Respondent shall, for a period of no less than one year after the agreement containing consent order is signed by respondent, provide title plant services in the District of Columbia to all customers or users of the Commonwealth Washington DC Title Plant on the most

recent prices, terms and conditions applicable to such customer or user prior to the relocation of the Commonwealth Washington DC Title Plant in November 1997 to the First American Capitol Hill Premises.

E. Respondent shall refund to all customers or users of the Commonwealth Washington DC Title Plant all amounts paid for title plant services provided during the period when the Commonwealth Washington DC Title Plant was located at the First American Capitol Hill Premises, to the extent such payments exceed the amount which would have been payable by each such customer or user under the most recent prior prices, terms and conditions applicable to such customer or user. Respondent shall conduct a review of its own files and all other relevant information available to it to determine to whom and in what amount such refunds are or may be payable and shall, no later than fourteen days after the agreement containing consent order is signed by respondent, pay the full amount of such refunds. Respondent, as part of its reports submitted pursuant to paragraph 6 of the agreement containing consent order and paragraph VI of this order, shall state each person or entity as to whom it has made a determination that such a refund is or is not payable, and the date and amount of any refund paid, and shall provide copies of all documents and all other information in its possession pertaining to payments by or amounts due from each such person or entity for title plant services provided during and for six months prior to the period when the Commonwealth Washington DC Title Plant was located at the First American Capitol Hill Premises. Respondent shall, no later than fourteen days after the agreement containing consent order is signed by respondent, notify in writing each customer or user of the Commonwealth Washington DC Title Plant of the availability of refunds and of the customer's or user's rights under this paragraph. In the event that the respondent shall receive (from the customer or user or from any other source) further evidence that a refund is payable under the terms of this paragraph, it shall pay such refund to any customer or user no later than seven days after receiving such evidence. In the event of any dispute between respondent and any customer or user concerning a refund pursuant to this paragraph, respondent shall immediately pay to the customer or user any portion of such refund that is not in dispute, and shall negotiate in good faith with the customer or user in an attempt to resolve the dispute. If the dispute is not resolved within fourteen days, respondent shall offer

the customer or user the option of referring such dispute to the Commission for resolution, whose determination shall be binding on Commonwealth.

III.

It is further ordered, That:

A. If respondent has not complied absolutely and in good faith with all of the requirements set forth in paragraph II, within three months from the date the agreement containing consent order is signed by respondent, the Commission may appoint a trustee to accomplish the required actions. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III. A of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to carry out the actions specified in paragraph II that have not been accomplished by the respondent.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior

approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to accomplish the actions required by this order.

4. The trustee shall have three (3) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the actions specified by paragraph II. If, however, at the end of the three-month period, the trustee has submitted a plan of action or believes that the required actions can be accomplished within a reasonable time, the period for accomplishing the required actions may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the properties specified in paragraph II and to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the required actions. Any delays in the required actions caused by respondent shall extend the time for accomplishing the required actions under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. To the extent consistent with the terms of paragraph II, the trustee shall use his or her best efforts to negotiate expeditiously the most favorable price and terms available in connection with each required action, subject to respondent's absolute and unconditional obligation to accomplish the required actions.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all expenses incurred and monies received in connection with the required actions. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for

his or her services, all amounts due to the trustee shall be paid by the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's promptly accomplishing the actions required by paragraph II.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the properties specified in paragraph II.

12. The trustee shall report in writing to respondent and the Commission every thirty (30) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That:

A. For a period of ten (10) years from the date this order becomes final, respondent shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, that has any direct or indirect ownership interest in a title plant serving the District of Columbia; or

2. Acquire any assets (other than in the ordinary course of business) or ownership interest in a title plant serving the District of Columbia; or

3. Sell or transfer any stock, share capital, equity or other interest in, or any assets of, the Commonwealth Washington DC Title Plant to any person or concern, corporate or non-corporate, that has any direct or indirect ownership interest in a title plant serving the District of Columbia; or

4. Merge, combine or otherwise consolidate the Commonwealth Washington DC Title Plant with any other title plant serving the District of Columbia; or

5. Enter into any contract, venture or arrangement to provide title plant services for the District of Columbia jointly with any person or concern, corporate or non-corporate, that has any direct or indirect ownership interest in a title plant serving the District of Columbia.

Notification is not required to be made pursuant to this paragraph IV with respect to any acquisition by respondent of a copy of title records or other information from a person or entity which thereafter retains the original information in its ownership and control, and where competition in the ordinary course between the parties is not otherwise restrained.

B. Notification pursuant to this paragraph 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 respondent and not of any other party to the transaction.

C. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating the 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 or documentary material (within the meaning of 16 CFR 803.20), respondent shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in

this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph 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.

V.

It is further ordered, That, for a period extending until November 10, 2018, respondent, directly or indirectly or through any corporate or other device in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall forthwith cease and desist from entering into, attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, or continuing or attempting to continue, any combination, agreement, or understanding, express or implied, for the purpose or with the effect of raising, lowering, fixing, maintaining or stabilizing the price, terms or other forms or conditions of compensation paid for title plant services in the District of Columbia; or encouraging, advising, pressuring, assisting, inducing, or attempting to induce any person to engage in any action prohibited by this order.

VI.

It is further ordered, That:

A. Within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraphs II or III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the accomplishment of the required actions and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs IV and V of this order.

VII.

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, 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 the order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

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

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

IN THE MATTER OF

TOYS "R" US, INC.

Docket 9278. Interlocutory Order, Dec. 1, 1998

ORDER GRANTING PARTIAL STAY

Upon considering respondent's application to stay enforcement of the Commission's order, issued October 13, 1998,

It is ordered, That enforcement of paragraphs II.C and II.E of the Commission's Final Order of October 13, 1998, be stayed upon the filing of a timely petition for review of Commission's order in an appropriate court of appeals and until the court issues a ruling disposing of the petition for review.

OPINION OF THE COMMISSION ON RESPONDENT'S APPLICATION FOR STAY OF THE COMMISSION'S FINAL ORDER

On November 2, 1998, respondent Toys "R" Us, Inc. ("TRU") applied for a stay pending appeal of the Commission's order of October 13, 1998. TRU's application for a stay was received by the Commission on November 3, 1998. Complaint counsel opposes the granting of a stay. For the reasons stated below, the Commission stays the enforcement of paragraphs II.C and II.E of its order, effective upon the filing of a timely petition for review of that order in an appropriate court of appeals and until the court of appeals issues a ruling disposing of the petition for review. The Commission denies the application of TRU in all other respects.

APPLICABLE STANDARD

Section 5(g) of the Federal Trade Commission Act (the "FTC Act") provides that Commission adjudicatory orders (except divestiture orders) shall take effect "upon the sixtieth day after" the date of service, unless "stayed, in whole or in part and subject to such conditions as may be appropriate by . . . the Commission" or "an appropriate court of appeals." 15 U.S.C. 45(g)(2). A party seeking a stay must first apply for such relief to the Commission. TRU has done so in its November 2 application.

Pursuant to Commission Rule 3.56(c), 16 CFR 3.56(c), an application for a stay must be supported with sworn facts and relevant record excerpts. Additionally, an applicant for a stay must address the following considerations: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. Each such factor is discussed below.

ANALYSIS

TRU objects to the provisions of paragraph II.E of the order, which prohibit TRU, for a period of five years, from (1) announcing that it may discontinue purchasing from a supplier who sells toys to a discounter, and (2) refusing to purchase toys or related products from a supplier because, in whole or in part, that supplier offered to sell or sold toys and related products to any discounter. TRU alleges that these provisions, *inter alia*, deprive TRU of its rights to decide "with whom, and on what terms, it will do business with a supplier" and to "inform suppliers of reasons why it may refuse to purchase a product sold to a competitor." Mem. in Supp. of App. for Stay at 7, 10.

TRU also protests paragraph II.C, which prohibits "[r]equiring, soliciting, requesting or encouraging any supplier to furnish information to [TRU] relating to any supplier's sales or . . . shipments to any toy discounter," and (2) paragraph II.D, which prohibits TRU from facilitating or attempting to facilitate agreements or understandings among suppliers "relating to limiting the sale of toys and related products to any retailer." Finally, TRU objects to various definitional provisions of the Commission's order. Specifically, TRU alleges that paragraphs I.A, I.B, and I.C are overbroad because they cover non-toy items; encompass the activities of the divisions of TRU that are not toy retailers (*i.e.*, Kids "R" Us and Babies "R" Us); and, together with the substantive provisions of the order, would effectively regulate TRU's ability to communicate with its suppliers about the business activities of all major toy retailers. Although TRU seeks a stay of the order in its entirety, it does not specifically mention paragraphs II.A or II.B (which prohibit agreements with suppliers to limit sales to discounters, and coercion of suppliers to limit sales to discounters) and provides no justification for a stay of those provisions.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

TRU's primary arguments in favor of their likelihood of success on the merits merely revisit arguments that the Commission has already considered and rejected in its October 13, 1998 opinion.[1] The renewal of these arguments, alone, is insufficient to justify the grant of a stay. *See, e.g., In re Detroit Auto Dealers Ass'n, Inc.*, 1995 FTC LEXIS 256, at *4 (Aug. 23, 1995).

Nevertheless, "it can scarcely be maintained that the Commission must harbor doubt about its decision in order to grant the stay." *In re California Dental Ass'n*, 1996 FTC LEXIS 277, at *9. The difficulty inherent in applying the applicable law to a complex set of facts is a relevant factor in determining whether a stay applicant has made a substantial showing on the merits. *See, e.g., In re KVG Coffee Shop*, 1995 U.S. Dist. LEXIS 15617 (S.D.N.Y. 1995)(recognizing significance of factual issues in analyzing likelihood of success); *Supermarket Services, Inc. v. Hartz Mountain Corp.*, 382 F. Supp. 1248, 1255 (S.D.N.Y. 1974) (same). In the instant case, TRU argues that the provisions of paragraphs II.C and E sweep too broadly, and present serious potential issues of enforceability in distinguishing truly unilateral conduct or legitimate business activities from improper conspiratorial activities that restrain competition.

The Commission's principal opinion detailed the reasons for our disagreement with this argument. We explained the legal basis for ordering fencing in relief in antitrust cases:

> It is well settled that once a respondent engages in illegal conduct, the Commission's order need not prohibit merely unlawful conduct, but may "close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). The order may also include such additional provisions as are necessary to "preclude the revival of the illegal practices." *FTC v. National Lead Co.*, 352 U.S. 419, 430 (1957). Indeed, "those caught violating the Act must expect some fencing in." *Id.* at 431.

Op. at 89.

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[1] Specifically, TRU again alleges that the Commission's finding of horizontal collusion is inconsistent with the law and with economic theory, Mem. in Supp. of App. for Stay at 16-20, that the Commission's analysis of TRU's market power was erroneous, Mem. in Supp. of App. for Stay at 20-24, and that the Commission should have accepted its free rider defense of its actions, Mem. in Supp. of App. for Stay at 24-26. Each of these arguments was considered and rejected in the Commission's earlier opinion in this matter.

The communications and purchasing policies prohibited by paragraphs II.C and II.E are the means used by TRU to implement and police the illegal restraints of trade. These paragraphs are accordingly necessary to correct the effects and prevent the recurrence of the illegal conduct.

The principal opinion squarely acknowledges (*see* Op. at 1 (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919))) that legal liability under Section 1 of the Sherman Act does not attach to any truly *unilateral* business decision. Likewise, the vast majority of communications between a manufacturer and its distributors enhance the marketing of products and therefore enhance competition. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. at 764 & n.8. In this case, however, TRU went far beyond the legal and procompetitive use of these business practices. Although the contested provisions of the Commission's Order redress the abuses of these ordinarily acceptable business practices that were identified in the principal opinion, we believe that for the relatively brief period of a stay pending appeal, TRU's asserted difficulties in distinguishing between lawful and unlawful conduct support granting a stay as to these provisions.

II. IRREPARABLE INJURY

TRU bears the burden of demonstrating that denial of a stay would cause irreparable harm. Bald assertions of harm or conclusory statements based on unsupported assumptions will not suffice. Rather, TRU must show that the alleged irreparable injury is substantial and likely to occur absent a stay. *See Michigan Coalition of Radioactive Material Users v. Griepentrog, Inc.*, 945 F.2d 150, 154 (6th Cir. 1991).

TRU's most serious allegation of irreparable injury involves the application of the provisions of paragraphs II.C and II.E. Complaint counsel argues that these provisions are "reasonably related" to TRU's unlawful conduct and therefore must remain in force during the pendency of an appeal. *See FTC v. National Lead Co.*, 352 U.S. 419 (1957). While the Commission undoubtedly has the authority to impose this relief (*Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. at 473), these provisions potentially affect to a substantial degree TRU's purchasing behavior during the next one or two buying seasons. Moreover, the communications with suppliers proscribed by

paragraphs II.C and II.E would, *if considered alone and undertaken unilaterally*, fall under the umbrella of *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. at 762, *United States v. Colgate & Co.*, 250 U.S. at 307, and their progeny.[2] Despite the fact that it might not be feasible to quantify their potential harm, the Commission recognizes that paragraphs II.C and II.E may unnecessarily impose "irretrievable costs," in terms of changes in purchasing behavior that TRU might not otherwise have made or transaction costs that TRU might not otherwise have incurred, were the Commission's decision to be overturned on appeal.

TRU's remaining allegations of irreparable injury are premised principally upon speculative concerns and misconceptions about the requirements of the Commission's order. Mem. in Supp. of App. for Stay at 12-13. TRU argues primarily that the facilitating conduct prohibited by paragraph II.D of the Commission's Order is useful and necessary; however, the Commission has already rejected these contentions in its ruling on the merits.

TRU's objections to the breadth of the definitional provisions of the order (*see* Mem. in Supp. of Supp. of App. for Stay at 13-14) are likewise without merit. TRU's inability to extend the same anticompetitive conduct to products and entities beyond the scope of the administrative complaint is not legally cognizable irreparable injury. *Cf. FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967) (even "substantial financial injury" is not cognizable where the injury is caused by prohibitions on unlawful activity).

Finally, as noted above, TRU has not even attempted to explain why compliance with paragraphs II.A and II.B would cause it irreparable harm. Indeed, as noted by complaint counsel, these provisions merely prohibit conduct that TRU continues to deny ever occurred. TRU cannot logically argue that it did not enter a vertical agreement, or orchestrate a horizontal agreement, yet also assert that it would be irreparably harmed if not allowed to continue these conspiracies during the pendency of an appeal.

III. HARM TO OTHERS AND THE PUBLIC INTEREST

Because complaint counsel represents the public interest in effective law enforcement, we consider the third and fourth prongs

[2] We emphasize here, however, as we did in the opinion, that TRU's conduct as demonstrated in the record falls far outside of the protections of *Colgate*.

together. *See In re California Dental Ass'n*, 1996 FTC LEXIS 277, at *7-8.

TRU contends that the issuance of a stay would be in the public interest because implementation of the order, and particularly of paragraphs II.C, II.D, and II.E(1), would likely lead to reduced toy output and promotional activity and restrict consumer choice. Mem. in Supp. of App. for Stay at 26-29. The requirements of paragraph II.D go to the core of TRU's ability to implement and supervise the unlawful vertical and horizontal agreements. The Commission already has held that absent these agreements, "competition would have driven TRU to lower its prices." Op. at 41. Because a stay of the provisions of paragraph II.D would enable TRU to maintain and supervise the vertical and horizontal agreements for another one or two buying seasons, a stay of these provisions would cause substantial harm to consumers and far outweigh any conceivable harm to TRU.

These concerns are reduced somewhat with respect to the requirements of paragraphs II.C and II.E(1). While these provisions are necessary under the facts of this case to "close all roads to the prohibited goal" (Op. at 88 (quoting *FTC v. Ruberoid Co.*, 343 U.S. at 473)), the conduct at issue was largely a means to a prohibited end and less of an immediate restraint. Accordingly, a stay of these provisions is less likely to cause immediate harm to the public. The unstayed provisions of our Order prohibit TRU from engaging in the core conspiratorial activities during the pendency of appellate review.

CONCLUSION

Although the decision is a close one, the Commission stays the order with respect to paragraphs II.C and II.E, effective upon the filing of a timely petition for review of the Commission's order in an appropriate court of appeals. *Cf. California Dental Ass'n*, 1996 FTC LEXIS 277, at *11 ("Respondent has not sought to stay those provisions of the order that prohibit continuation of the restraints found to be unlawful. Respondent has thus attempted to minimize the harm to the public interest while focusing on the provisions that create the greatest harm to itself."). The stay will last until the court of appeals issues a ruling disposing of the petition for review. TRU's application is hereby denied in all other respects.

STATEMENT OF COMMISSIONER ORSON SWINDLE ON RESPONDENT'S APPLICATION FOR STAY OF THE COMMISSION'S FINAL ORDER

I join the decision of the Commission to stay the enforcement of paragraphs II.C and II.E of the order in this case pending a court of appeals' disposition of any petition for review filed by Toys "R" Us ("TRU"). In the opinion that it issues today, the Commission accurately identifies those two paragraphs as the provisions for which a stay is appropriate under the criteria set forth in Commission Rule 3.56(c).

One might ask why I do not also advocate a stay of order paragraph II.D, given my previous conclusion that the evidence adduced by complaint counsel did not prove TRU's orchestration of a horizontal boycott among toy manufacturers. The answer is simple. Although I am doubtless more confident than my colleagues about TRU's chances of persuading an appellate court to reverse the Commission's horizontal boycott findings, I also view as negligible the harm that TRU – which stoutly denies that it ever organized or enforced such a boycott – will incur if paragraph II.D is not stayed. Moreover, in the event a court of appeals sustains the Commission on the horizontal issue, the issuance of a stay at this juncture will have caused considerable harm to the public interest. Thus, under the standards of Rule 3.56(c), a stay of paragraph II.D is unwarranted.

IN THE MATTER OF

FEDERAL-MOGUL CORPORATION, ET AL.

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

Docket C-3836. Complaint, Dec. 4, 1998--Decision, Dec. 4, 1998

This consent order requires, among other things, Federal-Mogul Corporation to divest T&N's thin-wall bearings business, Glacier Vandervell Bearings Group, to a Commission-approved buyer. The consent order allows Federal-Mogul to retain a royalty-free license to use the shared patents that were in use for former T&N products other than thin-wall bearings.

Participants

For the Commission: *Philip Eisenstat, Wallace Easterling, Joseph Krauss, William Baer, Oliver Grawe,* and *Jonathan Baker.*

For the respondents: *Mark Leddy, Cleary, Gottlieb, Steen & Hamilton*, Washington, D.C. and *Deborah Feinstein, Arnold & Porter*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Federal-Mogul Corporation ("Federal-Mogul"), a corporation subject to the jurisdiction of the Commission, has made a cash tender offer to acquire all of the common stock of T&N plc ("T&N"), an entity subject to the jurisdiction of the Commission, in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. THE RESPONDENTS

1. Respondent Federal-Mogul Corporation ("Federal-Mogul") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 26555 Northwestern Highway, Southfield, Michigan. In 1996, Federal-Mogul had worldwide net sales of approximately $2 billion.

2. Respondent T&N plc ("T&N") is a corporation organized under the laws of the United Kingdom, with its principal offices located at Manchester International Office Center, Styal Road, Manchester M22 5TN, England. In 1995, T&N had worldwide revenue of approximately $3.2 billion, including sales in the United States totaling approximately $877 million.

II. JURISDICTION

3. At all times relevant here, respondents have been, and are now, corporations as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. 44; and at all times relevant herein, the respondents have been, and are now, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and in Section 4 of the FTC Act, 15 U.S.C. 44.

III. THE PROPOSED ACQUISITION

4. On or about October 16, 1997, Federal-Mogul notified T&N of Federal-Mogul's intention to commence a cash tender offer to acquire 100 percent of the voting securities of T&N plc (the "Acquisition"), for approximately $2.4 billion.

IV. THE RELEVANT MARKETS

A. Relevant Product Markets

5. The development, manufacture and sale of fluid film or "plain" thinwall bearings ("thinwall bearings") is one relevant line of commerce within which to analyze the competitive effects of the proposed acquisition. Thinwall bearings have a wall thickness of approximately three-eighths of an inch or less, and include half bearings, bushings and thrust washers. Thinwall bearings are a type of bearing used in automobile, truck and heavy equipment engines and other vehicle applications and in certain industrial applications. The surface of thinwall bearings is coated with a film of oil and the thinwall bearings are used to separate two materials to prevent friction and the resulting heat from damaging or destroying parts. There are no economic substitutes for thinwall bearings. Both Federal-Mogul and T&N develop, manufacture and sell thinwall bearings.

6. The development, manufacture and sale of thinwall bearings for use in automobile and light truck engines ("light duty engine

bearings") and which are sold to original equipment manufacturers ("OEMs") for use in the manufacture of engines is another relevant line of commerce within which to analyze the competitive effects of the proposed acquisition. Not all thinwall bearings can be used as light duty engine bearings. Each automobile and light truck engine must have light duty engine bearings that are specifically designed and engineered for that engine. There are no economic substitutes for light duty bearings sold to OEMs. Both Federal-Mogul and T&N develop, manufacture and sell light duty engine bearings.

7. The development, manufacture and sale of thinwall bearings for use in heavy truck engines and heavy equipment engines ("heavy duty engine bearings") and which are sold to OEMs for use in the manufacture of engines is another relevant line of commerce within which to analyze the competitive effects of the proposed acquisition. Not all thinwall bearings can be used as heavy duty engine bearings. Each heavy truck and heavy equipment engine must have heavy duty engine bearings that are specifically designed and engineered for that engine. There are no economic substitutes for heavy duty bearings sold to OEMs. Both Federal-Mogul and T&N develop, manufacture and sell heavy duty engine bearings.

8. The manufacture and sale of light duty engine bearings and heavy duty engine bearings which are sold to the automotive and truck aftermarket ("aftermarket bearings") is another relevant line of commerce within which to analyze the competitive effects of the proposed acquisition. The automotive and truck aftermarket is the industry that services or repairs automobiles and trucks after the vehicles are no longer covered by the OEM warranty. Each engine that is serviced in the aftermarket and that requires new bearings must have bearings that are specifically designed to fit in that engine. There are no economic substitutes for light duty and heavy duty bearings sold to the aftermarket. Both Federal-Mogul and T&N manufacture and sell aftermarket bearings.

B. Relevant Geographic Market

9. The relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce is the world.

10. With few exceptions, each automobile and truck engine has a unique set of bearings that are designed only to be used in that engine and cannot be used in any other engine.

11. Different consumer preferences for engines, based on such things as different fuel costs, different fuel preferences, different pollution regulations, and different road conditions, all lead engine builders to build different engines in different parts of the world. The engines built to reflect differences in consumer demand have different requirements in terms of the properties they must have. These differences in the properties of engines mean that the engine bearings used in these engines must also have different properties. Customers who purchase bearings, including engine manufacturers, as well as aftermarket service businesses, can and do purchase thinwall bearings from producers located throughout the world so long as the producers can develop and manufacture thinwall bearings that will meet the particular requirements of engines in a given customer's part of the world.

12. Engine manufacturers in the United States have particular performance and engineering requirements for their engine bearings that differ from the requirements facing engine manufacturers in other parts of the world. Engine manufacturers in the United States can and do purchase thinwall bearings from bearing producers located throughout the world that can develop and manufacture bearings that meet the needs of engine manufacturers in the United States.

V. MARKET STRUCTURE

13. While customers for thinwall bearings can turn anywhere in the world, the thinwall bearings that they buy must be engineered to the particular applications of the customers. The best measure of a thinwall bearings producer's ability to meet the applications requirements of customers in the United States and compete for sales to customers in the United States, is the bearings producer's current sales to customers in the United States. As measured by current sales to customers in the United States, the relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (or "HHI") or by two-firm or four-firm concentration ratios. The proposed merger, if consummated, would significantly increase the HHIs in already highly concentrated markets.

14. In the sale of thinwall bearings to customers in the United States, respondent Federal-Mogul is the largest competitor with about a 49 percent market share, and T&N is the second largest with about a 34 percent market share. Together, Federal-Mogul and T&N would

control approximately 83 percent of all United States thinwall bearing sales. The proposed merger would increase the HHI by over 3300 points and produce an industry concentration of over 7000 points.

15. In the sale of light duty engine bearings to OEMs located in the United States, respondent Federal-Mogul is the largest competitor with about a 53 percent market share, and T&N is the second largest with about a 28 percent market share. Together, Federal-Mogul and T&N would control approximately 81 percent of all United States sales of light duty engine bearing sales to OEMs. The proposed merger would increase the HHI by over 3000 points and produce an industry concentration of over 7000 points.

16. In the sale of heavy duty engine bearings to OEMs located in the United States, respondent Federal-Mogul is the largest competitor with about a 62 percent market share, and T&N is the second largest with about a 22 percent market. Together, Federal-Mogul and T&N would control approximately 84 percent of all United States sales of heavy duty engine bearings to OEMs. The proposed merger would increase the HHI by over 2800 points and produce an industry concentration of over 7200 points.

17. In the sale of aftermarket bearings to aftermarket customers in the United States, respondent Federal-Mogul is the largest competitor with about a 58 percent market share, and T&N is the second largest with about a 21 percent market share. Together, Federal-Mogul and T&N would control approximately 79 percent of all United States sales of aftermarket bearings. The proposed merger would increase the HHI by over 2500 points and produce an industry concentration of over 6500 points.

VI. ENTRY CONDITIONS

18. Entry into the thinwall bearings market requires more than two years. Entry into the OEM market would not assure entry into the aftermarket, and entry into the aftermarket would not assure entry into the OEM market. The markets have different entry impediments as to product design, qualification and testing, production and brand name recognition. Entry into the thinwall bearing market is difficult and would not be timely to prevent anticompetitive effects in the relevant markets.

19. Entry into the development, manufacture, and sale to OEMs in the United States of light duty engine bearings requires substantially more than two years. Entry into competition for sales of

light duty engine bearings requires the development of materials from which to make the bearing, the development of exacting manufacturing processes and capabilities, the design of bearings for a particular engine, and the completion of extensive customer qualification and testing. Because the materials used to make the bearings are different, as are the manufacturing processes and the technical requirements of the bearings, the ability to compete in the sale of heavy duty engine bearings does not give a producer the ability to compete in the sale of light duty engine bearings. Entry into the sale of light duty engine bearings to OEMs would not be timely to prevent anticompetitive effects in the market for light duty engine bearings sold to OEM customers in the United States.

20. Entry into the development, manufacture, and sale to OEMs in the United States of heavy duty engine bearings requires substantially more than two years. Entry into competition for sales of heavy duty engine bearings requires the development of materials from which to make the bearing, the development of exacting manufacturing processes and capabilities, the design of bearings for a particular engine, and the completion of extensive customer qualification and testing. Because the materials used to make the bearings are different, as are the manufacturing processes and the technical requirements of the bearings, the ability to compete in the sale of light duty engine bearings does not give a producer the ability to compete in the sale of heavy duty engine bearings. Entry into the sale of heavy duty engine bearings to OEMs would not be timely to prevent anticompetitive effects in the market for heavy duty engine bearings sold to OEM customers in the United States.

21. Entry into the market for aftermarket bearings for customers in the United States, requires more than two years, and in order to match the broad product line of Federal-Mogul or T&N, a new entrant would be at a significant cost disadvantage to the incumbent firms. Successful competition in the sale of aftermarket bearings requires an extensive line of bearings that will fit not only engines in current production, but most of the engines that have been production over the past 30 to 40 years. Each aftermarket bearing requires tooling unique to it. The existing producers of aftermarket bearings for customers in the United States, including Federal-Mogul and T&N, have such extensive product offerings, exceeding 6,000 or 7,000 part numbers. To offer this extensive a line of bearings requires the design

of bearings and acquisition of the tooling required for each bearing. A new entrant that attempted to match the product offering of Federal-Mogul or T&N would have to acquire tooling for bearings for engines that are no longer in production and for which demand is declining. Federal-Mogul and T&N acquired the tooling for their broad line of aftermarket bearings when engines were first in production, allowing Federal-Mogul and T&N to amortize the cost of the tooling over a longer period of the engine's life and over a larger number of bearings. A new entrant that attempts to match Federal-Mogul's or T&N's product line will be able to amortize the tooling for many bearings only over a portion of the engine's life, and will necessarily have higher costs than Federal-Mogul or T&N.

22. Brand name recognition is also important for competing for sale of aftermarket bearings. A brand name can convey to customers in the aftermarket that the bearings are of high quality and will work in the application that they are designed for. The development of brand recognition also is time consuming. Entry into the manufacture and sale of light duty and heavy duty thinwall bearings to the aftermarket would not be timely to prevent anticompetitive effects in the market for sales of aftermarket bearings to customers in the United States.

VII. ACTUAL COMPETITION

23. Federal-Mogul and T&N are actual competitors in the relevant lines of commerce in the relevant area.

VIII. EFFECTS OF THE PROPOSED MERGER ON COMPETITION

24. The effect of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

A. By eliminating actual, direct, and substantial competition between Federal-Mogul and T&N in the relevant markets;

B. By increasing the likelihood that Federal-Mogul will unilaterally exercise market power in the relevant markets;

C. By increasing the likelihood of or facilitating collusion or coordinated interaction among Federal-Mogul and the remaining competitors in the market for heavy duty engine bearings;

D. By increasing the likelihood that customers of thinwall bearings would be forced to pay higher prices; and

E. By reducing innovation, quality, service, and product availability in the relevant markets.

IX. VIOLATIONS CHARGED

25. The proposed acquisition by Federal-Mogul of the voting stock of T&N violates Section 5 of the FTC Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by Federal-Mogul Corporation of T&N plc, hereinafter sometimes referred to as the "respondents," and 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 a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that 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, and having modified the consent order in some

respects, 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 Federal-Mogul Corporation ("Federal-Mogul") is a corporation organized, existing and doing business under and by virtue of the laws of Michigan, with its office and principal place of business located at 26555 Northwestern Highway, Southfield, Michigan.

2. Respondent T&N plc ("T&N") is a public limited company organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Manchester International Office Centre, Styal Road, Manchester M22 5TN, England.

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

ORDER

I.

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

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

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

C. "*Respondents*" means Federal-Mogul and T&N, individually and collectively.

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

E. "*Divestiture Date*" means the date on which The Assets To Be Divested are divested by Federal-Mogul.

F. "*Thinwall Bearings*" means lubricated friction bearings, commonly known as thinwall bearings, with a thickness of three-eighths inch or less, including, but not limited to, half-shell engine bearings, full round bushings, flange bearings, and half and full round thrust washers for use in engine and non-engine applications in passenger cars and trucks and in industrial applications.

G. "*Polymer Bearings*" means metal-backed polymer dry bearings for use in industrial applications and non-engine automotive components and manufactured at T&N's manufacturing facilities located at Kilmarnock, Scotland; Annecy, France; and Heilbronn, Germany.

H. "*Non-Automotive Heavywall Bearings*" means the products listed in Appendix VI.

I.. "*The Assets To Be Divested*" means

1. Glacier Vandervell, Inc., Glacier Vandervell Europe, and T&N Bearings Group Research and Development; all of the subsidiaries, divisions, groups and affiliates they control; all of their businesses and assets, tangible and intangible, including but not limited to facilities, technology, patent rights, and goodwill;

2. All businesses and assets of T&N in the following locations: Caldwell, Ohio; Atlantic, Iowa; Bellefontaine, Ohio; Plymouth, Michigan; Middlesex, England; Cawston, England; Kilmarnock, Scotland; Whitehill, Scotland; Annecy, France; Paris, France; Dieuze, France; Trento, Italy; and Heilbronn, Germany;

3. The McConnellsville Strip Facility;

4. All rights, titles, and interests in the trademarks listed at Appendix V and the patents listed at Appendix VII and Appendix VIII;

5. A perpetual, royalty-free license to use the P/2531.GB2 machine tool patent for any and all applications;

6. All other businesses and assets, tangible and intangible, relating to the research, development, manufacture, or sale of Thinwall Bearings and Polymer Bearings by T&N, regardless of where the business or assets are located in the world and regardless of whether used exclusively for such purposes, including, without limitation, the following:

a. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

b. All copies of customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents, trademarks, technology, know-how, specifications, designs, drawings, processes and quality control data;
c. All rights, titles, and interests in and to research and development, whether performed by T&N or by a third party;
d. Inventory and storage capacity;
e. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;
f. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
g. All rights under warranties and guarantees, express or implied;
h. All books, record, and files;
i. All items of prepaid expense;
j. Goodwill; and
k. All stock and other rights, titles, and interests held in joint ventures or other entities.

Provided that the definition of "The Assets To Be Divested" shall not include:

(i) T&N's ownership interest in Glacier Vandervell Pty. in South Africa;
(ii) Any assets related exclusively to the sale of automotive replacement parts to customers outside North and South America;
(iii) Any assets (other than the real estate and buildings) at Cawston, England, and Plymouth, Michigan, that are not related to Thinwall Bearings;
(iv) All rights, titles, and interests in those patents listed at Appendix X that do not relate to the research, development, manufacture, or sale of Thinwall Bearings and Polymer Bearings by T&N, regardless of whether used exclusively for

such purposes; and a perpetual, non-exclusive, royalty-free license to Federal-Mogul for all other patents listed at Appendix X, where such license is limited to the field of use designated in Appendix XI;

(v) A perpetual, non-exclusive, royalty-free license to Federal-Mogul for all patents listed at Appendix VIII, where such license is limited to the field of use designated in Appendix XI;

(vi) A contract with the purchaser of The Assets To Be Divested to supply Federal-Mogul with reasonable amounts of AS104 bearing strip material under reasonable commercial terms only for the production by Federal-Mogul of Non-Automotive Heavywall Bearings;

(vii) All rights, titles, and interests in the trademarks listed at Appendix IX;

(viii) A non-exclusive, royalty-free license to Federal-Mogul for the use of the trademarks "Clevite," "Clevite 77," "Michigan," "Michigan 77," "Deltawall," "CL 112," "CL 77," and "Clevite 66" on inventory other than engine bearings in accordance with the schedule designated in Appendix IV;

(ix) A non-exclusive, royalty-free license to Federal-Mogul for the use of the trademarks "Glacier," "Vandervell," and all subsidiary, ancillary, and related marks listed at Appendix V, only in the promotion and sale of Non-Automotive Heavywall Bearings, where such license expires no later than one (1) year after the Divestiture Date; and

(x) For a period of five (5) years after the Divestiture Date, the use of the trademarks "Glacier," "Glacier Sentry," "Glacier Spinner," "Glacier (T.V.)," "Glacier DQ," "Glacier DU," and "Glacier DX" in the promotion or sale of Non-Automotive Heavywall Bearings. (Notwithstanding this proviso, the respondents shall not retain any rights to use the trademarks "Glacier," "Glacier Sentry," "Glacier Spinner," "Glacier (T.V.)," "Glacier DQ," "Glacier DU," and "Glacier DX" after the Divestiture Date, except as specifically provided in proviso (ix) above and in paragraph II.B. below; and the definition of "The Assets To Be Divested" shall include the unrestricted right to use the "Glacier" trademark as a company name and to use the trademarks "Glacier," "Glacier Sentry,"

"Glacier Spinner," "Glacier (T.V.)," "Glacier DQ," "Glacier DU," and "Glacier DX" in the promotion and sale of "Deva," "Deva BM," "Devaglide," or "Devatex" Non-Automotive Heavywall Bearings purchased from Federal-Mogul.)

J. "*Key Employees*" means the individuals employed by T&N listed in Appendix II.

K. "*Thinwall Research Personnel*" means the individuals employed by T&N listed in Appendix III.

L. "*McConnellsville Strip Facility*" means the facility for the manufacture of cast copper-lead strip operated by T&N in McConnellsville, Ohio.

M. "*Daido*" means Daido Metal Co. Ltd. of Nagoya, Japan, and all its subsidiaries, divisions, groups and affiliates.

II.

It is further ordered, That:

A. Respondents shall divest absolutely and in good faith, no later than December 21, 1998, The Assets To Be Divested, as a fully viable and competitive ongoing business, and shall also divest such additional assets and businesses and effect such arrangements as are necessary to assure the viability, marketability, and competitiveness of The Assets To Be Divested.

Provided that, if the Commission-approved acquirer or acquirers of The Assets To Be Divested all express through affidavit a preference not to acquire any portion of (1) the McConnellsville Strip Facility, (2) the real estate and buildings of the facility operated by T&N Technology in Cawston, England, (3) the real estate and buildings of the facility located at Northwood Hills, Middlesex, England, (4) the real estate and buildings of the facility located at Paris, France, or (5) the real estate and buildings of the facility located at Plymouth, Michigan, then, subject to the approval of the Commission, respondents shall not be required to divest that portion of such assets.

Further provided that, if the Commission-approved acquirer or acquirers of The Assets To Be Divested all express through affidavit a preference not to acquire any portion of the packaging facilities and warehouses of A.E. Clevite, then, subject to the approval of the

Commission, respondents shall not be required to divest that portion of such assets.

B. Respondents shall, in no event later than 90 days after the Divestiture Date, eliminate "Glacier," "Vandervell," "Clevite," and all other trademarks included with The Assets To Be Divested from the names of all companies or business units they will own after the divestiture, including Glacier Vandervell Pty.

Provided that (i) Federal-Mogul may use the name "Glacier Sollinger Huette" in Germany for government certification purposes for one (1) year after the Divestiture Date; and (ii) Federal-Mogul may use the designation "formerly known as Glacier" or "formerly known as Vandervell" in the sale of Non-Automotive Heavywall Bearings where such descriptor is not used as a trademark or logo and is used only in direct response to customer inquiries.

C. Within ten (10) days after signing the agreement containing consent order, respondents shall transfer to The Assets To Be Divested the employment of all Key Employees (who are not already employees of The Assets To Be Divested) and all Thinwall Research Personnel, to the extent permissible by law.

D. Respondents shall divest The Assets To Be Divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of The Assets To Be Divested is to ensure the continuation of The Assets To Be Divested as an ongoing, viable, and competitive business engaged in the research, development, manufacture, and sale of Thinwall Bearings and to remedy the lessening of competition resulting from the acquisition by Federal-Mogul of T&N as alleged in the Commission's complaint.

E. If any person who is not party to this order withholds its consent to the transfer or assignment of any agreement, contract, or license to which T&N is a party and that is related in any way to The Assets To Be Divested, then respondents shall use their best efforts to obtain the necessary consents. If such person continues to withhold its consent, then respondents shall to the extent possible enter into such agreements, contracts, licenses as are necessary to realize the same effect as such transfer or assignment. (Respondents shall submit a copy of each such agreement, contract, or license with their compliance reports to the Commission pursuant to paragraphs IV and

V of this order.) For a period of five (5) years after executing the agreement containing consent order, respondents shall not do any business with Daido relating to Thinwall Bearings, whether through agreement, contract, license, exchange of technology, joint venture, or other means.

F. Pending divestiture of The Assets To Be Divested, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of The Assets To Be Divested and to prevent the destruction, removal, wasting, deterioration, or impairment of any assets or business of The Assets To Be Divested except for ordinary wear and tear.

G. Respondents shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as respondents have divested all The Assets To Be Divested as required by this order or until such other time as the Agreement to Hold Separate provides.

H. Respondents shall not conduct any research or development relating to bearings at the T&N facilities in Cawston, England, until employees and other personnel of The Assets To Be Divested, and of the purchaser of The Assets To Be Divested, no longer occupy any of those facilities.

I.. Respondents shall provide the Key Employees with financial incentives to continue in their employment positions during the period covered by the Agreement to Hold Separate, and to accept employment with a Commission-approved acquirer at the time of the divestiture. Such incentives shall include:

1. Vesting of all pension benefits;
2. Continuation of all employee benefits offered by T&N until the Divestiture Date; and
3. A bonus equal to thirty (30) percent of the employee's annual salary (including any other bonuses) as of the date this order becomes final for any individual who agrees to employment with a Commission-approved acquirer, payable upon the beginning of their employment by the Commission-approved acquirer.

J. For a period of one (1) year from the Divestiture Date, respondents shall not make offers of employment to any employees

of The Assets To Be Divested (including employees who are not Key Employees) who have accepted offers of employment with the Commission-approved acquirer or acquirers of The Assets To Be Divested.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, The Assets To Be Divested within the time required by paragraph II.A of this order, then the Commission may appoint a trustee to divest The Assets To Be Divested. The trustee shall have all rights and powers necessary to permit the trustee to effect the divestiture of The Assets To Be Divested and to divest such additional assets and to effect such arrangements as are necessary to assure the viability, competitiveness, and marketability of The Assets To Be Divested so as to expeditiously accomplish the remedial purposes of this order. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute enforced by the Commission, for any failure by either of the respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Federal-Mogul, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Federal-Mogul has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Federal-Mogul of the identity of any proposed trustee,

Federal-Mogul shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest The Assets To Be Divested, and shall have the power to divest such additional assets and to effect such arrangements as are necessary to assure the viability, competitiveness, and marketability of The Assets To Be Divested so as to expeditiously accomplish the divestiture required by this order.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission (and, in the case of a court-appointed trustee, of the court), transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission (or, in the case of a court-appointed trustee, by the court); provided, however, the Commission may extend this period for no more than two (2) additional terms.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to The Assets To Be Divested, or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph III in an amount equal to the delay, as determined by the Commission (or, in the case of a court-appointed trustee, by the court).

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The

divestiture shall be made in the manner, and to the acquirer or acquirers, as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission approves more than one such acquiring entity, then the trustee shall divest to the acquiring entity or entities selected by Federal-Mogul from among those approved by the Commission.

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

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, recklessness, willful or wanton acts, or bad faith by the trustee.

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

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

11. In the event that the trustee determines that he or she is unable to divest The Assets To Be Divested in a manner consistent with the Commission's purpose as described in paragraph II, the trustee may divest additional assets of respondents and effect such arrangements as are necessary to satisfy the requirements of this order.

12. The trustee shall have no obligation or authority to operate or maintain The Assets To Be Divested.

13. The trustee shall report in writing to Federal-Mogul and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the divestiture.

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondents intend to comply, are complying, and have complied with paragraphs II and III of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties that have contacted respondents or that have been contacted by respondents. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representatives of the Commission:

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

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

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate Agreement") is by and among Federal-Mogul Corporation ("Federal-Mogul"), a corporation organized, existing, and doing business under and by virtue of the laws of Michigan, with its office and principal place of business located at 26555 Northwestern Highway, Southfield, Michigan; T&N plc ("T&N"), a public limited company organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Manchester International Office Centre, Styal Road, Manchester M22 5TN, England; and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on October 16, 1997, Federal-Mogul announced a tender offer to acquire all of the outstanding shares of T&N (the "Acquisition"); and

Whereas, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Order"), which would require the divestiture of The Assets To Be Divested, the Commission must place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached preserving the *status quo ante* of The Assets To Be Divested as defined in paragraph I.I. of the Consent Order during the period prior to the divestiture of The Assets To Be Divested as required by the Consent Order, the divestiture required by the Consent Order or resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of The Assets To Be Divested, as described in paragraph I.I. of the Consent Order, and the Commission's right to have The Assets To Be Divested continue as a viable competitor independent of Federal-Mogul and T&N (collectively, the "respondents"); and

Whereas, if the Commission determines to finally issue the Consent Order, it is necessary to hold separate The Assets To Be Divested to protect interim competition pending divestiture or other relief; and

Whereas, the purpose of the Hold Separate Agreement and the Consent Order is to:

1. Preserve, pending the divestiture required by the Consent Order, The Assets To Be Divested as an ongoing, viable, competitive, and independent entity engaged in the same business in which they are presently engaged;

2. Prevent interim harm to competition pending divestiture and other relief; and

3. Remedy any anticompetitive effects of the Acquisition; and

Whereas, respondents' entering into this Hold Separate Agreement shall in no way be construed as an admission by respondents that the Acquisition is illegal; and

Whereas, respondents understand that no act or transaction contemplated by this Hold Separate Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Hold Separate Agreement.

Now, therefore, upon the understanding that the Commission has not yet determined whether it will challenge the Acquisition, and in consideration of the Commission's agreement that the Commission will accept the Consent Order for public comment, the Parties agree as follows:

1. Respondents agree to execute the attached Agreement Containing Consent Order and, from the date of execution, to comply with the provisions of the Consent Order as if it were final.

2. Respondents agree that from the date they execute the Agreement Containing Consent Order, they will comply with the provisions of this Hold Separate Agreement until:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the divestiture required by the Consent Order has been completed.

3. The terms capitalized herein shall have the same definitions as in the Consent Order.

4. ("Material Confidential Information," as used herein, means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.) To assure the complete independence and viability of The Assets To Be Divested, and to assure that no Material Confidential Information is exchanged between Federal-Mogul (meaning here and hereinafter, Federal-Mogul and T&N excluding The Assets To Be Divested and excluding all personnel connected with The Assets To Be Divested as of the date this Hold Separate Agreement was signed) and The Assets To Be Divested, Federal-Mogul shall hold The Assets To Be Divested separate and apart on the following terms and conditions:

a. The Assets To Be Divested shall be held separate and apart and shall be managed and operated independently of Federal-Mogul, except to the extent that Federal-Mogul must exercise direction and control over such assets to assure compliance with this Hold Separate Agreement or the Consent Order, and except as otherwise provided in this Hold Separate Agreement.

b. Within three (3) days after complete execution of this Hold Separate Agreement, Federal-Mogul shall appoint, subject to the approval of the Commission, an individual to be the Independent Auditor. Federal-Mogul shall give the Independent Auditor all powers and authority necessary to effectuate his/her responsibilities pursuant to this Hold Separate Agreement.

c. Within five (5) business days of the Commission's acceptance of the Consent Order for public comment, Federal-Mogul shall organize a distinct and separate entity ("The New Group") to be composed of: (1) The Assets To Be Divested and (2) A.E. Clevite Inc., excluding the following (a) the stock of McCord Payen Technical Services Inc., McCord Payen Inc., McCord Sealing Inc., and McCord Leakless Sealing Co., and (b) the assets of A. E. Goetze - Lake City Division and Glacier Clevite Heavywall Bearings Division (except the McConnellsville Strip Facility).

d. The New Group shall be staffed with sufficient employees to maintain the viability and competitiveness of The Assets To Be Divested. The Management Team, as defined below, with the approval of the Independent Auditor, shall have the authority to replace employees who left their positions with The Assets To Be Divested since January 1, 1998. To the extent that The New Group employees leave The New Group prior to the divestiture of The Assets To Be Divested, the Management Team may replace the departing employees of The New Group, subject to the approval of the Independent Auditor, with persons who have similar experience and expertise.

e. The Independent Auditor shall monitor the organization of The New Group and shall have responsibility for managing The New Group consistent with the terms of Hold Separate Agreement; for maintaining the independence of The New Group consistent with the terms of this Hold Separate Agreement and this Consent Order; and for assuring respondents' compliance with their obligations pursuant to the Hold Separate Agreement.

f. Simultaneously with the organization of The New Group, Federal-Mogul shall appoint, subject to the approval of the Independent Auditor, four individuals from among the current employees of The Assets To Be Divested to manage and maintain The Assets To Be Divested (the "Management Team"). The Management Team, in its capacity as such, shall report directly and exclusively to the Independent Auditor and shall manage The New Group independently of the management of Federal-Mogul. The Management Team shall not be involved, in any way, in the operations of the businesses of Federal-Mogul during the term of the Hold Separate Agreement.

g. Federal-Mogul shall not change the composition of the Management Team unless the Independent Auditor consents. Federal-Mogul shall not change the composition of the management of The New Group, except that the Management Team shall be permitted to remove management employees for cause subject to approval of the Independent Auditor. The Independent Auditor shall have the power to remove members of the Management Team for cause and to require Federal-Mogul to appoint replacement members to the Management Team in the same manner as provided in subparagraph 4.f. of this Hold Separate Agreement.

h. The Independent Auditor, each member of the Management Team, and each employee of The New Group who has access to Material Confidential Information shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions of this Hold Separate Agreement. These individuals must retain and maintain all confidential information relating to the held separate business on a confidential basis and, except as is permitted by this Hold Separate Agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Federal-Mogul's business. These persons shall not be involved in any way in the Thinwall Bearings operations of Federal-Mogul.

i. Within ten (10) business days of the Commission's acceptance of the Consent Order for public comment, Federal-Mogul shall establish written procedures to be approved by the Independent Auditor, covering the management, maintenance, and independence of The Assets To Be Divested consistent with the provisions of the Hold Separate Agreement.

j. Within ten (10) business days of the Commission's acceptance of the Consent Order for public comment, Federal-Mogul shall circulate, to employees of The New Group and to Federal-Mogul employees who are involved in operations relating to the Thinwall Bearings of Federal-Mogul, a notice of this Hold Separate Agreement and Consent Order in the form attached as Attachment A.

k. The Independent Auditor shall have full and complete access to all personnel, books, records, documents and facilities of The New Group or to any other relevant information, as the Independent Auditor may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to The Assets To Be Divested. Federal-Mogul shall develop such financial or other information as such Independent Auditor may request and shall cooperate with the Independent Auditor. Federal-Mogul shall take no action to interfere with or impede the Independent Auditor's ability to perform his/her responsibilities consistent with the terms of the Hold Separate Agreement or to monitor Federal-Mogul's compliance with the Hold Separate Agreement and the Consent Order.

l. Federal-Mogul may require the Independent Auditor to sign a confidentiality agreement prohibiting the disclosure of any material information gained as a result of his or her role as Independent Auditor to anyone other than the Commission.

m. The Independent Auditor shall have the authority to employ, at the cost and expense of Federal-Mogul, such consultants, accountants, attorneys, and other representatives and assistants as are necessary to carry out the Independent Auditor's duties and responsibilities.

n. The Independent Auditor and the Management Team shall serve, without bond or other security, at the cost and expense of Federal-Mogul, on reasonable and customary terms commensurate with the person's experience and responsibilities. Federal-Mogul shall indemnify the Independent Auditor and the Management Team and hold the Independent Auditor and the Management Team harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Independent Auditor's or the Management Team's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages,

claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Independent Auditor or the Management Team.

o. Federal-Mogul shall provide The New Group with sufficient working capital to operate The Assets To Be Divested at least at current rates of operation, to meet all capital calls in respect of The Assets To Be Divested, and to carry on, at least at their scheduled pace, all capital and research and development projects for The Assets To Be Divested ongoing, planned, or approved as of or after February 20, 1998. During the period this Hold Separate Agreement is effective, Federal-Mogul shall make available for use by The New Group funds sufficient to perform all necessary routine maintenance to, and replacements of, The Assets To Be Divested. Federal-Mogul shall provide The New Group with such funds as are necessary to maintain the viability, competitiveness, and marketability of The Assets To Be Divested until the Divestiture Date. At a minimum, Federal-Mogul shall ensure that The Assets To Be Divested have available average working capital of not less than one hundred twenty percent (120%) of the average working capital of The Assets To Be Divested during the twelve (12) months preceding the date of this Hold Separate Agreement.

p. Federal-Mogul shall continue to provide the same support services to The Assets To Be Divested as are being provided to such assets by Federal-Mogul as of the date this Hold Separate Agreement is signed by Federal-Mogul. Federal-Mogul may charge The New Group the same fees, if any, charged by Federal-Mogul for such support services as of the date this Hold Separate Agreement is signed by Federal-Mogul. Federal-Mogul's personnel providing such support services must retain and maintain all Material Confidential Information of The Assets To Be Divested on a confidential basis, and, except as is permitted by this Hold Separate Agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Federal-Mogul's businesses. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of The Assets To Be Divested.

q. Except as provided in this Hold Separate Agreement, Federal-Mogul shall not employ or make offers of employment to employees

of The New Group, during the term of the Hold Separate Agreement. The acquirer or acquirers of The Assets To Be Divested shall have the option of offering employment to the employees of The New Group. After the term of the Hold Separate Agreement, Federal-Mogul may offer employment to employees of The New Group who have not accepted employment with the acquirer or acquirers of The Assets To Be Divested. Federal-Mogul shall not interfere with the employment of such employees of The New Group by the acquirer or acquirers of The Assets To Be Divested; shall not offer any incentive to such employees of The New Group to decline employment with the acquirer or acquirers of The Assets To Be Divested or accept other employment with Federal-Mogul; and shall remove any impediments that may deter such employees of The New Group from accepting employment with the acquirer or acquirers of The Assets To Be Divested, including but not limited to the payment, or the transfer for the account of the employee, of all accrued bonuses, pensions and other accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of Federal-Mogul.

r. Federal-Mogul shall not exercise direction or control over, or influence directly or indirectly, The Assets To Be Divested, the Independent Auditor, the Management Team, or The New Group or any of its operations; provided, however, that Federal-Mogul may exercise only such direction and control over The New Group as is necessary to assure compliance with this Hold Separate Agreement or the Consent Order, or with all applicable laws.

s. Except for the Management Team and except to the extent provided in subparagraph 4.p., Federal-Mogul shall not permit any other of its employees, officers, or directors to be involved in the operations of The New Group.

t. Federal-Mogul shall maintain the viability, competitiveness, and marketability of The Assets To Be Divested; shall not sell, transfer, or encumber The Assets To Be Divested (other than in the normal course of business); and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of The Assets To Be Divested.

u. If the Independent Auditor ceases to act or fails to act diligently and consistently with the purposes of this Hold Separate Agreement, Federal-Mogul shall appoint a substitute Independent Auditor, subject to Commission approval.

v. Except as required by law, and except to the extent that necessary information is exchanged in the course of consummating the Acquisition, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating agreements to divest assets pursuant to the Consent Order, or complying with this Hold Separate Agreement or the Consent Order, Federal-Mogul shall not receive or have access to, or use or continue to use, any Material Confidential Information, not in the public domain, relating to The New Group or The Assets To Be Divested. Nor shall The New Group or the Management Team receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about Federal-Mogul and relating to Federal-Mogul's business. Federal-Mogul may receive aggregate financial information relating to The New Group to the extent necessary to allow Federal-Mogul to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

w. Within thirty (30) days after the date this Hold Separate Agreement is accepted by the Commission and every thirty (30) days thereafter until this Hold Separate Agreement terminates, the Independent Auditor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Agreement. Included within that report shall be the Independent Auditor's assessment of the extent to which The New Group is meeting (or exceeding) its projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

5. Should the Commission seek in any proceeding to compel respondents to divest any of The Assets To Be Divested, as provided in the Consent Order, or to seek any other injunctive or equitable relief for any failure to comply with the Consent Order or this Hold Separate Agreement, or in any way relating to the Acquisition, as defined in the draft complaint, respondents shall not raise any objection based upon the fact that the Commission has permitted the Acquisition. Respondents also waive all rights to contest the validity of this Hold Separate Agreement.

6. To the extent that this Hold Separate Agreement requires respondents to take, or prohibits respondents from taking, certain

actions that otherwise may be required or prohibited by contract, respondents shall abide by the terms of this Hold Separate Agreement or the Consent Order and shall not assert as a defense such contract requirements in a civil action brought by the Commission to enforce the terms of this Hold Separate Agreement or this Consent Order.

7. For the purposes of determining or securing compliance with this Hold Separate Agreement, and upon written request with reasonable notice to respondents made to their counsel, respondents shall permit any duly authorized representatives of the Commission:

a. During the office hours of respondents, and in the presence of counsel, access to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of respondents relating to compliance with this Agreement; and

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

8. This Hold Separate Agreement shall not be binding on the Commission until it is approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

Federal-Mogul Corporation ("Federal-Mogul") and T&N plc ("T&N") have entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the T&N worldwide thinwall bearing business. Until after the Commission's Order becomes final and the T&N worldwide thinwall bearing business is divested, the T&N worldwide thinwall bearing business must be managed and maintained as a separate, ongoing business, independent of all other T&N businesses. All competitive information relating to the T&N worldwide thinwall bearing business must be retained and maintained by the persons involved in the T&N worldwide thinwall bearing business on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose

employment or agency involves any other Federal-Mogul or T&N business. Similarly, all such persons involved in any other Federal-Mogul or T&N business shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment or agency involves the T&N worldwide thinwall bearing business.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the Consent Order, may subject Federal-Mogul and T&N to civil penalties and other relief as provided by law.

APPENDIX II

John E. Wheatley	T. Allan Welsh
Derrick Parker	Clive Kellett
Jeffrey Senior	Ian Massey
Graham Jones	Tony Dolton
Paulo Detasis	Brian Campbell
Dr. Peter Brown	Ken McMeekin

APPENDIX III

Martin Ashmore
Alister Brydon
Nick Butler
John Carey
Barbara Carroll
Nigel Felgate
Brian Fitzsimons
Bill Hall
David Hall
Adrian Hardgrave
Paul Harrison
Craig Hobson
Alun Howells
Chas Johal
Kevin Jupe
Steve Kennedy
Mike Kirk
Devji Lad
Ian Laing
Tony Latkowski
Kate Leeper
Carolyn Mayston
Julie McDonald
Jonathan McGivan
Bob Mee
Omar Mian
Geraldine Mulet
Dean Murden
Tim Partridge
Carl Perrin
Alan Pope
Gerry Sanders
Nicola Seymour
Paul Shenton
Mike Silvester
Suky Singh
Tony Smith
Jeff Stevens
Graeme Topping
Ha Tran
Ducai Wang
Adrian Watkins
Ian Williams
Richard Williams
Robert Williams
Trevor Wright
Hao Xu

APPENDIX IV

A. Definitions

1. For purposes of this appendix, the term "Clevite trademarks" shall mean the "Clevite," "Clevite 77," "77," "Michigan," "Michigan 77," "Deltawall," "CL 112," "CL 77," and "Clevite 66" trademarks.

2. For purposes of this appendix, the term "inventory" shall mean engine parts other than engine bearings.

B. Phase Out Periods

1. Federal-Mogul may continue to affix Clevite trademarks to newly packaged inventory for 6 months after the Divestiture Date.

2.Federal-Mogul may sell inventory on which any Clevite trademarks appear for:

a. An unlimited period of time in packages where any Clevite trademarks are displayed only inside the packaging, such as on instructions or on parts;

b. 18 months after the Divestiture Date in packages that display any Clevite trademarks on the outside of the package, if such inventory consists only of gaskets;

c. 12 months after the Divestiture Date in packages that display any Clevite trademarks on the outside of the package, if such inventory includes any product other than gaskets; and

d. 24 months after the Divestiture Date in packages on which the only Clevite trademark on the outside of the package is the "AE Clevite Inc." company name.

3. Federal-Mogul may not use the "Clevite" mark in catalogues published after the Divestiture Date, but may continue to use printed catalogues published before the Divestiture Date for an unlimited period of time.

4.Except as otherwise specified herein, Federal-Mogul may not use the Clevite trademarks after the Divestiture Date.

APPENDIX V

CL 77
CL 112
Clevite
Clevite 66
Clevite 77
De-ex
Deltawall
DQ
DU
Dualign
Dualine
Duroglide
DX
Exalign
Glacelign
Glacelube
Glacetal
Glacier
Glacier DQ
Glacier DU
Glacier DX
Glacier Sentry
Glacier Spinner
Glacier (T-V.)
Glamat
Hi-Ex
Michigan
Michigan 77
SIC
Vandervell
Vandry
Vanwall
VP
VP-Logo

APPENDIX VI

"Non-Automotive Heavywall Bearings"

1. Plain half shell bearings, full round bushings, flange bearings and half and full round thrust washers with wall thickness of greater than .375 inches, EXCEPT for those manufactured and/or sold as of March 6, 1998 by The Assets To Be Divested with wall thickness in excess of .375 inches;
2. Magnetic bearings;
3. Ceramic bearings;
4. Tilting pad thrust and journal bearings;
5. Fixed profile ramp and pad bearings for non-automotive bearings (industrial applications);
6. Rotating plant bearings (mainly for steam turbines, gas turbines, large pumps, large gear boxes, compressors and large electrical machines);
7. NON-POLYMER self lubricated sintered bearings incorporating graphite type, molybdenum type, PTFE type, and other types of dry lubricants;
8. Deva BM type bearing material consisting of a steel backing with self-lubricated sintered layer incorporating solid lubricants such as graphite, molybdenum and PTFE;
9. Devaglide type self-lubricating bearing material that consists of a bearing bronze with pockets filled with solid lubricant;
10. Crankshaft bearings for medium and slow speed diesel engines;
11. Crankshaft bearings for locomotive diesel engines;
12. Profile faced thrust washers for medium and slow speed diesel engines;
13. Solid (not wrapped) steel and bronze backed bushes;
14. Centrifugally cast bearings;
15. Structural bearings for supporting bridges, roads and heavy plant;
16. Road joints;
17. Oil conditioning systems, including centrifugal oil filters and their component parts and screen filters;
18. Oil immersed friction plates;
19. Turbocharger bearings other than for passenger cars or heavy duty trucks;
20. DEVATEX type bearings consisting of 2 layers, both produced by a common cross-winding manufacturing technique, in which high strength polymer fibers embedded in a PTFE filled epoxy resin form the unique bearing surface which is machined; and
21. Rotating plant bearing assemblies (self contained and non-self contained).

APPENDIX VII

Case Ref: P/11.GB2 **Country:** United Kingdom **Patent No:** 2174717 **App No:** 8610215 **Grant Date:** 21/12/1988 **App Date:** 25/04/1986 **Applicant:** AE PLC **Desc. Title:** Spray Casting

Case Ref: P/33.AT **Country:** EP (Austria) **Patent No:** E 56227 **App No:** 87201325.5 **Grant Date:** 05/09/1990 **App Date:** 13/07/1987 **Applicant:** AE PLC **Desc. Title:** Tin-Cobalt Overlays

Case Ref: P/33.DE **Country:** EP (Germany) **Patent No:** 3764736.9 **App No:** 87201325.5 **Grant Date:** 05/09/1990 **App Date:** 13/07/1987 **Applicant:** AE PLC **Desc. Title:** Tin-Cobalt Overlays

Case Ref: P/33.ES **Country:** EP (Spain) **Patent No:** 2016965 **App No:** 87201325.5 **Grant Date:** 05/09/1990 **App Date:** 13/07/1987 **Applicant:** AE PLC **Desc. Title:** Tin-Cobalt Overlays

Case Ref: P/33.FR **Country:** EP (France) **Patent No:** 0254355 **App No:** 87201325.5 **Grant Date:** 05/09/1990 **App Date:** 13/07/1987 **Applicant:** AE PLC **Desc. Title:** Tin-Cobalt Overlays

Case Ref: P/33.GB2 **Country:** United Kingdom **Patent No:** 2192641 **App No:** 8716478.6 **Grant Date:** 11/07/1990 **App Date:** 13/07/1987 **Applicant:** AE PLC **Desc. Title:** Tin-Cobalt Overlays

Case Ref: P/33.IT **Country:** P (Italy) **Patent No:** 0254355 **App No:** 87201325.5 **Grant Date:** 05/09/1990 **App Date:** 13/07/1987 **Applicant:** AE PLC **Desc. Title:** Tin-Cobalt Overlays

Case Ref: P/33.JP **Country:** Japan **Patent No:** 2605049 **App No:** 177388/87 **Grant Date:** 13/02/1997 **App Date:** 17/07/1987 **Applicant:** AE PLC **Desc. Title:** Tin-Cobalt Overlays

Case Ref: P/33.US **Country:** United States **Patent No:** 4795682 **App No:** 07/72532 **Grant Date:** 03/01/1989 **App Date:** 13/07/1987 **Applicant:** AE PLC **Desc. Title:** Tin-Cobalt Overlays

Case Ref: P/40.GB2 **Country:** United Kingdom **Patent No:** 2196704 **App No:** 8724225.1 **Grant Date:** 02/05/1990 **App Date:** 15/10/1987 **Applicant:** AE PLC **Desc. Title:** Flanged Bearings

Case Ref: P/76.DE **Country:** Germany **Patent No:** P 2842494 **App No:** 2842494.4 **Grant Date:** 09/06/1983 **App Date:** 29/09/1978 **Applicant:** Vandervell Limited **Desc. Title:** High Strength Bearing Material

Case Ref: P/81.AT **Country:** EP (Austria) **Patent No:** 0048579 **App No:** 81304194.4 **Grant Date:** 19/12/1984 **App Date:** 14/09/1981 **Applicant:** GKN Vandervell Limited **Desc. Title:** Ion Exchange Membrane

Case Ref: P/81.BE **Country:** EP (Belgium) **Patent No:** 0048579 **App No:** 81304194.4 **Grant Date:** 19/12/1984 **App Date:** 14/09/1981 **Applicant:** GKN Vandervell Limited **Desc. Title:** Ion Exchange Membrane

Case Ref: P/81.CA **Country:** Canada (No Fee) **Patent No:** 1172599 **App No:** 386328 **Grant Date:** 14/08/1984 **App Date:** 21/09/1981 **Applicant:** GKN Vandervell Limited **Desc. Title:** Ion Exchange Membrane

Case Ref: P/81.CH **Country:** EP (Switzerland) **Patent No:** 0048579 **App No:** 81304194.4 **Grant Date:** 19/12/1984 **App Date:** 14/09/1981 **Applicant:** GKN Vandervell Limited **Desc. Title:** Ion Exchange Membrane

Case Ref: P/81.DE **Country:** EP (Germany) **Patent No:** P3167841 **App No:** 81304194.4 **Grant Date:** 19/12/1984 **App Date:** 14/09/1981 **Applicant:** GKN Vandervell Limited **Desc. Title:** Ion Exchange Membrane

Case Ref: P/81.FR **Country:** EP (France) **Patent No:** 0048579 **App No:** 81304194.4 **Grant Date:** 19/12/1984 **App Date:** 14/09/1981 **Applicant:** GKN Vandervell Limited **Desc. Title:** Ion Exchange Membrane

Case Ref: P/81.GB2 **Country:** EP (United Kingdom) **Patent No:** 0048579 **App No:** 81304194.4 **Grant Date:** 19/12/1984 **App Date:** 14/09/1981 **Applicant:** GKN Vandervell Limited **Desc. Title:** Ion Exchange Membrane

Case Ref: P/81.NL **Country:** EP (Netherlands) **Patent No:** 0048579 **App No:** 81304194.4 **Grant Date:** 19/12/1984 **App Date:** 14/09/1981 **Applicant:** GKN Vandervell Limited **Desc. Title:** Ion Exchange Membrane

Case Ref: P/83.GB2 **Country:** United Kingdom **Patent No:** 2156011 **App No:** 85066620 **Grant Date:** 03/06/1987 **App Date:** 14/03/1985 **Applicant:** GKN Vandervell Limited **Desc. Title:** Bearing Damage Indication

Case Ref: P/619.US **Country:** United States (No Fee) **Patent No:** 4386118 **App No:** 704800 **Grant Date:** 31/05/1983 **App Date:** 13/07/1976 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** PPS

Case Ref: P/637.US2 **Country:** United States (No Fee) **Patent No:** 4228895 **App No:** 53,518 **Grant Date:** 15/09/1981 **App Date:** 29/06/1979 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Laser Beam Welding of Flanges

Case Ref: P/649.AT **Country:** Austria **Patent No:** 376595 **App No:** 2128/79 **Grant Date:** 10/12/1984 **App Date:** 21/03/1979 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Laser Beam Welding Apparatus

Case Ref: P/649.DE **Country:** Germany **Patent No:** 2943228 **App No:** P2943228.8 **Grant Date:** 25/08/1988 **App Date:** 21/03/1979 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Laser Beam Welding Apparatus

Case Ref: P/649.GB2 **Country:** United Kingdom **Patent No:** 2041811 **App No:** 8013077 **Grant Date:** 06/05/1982 **App Date:** 21/03/1979 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Laser Beam Welding Apparatus

Case Ref: P/649.US **Country:** United States (No Fee) **Patent No:** 4326118 **App No:** 173,134 **Grant Date:** 20/04/1982 **App Date:** 21/03/1979 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Laser Beam Welding Apparatus

Case Ref: P/652.US **Country:** United States (No Fee) **Patent No:** 4301213 **App No:** 165123 **Grant Date:** 17/11/1981 **App Date:** 08/02/1979 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** PPS Bonded to Steel with Frit

Case Ref: P/662.DE **Country:** EP (Germany) **Patent No:** 3173059.0 **App No:** 81901800.3 **Grant Date:** 27/11/1985 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Solvents For PPS

Case Ref: P/662.FR **Country:** EP (France) **Patent No:** 0055273 **App No:** 81901800.3 **Grant Date:** 27/11/1985 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Solvents For PPS

Case Ref: P/662.GB2 **Country:** EP (United Kingdom) **Patent No:** 0055273 **App No:** 81901800.3 **Grant Date:** 27/11/1985 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Solvents For PPS

Case Ref: P/662.US **Country:** United States **Patent No:** 4413083 **App No:** 359,664 **Grant Date:** 01/11/1983 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Solvents For PPS

Case Ref: P/669.GB **Country:** United Kingdom **Patent No:** 2079867 **App No:** 8023069 **Grant Date:** 16/05/1984 **App Date:** 15/07/1980 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** High Fatigue Plastic B'ing Mat

Case Ref: P/675.DE **Country:** Germany **Patent No:** 3238987 **App No:** P32389987.6 **Grant Date:** 16/07/1992 **App Date:** 21/10/1982 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** PPS/Peek Alloy

Case Ref: P/675.FR **Country:** France **Patent No:** 8217638 **App No:** 8217638 **Grant Date:** 27/06/1986 **App Date:** 21/10/1982 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** PPS/Peek Alloy

Case Ref: P/675.GB2 **Country:** United Kingdom **Patent No:** 2108983 **App No:** 8230115 **Grant Date:** 19/12/1984 **App Date:** 21/10/1982 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** PPS/Peek Alloy

Case Ref: P/675.IT **Country:** Italy **Patent No:** 1158021 **App No:** 21/10/1982 **Grant Date:** 18/02/1987 **App Date:** 21/10/1982 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** PPS/Peek Alloy

Case Ref: P/675.JP **Country:** Japan **Patent No:** 1787772 **App No:** 57-184805 **Grant Date:** 10/09/1993 **App Date:** 22/10/1982 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** PPS/Peek Alloy

Case Ref: P/675.US **Country:** United States **Patent No:** RE.32,595 **App No:** 824,798 **Grant Date:** 09/02/1988 **App Date:** 22/10/1982 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** PPS/Peek Alloy

Case Ref: P/675.ZA **Country:** South Africa **Patent No:** 82/7687 **App No:** 82/7687 **Grant Date:** 27/06/1984 **App Date:** 20/10/1982 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** PPS/Peek Alloy

Case Ref: P/676.GB **Country:** United Kingdom **Patent No:** 121722 **App No:** 8216621 **Grant Date:** 18/12/1985 **App Date:** 08/06/1982 **Applicant:** AE PLC **Desc. Title:** High Molecular PPS Bearings

Case Ref: P/685.CA **Country:** Canada (No Fee) **Patent No:** 1227184 **App No:** 449,484 **Grant Date:** 22/09/1987 **App Date:** 13/03/1984 **Applicant:** AE PLC **Desc. Title:** PFTE/Peek/Graphite/Bronze

Case Ref: P/685.GB2 **Country:** United Kingdom **Patent No:** 2136439 **App No:** 8406547 **Grant Date:** 16/04/1986 **App Date:** 13/03/1984 **Applicant:** AE PLC **Desc. Title:** Hi-ex

Case Ref: P/685.JP **Country:** Japan **Patent No:** 1590510 **App No:** P11621JP **Grant Date:** 30/11/1990 **App Date:** 14/03/1984 **Applicant:** AE PLC **Desc. Title:** PFTE/Peek/Graphite/Bronze

Case Ref: P/685.US **Country:** United States **Patent No:** 4592782 **App No:** 588,386 **Grant Date:** 03/06/1986 **App Date:** 12/03/1984 **Applicant:** AE PLC **Desc. Title:** PFTE/Peek/Graphite/Bronze

Case Ref: P/698.AR **Country:** Argentina **Patent No:** 236060 **App No:** 302027 **Grant Date:** 30/10/1987 **App Date:** 22/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.AU **Country:** Australia **Patent No:** 581692 **App No:** 48874/85 **Grant Date:** 09/06/1989 **App Date:** 21/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.BR **Country:** Brazil **Patent No:** PI8505232 **App No:** PI8505232 **Grant Date:** 25/09/1990 **App Date:** 21/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.CA **Country:** Canada (No Fee) **Patent No:** 1246538 **App No:** 493,452 **Grant Date:** 13/12/1988 **App Date:** 21/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.CN **Country:** China **Patent No:** 938 **App No:** 85109639.5 **Grant Date:** 24/05/1988 **App Date:** 21/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.DE **Country:** EP (Germany) **Patent No:** 3580741.5 **App No:** 85307552.1 **Grant Date:** 28/11/1990 **App Date:** 18/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.ES **Country:** Spain **Patent No:** 548071 **App No:** 548071 **Grant Date:** 13/10/1986 **App Date:** 21/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.FR **Country:** EP (France) **Patent No:** 0183375 **App No:** 85307552.1 **Grant Date:** 28/11/1990 **App Date:** 18/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.GB2 **Country:** United **Patent No:** 2166142 **App No:** 8525729 **Grant Date:** 02/03/1988 **App Date:** 18/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.GB3 **Country:** EP (United Kingdom) **Patent No:** 0183375 **App No:** 85307552.1 **Grant Date:** 28/11/1990 **App Date:** 18/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.IN **Country:** India **Patent No:** 166217 **App No:** 832/MAS/85 **Grant Date:** 09/11/1990 **App Date:** 22/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.IT **Country:** EP (Italy) **Patent No:** 0183375 **App No:** 85307552.1 **Grant Date:** 28/11/1990 **App Date:** 18/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/698.ZA **Country:** South Africa **Patent No:** 85/8086 **App No:** 85/8086 **Grant Date:** 27/05/1987 **App Date:** 21/10/1985 **Applicant:** AE PLC **Desc. Title:** Cavit Resistant Bearing Material

Case Ref: P/700.AR **Country:** Argentina **Patent No:** 247228 **App No:** 303406 **Grant Date:** 30/11/1994 **App Date:** 15/03/1985 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.AU **Country:** Australia **Patent No:** 577933 **App No:** 54702/86 **Grant Date:** 06/10/1988 **App Date:** 13/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.BR **Country:** Brazil **Patent No:** PI8601099 **App No:** PI8601099 **Grant Date:** 27/04/1993 **App Date:** 13/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.CA **Country:** Canada **Patent No:** 1286829 **App No:** 504,133 **Grant Date:** 23/07/1991 **App Date:** 14/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.CN **Country:** China **Patent No:** 932 **App No:** 86101638.6 **Grant Date:** 31/05/1988 **App Date:** 14/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.DE **Country:** EP (Germany) **Patent No:** P3660391.0 **App No:** 14/03/1986 **Grant Date:** 13/07/1988 **App Date:** 86301858.6 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.ES **Country:** Spain **Patent No:** 553,024/5 **App No:** 553,024 **Grant Date:** 03/04/1987 **App Date:** 14/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.FR **Country:** EP (France) **Patent No:** 0194893 **App No:** 86301858.6 **Grant Date:** 13/07/1988 **App Date:** 14/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.GB **Country:** United Kingdom **Patent No:** 2172296 **App No:** 8506807 **Grant Date:** 06/07/1988 **App Date:** 15/03/1985 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.IN **Country:** India **Patent No:** 167182 **App No:** 184/MAS/86 **Grant Date:** 19/04/1991 **App Date:** 14/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.IT **Country:** EP (Italy) **Patent No:** 0194893 **App No:** 86301858.6 **Grant Date:** 13/07/1988 **App Date:** 14/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.JP **Country:** Japan **Patent No:** 1576020 **App No:** 057998/86 **Grant Date:** 24/08/1990 **App Date:** 15/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.KR **Country:** South Korea **Patent No:** 43480 **App No:** 1855/1986 **Grant Date:** 08/08/1991 **App Date:** 14/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.MX **Country:** Mexico **Patent No:** 166889 **App No:** 1880 **Grant Date:** 11/02/1993 **App Date:** 14/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.PL **Country:** Poland **Patent No:** 147533 **App No:** P-258428 **Grant Date:** 04/11/1988 **App Date:** 14/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.RU **Country:** Russian Federation **Patent No:** 1627094 **App No:** 4027169/27 **Grant Date:** 07/02/1991 **App Date:** 14/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.TW **Country:** Taiwan **Patent No:** 36103 **App No:** 7510112 **Grant Date:** 01/12/1989 **App Date:** 14/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.US **Country:** United States **Patent No:** 4657683 **App No:** 839,429 **Grant Date:** 14/04/1987 **App Date:** 13/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/700.ZA **Country:** South Africa **Patent No:** 86/1891 **App No:** 86/1891 **Grant Date:** 28/10/1987 **App Date:** 13/03/1986 **Applicant:** AE PLC **Desc. Title:** Erosion Resistant DU

Case Ref: P/909.CA **Country:** Canada (No Fee) **Patent No:** 1119900 **App No:** 323809 **Grant Date:** 16/03/1982 **App Date:** 20/03/1979 **Applicant:** Imperial Clevite Inc. **Desc. Title:** Comp Structure Plating Process

Case Ref: P/911.CA **Country:** Canada (No Fee) **Patent No:** 1153728 **App No:** 340975 **Grant Date:** 13/09/1983 **App Date:** 30/11/1979 **Applicant:** Imperial Clevite Inc. **Desc. Title:** Removing Copper Ions from Bath

Case Ref: P/911.US **Country:** United States (No Fee) **Patent No:** 4187166 **App No:** 5602 **Grant Date: App Date:** 05/02/1980 22/01/1979 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Removing Copper Ions from Bath

Case Ref: P/912.US **Country:** United States (No Fee) **Patent No:** 4333215 **App No:** 49102 **Grant Date:** 08/06/1982 **App Date:** 10/06/1979 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Br'g Material & Method of Making

Case Ref: P/913.CA **Country:** Canada (No Fee) **Patent No:** 1165275 **App No:** 394288 **Grant Date:** 10/04/1984 **App Date:** 15/01/1982 **Applicant:** Imperial Clevite Inc. **Desc. Title:** Evap'n Driven C-flow Rinse Sys

Case Ref: P/913.US **Country:** United States (No Fee) **Patent No:** 4379031 **App No:** 225709 **Grant Date:** 05/04/1983 **App Date:** 16/01/1981 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Evap'n Driven C-flow Rinse Sys

Case Ref: P/914.CA **Country:** Canada (No Fee) **Patent No:** 1175778 **App No:** 820622 **Grant Date:** 09/10/1984 **App Date:** 22/06/1982 **Applicant:** Imperial Clevite Inc. **Desc. Title:** U-high Current density E-P cell

Case Ref: P/915.CA **Country:** Canada (No Fee) **Patent No:** 1185843 **App No:** 368101 **Grant Date:** 23/04/1985 **App Date:** 08/01/1981 **Applicant:** Imperial Clevite Inc. **Desc. Title:** Wear Resist Metallic Article

Case Ref: P/915.JP **Country:** Japan **Patent No:** 1528512 **App No:** 3990/81 **Grant Date:** 30/10/1989 **App Date:** 16/01/1981 **Applicant:** Imperial Clevite Inc. **Desc. Title:** Wear Resist Metallic Article

Case Ref: P/915.US **Country:** United States (No Fee) **Patent No:** 4495252 **App No:** 112525 **Grant Date:** 22/01/1985 **App Date:** 16/01/1980 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Wear Resist Metallic Article

Case Ref: P/917.BR **Country:** Brazil **Patent No:** PI 8400454 **App No:** 8400545 **Grant Date:** 28/07/1987 **App Date:** 02/02/1999 **Applicant:** Clevite S.r.l. **Desc. Title:** Flanged Half-Brg for Motor App

Case Ref: P/917.DE **Country:** Germany **Patent No:** 3345652 **App No:** P 3345652.6 **Grant Date:** 19/05/1993 **App Date:** 16/12/1983 **Applicant:** Clevite S.r.l. **Desc. Title:** Flanged Half-Brg for Motor App

Case Ref: P/917.FR **Country:** France **Patent No:** 8401414 **App No:** 8401414 **Grant Date:** 26/06/1987 **App Date:** 30/01/1984 **Applicant:** Clevite S.r.l. **Desc. Title:** Flanged Half-Brg for Motor App

Case Ref: P/917.GB **Country:** United Kingdom **Patent No:** 2134189 **App No:** 8400778 **Grant Date:** 21/05/1986 **App Date:** 12/01/1984 **Applicant:** Clevite S.r.l. **Desc. Title:** Flanged Half-Brg for Motor App

Case Ref: P/917.IT **Country:** Italy **Patent No:** 1175166 **App No:** 84909/83 **Grant Date:** 01/07/1987 **App Date:** 03/02/1983 **Applicant:** Clevite S.r.l. **Desc. Title:** Flanged Half-Brg for Motor App

Case Ref: P/918.AU **Country:** Australia **Patent No:** 585816 **App No:** 73740/87 **Grant Date:** 13/10/1989 **App Date:** 02/06/1987 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/918.BR **Country:** Brazil **Patent No:** PI8702767.4 **App No:** PI8702767.4 **Grant Date:** 25/07/1995 **App Date:** 29/05/1987 **Applicant:** Imperial Clevite Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/918.CA **Country:** Canada **Patent No:** 1278154 **App No:** 538523 **Grant Date:** 27/12/1990 **App Date:** 01/06/1987 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/918.DE **Country:** EP (Germany) **Patent No:** P3781032.4 **App No:** 87304126.3 **Grant Date:** 12/08/1992 **App Date:** 08/05/1987 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/918.FR **Country:** EP (France) **Patent No:** 0248546 **App No:** 87304126.3 **Grant Date:** 12/08/1992 **App Date:** 08/05/1987 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/918.GB **Country:** EP (United Kingdom) **Patent No:** 0248546 **App No:** 87304126.3 **Grant Date:** 12/08/1992 **App Date:** 08/05/1987 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/918.IN **Country:** India **Patent No:** 167764 **App No:** 408/DEL/87 **Grant Date:** 06/09/1991 **App Date:** 12/05/1987 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/918.IT **Country:** EP (Italy) **Patent No:** 0248546 **App No:** 87304126.3 **Grant Date:** 12/08/1992 **App Date:** 08/05/1987 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/918.JP **Country:** Japan **Patent No:** 2502600 **App No:** 138036/87 **Grant Date:** 13/03/1996 **App Date:** 01/06/1987 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/918.KR **Country:** South Korea **Patent No:** 108516 **App No:** 5544/1987 **Grant Date:** 02/12/1996 **App Date:** 01/06/1987 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/918.MX **Country:** Mexico **Patent No:** 164473 **App No:** 6477 **Grant Date:** 19/08/1992 **App Date:** 14/05/1987 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/918.US **Country:** United States **Patent No:** 4734967 **App No:** 869489 **Grant Date:** 05/04/1988 **App Date:** 02/06/1986 **Applicant:** Imperial Clevite Inc. **Desc. Title:** Heat Treating Bearing Materials

Case Ref: P/919.US **Country:** United States **Patent No:** 4751777 **App No:** 06/902538 **Grant Date:** 21/06/1988 **App Date:** 02/09/1986 **Applicant:** JPI Acquisitions Inc. **Desc. Title:** Full Round Bush Manufacturing Method

Case Ref: P/927.US **Country:** United States **Patent No:** 5026967 **App No:** 07/550085 **Grant Date:** 25/06/1991 **App Date:** 09/07/1990 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Vision Enhanced Laser Welder

Case Ref: P/928.US **Country:** United States **Patent No:** 5114246 **App No:** 620727 **Grant Date:** 19/05/1992 **App Date:** 03/12/1990 **Applicant:** JPI Transportation Products Inc. **Desc. Title:** Floating Flange Half Bearing

Case Ref: P/1997.DE **Country:** EP (Germany) **Patent No:** P3878103.4 **App No:** 88201810.4 **Grant Date:** 03/02/1993 **App Date:** 25/08/1988 **Applicant:** Glacier Vandervell SA **Desc. Title:** Dissimilar bearing halves

Case Ref: P/1997.ES **Country:** EP (Spain) **Patent No:** 2037817 **App No:** 88201810.4 **Grant Date:** 03/02/1993 **App Date:** 25/08/1988 **Applicant:** Glacier Vandervell SA **Desc. Title:** Dissimilar bearing halves

Case Ref: P/1997.FR **Country:** EP (France) **Patent No:** 0307028 **App No:** 88201810.4 **Grant Date:** 03/02/1993 **App Date:** 25/08/1988 **Applicant:** Glacier Vandervell SA **Desc. Title:** Dissimilar bearing halves

Case Ref: P/1997.GB2 **Country:** United Kingdom **Patent No:** 2209566 **App No:** 8820155.3 **Grant Date:** 11/09/1991 **App Date:** 25/08/1988 **Applicant:** Glacier Vandervell SA **Desc. Title:** Dissimilar bearing halves

Case Ref: P/1997.IT **Country:** EP (Italy) **Patent No:** 0307028 **App No:** 88201810.4 **Grant Date:** 03/02/1993 **App Date:** 25/08/1988 **Applicant:** Glacier Vandervell SA **Desc. Title:** Dissimilar bearing halves

Case Ref: P/1997.US **Country:** United States **Patent No:** 4889435 **App No:** 07/240709 **Grant Date:** 26/12/1989 **App Date:** 06/09/1988 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Dissimilar bearing halves

Case Ref: P/2000.DE **Country:** EP (Germany) **Patent No:** 3879830.1 **App No:** 88201811.2 **Grant Date:** 31/03/1993 **App Date:** 25/08/1988 **Applicant:** Societe Industrielle des Coussinets SA **Desc. Title:** Freely Assoc'd Thrust Washers

Case Ref: P/2000.ES **Country:** EP (Spain) **Patent No:** 2039593 **App No:** 88201811.2 **Grant Date:** 31/03/1993 **App Date:** 25/08/1988 **Applicant:** Societe Industrielle des Coussinets SA **Desc. Title:** Freely Assoc'd Thrust Washers

Case Ref: P/2000.FR **Country:** EP (France) **Patent No:** 0307984 **App No:** 88201811.2 **Grant Date:** 31/03/1993 **App Date:** 25/08/1988 **Applicant:** Societe Industrielle des Coussinets SA **Desc. Title:** Freely Assoc'd Thrust Washers

Case Ref: P/2000.GB **Country:** United Kingdom **Patent No:** 2210113 **App No:** 8820156.1 **Grant Date:** 04/09/1991 **App Date:** 25/08/1988 **Applicant:** Glacier Vandervell SA **Desc. Title:** Freely Assoc'd Thrust Washers

Case Ref: P/2000.IT **Country:** EP (Italy) **Patent No:** 0307984 **App No:** 88201811.2 **Grant Date:** 31/03/1993 **App Date:** 25/08/1988 **Applicant:** Societe Industrielle des Coussinets SA **Desc. Title:** Freely Assoc'd Thrust Washers

Case Ref: P/2000.US **Country:** United States **Patent No:** 4924523 **App No:** 07/241,114 **Grant Date:** 08/05/1990 **App Date:** 06/09/1988 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Freely Assoc'd Thrust Washers

Case Ref: P/2076.GB2 **Country:** United Kingdom **Patent No:** 2225393 **App No:** 8926318.0 **Grant Date:** 02/12/1992 **App Date:** 21/11/1989 **Applicant:** Vandervell Limited **Desc. Title:** Offset "K" flange

Case Ref: P/2076.US **Country:** United States **Patent No:** 4989998 **App No:** 07/473904 **Grant Date:** 05/02/1991 **App Date:** 17/11/1989 **Applicant:** Vandervell Limited **Desc. Title:** Offset "K" flange

Case Ref: P/2077.GB2 **Country:** United Kingdom **Patent No:** 2225392 **App No:** 8926317.2 **Grant Date:** 19/08/1992 **App Date:** 21/11/1989 **Applicant:** Vandervell Limited **Desc. Title:** Single-lug "K" Flange

Case Ref: P/2111.AT **Country:** EP (Austria) **Patent No:** E123078 **App No:** 90909691.9 **Grant Date:** 24/05/1995 **App Date:** 18/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.BR **Country:** Brazil **Patent No:** Pending **App No:** PI9006838 **Grant Date:** Pending **App Date:** 18/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.DE **Country:** EP (Germany) **Patent No:** 69019710.1 **App No:** 90909691.9 **Grant Date:** 24/05/1995 **App Date:** 18/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.ES **Country:** EP (Spain) **Patent No:** 2074166 **App No:** 90909691.9 **Grant Date:** 24/05/1995 **App Date:** 18/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.FR **Country:** EP (France) **Patent No:** 0435980 **App No:** 90909691.9 **Grant Date:** 24/05/1995 **App Date:** 18/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.GB2 **Country:** United Kingdom **Patent No:** 2233718 **App No:** 9013355.4 **Grant Date:** 26/05/1993 **App Date:** 15/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.IT **Country:** EP (Italy) **Patent No:** 0435980 **App No:** 90909691.9 **Grant Date:** 24/05/1995 **App Date:** 18/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.JP **Country:** Japan **Patent No:** Pending **App No:** 509163/90 **Applicant:** T&N Technology Limited **Grant Date:** Pending **App Date:** 18/06/1990 **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.KR **Country:** South Korea **Patent No:** Pending **App No:** 700,243/1991 **Grant Date:** Pending **App Date:** 18/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.NL **Country:** EP (Netherlands) **Patent No:** 0435980 **App No:** 90909691.9 **Grant Date:** 24/05/1995 **App Date:** 18/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.RU **Country:** Russian Federation **Patent No:** 2018735 **App No:** 4894981.27 **Grant Date:** 30/08/1994 **App Date:** 18/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.SE **Country:** EP (Sweden) **Patent No:** 0435980 **App No:** 90909691.9 **Grant Date:** 24/05/1995 **App Date:** 18/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.US **Country:** United States **Patent No:** 5,209,578 **App No:** 07/640365 **Grant Date:** 11/05/1993 **App Date:** 18/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2111.ZA **Country:** South Africa **Patent No:** 90/4953 **App No:** 90/4953 **Grant Date:** 27/03/1991 **App Date:** 26/06/1990 **Applicant:** T&N Technology Limited **Desc. Title:** Sputtered Bearings

Case Ref: P/2138.AU **Country:** Australia **Patent No:** 633162 **App No:** 67619/90 **Grant Date:** 14/05/1993 **App Date:** 30/11/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** RB85-PVDF Bearing Material

Case Ref: P/2138.BR **Country:** Brazil **Patent No:** PI9006004-0 **App No:** PI9006004 **Grant Date:** 26/08/1997 **App Date:** 27/11/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** RB85-PVDF Bearing Material

Case Ref: P/2138.DE **Country:** EP (Germany) **Patent No:** 69012285.3 **App No:** 90202993.3 **Grant Date:** 07/09/1994 **App Date:** 12/11/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** RB85-PVDF Bearing Material

Case Ref: P/2138.ES **Country:** EP (Spain) **Patent No:** 0430324 **App No:** 90202993.3 **Grant Date:** 07/09/1994**App Date:** 12/11/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** RB85-PVDF Bearing Material

Case Ref: P/2138.FR **Country:** EP (France) **Patent No:** 0430324 **App No:** 90202993.3 **Grant Date:** 07/09/1994 **App Date:** 12/11/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** RB85-PVDF Bearing Material

Case Ref: P/2138.GB2 **Country:** United Kingdom **Patent No:** 2238548 **App No:** 9024540.8 **Grant Date:** 09/12/1992 **App Date:** 12/11/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** RB85-PVDF Bearing Material

Case Ref: P/2138.IT **Country:** EP (Italy) **Patent No:** 0430324 **App No:** 90202993.3 **Grant Date:** 07/09/1994 **App Date:** 12/11/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** RB85-PVDF Bearing Material

Case Ref: P/2138.KR **Country:** South Korea **Patent No:** Pending **App No:** 19584/1990 **Grant Date:** Pending **App Date:** 30/11/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** RB85-PVDF Bearing Material

Case Ref: P/2138.US **Country:** United States **Patent No:** 5153253 **App No:** 07/611699 **Grant Date:** 06/10/1992 **App Date:** 13/11/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** RB85-PVDF Bearing Material

Case Ref: P/2154.AT **Country:** EP (Austria) **Patent No:** E 123115 **App No:** 91200409.0 **Grant Date:** 24/05/1995 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 1 Flanged Bush

Case Ref: P/2154.DE **Country:** EP (Germany) **Patent No:** 69109892.1 **App No:** 91200409.0 **Grant Date:** 24/05/1995 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 1 Flanged Bush

Case Ref: P/2154.ES **Country:** EP (Spain) **Patent No:** 2074214 **App No:** 91200409.0 **Grant Date:** 24/05/1995 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 1 Flanged Bush

Case Ref: P/2154.FR **Country:** EP (France) **Patent No:** 0444754 **App No:** 91200409.0 **Grant Date:** 24/05/1995 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 1 Flanged Bush

Case Ref: P/2154.GB2 **Country:** United Kingdom **Patent No:** 2241752 **App No:** 9104027.9 **Grant Date:** 04/05/1994 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 1 Flanged Bush

Case Ref: P/2154.IT **Country:** EP (Italy) **Patent No:** 0444754 **App No:** 91200409.0 **Grant Date:** 24/05/1995 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 1 Flanged Bush

Case Ref: P/2154.US **Country:** United States **Patent No:** 5145264 **App No:** 07/661183 **Grant Date:** 08/09/1992 **App Date:** 27/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 1 Flanged Bush

Case Ref: P/2155.AT **Country:** EP (Austria) **Patent No:** E 120836 **App No:** 91200410.8 **Grant Date:** 05/04/1995 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 2 Flanged Bush

Case Ref: P/2155.DE **Country:** EP (Germany) **Patent No:** 69108592.7 **App No:** 91200410.8 **Grant Date:** 05/04/1995 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 2 Flanged Bush

Case Ref: P/2155.ES **Country:** EP (Spain) **Patent No:** 2070412 **App No:** 91200410.8 **Grant Date:** 05/04/1995 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 2 Flanged Bush

Case Ref: P/2155.FR **Country:** EP (France) **Patent No:** 0444755 **App No:** 91200410.8 **Grant Date:** 05/04/1995 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 2 Flanged Bush

Case Ref: P/2155.GB2 **Country:** United Kingdom **Patent No:** 9104026.1 **App No:** 2241751 **Grant Date:** 01/06/1994 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 2 Flanged Bush

Case Ref: P/2155.IT **Country:** EP (Italy) **Patent No:** 0444755 **App No:** 91200410.8 **Grant Date:** 05/04/1995 **App Date:** 26/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 2 Flanged Bush

Case Ref: P/2155.US **Country:** United States **Patent No:** 5139348 **App No:** 07/661184 **Grant Date:** 18/08/1992 **App Date:** 27/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Type 2 Flanged Bush

Case Ref: P/2189.DE **Country:** EP (Germany) **Patent No:** P69105513.0 **App No:** 91916415.2 **Grant Date:** 30/11/1994 **App Date:** 03/09/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Non Toxic DU

Case Ref: P/2189.FR **Country:** EP (France) **Patent No:** 0546070 **App No:** 91916415.2 **Grant Date:** 30/11/1994 **App Date:** 03/09/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Non Toxic DU

Case Ref: P/2189.GB2 **Country:** United Kingdom **Patent No:** 2248238 **App No:** 9118810.2 **Grant Date:** 23/03/1994 **App Date:** 03/09/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Non Toxic DU

Case Ref: P/2220.AT **Country:** EP (Austria) **Patent No:** E 150851 **App No:** PCT/GB92/00300 **Grant Date:** 26/03/1997 **App Date:** 20/02/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Composite overlays

Case Ref: P/2220.DE **Country:** EP (Germany) **Patent No:** 69218588.7 **App No:** PCT/GB92/00300 **Grant Date:** 26/03/1997 **App Date:** 20/02/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Composite overlays

Case Ref: P/2220.ES **Country:** EP (Spain) **Patent No:** 2099248 **App No:** PCT/GB92/00300 **Grant Date:** 26/03/1997 **App Date:** 20/02/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Composite overlays

Case Ref: P/2220.FR **Country:** EP (France) **Patent No:** 0571481 **App No:** PCT/GB92/00300 **Grant Date:** 26/03/1997 **App Date:** 20/02/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Composite overlays

Case Ref: P/2220.GB2 **Country:** United Kingdom **Patent No:** 2253412 **App No:** 9203593.0 **Grant Date:** 05/07/1995 **App Date:** 20/02/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Composite overlays

Case Ref: P/2220.IT **Country:** EP (Italy) **Patent No:** 0571481 **App No:** PCT/GB92/00300 **Grant Date:** 26/03/1997 **App Date:** 20/02/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Composite overlays

Case Ref: P/2220.JP **Country:** Japan **Patent No:** Pending **App No:** 505032/92 **Grant Date:** Pending **App Date:** 20/02/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Composite overlays

Case Ref: P/2220.US2 **Country:** United States **Patent No:** Pending **App No:** 08/436955 **Grant Date:** Pending **App Date:** 12/07/1993 **Applicant:** T&N Technology Limited **Desc. Title:** Composite overlays

Case Ref: P/2220.US3 **Country:** United States **Patent No:** 5770323 **App No:** 08/606275 **Grant Date:** 23/06/1998 **App Date:** 12/07/1993 **Applicant:** T&N Technology Limited **Desc. Title:** Composite overlays

Case Ref: P/2263.GB2 **Country:** United Kingdom **Patent No:** 2 262 576 **App No:** 9226356.5 **Grant Date:** 04/01/1995 **App Date:** 17/12/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Bearing w/Inj Moulded Flange

Case Ref: P/2263.US **Country:** United States **Patent No:** 5520466 **App No:** 08/244,676 **Grant Date:** 28/05/1996 **App Date:** 17/12/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Bearing w/Inj Moulded Flange

Case Ref: P/2264.DE **Country:** EP (Germany) **Patent No:** 69218249 T2 **App No:** 93900290.3 **Grant Date:** 12/03/1997 **App Date:** 17/12/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Plastic Bearing Bush

Case Ref: P/2264.ES **Country:** EP (Spain) **Patent No:** 2098723 T3 **App No:** 93900290.3 **Grant Date:** 12/03/1997 **App Date:** 17/12/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Plastic Bearing Bush

Case Ref: P/2264.FR **Country:** EP (France) **Patent No:** 0618944 **App No:** 93900290.3 **Grant Date:** 12/03/1997 **App Date:** 17/12/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Plastic Bearing Bush

Case Ref: P/2264.GB **Country:** United Kingdom **Patent No:** 2262784 **App No:** 9127342.5 **Grant Date:** 10/05/1995 **App Date:** 24/12/1991 **Applicant:** T&N Technology Limited **Desc. Title:** Plastic Bearing Bush

Case Ref: P/2264.GB2 **Country:** EP (United Kingdom) **Patent No:** 0618944 **App No:** 93900290.3 **Grant Date:** 12/03/1997 **App Date:** 17/12/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Plastic Bearing Bush

Case Ref: P/2264.IT **Country:** EP (Italy) **Patent No:** 0618944 **App No:** 93900290.3 **Grant Date:** 12/03/1997 **App Date:** 17/12/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Plastic Bearing Bush

Case Ref: P/2264.JP **Country:** Japan **Patent No:** Pending **App No:** 511517/93 **Grant Date:** Pending **App Date:** 17/12/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Plastic Bearing Bush

Case Ref: P/2264.SE **Country:** EP (Sweden) **Patent No:** 0618944 **App No:** 93900290.3 **Grant Date:** 12/03/1997 **App Date:** 17/12/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Plastic Bearing Bush

Case Ref: P/2264.US **Country:** United States **Patent No:** 5416154 **App No:** 244,759 **Grant Date:** 16/05/1995 **App Date:** 17/12/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Plastic Bearing Bush

Case Ref: P/2274.GB **Country:** United Kingdom **Patent No:** 2264150 **App No:** 9202304.3 **Grant Date:** 17/05/1995 **App Date:** 04/02/1992 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Encapsulated DU

Case Ref: P/2320.GB **Country:** United Kingdom **Patent No:** 2270720 **App No:** 9219800.1 **Grant Date:** 10/01/1996 **App Date:** 17/09/1992 **Applicant:** T&N Technology Limited **Desc. Title:** Expanded Metal w Tape Bearing

Case Ref: P/2338.BR **Country:** Brazil **Patent No:** Pending **App No:** PI 9406184-0 **Grant Date:** Pending **App Date:** 24/01/1994 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE PPS Bearing

Case Ref: P/2338.CN **Country:** China **Patent No:** Pending **App No:** 94191137.3 **Grant Date:** Pending **App Date:** 24/01/1994 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE PPS Bearing

Case Ref: P/2338.DE **Country:** EP (Germany) **Patent No:** 69405977.3-08 **App No:** 94904299.8 **Grant Date:** 01/10/1997 **App Date:** 24/01/1994 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE PPS Bearing

Case Ref: P/2338.ES **Country:** EP (Spain) **Patent No:** 2107178 T3 **App No:** 94904299.8 **Grant Date:** 01/10/1997 **App Date:** 24/01/1994 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE PPS Bearing

Case Ref: P/2338.FR **Country:** EP (France) **Patent No:** 0683807 **App No:** 94904299.8 **Grant Date:** 01/10/1997 **App Date:** 24/01/1994 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE PPS Bearing

Case Ref: P/2338.GB **Country:** United Kingdom **Patent No:** 2274844 **App No:** 9302533.6 **Grant Date:** 03/01/1996 **App Date:** 09/02/1993 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE PPS Bearing

Case Ref: P/2338.GB2 **Country:** EP (United Kingdom) **Patent No:** 0683807 **App No:** 94904299.8 **Grant Date:** 01/10/1997 **App Date:** 24/01/1994 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE PPS Bearing

Case Ref: P/2338.IT **Country:** EP (Italy) **Patent No:** 0683807 **App No:** 94904299.8 **Grant Date:** 01/10/1997 **App Date:** 24/01/1994 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE PPS Bearing

Case Ref: P/2338.JP **Country:** Japan **Patent No:** Pending **App No:** 517754/94 **Grant Date:** Pending **App Date:** 24/01/1994 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE PPS Bearing

Case Ref: P/2338.US **Country:** United States **Patent No:** 5665825 **App No:** 495,549 **Grant Date:** 09/09/1997 **App Date:** 24/01/1994 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE PPS Bearing

Case Ref: P/2363.BE **Country:** EP (Belgium) **Patent No:** 0708892 **App No:** 94920551.2 **Grant Date:** 07/05/1997 **App Date:** 12/07/1994 **Applicant:** T&N Technology Limited **Desc. Title:** Fibrilated Fibres in PTFE L'nr

Case Ref: P/2363.DE **Country:** EP (Germany) **Patent No:** 69403081.3 **App No:** 94920551.2 **Grant Date:** 07/05/1997 **App Date:** 12/07/1994 **Applicant:** T&N Technology Limited **Desc. Title:** Fibrilated Fibres in PTFE L'nr

Case Ref: P/2363.ES **Country:** EP (Spain) **Patent No:** 2101548 **App No:** 94920551.2 **Grant Date:** 07/05/1997 **App Date:** 12/07/1994 **Applicant:** T&N Technology Limited **Desc. Title:** Fibrilated Fibres in PTFE L'nr

Case Ref: P/2363.FR **Country:** EP (France) **Patent No:** 0708892 **App No:** 94920551.2 **Grant Date:** 07/05/1997 **App Date:** 12/07/1994 **Applicant:** T&N Technology Limited **Desc. Title:** Fibrilated Fibres in PTFE L'nr

Case Ref: P/2363.GB **Country:** United Kingdom **Patent No:** 2279998 **App No:** 9314582.9 **Grant Date:** 09/04/1997 **App Date:** 14/07/1993 **Applicant:** T&N Technology Limited **Desc. Title:** Fibrilated Fibres in PTFE L'nr

Case Ref: P/2363.GB2 **Country:** EP (United Kingdom) **Patent No:** 0708892 **App No:** 94920551.2 **Grant Date:** 07/05/1997 **App Date:** 12/07/1994 **Applicant:** T&N Technology Limited **Desc. Title:** Fibrilated Fibres in PTFE L'nr

Case Ref: P/2363.IT **Country:** EP (Italy) **Patent No:** 0708892 **App No:** 94920551.2 **Grant Date:** 07/05/1997 **App Date:** 12/07/1994 **Applicant:** T&N Technology Limited **Desc. Title:** Fibrilated Fibres in PTFE L'nr

Case Ref: P/2363.JP **Country:** Japan **Patent No:** Pending **App No:** 504403/95 **Grant Date:** Pending **App Date:** 12/07/1994 **Applicant:** T&N Technology Limited **Desc. Title:** Fibrilated Fibres in PTFE L'nr

Case Ref: P/2363.NL **Country:** EP (Netherlands) **Patent No:** 0708892 **App No:** 94920551.2 **Grant Date:** 07/05/1997 **App Date:** 12/07/1994 **Applicant:** T&N Technology Limited **Desc. Title:** Fibrilated Fibres in PTFE L'nr

Case Ref: P/2363.US **Country:** United States **Patent No:** Pending **App No:** 08/553597 **Grant Date:** Pending **App Date:** 12/07/1994 **Applicant:** T&N Technology Limited **Desc. Title:** Fibrilated Fibres in PTFE L'nr

Case Ref: P/2398.BE **Country:** EP (Belgium) **Patent No:** 0752075 **App No:** 95911418.2-2312 **Grant Date:** 05/08/1998 **App Date:** 17/03/1995 **Applicant:** Glacier Vandervell SA **Desc. Title:** SIC Strut Housings

Case Ref: P/2398.DE **Country:** EP (Germany) **Patent No:** 0752075 **App No:** 95911418.2 **Grant Date:** 05/08/1998 **App Date:** 17/03/1995 **Applicant:** Glacier Vandervell SA **Desc. Title:** SIC Strut Housings

Case Ref: P/2398.ES **Country:** EP (Spain) **Patent No:** 0752075 **App No:** 95911418.2-2312 **Grant Date:** 05/08/1998 **App Date:** 17/03/1995 **Applicant:** Glacier Vandervell SA **Desc. Title:** SIC Strut Housings

Case Ref: P/2398.FR **Country:** EP (France) **Patent No:** 0752075 **App No:** 95911418.2 **Grant Date:** 05/08/1998 **App Date:** 17/03/1995 **Applicant:** Glacier Vandervell SA **Desc. Title:** SIC Strut Housings

Case Ref: P/2398.GB2 **Country:** United Kingdom **Patent No:** 2287771 **App No:** 9505395.5 **Grant Date:** 08/10/1997 **App Date:** 17/03/1995 **Applicant:** Glacier Vandervell SA **Desc. Title:** SIC Strut Housings

Case Ref: P/2398.GB3 **Country:** EP (United Kingdom) **Patent No:** 0752075 **App No:** 95911418.2-2312 **Grant Date:** 05/08/1998 **App Date:** 17/03/1995 **Applicant:** Vandervell SA **Desc. Title:** SIC Strut Housings

Case Ref: P/2398.IT **Country:** EP (Italy) **Patent No:** 0752075 **App No:** 95911418.2-2312 **Grant Date:** 05/08/1998 **App Date:** 17/03/1995 **Applicant:** Vandervell SA **Desc. Title:** SIC Strut Housings

Case Ref: P/2398.JP **Country:** Japan **Patent No:** Pending **App No:** 524460/95 **Grant Date:** Pending **App Date:** 17/03/1995 **Applicant:** Glacier SIC and T&N plc **Desc. Title:** SIC Strut Housings

Case Ref: P/2398.NL **Country:** EP (Netherlands) **Patent No:** 0752075 **App No:** 95911418.2-2312 **Grant Date:** 05/08/1998 **App Date:** 17/03/1995 **Applicant:** Glacier Vandervell SA **Desc. Title:** SIC Strut Housings

Case Ref: P/2398.SE **Country:** EP (Sweden) **Patent No:** 0752075 **App No:** 95911418.2-2312 **Grant Date:** 05/08/1998 **App Date:** 17/03/1995 **Applicant:** Glacier Vandervell SA **Desc. Title:** SIC Strut Housings

Case Ref: P/2398.US **Country:** United States **Patent No:** 5765666 **App No:** 08/716,373 **Grant Date:** 16/06/1998 **App Date:** 17/03/1995 **Applicant:** Glacier Vandervell SA **Desc. Title:** SIC Strut Housings

Case Ref: P/2433.GB2 **Country:** United Kingdom **Patent No:** 2293419 **App No:** 9518650.8 **Grant Date:** 25/03/1998 **App Date:** 05/09/1995 **Applicant:** T&N Technology Limited **Desc. Title:** All Plastics Bush

Case Ref: P/2441.BR **Country:** Brazil **Patent No:** Pending **App No:** PI9509722-8 **Grant Date:** Pending **App Date:** 03/11/1995 **Applicant:** T&N Technology Limited **Desc. Title:** Zinc Alloy Overlay

Case Ref: P/2441.EP **Country:** European Patent Office **Patent No:** Pending **App No:** 95936022.3-2309 **Grant Date:** Pending **App Date:** 03/11/1995 **Applicant:** T&N Technology Limited **Desc. Title:** Zinc Alloy Overlay

Case Ref: P/2441.GB2 **Country:** United Kingdom **Patent No:** 2294981 **App No:** 9522500.9 **Grant Date:** 11/03/1998 **App Date:** 02/11/1995 **Applicant:** T&N Technology Limited **Desc. Title:** Zinc Alloy Overlay

Case Ref: P/2441.JP **Country:** Japan **Patent No:** Pending **App No:** 515815/96 **Grant Date:** Pending **App Date:** 03/11/1995 **Applicant:** T&N Technology Limited **Desc. Title:** Zinc Alloy Overlay

Case Ref: P/2441.US **Country:** United States **Patent No:** Pending **App No:** 08/836450 **Grant Date:** Pending **App Date:** 03/11/1995 **Applicant:** T&N Technology Limited **Desc. Title:** Zinc Alloy Overlay

Case Ref: P/2459.BR **Country:** Brazil **Patent No:** Pending **App No:** PI9607291-1 **Grant Date:** Pending **App Date:** 21/02/1996 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Pressure Bonding Al-Sn Overlay

Case Ref: P/2459.EP **Country:** European Patent Office **Patent No:** Pending **App No:** 96903116.0-2309 **Grant Date:** Pending **App Date:** 21/02/1996 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Pressure Bonding Al-Sn Overlay

Case Ref: P/2459.GB2 **Country:** United Kingdom **Patent No:** Pending **App No:** 9603697.5 **Grant Date:** Pending **App Date:** 21/02/1996 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Pressure Bonding Al-Sn Overlay

Case Ref: P/2459.JP **Country:** Japan **Patent No:** Pending **App No:** 526083/96 **Grant Date:** Pending **App Date:** 21/02/1996 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Pressure Bonding Al-Sn Overlay

Case Ref: P/2459.US **Country:** United States **Patent No:** Pending **App No:** 08/894,650 **Grant Date:** Pending **App Date:** 21/02/1996 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Pressure Bonding Al-Sn Overlay

Case Ref: P/2511.GB2 **Country:** United Kingdom **Patent No:** Pending **App No:** 9701776.8 **Grant Date:** Pending **App Date:** 29/01/1997 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Copper Containing Interlayer

Case Ref: P/2526.BR **Country:** Brazil **Patent No:** Pending **App No:** PCT/GB97/01143 **Grant Date:** Pending **App Date:** 25/04/1997 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Bearing Overlay Surface

Case Ref: P/2526. **Country:** EP European Patent Office **Patent No:** Pending **App No:** PCT/GB97/01143 **Grant Date:** Pending **App Date:** 25/04/1997 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Bearing Overlay Surface

Case Ref: P/2526.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9610096.1 **Grant Date:** Pending **App Date:** 15/05/1996 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Bearing Overlay Surface

Case Ref: P/2526.JP **Country:** Japan **Patent No:** Pending **App No:** PCT/GB97/01143 **Grant Date:** Pending **App Date:** 25/04/1997 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Bearing Overlay Surface

Case Ref: P/2526.US **Country:** United States **Patent No:** Pending **App No:** PCT/GB97/01143 **Grant Date:** Pending **App Date:** 25/04/1997 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Bearing Overlay Surface

Case Ref: P/2550.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9623052.9 **Grant Date:** Pending **App Date:** 06/11/1996 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE Bearing With Nanoparticle

Case Ref: P/2550.IN **Country:** India **Patent No:** Pending **App No:** 3089/DEL/1997 **Grant Date:** Pending **App Date:** 27/10/1997 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE Bearing With Nanoparticle

Case Ref: P/2550.WO **Country:** WIPO - International Pat **Patent No:** Pending **App No:** PCT/GB97/02846 **Grant Date:** Pending **App Date:** 15/10/1997 **Applicant:** T&N Technology Limited **Desc. Title:** PTFE Bearing With Nanoparticle

Case Ref: P/2562.GB2 **Country:** United Kingdom **Patent No:** Pending **App No:** 9725513.7 **Grant Date:** Pending **App Date:** 03/12/1997 **Applicant:** Glacier Vandervell SA **Desc. Title:** Steering Column Bearing

Case Ref: P/2562.WO **Country:** WIPO - International Pat **Patent No:** Pending **App No:** PCT/EP97/06952 **Grant Date:** Pending **App Date:** 02/12/1997 **Applicant:** Glacier Vandervell SA **Desc. Title:** Steering Column Bearing

Case Ref: P/2569.GB2 **Country:** United Kingdom **Patent No:** Pending **App No:** 9723152.6 **Grant Date:** Pending **App Date:** 04/11/1997 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Grooved Burnished Bush

Case Ref: P/2569.WO **Country:** WIPO - International Pat **Patent No:** Pending **App No:** PCT/GB98/00199 **Grant Date:** Pending **App Date:** 22/01/1998 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Grooved Burnished Bush

Case Ref: P/2570.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9701778.4 **Grant Date:** Pending **App Date:** 29/01/1997 **Applicant:** Glacier Vandervell Limited **Desc. Title:** PTFE Lining with Aramid/Glass

Case Ref: P/2570.WO **Country:** WIPO - International Pat **Patent No:** Pending **App No:** PCT/GB98/00196 **Grant Date:** Pending **App Date:** 22/01/1998 **Applicant:** Glacier Vandervell Limited **Desc. Title:** PTFE Lining with Aramid/Glass

Case Ref: P/2571.GB2 **Country:** United Kingdom **Patent No:** Pending **App No:** 9801777.5 **Grant Date:** Pending **App Date:** 28/01/1998 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Bearing Conveyor

Case Ref: P/2571.WO **Country:** WIPO - International Pat **Patent No:** Pending **App No:** PCT/GB98/00247 **Grant Date:** Pending **App Date:** 27/01/1998 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Bearing Conveyor

Case Ref: P/2599.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9713079.3 **Grant Date:** Pending **App Date:** 21/06/1997 **Applicant:** T&N Technology Limited **Desc. Title:** Aramid and PTFE etc.

Case Ref: P/2599.IN **Country:** India **Patent No:** Pending **App No:** 1059/CAL/98 **Grant Date:** Pending **App Date:** 15/06/1998 **Applicant:** T&N Technology Limited **Desc. Title:** Aramid and PTFE etc.

Case Ref: P/2599.WO **Country:** WIPO - International Pat **Patent No:** Pending **App No:** PCT/GB98/01740 **Grant Date:** Pending **App Date:** 15/06/1998 **Applicant:** T&N Technology Limited **Desc. Title:** Aramid and PTFE etc.

Case Ref: P/2599.ZA **Country:** South Africa **Patent No:** Pending **App No:** 98/5230 **Grant Date:** Pending **App Date:** 17/06/1998 **Applicant:** T&N Technology Limited **Desc. Title:** Aramid and PTFE etc.

Case Ref: P/2684.DE **Country:** EP (Germany) **Patent No:** 3167697.9 **App No:** 81901801.1 **Grant Date:** 12/12/1984 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Solvents for PPS

Case Ref: P/2684.GB2 **Country:** EP (United Kingdom) **Patent No:** 0055723 **App No:** 81901801.1 **Grant Date:** 12/12/1984 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Solvents for PPS

Case Ref: P/2690.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9726099.6 **Grant Date:** Pending **App Date:** 10/12/1997 **Applicant:** Glacier Vandervell SA **Desc. Title:** Elastomeric Element with Holes

Case Ref: P/2699.US **Country:** United States **Patent No:** 4405740 **App No:** 355,741 **Grant Date:** 20/09/1983 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Solvent For PPS

Case Ref: P/2700.US **Country:** United States **Patent No:** 4383069 **App No:** 355,747 **Grant Date:** 10/05/1983 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Solvents For PPS

Case Ref: P/2701.DE **Country:** EP (Germany) **Patent No:** 3173060.4 **App No:** 81901804.5 **Grant Date:** 27/11/1985 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Solvents For PPS

Case Ref: P/2701.FR **Country:** EP (France) **Patent No:** 81901804.5 **App No:** 0055275 **Grant Date:** 27/11/1985 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Solvents For PPS

Case Ref: P/2701.GB2 **Country:** EP (United Kingdom) **Patent No:** 0055275 **App No:** 81901804.5 **Grant Date:** 27/11/1985 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Solvents For PPS

Case Ref: P/3008.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9803213.9 **Grant Date:** Pending **App Date:** 14/02/1998 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Jewel Bearing

Case Ref: P/3010.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9804774.9 **Grant Date:** Pending **App Date:** 07/03/1998 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** PTFE lining with Kevlar & F **Country:** EP

Case Ref: P/3012.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9805353.1 **Grant Date:** Pending **App Date:** 14/03/1998 **Applicant:** T&N Technology Limited **Desc. Title:** HVOF SPRAYING

Case Ref: P/3013.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9805347.3 **Grant Date:** Pending **App Date:** 14/03/1998 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Variable composition spraying

Case Ref: P/20876 **Country:** United Kingdom **Patent No:** Pending **App No:** 9812586.7 **Grant Date:** Pending **App Date:** 12/06/1998 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Method & Apparatus for Electroplating

Case Ref: P/20877 **Country:** United Kingdom **Patent No:** Pending **App No:** 9817249.7 **Grant Date:** Pending **App Date:** 07/08/1998 **Applicant:** Glacier Vandervell Limited **Desc. Title:** Bearing Material

APPENDIX VIII

Case Ref: P/1.DE **Country:** EP (Germany) **Patent No:** P3576553.4 **App No:** 85114747.0 **Grant Date:** 14/03/1990 **App Date:** 19/11/1985 **Applicant:** AE PLC **Desc. Title:** Flexible Attached Flanges

Case Ref: P/1.ES **Country:** Spain **Patent No:** 296769.3 **App Date:** 549737 **Grant Date:** 29/07/1988 **App Date:** 09/12/1985 **Applicant:** AE PLC **Desc. Title:** Flexible Attached Flanges

Case Ref: P/1.FR **Country:** EP (France) **Patent No:** 0184693 **App No:** 85114747.0 **Grant Date:** 14/03/1990 **App Date:** 19/11/1985 **Applicant:** AE PLC **Desc. Title:** Flexible Attached Flanges

Case Ref: P/1.GB2 **Country:** EP (United Kingdom) **Patent No:** 0184693 **App No:** 85114747.0 **Grant Date:** 14/03/1990 **App Date:** 19/11/1985 **Applicant:** AE PLC **Desc. Title:** Flexible Attached Flanges

Case Ref: P/1.IT **Country:** EP (Italy) **Patent No:** 0184693 **App No:** 85114747.0 **Grant Date:** 14/03/1990 **App Date:** 19/11/1985 **Applicant:** AE PLC **Desc. Title:** Flexible Attached Flanges

Case Ref: P/1.SE **Country:** EP (Sweden) **Patent No:** 0184693 **App No:** 85114747.0 **Grant Date:** 14/03/1990 **App Date:** 19/11/1985 **Applicant:** AE PLC **Desc. Title:** Flexible Attached Flanges

Case Ref: P/1.US **Country:** United States **Patent No:** 4652150 **App No:** 06/794,550 **Grant Date:** 24/03/1987 **App Date:** 04/11/1985 **Applicant:** AE PLC **Desc. Title:** Flexible Attached Flanges

Case Ref: P/12.AT **Country:** EP (Austria) **Patent No:** E 47891 **App No:** 86106598.5 **Grant Date:** 08/11/1989 **App Date:** 15/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.AU **Country:** Australia **Patent No:** 582443 **App No:** 57860/86 **Grant Date:** 21/07/1989 **App Date:** 23/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.BR **Country:** Brazil **Patent No:** PI8602408 **App No:** PI8602408 **Grant Date:** 31/08/1993 **App Date:** 27/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.CA **Country:** Canada **Patent No:** 1270383 **App No:** 510047 **Grant Date:** 19/06/1990 **App Date:** 27/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.CN **Country:** China **Patent No:** 7595 **App No:** 86104271-4 **Grant Date:** 10/10/1990 **App Date:** 28/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.DE **Country:** EP (Germany) **Patent No:** P 3666843.5-08 **App No:** 86106598.5 **Grant Date:** 08/11/1989 **App Date:** 15/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.FR **Country:** EP (France) **Patent No:** 0205893 **App No:** 86106598.5 **Grant Date:** 08/11/1989 **App Date:** 15/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.GB2 **Country:** United Kingdom **Patent No:** 2175604 **App No:** 8611829.6 **Grant Date:** 05/07/1989 **App Date:** 15/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.IN **Country:** India **Patent No:** 167454 **App No:** 398/MAS/86 **Grant Date:** 30/08/1991 **App Date:** 22/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.IT **Country:** EP (Italy) **Patent No:** 0205893 **App No:** 86106598.5 **Grant Date:** 08/11/1989 **App Date:** 15/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.JP **Country:** Japan **Patent No:** 2009480 **App No:** 119420/86 **Grant Date:** 02/02/1996 **App Date:** 26/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.KR **Country:** South Korea **Patent No:** 75178 **App No:** 4197/1986 **Grant Date:** 07/07/1994 **App Date:** 26/05/2006 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.SE **Country:** EP (Sweden) **Patent No:** 0205893 **App No:** 86106598.5 **Grant Date:** 08/11/1989 **App Date:** 15/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.US **Country:** United States **Patent No:** 4707194 **App No:** 06/863711 **Grant Date:** 17/11/1987 **App Date:** 16/05/1986 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** AS124 Bearing Material

Case Ref: P/12.ZA **Country:** South Africa **Patent No:** 86/3845 **App No:** 86/3845 **Grant Date:** 28/01/1987 **App Date:** 22/05/1986 **Applicant:** AE PLC **Desc. Title:** AS124 Bearing Material

Case Ref: P/29.DE **Country:** EP (Germany) **Patent No:** P 3761328.6-08 **App No:** 87201003.8 **Grant Date:** 03/01/1990 **App Date:** 29/05/1987 **Applicant:** AE PLC **Desc. Title:** Thrust Washer w Bent-over Tabs

Case Ref: P/29.FR **Country:** EP (France) **Patent No:** 0248484 **App No:** 87201003.8 **Grant Date:** 03/01/1990 **App Date:** 29/05/1987 **Applicant:** AE PLC **Desc. Title:** Thrust Washer w Bent-over Tabs

Case Ref: P/29.GB2 **Country:** United Kingdom **Patent No:** 2193267 **App No:** 8712626.4 **Grant Date:** 20/12/1989 **App Date:** 29/05/1987 **Applicant:** AE PLC **Desc. Title:** Thrust Washer w Bent-over Tabs

Case Ref: P/29.IT **Country:** EP (Italy) **Patent No:** 0248484 **App No:** 87201003.8 **Grant Date:** 03/01/1990 **App Date:** 29/05/2007 **Applicant:** AE PLC **Desc. Title:** Thrust Washer w Bent-over Tabs

Case Ref: P/29.US **Country:** United States **Patent No:** 4770547 **App No:** 07/55305 **Grant Date:** 13/09/1988 **App Date:** 29/05/1987 **Applicant:** AE PLC **Desc. Title:** Thrust Washer w Bent-over Tabs

Case Ref: P/32.AT **Country:** EP (Austria) **Patent No:** E67528 **App No:** 87201324.8 **Grant Date:** 18/09/1991 **App Date:** 13/07/1987 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Brush Plating

Case Ref: P/32.DE **Country:** EP (Germany) **Patent No:** 3773088.6 **App No:** 87201324.8 **Grant Date:** 18/09/1991 **App Date:** 13/07/1987 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Brush Plating

Case Ref: P/32.ES **Country:** EP (Spain) **Patent No:** 2024494 **App No:** 87201324.8 **Grant Date:** 18/09/1991 **App Date:** 13/07/1987 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Brush Plating

Case Ref: P/32.FR **Country:** EP (France) **Patent No:** 0257670 **App No:** 87201324.8 **Grant Date:** 18/09/1991 **App Date:** 13/07/1987 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Brush Plating

Case Ref: P/32.GB2 **Country:** United Kingdom **Patent No:** 2192642 **App No:** 8716477.8 **Grant Date:** 19/12/1990 **App Date:** 13/07/1987 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Brush Plating

Case Ref: P/32.IT **Country:** EP (Italy) **Patent No:** 0257670 **App No:** 87201324.8 **Grant Date:** 18/09/1991 **App Date:** 13/07/1987 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Brush Plating

Case Ref: P/686.AU **Country:** Australia **Patent No:** 574691 **App No:** 30227/84 **Grant Date:** 14/12/1988 **App Date:** 03/07/2004 **Patent No:** AE PLC **Desc. Title:** Al/Tin/Silicon Bearing Alloy

Case Ref: P/686.BR **Country:** Brazil **Patent No:** PI8403288 **App No:** PI8403288 **Grant Date:** 25/05/1993 **App Date:** 03/07/1984 **Applicant:** AE PLC **Desc. Title:** Al/Tin/Silicon Bearing Alloy

Case Ref: P/686.CA **Country:** Canada (No Fee) **Patent No:** 1253722 **App No:** 458055 **Grant Date:** 09/05/1989 **App Date:** 04/07/1984 **Applicant:** AE PLC **Desc. Title:** Al/Tin/Silicon Bearing Alloy

Case Ref: P/686.GB2 **Country:** United Kingdom **Patent No:** 2144149 **App No:** 8417063 **Grant Date:** 16/09/1987 **App Date:** 04/07/1984 **Applicant:** AE PLC **Desc. Title:** AS104

Case Ref: P/686.KR **Country:** South Korea **Patent No:** 35820 **App No:** 3826/1984 **Grant Date:** 07/09/1990 **App Date:** 03/07/1984 **Applicant:** AE PLC **Desc. Title:** Al/Tin/Silicon Bearing Alloy

Case Ref: P/686.US **Country:** United States **Patent No:** 4696867 **App No:** 583,198 **Grant Date:** 29/09/1987 **App Date:** 24/02/1984 **Applicant:** AE PLC **Desc. Title:** Al/Tin/Silicon Bearing Alloy

Case Ref: P/686.ZA **Country:** South Africa **Patent No:** 84/5082 **App No:** 84/5082 **Grant Date:** 26/02/1986 **App Date:** 03/07/1984 **Applicant:** AE PLC **Desc. Title:** Al/Tin/Silicon Bearing Alloy

Case Ref: P/925.US **Country:** United States **Patent No:** 4551395 **App No:** 648466 **Grant Date:** 05/11/1985 **App Date:** 07/09/1984 **Applicant:** JPI Transportation Products Inc **Desc. Title:** Bearing Materials Cu/Bi

Case Ref: P/2092.GB2 **Country:** United Kingdom **Patent No:** 2217347 **App No:** 8902608.2 **Grant Date:** 02/12/1992 **App Date:** 06/02/1989 **Applicant:** T&N Technology Limited **Desc. Title:** Coating of Metal Substrates 2

APPENDIX IX

AE	DEVAGLIDE
CYGNUS	devaglide
HONEL	DEVAGLIDE
DEVA	(In Chinese characters)
DEVA (In Chinese characters)	DEVASLIDE
DEVA (In circle)	devatex
DEVA (In Japanese characters)	devatex (In Chinese characters)
DEVA (In rectangle)	ELASTOCRETE - D
DEVAGLEIT	SOLLINGER HUTTE (Device)

APPENDIX X

Case Ref: 2.AR **Country:** Argentina **Patent No:** 236,061 **App No:** 302,785 **Grant Date:** 30/10/1987 **App Date:** 03/01/1986 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.AT **Country:** EP (Austria) **Patent No:** E51686 **App No:** 86300019.6 **Grant Date:** 04/04/1990 **App Date:** 03/01/1986 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.AU **Country:** Australia **Patent No:** 583570 **App No:** 51274/85 **Grant Date:** 25/08/1989 **App Date:** 16/12/1985 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.BR **Country:** Brazil **Patent No:** PI8506582 **App No:** PI8506582 **Grant Date:** 30/03/1993 **App Date:** 30/12/1985 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.CA **Country:** Canada **Patent No:** 1291631 **App No:** 498,932 **Grant Date:** 05/11/1991 **App Date:** 03/01/1986 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.CN **Country:** China **Patent No:** 86100018.8 **App No:** 86100018 **Grant Date:** 16/08/1989 **App Date:** 04/01/1986 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.DE **Country:** EP (Germany) **Patent No:** 0187695 **App No:** 86300019.6 **Grant Date:** 04/04/1990 **App Date:** 03/01/1986 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.ES **Country:** Spain **Patent No:** 550665/4 **App No:** 550665/4 **Grant Date:** 23/07/1986 **App Date:** 23/07/1986 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.FI **Country:** Finland **Patent No:** 79748 **App No:** 860034 **Grant Date:** 12/02/1990 **App Date:** 03/01/1986 **Applicant:** AE plc & Dresser Industries **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.FR **Country:** EP (France) **Patent No:** 0187695 **App No:** 86300019.6 **Grant Date:** 04/04/1990 **App Date:** 03/01/1986 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.GB2 **Country:** EP (United Kingdom) **Patent No:** 0187695 **App No:** 86300019.6 **Grant Date:** 04/04/1990 **App Date:** 03/01/1986 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.IN **Country:** India **Patent No:** 166564 **App No:** 1007/MAS/85 **Grant Date:** 15/02/1991 **App Date:** 16/12/1985 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.JP **Country:** Japan **Patent No:** 2123272 **App No:** 292390/85 **Grant Date:** 20/12/1996 **App Date:** 26/12/1985 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.US **Country:** United States **Patent No:** 4718155 **App No:** 811930 **Grant Date:** 20/12/2005 **App Date:** 12/01/1988 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.VE **Country:** Venezuela **Patent No:** 48012 **App No:** 2062-85 **Grant Date:** 12/07/1990 **App Date:** 23/12/1985 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/2.ZA **Country:** South Africa **Patent No:** 86/0023 **App No:** 86/0023 **Grant Date:** 27/08/1986 **App Date:** 02/01/1986 **Applicant:** AE plc & Dresser Industries Inc. **Desc. Title:** Glacier Inlay Bearing

Case Ref: P/41.GB2 **Country:** United Kingdom **Patent No:** 2198486 **App No:** 8725100.5 **Grant Date:** 20/03/1991 **App Date:** 27/10/1987 **Applicant:** AE PLC **Desc. Title:** Ceramic Bearings

Case Ref: P/60.US **Country:** United States (No Fee) **Patent No:** 4229057 **App No:** 30730 **Grant Date:** 21/10/1980 **App Date:** 17/04/1979 **Applicant:** Vandervell Limited **Desc. Title:** R Type Railway Bearing

Case Ref: P/82.CA **Country:** Canada (No Fee) **Patent No:** 1127217 **App No:** 355491 **Grant Date:** 06/07/1982 **App Date:** 06/07/1980 **Applicant:** Vandervell Products Limited **Desc. Title:** R Bearing with Baffle

Case Ref: P/82.US **Country:** United States (No Fee) **Patent No:** 4336970 **App No:** 161819 **Grant Date:** 29/06/1982 **App Date:** 23/06/1980 **Applicant:** Vandervell Products Limited **Desc. Title:** R Bearing with Baffle

Case Ref: P/653.US **Country:** United States (No Fee) **Patent No:** 4360208 **App No:** 178,461 **Grant Date:** 23/11/1982 **App Date:** 17/04/1979 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Lip-Type Seals

Case Ref: P/655.GB2 **Country:** EP (United Kingdom) **Patent No:** 0026765 **App No:** 80900496.3 **Grant Date:** 23/05/1984 **App Date:** 20/03/1980 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Viscosity Pump

Case Ref: P/655.US **Country:** United States (No Fee) **Patent No:** 4,396,348 **App No:** 212,732 **Grant Date:** 02/08/1983 **App Date:** 02/08/1980 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Viscosity Pump

Case Ref: P/656.CA **Country:** Canada (No Fee) **Patent No:** 1152548 **App No:** 339,043 **Grant Date:** 23/08/1983 **App Date:** 02/11/1979 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Glacelign CQ

Case Ref: P/656.GB **Country:** United Kingdom **Patent No:** 2033023 **App No:** 7842945 **Grant Date:** 19/01/1983 **App Date:** 02/11/1978 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Glacelign CQ

Case Ref: P/656.US **Country:** United States (No Fee) **Patent No:** 4,335,925 **App No:** 197,349 **Grant Date:** 22/06/1982 **App Date:** 31/10/1979 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Glacelign CQ

Case Ref: P/668.GB **Country:** United Kingdom **Patent No:** 2079385 **App No:** 8021803 **Grant Date:** 20/06/1984 **App Date:** 03/07/1980 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Lubrication System

Case Ref: P/668.US **Country:** United States **Patent No:** 4,445,592 **App No:** 279,799 **Grant Date:** 01/05/1984 **App Date:** 02/07/1981 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Lubrication System

Case Ref: P/691.CA **Country:** Canada (No Fee) **Patent No:** 1234858 **App No:** 477904 **Grant Date:** 05/04/1988 **App Date:** 29/03/1985 **Applicant:** AE PLC **Desc. Title:** Re-lubricatable bridge bearing

Case Ref: P/697.AU **Country:** Australia **Patent No:** 571608 **App No:** 35872/84 **Grant Date:** 10/08/1988 **App Date:** 26/11/1984 **Applicant:** AE PLC **Desc. Title:** Expansion Joints

Case Ref: P/697.CA **Country:** Canada (No Fee) **Patent No:** 1237010 **App No:** 468,656 **Grant Date:** 24/05/1988 **App Date:** 27/11/1984 **Applicant:** AE PLC **Desc. Title:** Expansion Joints

Case Ref: P/697.GB **Country:** United Kingdom **Patent No:** 2151276 **App No:** 8429930 **Grant Date:** 14/01/1987 **App Date:** 27/11/1984 **Applicant:** AE PLC **Desc. Title:** Expansion Joints

Case Ref: P/697.ZA2 **Country:** South Africa **Patent No:** 84/9216 **App No:** 84/9216 **Grant Date:** 31/07/1985 **App Date:** 26/11/1984 **Applicant:** AE PLC **Desc. Title:** Expansion Joints

Case Ref: P/715.AT **Country:** EP (Austria) **Patent No:** E56778 **App No:** 88100192.9 **Grant Date:** 19/09/1990 **App Date:** 08/01/1988 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Sealing Spaces w/Elastic Material

Case Ref: P/715.CH **Country:** EP (Switzerland) **Patent No:** 0286775 **App No:** 88100192.9 **Grant Date:** 19/09/1990 **App Date:** 08/01/1988 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Sealing Spaces w/Elastic Material

Case Ref: P/715.DE2 **Country:** EP (Germany) **Patent No:** 0286775 **App No:** 88100192.9 **Grant Date:** 19/09/1990 **App Date:** 08/01/1988 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Sealing Spaces w/Elastic Material

Case Ref: P/716.DE2 **Country:** EP (Germany) **Patent No:** 3666472.3-08 **App No:** 86118112.1 **Grant Date:** 18/10/1989 **App Date:** 29/12/1986 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Railroad Expansion Joint

Case Ref: P/719.AT **Country:** EP (Austria) **Patent No:** E143079 **App No:** 94106402.4 **Grant Date:** 18/09/1996 **App Date:** 25/04/1994 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Level Crossing

Case Ref: P/719.CH **Country:** EP (Switzerland) **Patent No:** 0622494 **App No:** 94106402.4 **Grant Date:** 18/09/1996 **App Date:** 25/04/1994 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Level Crossing

Case Ref: P/719.DE2 **Country:** EP (Germany) **Patent No:** 59400662.7-08 **App No:** 94106402.4 **Grant Date:** 18/09/1996 **App Date:** 25/04/1994 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Level Crossing

Case Ref: P/719.GB **Country:** EP (United Kingdom) **Patent No:** 0622494 **App No:** 94106402.4 **Grant Date:** 18/09/1996 **App Date:** 25/04/1994 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Level Crossing

Case Ref: P/719.PL **Country:** Poland **Patent No:** Pending **App No:** P303223 **Grant Date:** Pending **App Date:** 27/04/1994 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Level Crossing

Case Ref: P/2041.CH **Country:** EP (Switzerland) **Patent No:** 0344595 **App No:** 89109336.1 **Grant Date:** 16/03/1994 **App Date:** 24/05/1989 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Thrust Bearings

Case Ref: P/2041.DE **Country:** EP (Germany) **Patent No:** P68913810.5 **App No:** 89109336.1 **Grant Date:** 16/03/1994 **App Date:** 24/05/1989 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Thrust Bearings

Case Ref: P/2041.FR **Country:** EP (France) **Patent No:** 0344595 **App No:** 89109336.1 **Grant Date:** 16/03/1994 **App Date:** 24/05/1989 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Thrust Bearings

Case Ref: P/2041.GB **Country:** United Kingdom **Patent No:** 2219357 **App No:** 8813019.0 **Grant Date:** 27/05/1992 **App Date:** 02/06/1988 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Thrust Bearings

Case Ref: P/2041.IT **Country:** EP (Italy) **Patent No:** 0344595 **App No:** 89109336.1 **Grant Date:** 16/03/1994 **App Date:** 24/05/1989 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Thrust Bearings

Case Ref: P/2041.JP **Country:** Japan **Patent No:** Pending **App No:** 136278/89 **Grant Date:** Pending **App Date:** 31/05/1989 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Thrust Bearings

Case Ref: P/2041.SE **Country:** EP (Sweden) **Patent No:** 0344595 **App No:** 89109336.1 **Grant Date:** 16/03/1994 **App Date:** 24/05/1989 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Thrust Bearings

Case Ref: P/2041.US **Country:** United States **Patent No:** 5101130 **App No:** 07/358140 **Grant Date:** 31/03/1992 **App Date:** 30/05/1989 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Thrust Bearings

Case Ref: P/2053.US **Country:** United States **Patent No:** 5,140,209 **App No:** 07/469,538 **Grant Date:** 18/08/1992 **App Date:** 17/07/1989 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Controlled Stiffness & Damping

Case Ref: P/2116.US **Country:** United States **Patent No:** 5083053 **App No:** 07/558497 **Grant Date:** 21/01/1992 **App Date:** 27/07/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Dry Back-up Bearings with Heat Sinks

Case Ref: P/2118.US **Country:** United States **Patent No:** 5072146 **App No:** 07/558496 **Grant Date:** 10/12/1991 **App Date:** 27/07/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Coil w. Heat Conductive Insert

Case Ref: P/2142.AT **Country:** EP (Austria) **Patent No:** E112023 **App No:** 90203270.5 **Grant Date:** 21/09/1994 **App Date:** 12/12/1990 **Applicant:** Vandervell Limited **Desc. Title:** Vandervell Mosaic

Case Ref: P/2142.DE **Country:** EP (Germany) **Patent No:** 69012765 **App No:** 90203270.5 **Grant Date:** 21/09/1994 **App Date:** 12/12/1990 **Applicant:** Vandervell Limited **Desc. Title:** Vandervell Mosaic

Case Ref: P/2142.ES **Country:** EP (Spain) **Patent No:** 2060936 **App No:** 90203270.5 **Grant Date:** 21/09/1994 **App Date:** 12/12/1990 **Applicant:** Vandervell Limited **Desc. Title:** Vandervell Mosaic

Case Ref: P/2142.FR **Country:** EP (France) **Patent No:** 0434127 **App No:** 90203270.5 **Grant Date:** 21/09/1994 **App Date:** 12/12/1990 **Applicant:** Vandervell Limited **Desc. Title:** Vandervell Mosaic

Case Ref: P/2142.GB2 **Country:** United Kingdom **Patent No:** 2239495 **App No:** 9026914.3 **Grant Date:** 03/11/1993 **App Date:** 11/12/1990 **Applicant:** Vandervell Limited **Desc. Title:** Vandervell Mosaic

Case Ref: P/2142.IT **Country:** EP (Italy) **Patent No:** 0434127 **App No:** 90203270.5 **Grant Date:** 21/09/1994 **App Date:** 12/12/1990 **Applicant:** Vandervell Limited **Desc. Title:** Vandervell Mosaic

Case Ref: P/2142.US **Country:** United States **Patent No:** 5195244 **App No:** 07/626018 **Grant Date:** 23/03/1993 **App Date:** 12/12/1990 **Applicant:** Vandervell Limited **Desc. Title:** Vandervell Mosaic

Case Ref: P/2187.CH **Country:** EP (Switzerland) **Patent No:** 0541656 **App No:** 91914153.1 **Grant Date:** 31/08/1994 **App Date:** 29/07/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Wrapped Laminations

Case Ref: P/2187.DE **Country:** EP (Germany) **Patent No:** 69103756.6 **App No:** 91914153.1 **Grant Date:** 31/08/1994 **App Date:** 29/07/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Wrapped Laminations

Case Ref: P/2187.FR **Country:** EP (France) **Patent No:** 0541656 **App No:** 91914153.1 **Grant Date:** 31/08/1994 **App Date:** 29/07/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Wrapped Laminations

Case Ref: P/2187.GB **Country:** United Kingdom **Patent No:** 2246400 **App No:** 9016625.7 **Grant Date:** 26/01/1994 **App Date:** 28/07/1990 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Wrapped Laminations

Case Ref: P/2187.IT **Country:** EP (Italy) **Patent No:** 0541656 **App No:** 91914153.1 **Grant Date:** 31/08/1994 **App Date:** 29/07/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Wrapped Laminations

Case Ref: P/2187.SE **Country:** EP (Sweden) **Patent No:** 0541656 **App No:** 91914153.1 **Grant Date:** 31/08/1994 **App Date:** 29/07/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Wrapped Laminations

Case Ref: P/2187.US **Country:** United States **Patent No:** 5317226 **App No:** 07/960401 **Grant Date:** 31/05/1994 **App Date:** 29/07/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Wrapped Laminations

Case Ref: P/2188.US **Country:** United States **Patent No:** 5319274 **App No:** 07/960400 **Grant Date:** 07/06/1994 **App Date:** 29/07/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Twisted Laminations

Case Ref: P/2217.JP **Country:** Japan **Patent No:** Pending **App No:** 28304/92 **Grant Date:** Pending **App Date:** 14/02/1992 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Bearing Shaft

Case Ref: P/2217.US2 **Country:** United States **Patent No:** 5272403 **App No:** 07/987,564 **Grant Date:** 21/12/1993 **App Date:** 15/02/1991 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Bearing Shaft

Case Ref: P/2218.JP **Country:** Japan **Patent No:** Pending **App No:** 28305/92 **Grant Date:** Pending **App Date:** 14/02/1992 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Bearing

Case Ref: P/2218.US **Country:** United States **Patent No:** 5231323 **App No:** 07/829265 **Grant Date:** 27/07/1993 **App Date:** 03/02/1992 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Magnetic Bearing

Case Ref: P/2257.GB2 **Country:** United Kingdom **Patent No:** 2260790 **App No:** 9222034.2 **Grant Date:** 05/04/1995 **App Date:** 20/10/1992 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Etched Mosaic

Case Ref: P/2303.CH **Country:** EP (Switzerland) **Patent No:** 0580201 **App No:** 93201915.1 **Grant Date:** 24/04/1996 **App Date:** 01/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Integral Fluid Back up

Case Ref: P/2303.DE **Country:** EP (Germany) **Patent No:** 69302334.1 **App No:** 93201915.1 **Grant Date:** 24/04/1996 **App Date:** 01/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Integral Fluid Back up

Case Ref: P/2303.FR **Country:** EP (France) **Patent No:** 0580201 **App No:** 93201915.1 **Grant Date:** 24/04/1996 **App Date:** 01/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Integral Fluid Back up

Case Ref: P/2303.GB **Country:** United Kingdom **Patent No:** 2268984 **App No:** 9215691.8 **Grant Date:** 03/04/1996 **App Date:** 23/07/1992 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Integral Fluid Back up

Case Ref: P/2303.IT **Country:** EP (Italy) **Patent No:** 0580201 **App No:** 93201915.1 **Grant Date:** 24/04/1996 **App Date:** 01/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Integral Fluid Back up

Case Ref: P/2303.JP **Country:** Japan **Patent No:** Pending **App No:** 181103/93 **Grant Date:** Pending **App Date:** 22/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Integral Fluid Back up

Case Ref: P/2303.SE **Country:** EP (Sweden) **Patent No:** 0580201 **App No:** 93201915.1 **Grant Date:** 24/04/1996 **App Date:** 01/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Integral Fluid Back up

Case Ref: P/2303.US **Country:** United States **Patent No:** 5,355,040 **App No:** 08/091,189 **Grant Date:** 11/10/1994 **App Date:** 14/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Integral Fluid Back up

Case Ref: P/2304.CH **Country:** EP (Switzerland) **Patent No:** 0580202 **App No:** 93201916.9 **Grant Date:** 17/04/1996 **App Date:** 01/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Separate Fluid Back-up

Case Ref: P/2304.DE **Country:** EP (Germany) **Patent No:** 69302235.3 **App No:** 93201916.9 **Grant Date:** 17/04/1994 **App Date:** 01/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Separate Fluid Back-up

Case Ref: P/2304.FR **Country:** EP (France) **Patent No:** 0580202 **App No:** 93201916.9 **Grant Date:** 24/04/1996 **App Date:** 01/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Separate Fluid Back-up

Case Ref: P/2304.GB **Country:** United Kingdom **Patent No:** 2268983 **App No:** 9215620.7 **Grant Date:** 03/04/1996 **App Date:** 23/07/1992 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Separate Fluid Back-up

Case Ref: P/2304.IT **Country:** EP (Italy) **Patent No:** 0580202 **App No:** 93201916.9 **Grant Date:** 17/04/1996 **App Date:** 01/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Separate Fluid Back-up

Case Ref: P/2304.JP **Country:** Japan **Patent No:** Pending **App No:** 181104/93 **Grant Date:** Pending **App Date:** 22/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Separate Fluid Back-up

Case Ref: P/2304.SE **Country:** EP (Sweden) **Patent No:** 0580202 **App No:** 93201916.9 **Grant Date:** 17/04/1996 **App Date:** 01/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Separate Fluid Back-up

Case Ref: P/2304.US **Country:** United States **Patent No:** 5345127 **App No:** 08/091,184 **Grant Date:** 06/09/1994 **App Date:** 14/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Mag Brg Separate Fluid Back-up

Case Ref: P/2312.CH **Country:** EP (Switzerland) **Patent No:** 0584846 **App No:** 93202026.6 **Grant Date:** 09/10/1996 **App Date:** 09/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Radially Offset Stator Pole

Case Ref: P/2312.DE **Country:** EP (Germany) **Patent No:** 69305294.5 **App No:** 93202026.6 **Grant Date:** 09/10/1996 **App Date:** 09/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Radially Offset Stator Pole

Case Ref: P/2312.FR **Country:** EP (France) **Patent No:** 0584846 **App No:** 93202026.6 **Grant Date:** 09/10/1996 **App Date:** 09/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Radially Offset Stator Pole

Case Ref: P/2312.GB **Country:** United Kingdom **Patent No:** 2269862 **App No:** 9217905.0 **Grant Date:** 08/05/1996 **App Date:** 22/08/1992 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Radially Offset Stator Pole

Case Ref: P/2312.IT **Country:** EP (Italy) **Patent No:** 0584846 **App No:** 93202026.6 **Grant Date:** 09/10/1996 **App Date:** 09/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Radially Offset Stator Pole

Case Ref: P/2312.JP **Country:** Japan **Patent No:** Pending **App No:** 205956/93 **Grant Date:** Pending **App Date:** 20/08/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Radially Offset Stator Pole

Case Ref: P/2312.SE **Country:** EP (Sweden) **Patent No:** 0584846 **App No:** 93202026.6 **Grant Date:** 09/10/1996 **App Date:** 09/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Radially Offset Stator Pole

Case Ref: P/2312.US **Country:** United States **Patent No:** 5406157 **App No:** 08090700 **Grant Date:** 11/04/1995 **App Date:** 13/07/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Radially Offset Stator Pole

Case Ref: P/2343.GB **Country:** United Kingdom **Patent No:** 2276681 **App No:** 9306923.5 **Grant Date:** 24/01/1996 **App Date:** 02/04/1993 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Sprung-apart Floating Seal

Case Ref: P/2421.JP **Country:** Japan **Patent No:** Pending **App No:** 504168/96 **Grant Date:** Pending **App Date:** 28/06/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Brg backup TiN&Cu Heat Conduct

Case Ref: P/2421.US **Country:** United States **Patent No:** 5693994 **App No:** 08/765,065 **Grant Date:** 02/12/1997 **App Date:** 28/06/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Brg backup TiN&Cu Heat Conduct

Case Ref: P/2422.JP **Country:** Japan **Patent No:** Pending **App No:** 504787/96 **Grant Date:** Pending **App Date:** 10/07/1995 **Applicant:** Glacier RPB Inc. **Desc. Title:** Axial Gas Damper

Case Ref: P/2422.US **Country:** United States **Patent No:** 5,548,170 **App No:** 08/274,432 **Grant Date:** 20/08/1996 **App Date:** 13/07/1994 **Applicant:** Glacier RPB Inc. **Desc. Title:** Axial Gas Damper

Case Ref: P/2428.CH **Country:** EP (Switzerland) **Patent No:** 0774080 **App No:** 95925946.6-2309 **Grant Date:** 24/06/1998 **App Date:** 24/07/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Hemispherical Journal Pad

Case Ref: P/2428.DE **Country:** EP (Germany) **Patent No:** 695 03 138.4 **App No:** 95925946.6 **Grant Date:** 24/06/1998 **App Date:** 24/07/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Hemispherical Journal Pad

Case Ref: P/2428.FR **Country:** EP (France) **Patent No:** 0774080 **App No:** 95925946.6 **Grant Date:** 24/06/1998 **App Date:** 24/07/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Hemispherical Journal Pad

Case Ref: P/2428.GB **Country:** United Kingdom **Patent No:** 2292192 **App No:** 9415964.7 **Grant Date:** 10/12/1997 **App Date:** 06/08/1994 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Hemispherical Journal Pad

Case Ref: P/2428.IT **Country:** EP (Italy) **Patent No:** 0774080 **App No:** 95925946.6-2309 **Grant Date:** 24/06/1998 **App Date:** 24/07/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Hemispherical Journal Pad

Case Ref: P/2428.JP **Country:** Japan **Patent No:** Pending **App No:** 507089/96 **Grant Date:** Pending **App Date:** 24/07/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Hemispherical Journal Pad

Case Ref: P/2428.NL **Country:** EP (Netherlands) **Patent No:** 0774080 **App No:** 95925946.6-2309 **Grant Date:** 24/06/1998 **App Date:** 24/07/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Hemispherical Journal Pad

Case Ref: P/2428.SE **Country:** EP (Sweden) **Patent No:** 0774080 **App No:** 95925946.6-2309 **Grant Date:** 24/06/1998 **App Date:** 24/07/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Hemispherical Journal Pad

Case Ref: P/2428.US **Country:** United States **Patent No:** 5743657 **App No:** 08/793,012 **Grant Date:** 28/04/1998 **App Date:** 24/07/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Hemispherical Journal Pad

Case Ref: P/2435.JP **Country:** Japan **Patent No:** Pending **App No:** 511486/96 **Grant Date:** Pending **App Date:** 15/09/1995 **Applicant:** Glacier RPB Inc. **Desc. Title:** Radial Gas Damper

Case Ref: P/2435.US **Country:** United States **Patent No:** 5,584,463 **App No:** 08/293,920 **Grant Date:** 17/12/1996 **App Date:** 29/09/1994 **Applicant:** Glacier RPB Inc. **Desc. Title:** Radial Gas Damper

Case Ref: P/2436.JP **Country:** Japan **Patent No:** Pending **App No:** 511481/96 **Grant Date:** Pending **App Date:** 15/09/1995 **Applicant:** Glacier RPB Inc. **Desc. Title:** Active Axial Gas Damper

Case Ref: P/2436.GB EP **Country:** (United Kingdom) **Patent No:** 0783635 **App No:** 95931323.0 **Grant Date:** 12/08/98 **App Date:** 15/09/95 **Applicant:** Glacier RPB Inc. **Desc. Title:** Radial Gas Damper

Case Ref: P/2436.US **Country:** United States **Patent No:** 5,578,881 **App No:** 08/313,600 **Grant Date:** 6/11/1996 **App Date:** 29/09/1994 **Applicant:** Glacier RPB Inc. **Desc. Title:** Active Axial Gas Damper

Case Ref: P/2447.EP **Country:** Europ Pat Office **Patent No:** Pending **App No:** 95937115.4-2309 **Grant Date:** Pending **App Date:** 27/11/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Vertical Brg Viscosity Pump

Case Ref: P/2447.GB **Country:** United Kingdom **Patent No:** 2295864 **App No:** 9424592.5 **Grant Date:** 01/07/1998 **App Date:** 06/12/1994 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Vertical Brg Viscosity Pump

Case Ref: P/2447.JP **Country:** Japan **Patent No:** Pending **App No:** 517389/96 **Grant Date:** Pending **App Date:** 27/11/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Vertical Brg Viscosity Pump

Case Ref: P/2447.US **Country:** United States **Patent No:** Pending **App No:** 08/849,190 **Grant Date:** Pending **App Date:** 27/11/1995 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Vertical Brg Viscosity Pump

Case Ref: P/2479.EP **Country:** Euro Pat Office **Patent No:** Pending **App No:** 96922133.2-1270 **Grant Date:** Pending **App Date:** 02/07/1996 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Separate Bias & Control Coils

Case Ref: P/2479.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9514420.0 **Grant Date:** Pending **App Date:** 02/07/1996 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Separate Bias & Control Coils

Case Ref: P/2479.JP **Country:** Japan **Patent No:** Pending **App No:** 506387/97 **Grant Date:** Pending **App Date:** 02/07/1996 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Separate Bias & Control Coils

Case Ref: P/2479.US **Country:** United States **Patent No:** Pending **App No:** 08/983,458 **Grant Date:** Pending **App Date:** 2/07/1996 **Applicant:** Inventor(s) Pending Assignment **Desc. Title:** Separate Bias & Control Coils

Case Ref: P/2488.US **Country:** United States **Patent No:** 5698917 **App No:** 08/533,203 **Grant Date:** 16/12/1997 **App Date:** 25/09/1995 **Applicant:** Glacier RPB Inc. **Desc. Title:** Pressure Canning Arrangement

Case Ref: P/2499.EP **Country:** Euro Pat Office **Patent No:** Pending **App No:** 96940042.3-2309 **Grant Date:** Pending **App Date:** 02/12/1996 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Tilting Pad With Shim

Case Ref: P/2499.GB2 **Country:** United Kingdom **Patent No:** Pending **App No:** 9625030.3 **Grant Date:** Pending **App Date:** 02/12/1996 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Tilting Pad With Shim

Case Ref: P/2499.SG **Country:** Singapore **Patent No:** Pending **App No:** PCT/GB96/02969 **Grant Date:** Pending **App Date:** 02/12/1996 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Tilting Pad With Shim

Case Ref: P/2499.US **Country:** United States **Patent No:** Pending **App No:** 09/077918 **Grant Date:** Pending **App Date:** 02/12/1996 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Tilting Pad With Shim

Case Ref: P/2499.WO **Country:** WIPO - Intl Pat **Patent No:** Pending **App No:** PCT/GB96/02969 **Grant Date:** Pending **App Date:** 02/12/1996 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Tilting Pad With Shim

Case Ref: P/2514.EP **Country:** Euro Pat Office **Patent No:** Pending **App No:** 97902478.3 **Grant Date:** Pending **App Date:** 06/02/1997 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Axial Rate Inductive Sensor

Case Ref: P/2514.GB2 **Country:** United Kingdom **Patent No:** Pending **App No:** 9702416.0 **Grant Date:** Pending **App Date:** 06/02/1997 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Axial Rate Inductive Sensor

Case Ref: P/2514.JP **Country:** Japan **Patent No:** Pending **App No:** PCT/GB97/00325 **Grant Date:** Pending **App Date:** 06/02/1997 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Axial Rate Inductive Sensor

Case Ref: P/2514.US **Country:** United States **Patent No:** Pending **App No:** PCT/GB97/00325 **Grant Date:** Pending **App Date:** 06/02/1997 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Axial Rate Inductive Sensor

Case Ref: P/2514.WO **Country:** WIPO - Intl Pat **Patent No:** Pending **App No:** PCT/GB97/00325 **Grant Date:** Pending **App Date:** 06/02/1997 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Axial Rate Inductive Sensor

Case Ref: P/2531.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9614601.4 **Grant Date:** Pending **App Date:** 01/07/1996 **Applicant:** T&N Technology Limited **Desc. Title:** Bore Cutter

Case Ref: P/2531.WO **Country:** WIPO - Intl Pat **Patent No:** Pending **App No:** PCT/GB97/01827 **Grant Date:** Pending **App Date:** /04/07/1997 **Applicant:** T&N Technology Limited **Desc. Title:** Bore Cutter

Case Ref: P/2586.GB **Country:** United Kingdom **Patent No:** Pending **App No:** 9709164.9 **Grant Date:** Pending **App Date:** 07/05/1997 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Tilt Pad Progressive Springs

Case Ref: P/2586.WO **Country:** WIPO - Intl Pat **Patent No:** Pending **App No:** PCT/GB98/00983 **Grant Date:** Pending **App Date:** 02/04/1998 **Applicant:** The Glacier Metal Company Limited **Desc. Title:** Tilt Pad Progressive Springs

Case Ref: P/3003.DE **Country:** Germany **Patent No:** 19532750 **App No:** 19532750.0-25 **Grant Date:** 17/10/1996 **App Date:** 05/09/1995 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Rubber Seal

Case Ref: P/3003.EP **Country:** Euro Pat Office **Patent No:** Pending **App No:** 95116990.3 **Grant Date:** Pending **App Date:** 27/10/1995 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Rubber Seal

Case Ref: P/3004.DE **Country:** Germany **Patent No:** 4425037 **App No:** 4425037.1-25 **Grant Date:** 23/11/1995 **App Date:** 15/07/1994 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Elastomeric Spring

Case Ref: P/3004.EP **Country:** Euro Pat Office **Patent No:** Pending **App No:** 95109739.3 **Grant Date:** Pending **App Date:** 22/06/1995 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Elastomeric Spring

Case Ref: P/3004.HU **Country:** Hungary **Patent No:** Pending **App No:** P9502106 **Grant Date:** Pending **App Date:** 11/07/1995 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Elastomeric Spring

Case Ref: P/3004.PL **Country:** Poland **Patent No:** Pending **App No:** P309443 **Grant Date:** Pending **App Date:** 30/06/1995 **Applicant:** Glacier GmbH - Sollinger Hutte **Desc. Title:** Elastomeric Spring

APPENDIX XI

Field of Use

General License Restrictions: Federal-Mogul's rights under these patents will be limited to exploitation of the teachings of the patent only in relation to Non-Automotive Heavywall Bearings. The license will be non-exclusive and royalty-free for the life of the patents. The license will not require the transfer of any technical assistance of know-how relating to the patents. The license will be assignable or transferable only to Federal-Mogul facilities dedicated to the manufacture of Non-Automotive Heavywall Bearings.

Patent P/12: In addition to the General License Restrictions above, the license for patent P/12 will prohibit use at any plant which Federal-Mogul at any time uses for manufacture of Thinwall Bearings that are not Non-Automotive Heavywall Bearings. No materials manufacturing rights will be granted under this license. Rather, the rights to be granted to Federal-Mogul under this license are the rights to take alloy compositions to which Federal-Mogul otherwise has rights, bond the alloy to steel, and perform heat treatment on the bonded material. Beginning six months after the Divestiture Date, Federal-Mogul will not be permitted to use the "AS124" name, or any name with the prefix "AS" or the suffix "124", in connection with any Thinwall Bearings, any Non-Automotive Heavywall Bearings, or any other bearings.

Patent P/686: In addition to the General License Restrictions above, the license for P/686 will prohibit use at any plant which Federal-Mogul at any time uses for manufacture of Thinwall Bearings that are not Non-Automotive Heavywall Bearings. Beginning six months after the Divestiture Date, Federal-Mogul will not be permitted to use the "AS104" name, or any name with the prefix "AS" or the suffix "104," in connection with any Thinwall Bearings, any Non-Automotive Heavywall Bearings, or any other bearings.

IN THE MATTER OF

DEL PHARMACEUTICALS, INC., ET AL.

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

Docket C-3837. Complaint, Dec. 8, 1998--Decision, Dec. 8, 1998

This consent order prohibits, among other things, two New York-based pharmaceutical companies from making unsubstantiated claims concerning the efficacy of their over-the-counter head lice treatments. The consent order requires the respondents to make certain disclosures in advertisements concerning the use and effectiveness of their head lice treatment products. In addition, the consent order prohibits the respondents from making claims about the extent to which health care, child care, or other medical professionals recommend Baby Orajel, or any other topically applied oral cleanser, unless the respondents have adequate substantiation to support their claims.

Participants

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

For the respondents: *Nancy Buc* and *Philip Katz, Buc & Beardsley*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Del Pharmaceuticals, Inc. and Del Laboratories, Inc., corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Del Pharmaceuticals, Inc. is a Delaware corporation with its principal office or place of business at 178 EAB Plaza, Uniondale, New York. Del Pharmaceuticals is a wholly-owned subsidiary of Del Laboratories, Inc.

2. Respondent Del Laboratories, Inc. is a Delaware corporation with its principal office or place of business at 178 EAB Plaza, Uniondale, New York.

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed cosmetics and over-the-counter pharmaceuticals to the public, including "Pronto Lice Treatment" and

"Baby Orajel Tooth & Gum Cleanser." Pronto Lice Treatment is a pediculicide, which contains the active ingredients of 0.33 percent pyrethrum extract and 4 percent piperonyl butoxide. Baby Orajel Tooth & Gum Cleanser is a topically applied oral cleansing product, which is designed to clean the teeth and gums of infants and toddlers. Pronto Lice Treatment is a "drug" and Baby Orajel Tooth & Gum Cleanser is a "drug" and/or "cosmetic" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. 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.

PRONTO LICE TREATMENT

5. Respondents have disseminated or have caused to be disseminated advertisements for Pronto Lice Treatment, including but not necessarily limited to the attached Exhibits A through G. These advertisements contain the following statements:

A. **"100% Effective In Laboratory Testing In Killing Lice And Eggs. 0% Lasting Chemical Pesticide Residue Left in Your Child's Hair. Only One Lice Treatment Can Make These Claims.**

...

Pronto is the only lice shampoo that's laboratory-tested 100% effective in killing lice and eggs*...Plus Pronto actually helps prevent reinfestation. Breakthrough Formula Pronto. 100% effective in laboratory testing in killing lice and their eggs. While leaving nothing behind but clean, healthy hair.

...

*Data on file. Use as directed." (Exhibit A).

B. "What parents should know about head lice infestations.
Fallacy & Fact

...

Fact

While it's true that all lice killing shampoos can kill adult lice, they don't all have the same effectiveness in killing lice eggs (nits) which can hatch later and cause reinfestation. Pronto Shampoo-and-Conditioner-in-One is laboratory proven to kill ALL lice and eggs." (Exhibit B).

C. "... brought to you by Pronto
The only lice shampoo laboratory tested 100% effective in killing lice and eggs without leaving a lasting pesticide residue. Pronto. So your child's hair is clean and healthy." (Exhibit C).

D. "Announcer: Raulito is not going to school today because his mother found out he has lice.

Teacher: There isn't a better treatment than Pronto shampoo. It's the only one 100% effective against lice and eggs without leaving a lasting pesticide residue. Laboratory test show that it's more effective than Rid. Pronto is so effective that it guarantees it or your money back. Use Pronto! There is nothing more effective against lice.
Student (Raulito): And dead lice!"
(Exhibit D, translated from Spanish).

E. "Kills all the lice and their nits on contact."
(Exhibit E, translated from Spanish).

F. **"Get Lice Out of Your Hair and Home!**
Fast Acting Pronto
Lice Killing Shampoo Kit
One Treatment Kills Lice & Their Eggs on Contact."
(Exhibit F).

G. **"Medical Update for Pharmacists.**
. . .
Recommend Breakthrough Formula Pronto
Pronto represents a true breakthrough in pediculicide efficacy.
Pronto is Laboratory-Tested 100% Effective in Killing Lice and Eggs
Pronto is the first and only lice shampoo proven in single treatment laboratory tests to be 100% effective in killing lice and eggs."
(Exhibit G).

6. Through the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. Pronto Lice Treatment kills one hundred percent of lice eggs.

B. Pronto Lice Treatment is one hundred percent effective in killing lice and their eggs in a single treatment.

C. Pronto Lice Treatment helps prevent reinfestation.

7. In truth and in fact:

A. Pronto Lice Treatment does not kill one hundred percent of lice eggs. Pronto Lice Treatment is based on a pesticide which is not one hundred percent effective against lice eggs. As a result, purchasers are provided with an egg-removing comb, and are instructed to apply a second treatment in seven to ten days to kill any newly hatched lice.

B. Pronto Lice Treatment is not one hundred percent effective in killing lice and their eggs in a single treatment. In most cases, it must be reapplied in seven to ten days.

C. In many cases, Pronto Lice Treatment does not help prevent reinfestation. It does not leave a lasting pesticidal residue that would help prevent reinfestation from post-treatment contacts with other lice-infested people or things.

Therefore, the representations set forth in paragraph six were, and are, false or misleading.

8. Through the means described in paragraph five, respondents have represented, expressly or by implication, that laboratory tests prove that Pronto Lice Treatment is one hundred percent effective in killing lice and their eggs.

9. In truth and in fact, laboratory tests do not prove that Pronto Lice Treatment is one hundred percent effective in killing lice and their eggs. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. Through the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made.

11. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made. Therefore, the representation set forth in paragraph ten was, and is, false or misleading.

BABY ORAJEL TOOTH & GUM CLEANSER

12. Respondents have disseminated or have caused to be disseminated advertisements for Baby Orajel Tooth & Gum Cleanser, including but not necessarily limited to the attached Exhibits H and I. These advertisements contain the following statements:

A. **"Baby teeth have special needs.**
Pediatricians recommend Baby Orajel Tooth & Gum Cleanser.
...
- **Pediatrician recommended.**

Nine out of every ten pediatricians surveyed would recommend Baby Orajel Tooth & Gum Cleanser." (Exhibit H)

B. **"Ordinary toothpastes are great for older kids, but baby teeth have special needs.**
Discover why pediatricians recommend Baby Orajel Tooth & Gum Cleanser.
...

• PEDIATRICIAN RECOMMENDED.
Nine out of every ten pediatricians surveyed would recommend Baby Orajel Tooth & Gum Cleanser." (Exhibit I)

13. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that competent and reliable surveys show that nine out of ten pediatricians would recommend Baby Orajel Tooth & Gum Cleanser.

14. In truth and in fact, competent and reliable surveys do not show that nine out of ten pediatricians surveyed would recommend Baby Orajel Tooth & Gum Cleanser. Among other reasons, the survey relied upon by respondents is methodologically flawed and the greatest number of respondents to that survey said they were only "somewhat likely" to recommend Baby Orajel Tooth & Gum Cleanser. Therefore, the representation set forth in paragraph thirteen was, and is, false or misleading.

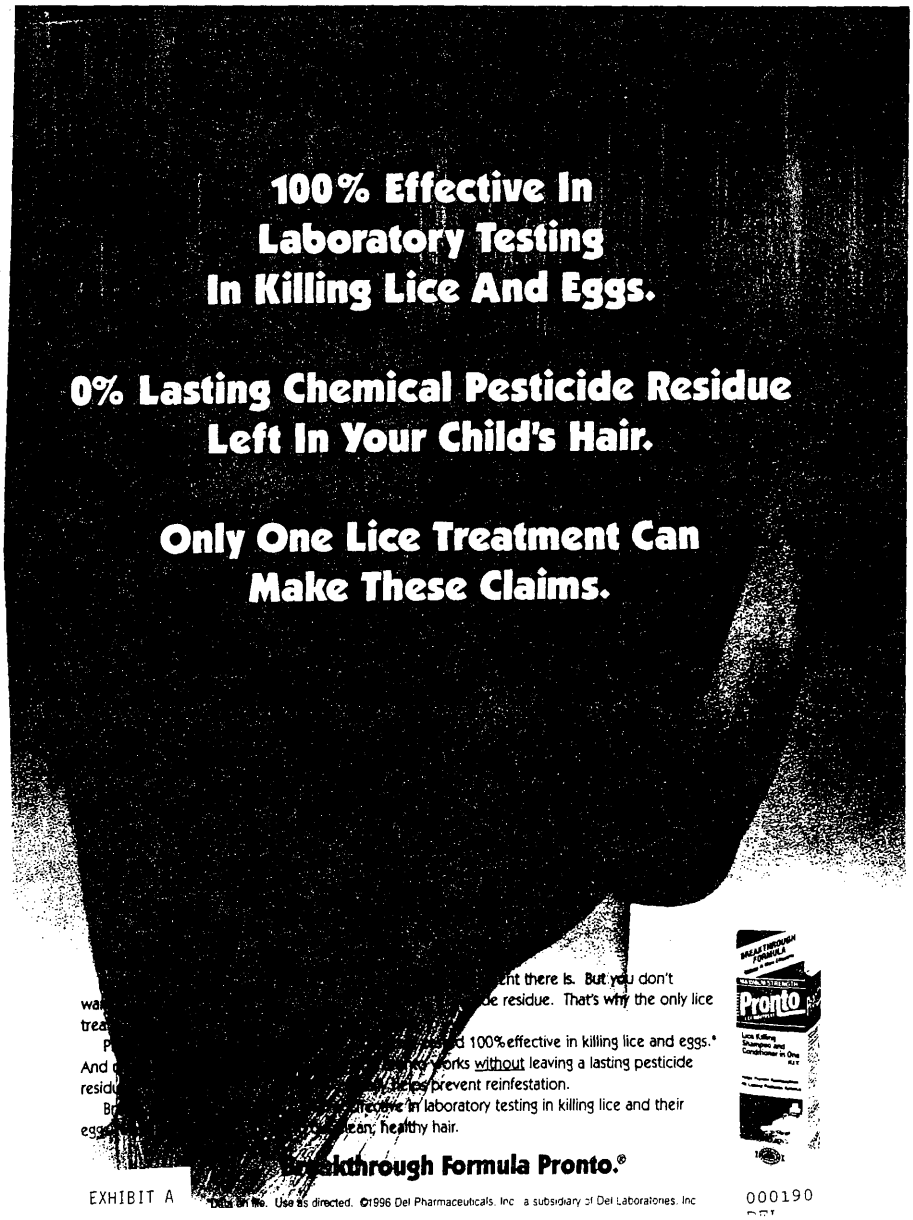
15. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that nine out of ten pediatricians recommend Baby Orajel Tooth & Gum Cleanser.

16. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraphs thirteen and fifteen, at the time the representations were made.

17. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraphs thirteen and fifteen, at the time the representations were made. In addition to the reasons stated in paragraph fourteen, the survey relied upon by respondents was not designed to elicit whether pediatricians actually do recommend Baby Orajel Tooth & Gum Cleanser to their patients. The survey merely asked pediatricians how likely they would be to recommend the product. Therefore, the representation set forth in paragraph sixteen was, and is, false or misleading.

18. The acts and practices of respondents 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



EXHIBT A 000190

EXHIBIT B

000319
DEL

Fallacy & Fact

There are many fallacies about head lice. This booklet will give you the facts about these tiny parasites and tell you the best ways to eliminate them when your children and household become infested.

A lice infestation is usually suspected by itching and scratching of the head, especially the back of the neck and ears. It is usually confirmed by finding yellowish-white lice eggs (nits) attached to the hair shaft near the scalp.

An Educational Service from the Makers of **Pronto®** Lice Killing Shampoo-and-Conditioner-in-One Kit.

Del Pharmaceuticals, Inc.
a subsidiary of Del Laboratories, Inc.
163 East Bethpage Rd., Plainview, NY 11803

Fact

Millions of American children become infested with head lice each year, regardless of cleanliness. Head lice don't discriminate and can live in the scalp and hair of all children, regardless of sex, race, cleanliness, or economic status. However, they are most often found on school-age children, particularly those in lower grades. African-American children have a much lower incidence of infestation than Caucasian or Asian children.

000320
DEL

Fact

Lice infestations are so common that nobody should be embarrassed about it. As a matter of fact, you should notify school officials about it so other parents can be warned about a possible epidemic. Inform your children's playmates' parents as well. It's important to protect all children as well as your own.

000321
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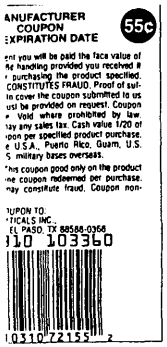
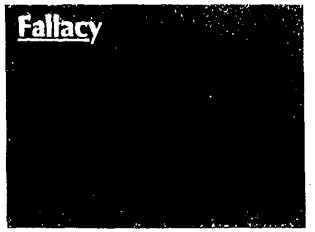
000314
DEL



15



Fact

The head louse cannot jump, hop or fly. And it is a human parasite that cannot live on the body of a dog or cat. The only way people become infested is through direct contact with infested persons, or by wearing infested clothing, using infested combs or brushes, or lying on infested bedding, carpeting or furniture. It's important that you caution your children about sharing a playmate's hat, clothing, or comb.

EXHIBIT B-1

000316
DEL

Fact

To prevent reinfestation, there are other precautions you should take:

1. All clothing and bed linens that have been in contact with the infested person must be washed in hot water and dried in a hot dryer.
2. Combs and brushes should be discarded or soaked in a lice shampoo for one hour.
3. Vacuum all rugs, furniture, and mattresses. You may want to use Pronto lice killing spray.

000317
DEL

Fact

While it's true that all lice killing shampoos can kill adult lice, they don't all have the same effectiveness in killing lice eggs (nits) which can hatch later and cause reinfestation. Pronto Shampoo-and-Conditioner-in-One is laboratory proven to kill ALL lice and eggs. What's more, its maximum strength pyrethrin formula will not leave a lasting pesticide residue on the child's head, like the leading creme rinse lice product that contains the synthetic ingredient permethrin.

000318
DEL

EXHIBIT C

Minimercial Copy

... brought to you by Pronto

The only lice shampoo laboratory tested 100% effective in killing lice and eggs without leaving a lasting pesticide residue. Pronto. So your child's hair is clean and healthy.

000264
DEL

EXHIBIT D

PRONTO

"RAULITO" :30

Spanish

Locutor: Raulito no va a la escuela porque su mama entero que tiene piojos.

Maestra: No hay mejor tratamiento que el champú Pronto. El único cien porciento efectivo contra piojos y huevecillos sin dejar residuos de pesticida duraderos. Pruebas de laboratorio demuestran que es más efectivo que Rid.

Pronto es tan efective que lo garantiza o le devuelva su dinero.

¡Use Pronto! No hay nada mas efectivo contra piojos.

Estudiante (Raulito):¡Y muerta piojos!

English

Announcer: Raulito is not going to school today because his mother found out he has lice.

Teacher: There isn't a better treatment than Pronto shampoo. It's the only one 100% effective against lice and eggs without leaving a lasting pesticide residue. Laboratory test show that it's more effective than Rid.

Pronto is so effective that it guarantees it or your money back.

Use Pronto! There is nothing more effective against lice.

Student (Raulito): And dead lice!

000262
DEL

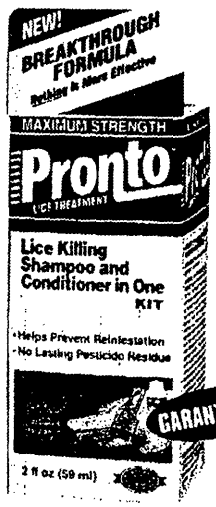
EXHIBIT D

EXHIBIT E

Print ad

¿Problemas de Piojos?

¡Resuélvalo Pronto!



- Llegó Pronto® Champú y Acondicionador
- Nueva fórmula
- Mata todos los piojos y sus liendres al contacto
- Ayuda a prevenir el contagio
- Sin residuos pesticidas

GARANTIZADO

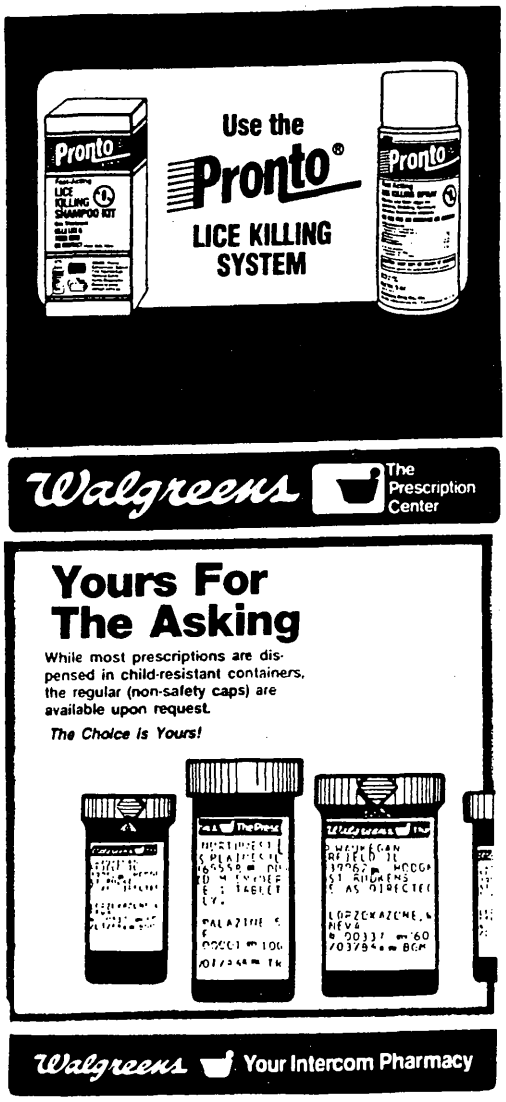
Pídalo en su Farmacia Favorita

DEL

EXHIBIT E

000249
DEL

EXHIBIT F



EX. F

EXHIBIT G

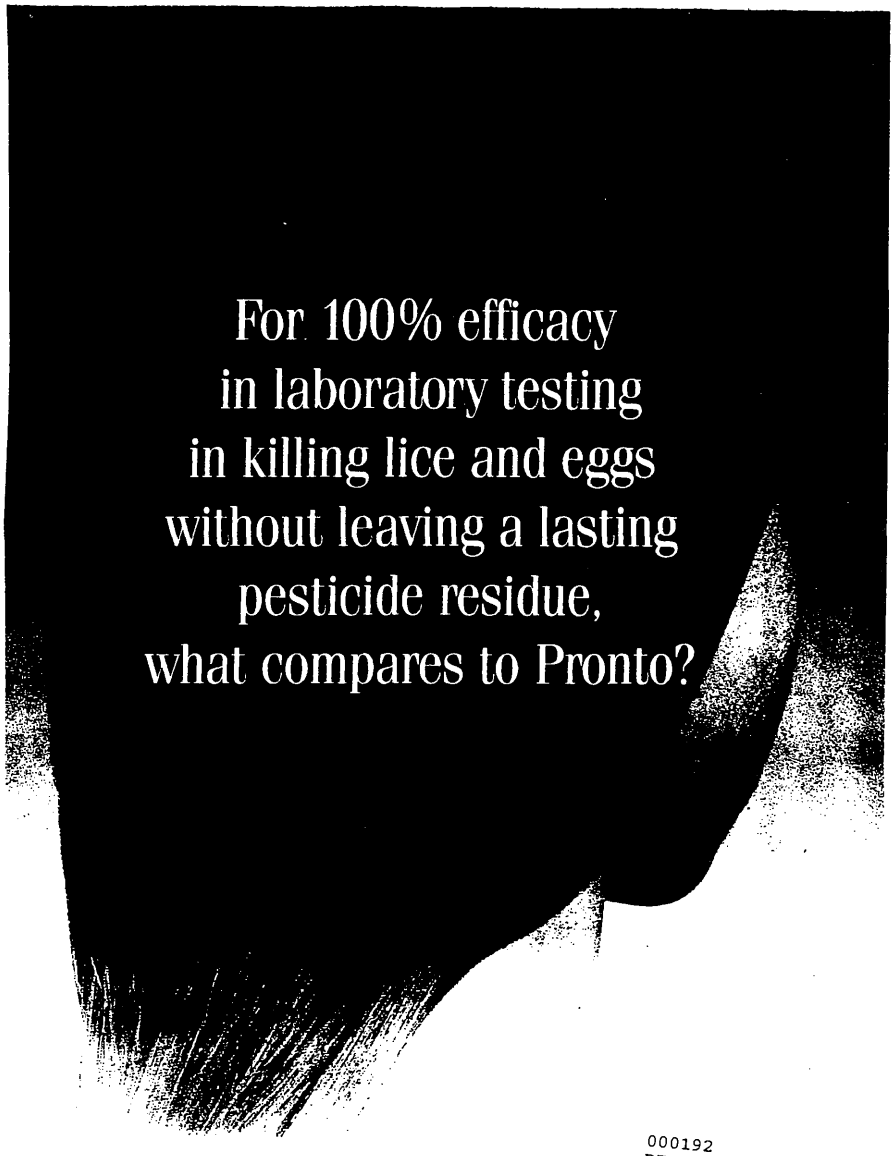
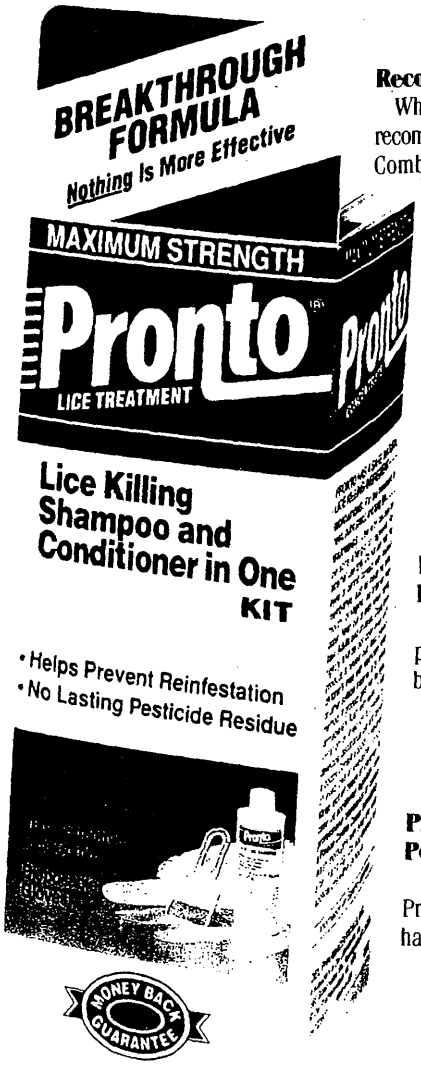


EXHIBIT G

000192
DEL

EXHIBIT G



Recommend the Most Effective Treatment

When someone's child has lice, you want to recommend the most effective treatment there is. Combine the improved formula with other Pronto benefits, and nothing compares to Pronto.

Recommend Breakthrough Formula Pronto

Pronto represents a true breakthrough in pediculicide efficacy.

Pronto is Laboratory-Tested 100% Effective in Killing Lice and Eggs

Pronto is the first and only lice shampoo proven in single treatment laboratory tests to be 100% effective in killing lice and eggs.

Pronto Works Without Leaving a Lasting Pesticide Residue

Unlike the leading creme rinse treatment, Pronto leaves nothing behind but clean, healthy hair. Plus, it actually helps prevent reinfestation.

000194
DEL

EXHIBIT G-1

EXHIBIT H

EXHIBIT H

Baby teeth have special needs.

Pediatricians recommend Baby Orajel® Tooth & Gum Cleanser.

- **Kids get plaque, too.**
  Sugars in formula, juice, and other foods form plaque. Water isn't enough to remove it. And ordinary toothpaste has disadvantages.
- **Unique plaque-fighter for babies and toddlers.**
  Gentle Microdent™ helps remove plaque from soft new teeth and prevent its build-up.
- **Non-abrasive and fluoride-free.**
  It's gentle on new enamel and gums. Also, ask your doctor why fluoride toothpaste may not be right for your baby.
- **Non-foaming and safe to swallow.**
  That's important since young children have trouble spitting out.
- **Babies and toddlers love the taste.**
  Now good oral hygiene can be fun!
- **Pediatrician recommended.**
  Nine out of every ten pediatricians surveyed would recommend Baby Orajel® Tooth & Gum Cleanser. Ask your doctor.

The one for kids under four.

Use as directed. © 1994 Del Pharmaceuticals, Inc., a subsidiary of Del Laboratories, Inc.

EXHIBIT I

EXHIBIT I

DECISION AND ORDER

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

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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, 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.a. Respondent Del Pharmaceuticals, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 178 EAB Plaza, Uniondale, New York. Del Pharmaceuticals is a wholly-owned subsidiary of Del Laboratories, Inc.

1.b. Respondent Del Laboratories, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 178 EAB Plaza, Uniondale, New York.

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

DEFINITIONS

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

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

2. "*Pronto Lice Treatment*" shall mean the pediculicide marketed by respondents which contains the active ingredients of 0.33 percent pyrethrum extract and 4 percent piperonyl butoxide.

3. "*Substantially similar product*" shall mean any pediculicide marketed by respondents which contains the active ingredients of pyrethrum extract and piperonyl butoxide, and is covered by the Food and Drug Administration's Final Monograph on OTC Pediculicide Drug Products.

4. "*Baby Orajel Tooth & Gum Cleanser*" shall mean the topical oral treatment for infants and toddlers marketed by respondents that contains the active ingredient Microdent™ (Poloxamer 407 2.0%, Simethicone 0.12%).

5. Unless otherwise specified, "*respondents*" shall mean Del Pharmaceuticals, Inc. and Del Laboratories, Inc., corporations, their successors and assigns, and their officers, agents, representatives, and employees.

6. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

7. "*Drug*" and "*device*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

8. "*Pesticide*" shall mean as defined in Section 2 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(u).

9. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any video disclosure shall be of a size and shade, and shall appear on the screen for a duration,

sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement or promotional material, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Pronto Lice Treatment or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Such product kills one hundred percent of lice eggs;

B. Such product is one hundred percent effective in killing lice and their eggs in a single treatment; or

C. Such product prevents reinfestation,

unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That, for a period of two (2) years from the date of service of this order, respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Pronto Lice Treatment or any other substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, in print advertisements or promotional materials about the efficacy of such product in the removal or elimination of lice or the treatment of lice infestations ("triggering representation"), unless it makes the

following disclosure, clearly and prominently, in such advertisements or promotional materials containing the triggering representation:

> Reapplication and egg removal are required to ensure complete effectiveness.
> See label for important information.

Provided, however, that the above disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that the product is effective for the complete elimination of all lice and lice eggs in a single application.

Provided, further, that the above disclosure shall not be required in a particular piece of promotional material if such promotional material constitutes "labeling of a pediculicide drug product" subject to the labeling requirements of the Food and Drug Administration's Final Monograph on OTC Pediculicide Drug Products, 21 CFR 358.650.

III.

It is further ordered, That, for a period of two (2) years from the date of service of this order, respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Pronto Lice Treatment or any other substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, in advertisements communicated through an electronic medium, about the efficacy of such product in the removal or elimination of lice or the treatment of lice infestations ("triggering representation"), unless it makes the following disclosure, clearly and prominently, in the video portion of such advertisements (or in the audio portion if the advertisement is audio only) containing the triggering representation:

> Two Treatments Required.

Provided, however, that if the respondents make any representation, in any manner, expressly or by implication, about directions for use of such product in advertisements communicated through an electronic medium utilizing both video and audio, the disclosure shall be presented in both the video and the audio portions of such advertisements.

Provided, further, that the above disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that the product is effective for the complete elimination of all lice and lice eggs in a single application.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Baby Orajel Tooth & Gum Cleanser or any other topically applied oral cleansing product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

A. The extent to which doctors or other health, childcare, or medical professionals recommend or would recommend such product; or

B. The recommendation, approval, or endorsement of such product by any health, childcare, or medical professional, profession, group or other entity;

unless, at the time the representation is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

V.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any drug or device for the treatment of lice in humans, any pesticide for treatment of lice, or any topically applied oral cleansing product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

VI.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with

the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any drug or device for the treatment of lice in humans, or any pesticide for treatment of lice in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, regarding the efficacy of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

VII.

It is further ordered, That the Parts I, II, III, V and VI of this order shall not apply to any labels or labeling printed prior to the date that the explanation of this order is published in the Federal Register for public comment pursuant to Section 2.34 of the Commission's Rules and shipped by respondents prior to one hundred (100) days after the date that the explanation of this order is published in the Federal Register for public comment pursuant to Section 2.34 of the Commission's Rules.

VIII.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IX.

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

A. All advertisements and promotional materials containing the representation;

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

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call

into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

X.

It is further ordered, That respondents Del Pharmaceuticals, Inc. and Del Laboratories, Inc., and their successors and assigns shall deliver a copy of this order to all current and future principals, officers, and directors, and to all current and future managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and, for a period of five (5) years from the date of issuance of this order, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XI.

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

XII.

It is further ordered, That respondents Del Pharmaceuticals, Inc. and Del Laboratories, Inc., and their successors and assigns shall, within sixty (60) days after the date of service of this order, and at

such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIII.

This order will terminate on December 8, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

STATEMENT OF CHAIRMAN PITOFSKY AND
COMMISSIONERS ANTHONY AND THOMPSON

We write to express our views about the concerns Commissioner Swindle raises regarding the disclosure remedy in these cases. The orders require that, for two years, whenever a claim is made regarding the efficacy of the lice removal products, the respondents include a disclosure about the necessity for a second application of their product. The disclosure remedy in these cases is fencing-in relief, designed to prevent purchasers of respondents' products from being deceived by *future* advertising.[1] The triggered disclosure about the

[1] It is also worth noting that the Commission has distinguished triggered disclosures such as those in these cases from corrective advertising, which is required regardless of the contents of the ad. *Removatron Int'l Corp.*, 111 FTC 206, 311-12 n. 28 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989). *See also American Home Prods. Corp. v. FTC*, 695 F.2d 681, 700 (3rd Circ. 1982).

need for two treatments provides additional assurance that consumers will not be misled by future ads. We are satisfied that the triggered disclosures in these orders are appropriate and reasonable.

STATEMENT OF COMMISSIONER ORSON SWINDLE

I have voted in favor of issuance of the final orders in these cases because there is reason to believe that the respondents have violated the law and most of the relief contained in the orders is necessary and appropriate. However, I continue to have concerns with regard to the need for and scope of one of the disclosure requirements contained in the orders.

The complaints include the allegation that the respondents claimed that their respective lice products eradicate a lice infestation after a single treatment. In truth, reapplication and careful combing are required to complete the treatments. To address this allegedly false claim, the orders prohibit the respondents from making, expressly or by implication, any claim that their lice treatment products work in only one treatment, unless that claim is true and substantiated. I agree that this prohibition is necessary and appropriate.

The orders, however, go further. For a period of two years, whenever the respondents make any efficacy claim for one of their lice treatment products, they must disclose "Two Treatments Required." The majority of the Commission has cast this provision as a "triggered disclosure requirement" and concluded that it is "appropriate and reasonably related to the alleged violations of Section 5." Even if this is a triggered disclosure requirement,[1] I do not believe that it is either necessary or appropriate.

The majority apparently believes that consumers will be misled if the respondents do not disclose that two treatments are required whenever they make an efficacy claim for their products. However, if a respondent makes a one-treatment claim that is false or unsubstantiated, the Commission can bring an action for violating the

[1] The majority is correct that the requirement has the form of a triggered disclosure, but the substance of the requirement is indistinguishable from corrective advertising. The disclosure will be required whenever the respondents make any express or implied claim that their products are efficacious, which likely would include all or virtually all of the ads they run for their lice treatment products. The disclosure also is required for only a limited period of time, which is also consistent with being a corrective advertising measure.

injunctive provisions of the order, and thus the two-treatment disclosure requirement would be unnecessary. On the other hand, if a respondent makes a one-treatment claim that is true and substantiated, the disclosure itself -- "Two Treatments Required" -- would be false, because the product would require only one treatment to be effective. Consequently, the disclosure requirement is not needed to prevent the respondents from making the misleading claim that their lice products work in one treatment.

Even if some sort of disclosure requirement were needed to prevent deception, the disclosure requirement imposed here is not appropriate. It appears both overbroad and inadequate in duration. The triggered disclosure must be made whenever an efficacy claim is made, but not every efficacy claim (*e.g.*, the product "works") creates the impression that the product will work in only one treatment. Without such an impression, there may well be no need to disclose that two treatments are required. Moreover, the triggered disclosure requirement is inadequate because it terminates after two years. If the disclosure in fact is necessary to prevent deception, then why does it end after two years? If the Commission decides to impose a triggered disclosure requirement to prevent future ads from being deceptive, it should be triggered by a claim that would be deceptive in the absence of the information to be disclosed and should continue as long as necessary to prevent deception.

I support the Commission's move toward stronger remedies. The injunctive provisions of these orders, together with the FDA-mandated labeling,[2] should ensure that consumers have truthful and accurate information before and after purchase. The disclosure requirement here, however, is unnecessary and inappropriate.

---

[2] The FDA requires the following statement on the label of any shampoo formulated to treat head lice: "Apply to affected area until all the hair is thoroughly wet with product. Allow product to remain on area for 10 minutes but no longer. Add sufficient warm water to form a lather and shampoo as usual. Rinse thoroughly. A fine-toothed comb or special lice/nit removing comb may be used to help remove dead lice or their eggs (nits) from hair. A second treatment must be done in 7 to 10 days to kill any newly hatched lice."

IN THE MATTER OF

ALBERTSON'S, INC., ET AL.

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

Docket C-3838. Complaint, Dec. 8, 1998--Decision, Dec. 8, 1998

This consent order, among other things, requires the respondents to divest 15 supermarkets, eight in Montana and seven in Wyoming. In addition, the consent order requires the respondents to provide written notification to the Commission prior to acquiring any facility that has operated as a supermarket in the designated areas.

Participants

For the Commission: *James Fishkin, Joseph Brownman, Phillip Broyles, William Baer, William Layher, and Jonathan Baker.*

For the respondents: *Christopher MacAvoy, Collier, Shannon, Rill & Scott*, Washington, D.C. and *Henry Thumann, O'Melveny & Myers*, Los Angeles, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent Albertson's, Inc. ("Albertson's") and respondent Locomotive Acquisition Corporation ("Locomotive"), a wholly-owned subsidiary of respondent Albertson's, have entered into an agreement to acquire all of the outstanding shares of respondent Buttrey Food and Drug Store Company, Inc. ("Buttrey"), a corporation of which a majority of the voting securities is owned by respondent FS Equity Partners II, L.P. ("FS Equity Partners"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITION

1. For the purposes of this complaint:

"*Supermarket*" means a full-line retail grocery store with annual sales of at least $2 million that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

ALBERTSON'S, INC.

2. Respondent Albertson's is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at East Parkcenter Boulevard, Boise, Idaho. Albertson's had $14.7 billion in total sales for the fiscal year ending January 31, 1998.

3. Respondent Albertson's is, and at all times relevant herein has been, engaged in the operation of supermarkets in 23 Western, Midwestern, and Southern states.

4. Respondent Albertson's is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

LOCOMOTIVE ACQUISITION CORPORATION

5. Respondent Locomotive is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at c/o Albertson's, Inc., East Parkcenter Boulevard, Boise, Idaho.

6. Respondent Locomotive is, and at all times relevant herein has been, a wholly-owned subsidiary of Albertson's established to acquire the outstanding shares of Buttrey.

7. Respondent Locomotive is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of

the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

BUTTREY FOOD AND DRUG STORES COMPANY

8. Respondent Buttrey is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 601 6th Street, S.W., Great Falls, Montana. Buttrey had $391.4 million in total sales for the fiscal year ending January 31, 1998.

9. Respondent Buttrey is, and at all times relevant herein has been, engaged in the operation of supermarkets in Montana, Wyoming, and North Dakota.

10. Respondent Buttrey is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

FS EQUITY PARTNERS II, L.P.

11. Respondent FS Equity Partners is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 11100 Santa Monica Boulevard, Suite 1900, Los Angeles, California.

12. Respondent FS Equity Partners is, and at all times relevant herein has been, the owner of a majority of the voting securities of Buttrey.

13. Respondent FS Equity Partners is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a partnership whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

ACQUISITION

14. On or about January 19, 1998, Albertson's and Locomotive entered into an Agreement and Plan of Merger with Buttrey to acquire

through a cash tender offer all of the outstanding common stock of Buttrey for $15.50 per share. The total value of the proposed acquisition is approximately $174 million.

TRADE AND COMMERCE

15. The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

16. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")) as well as a deep inventory of those SKUs. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

17. Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

18. Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores *(e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets because they operate significantly different retail formats. None of these stores offers a supermarket's distinct set of products and services that enable consumers to one-stop shop for food and grocery products.

19. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the areas in and near the following cities and towns:

a. Billings, Montana;
b. Bozeman, Montana;
c. Butte, Montana;
d. Great Falls, Montana;
e. Helena, Montana;
f. Missoula, Montana;
g. Casper, Wyoming;
h. Cheyenne, Wyoming;
i. Cody, Wyoming;
j. Gillette, Wyoming; and
k. Laramie, Wyoming.

MARKET STRUCTURE

20. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Albertson's and Buttrey would have a combined market share of more than 35% in each geographic market. The post-acquisition HHIs in the geographic markets range from 2,264 to 10,000.

ENTRY CONDITIONS

21. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

ACTUAL COMPETITION

22. Albertson's and Buttrey are actual and direct competitors in the relevant markets.

EFFECTS

23. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct competition between supermarkets owned or controlled by Albertson's and supermarkets owned or controlled by Buttrey;

b. By increasing the likelihood that Albertson's will unilaterally exercise market power; and

c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction,

each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

VIOLATIONS CHARGED

24. The Agreement and Plan of Merger between Albertson's and Locomotive to acquire all of the outstanding stock of Buttrey violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the proposed acquisition would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of Buttrey Food and Drug Store Company ("Buttrey"), a majority of which is owned by FS Equity Partners II, L.P. ("FS Equity Partners"), by Albertson's, Inc. ("Albertson's") and Locomotive Acquisition Corporation ("Locomotive") (collectively, "respondents"), and respondents having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the

executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Albertson's, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 250 East Parkcenter Boulevard, Boise, Idaho.

2. Respondent Locomotive Acquisition Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at c/o Albertson's, Inc., 250 East Parkcenter Boulevard, Boise, Idaho.

3. Respondent Buttrey Food and Drug Store Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 601 6th Street, S.W., Great Falls, Montana.

4. Respondent FS Equity Partners II, L.P. is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 11100 Santa Monica Boulevard, Suite 1900, Los Angeles, California.

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

A. "*Albertson's*" means Albertson's, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Albertson's, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Albertson's includes Locomotive and, after consummation of the Acquisition, includes Buttrey.

B. "*Locomotive*" means Locomotive Acquisition Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Locomotive, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Locomotive is a wholly-owned subsidiary of Albertson's.

C. "*Buttrey*" means Buttrey Food and Drug Store Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Buttrey, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "*FS Equity Partners*" means FS Equity Partners II, L.P., its predecessors, successors, assigns, subsidiaries, divisions, groups and affiliates controlled by FS Equity Partners and their respective general partners, officers, employees, agents, representatives, and the respective successors and assigns of each. FS Equity Partners owns a majority of the voting securities of Buttrey.

E. "*Respondents*" means Albertson's, Locomotive, Buttrey, and FS Equity Partners, individually and collectively.

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

G. "*Acquisition*" means Albertson's and Locomotive's proposed acquisition of all of the outstanding voting securities of and merger with Buttrey pursuant to the Agreement and Plan of Merger dated January 19, 1998.

H. "*Assets To Be Divested*" means the Supermarkets identified in Schedule A and Schedule B of this order and all assets, leases, properties, permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the respondents' trade marks, trade dress, service marks, or trade names.

I. "*Supermarket*" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products,

including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

J. "*Smith's*" means Smith's Food & Drug Centers, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 1550 South Redwood Road, Salt Lake City, Utah. Smith's is a wholly-owned subsidiary of Fred Meyer, Inc.

K. "*Supervalu*" means Supervalu Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 11840 Valley View Road, Eden Prairie, Minnesota; and Supervalu Holdings, Inc. a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal place of business located at 11840 Valley View Road, Eden Prairie, Minnesota. Supervalu Holdings, Inc. is a wholly-owned subsidiary of Supervalu Inc.

L. "*Smith's Agreement*" means the Purchase Agreement between Smith's and Albertson's executed on August 10, 1998, and all subsequent amendments thereto, for the divestiture by respondents to Smith's of the Schedule A Assets To Be Divested.

M. "*Supervalu Agreement*" means the Purchase Agreement between Supervalu and Albertson's executed on August 12, 1998, and all subsequent amendments thereto, for the divestiture by respondents to Supervalu of the Schedule B Assets To Be Divested.

N. "*Acquirer(s)*" means Smith's and Supervalu, and/or the entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this order, individually and collectively.

O. "*Third Party Consents*" means all consents from any other person, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the assets required to be divested pursuant to this order.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, the Schedule A Assets To Be Divested to:

1. Smith's, in accordance with the Smith's Agreement (which agreement shall not be construed to vary or contradict the terms of

this order or the Asset Maintenance Agreement) dated August 10, 1998, no later than

a. Ten (10) days after the date on which the Acquisition is consummated, or

b. Four (4) months after the date respondents signed the Agreement Containing Consent Order,

whichever is earlier; or

2. An Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, within three (3) months after the date on which this order becomes final.

Respondents shall obtain all required Third Party Consents prior to the closing of the Smith's Agreement or any other agreement pursuant to which the Schedule A Assets To Be Divested are divested to an Acquirer.

B. Respondents shall divest, absolutely and in good faith, the Schedule B Assets To Be Divested to:

1. Supervalu, in accordance with the Supervalu Agreement (which agreement shall not be construed to vary or contradict the terms of this order or the Asset Maintenance Agreement) dated August 12, 1998, no later than

a. Ten (10) days after the date on which the Acquisition is consummated, or

b. Four (4) months after the date respondents signed the Agreement Containing Consent Order,

whichever is earlier; or

2. An Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, within three (3) months after the date on which this order becomes final.

Respondents shall obtain all required Third Party Consents prior to the closing of the Supervalu Agreement or any other agreement pursuant to which the Schedule B Assets To Be Divested are divested to an Acquirer.

C. A condition of approval by the Commission of the divestiture transaction described in paragraph II.B shall be a written agreement by Supervalu that it will not sell or lease the Schedule B Assets To Be Divested, for a period of three (3) years from the date on which this order becomes final, directly or indirectly, through subsidiaries, partnerships or otherwise, without the prior approval of the Commission.

D. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time required by paragraph II of this order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

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

writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect each divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in paragraph III.B.3 to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for each divestiture only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest expeditiously at no minimum price.

The divestitures shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such asset to the acquiring entity or entities selected by Albertson's from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Albertson's, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

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

11. The trustee may also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Assets To Be Divested.

12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

13. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish each divestiture required by this order.

IV.

It is further ordered, That:

A. Pending divestiture of the Assets To Be Divested pursuant to this order, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of Assets To Be Divested except for ordinary wear and tear.

B. Respondents shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as all Assets To Be Divested have been divested as required by this order.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Albertson's shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any ownership or leasehold interest in any facility that has operated as a supermarket within six (6) months of the date of such proposed acquisition in Cascade, Gallatin, Lewis and Clark, Missoula, Silver Bow, and Yellowstone counties in Montana, and Albany, Campbell, Laramie, Natrona, and Park counties in Wyoming.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any supermarket or owned any interest in or operated any supermarket within six (6) months of such proposed acquisition in Cascade, Gallatin, Lewis and

Clark, Missoula, Silver Bow, and Yellowstone counties in Montana, and Albany, Campbell, Laramie, Natrona, and Park counties in Wyoming.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Albertson's or the acquisition of or leasing of a facility that has not operated as a supermarket within six (6) months of Albertson's offer to purchase or lease.

Said notification 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 Albertson's and not of any other party to the transaction. Albertson's shall provide the 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 or documentary material (within the meaning of 16 CFR 803.20), Albertson's shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph 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.

VI.

It is further ordered, That, for a period of ten (10) years commencing on the date this order becomes final:

A. Albertson's shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. 12(a)) that acquires any supermarket, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after January 1, 1998, in

Cascade, Gallatin, Lewis and Clark, Missoula, Silver Bow, and Yellowstone counties in Montana, and Albany, Campbell, Laramie, Natrona, and Park counties in Wyoming to operate a supermarket at that site if such supermarket was formerly owned or operated by Albertson's.

B. Albertson's shall not remove any equipment from a supermarket owned or operated by Albertson's in Cascade, Gallatin, Lewis and Clark, Missoula, Silver Bow, and Yellowstone counties in Montana, and Albany, Campbell, Laramie, Natrona, and Park counties in Wyoming, prior to a sale, sublease, assignment, or change in occupancy, except for replacement or relocation of such equipment in or to any other supermarket owned or operated by Albertson's in the ordinary course of business, or except as part of any negotiation for a sale, sublease, assignment, or change in occupancy of such supermarket.

VII.

It is further ordered, That:

A. Within thirty (30) days after the date respondents signed the Agreement Containing Consent Order and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II, III, and IV of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II, III, and IV of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II, III, and IV of the order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, Albertson's shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

VIII.

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

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondents shall permit any duly authorized representative of the Commission:

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

B. Upon five (5) days' notice to respondents and without restraint or interference from respondents, to interview respondents or officers, directors, or employees of respondents in the presence of counsel.

X.

It is further ordered, That, upon consummation of the Acquisition, the obligations of respondent FS Equity Partners under this order shall terminate.

SCHEDULE A

1. The following supermarket located in Cascade County, Montana:
   a. Buttrey store no. 3925 operating under the "Buttrey Big Fresh" trade name, which is located at 1601 Marketplace Drive, Great Falls, MT 59404.
2. The following supermarket located in Gallatin County, Montana:
   a. Buttrey store no. 3934 operating under the "Buttrey Big Fresh" trade name, which is located at 2825 West Main Street, Bozeman, MT 59715.
3. The following supermarket located in Lewis and Clark County, Montana:

a. Buttrey store no. 3824 operating under the "Buttrey Fresh Foods" trade name, which is located at 1000 Boulder Avenue, Helena, MT 59601.

4. The following supermarket located in Missoula County, Montana:
   a. Albertson's store no. 226 operating under the "Albertson's" trade name, which is located at 1906 Brooks Street, Missoula, MT 59801.
5. The following supermarkets located in Silver Bow County, Montana:
   a. Buttrey store no. 3930 operating under the "Buttrey Fresh Foods" trade name, which is located at 3745 Harrison Avenue, Butte, MT 59701; and
   b. Buttrey store no. 3985 operating under the "Buttrey Fresh Foods" trade name, which is located at 600 South Excelsior Street, Butte, MT 59701.
6. The following supermarkets located in Yellowstone County, Montana:
   a. Albertson's store no. 209 operating under the "Albertson's" trade name, which is located at 1633 Grand Avenue, Billings, MT 59102; and
   b. Albertson's store no. 232 operating under the "Albertson's" trade name, which is located at 1531 Main Street, Billings, MT 59101.
7. The following supermarket located in Albany County, Wyoming:
   a. Albertson's store no. 805 operating under the "Albertson's" trade name, which is located at 1209 15th Street, Laramie, WY 82070.
8. The following supermarket located in Campbell County, Wyoming:
   a. Buttrey store no. 3855 operating under the "Buttrey Fresh Foods" trade name, which is located at 906 Camel Drive, Gillette, WY 82716.
9. The following supermarkets located in Laramie County, Wyoming:
   a. Albertson's store no. 863 operating under the "Albertson's" trade name, which is located at 3745 E. Lincoln Way, Cheyenne, WY 82001; and
   b. Albertson's store no. 1804 operating under the "Max" trade name, which is located at 1600 E. Pershing Blvd., Cheyenne, WY 82001.
10. The following supermarket located in Park County, Wyoming:
   a. Buttrey store no. 3941 operating under the "Buttrey Fresh Foods" trade name, which is located at 1526 Rumsey Avenue, Cody, WY 82414.

SCHEDULE B

1. The following supermarkets located in Natrona County, Wyoming:
   a. Buttrey store no. 3872 operating under the "Buttrey Fresh Foods" trade name, which is located at 2101 East 12th Street, Casper WY 82601; and
   b. Buttrey store no. 3878 operating under the "Buttrey Fresh Foods" trade name, which is located at 4075 Cy Avenue, Casper WY 82601.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between Albertson's, Inc. ("Albertson's"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 250 East Parkcenter Boulevard, Boise, Idaho; Locomotive Acquisition Corporation ("Locomotive"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at c/o Albertson's, Inc., 250 East Parkcenter Boulevard, Boise, Idaho; Buttrey Food and Drug Store Company ("Buttrey"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 601 6th Street, S.W., Great Falls, Montana; FS Equity Partners II, L.P. ("FS Equity Partners"), a limited partnership organized, existing, and doing business under and by the virtue of the laws of the State of California, with its office and principal place of business located at 11100 Santa Monica Boulevard, Suite 1900, Los Angeles, California (collectively "Proposed Respondents"); and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively "the Parties").

PREMISES

Whereas, Albertson's and Locomotive, a wholly-owned subsidiary of Albertson's, pursuant to an Agreement and Plan of Merger dated January 19, 1998, agreed to acquire all of the outstanding stock of Buttrey, of which a majority of the voting securities are owned by FS Equity Parners (hereinafter "the proposed Acquisition"); and

Whereas, the Commission is now investigating the proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Order"), the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently either withdraw such acceptance or issue and serve its Complaint and its Decision and final Order in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Assets To Be Divested as defined in the attached Consent Order (hereinafter referred to as "Assets" or "Supermarket(s)") during the period prior to their divestiture, any divestiture resulting from the Consent Order or from any other administrative proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

Whereas, the purpose of this Agreement and of the Consent Order is to preserve the Assets pending their divestiture pursuant to the terms of the Consent Order, in order to remedy any anticompetitive effects of the proposed Acquisition; and

Whereas, Proposed Respondents' entering into this Agreement shall in no way be construed as an admission by Proposed Respondents that the proposed Acquisition is illegal; and

Whereas, Proposed Respondents understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, in consideration of the Commission's agreement that at the time it accepts the Consent Order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, the Parties agree as follows:

TERMS OF AGREEMENT

1. Proposed Respondents agree to execute, and upon its issuance to be bound by, the attached Consent Order. The Parties further agree that each term defined in the attached Consent Order shall have the same meaning in this Agreement.

2. Proposed Respondents agree that from the date Proposed Respondents sign this Agreement until the earlier of the dates listed

in subparagraphs 2.a and 2.b, Proposed Respondents will comply with the provisions of this Agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date all of the divestitures required by the Consent Order have been completed.

3. Proposed Respondents shall maintain the viability, marketability, and competitiveness of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall they cause the Assets to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the marketability, viability, or competitiveness of the Assets. Proposed Respondents shall conduct or cause to be conducted the business of the Supermarkets in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with each Supermarket's suppliers, customers, employees and others having business relations with the Supermarket, in the ordinary course of the Supermarkets' business and in accordance with past practice. Proposed Respondents shall not terminate the operation of any Supermarket. Proposed Respondents shall continue to maintain the inventory of each Supermarket at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Proposed Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Proposed Respondents shall use best efforts to keep the organization and properties of each of the Supermarkets intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with each Supermarket. Included in the above obligations, Proposed Respondents shall, without limitation:

a. Maintain operations and departments and not reduce hours at each Supermarket;

b. Not transfer inventory from any Supermarket other than in the ordinary course of business consistent with past practice;

c. Make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations, in each case in a manner consistent with past practice;

d. Maintain each Supermarket's books and records;

e. Not display any signs or conduct any advertising (including direct mailing, point-of-purchase coupons, etc.) that indicates that any Proposed Respondent is moving its operations to another location, or that indicates a Supermarket will close;

f. Not conduct any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any Supermarket; and

g. Not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket, other than changes in the ordinary course of business consistent with past practice for supermarkets of the Proposed Respondents not being closed or relocated.

4. Should the Commission seek in any proceeding to compel Proposed Respondents to divest themselves of the Assets or to seek any other injunctive or equitable relief, Proposed Respondents shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the Acquisition. Proposed Respondents also waive all rights to contest the validity of this Agreement.

5. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with five (5) days' notice to Proposed Respondents and to their principal office(s), Proposed Respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Proposed Respondents, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Proposed Respondents relating to compliance with this Agreement; and

b. To interview officers or employees of Proposed Respondents, who may have counsel present, regarding any such matters.

6. Upon consummation of the Acquisition, the obligations of Proposed Respondent FS Equity Partners under this Agreement shall terminate.

7. This Agreement shall not be binding on the Commission until approved by the Commission.

IN THE MATTER OF

MONTGOMERY WARD CREDIT CORPORATION, ET AL.

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

Docket C-3839. Complaint, Dec. 11, 1998--Decision, Dec. 11, 1998

This consent order prohibits, among other things, two corporations, that extend credit to consumers, from misrepresenting that any reaffirmation agreement has been or will be filed with the bankruptcy court, or that any reaffirmation agreement is binding.

Participants

For the Commission: *John C. Hallerud and C. Steven Baker.*

For the respondents: *Max Shulman* and *Elizabeth Grayer, Cravath, Swaine & Moore*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Montgomery Ward Credit Corporation, a corporation, and General Electric Capital Corporation, a corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Montgomery Ward Credit Corporation is a Delaware corporation with its principal office or place of business at 4246 South Riverboat Road, Taylorsville, Utah.

2. Respondent General Electric Capital Corporation is a New York corporation with its principal executive office or place of business at 260 Long Ridge Road, Stamford, Connecticut.

3. Respondents are engaged in, among other things, the offering and servicing of credit cards, including private label credit cards. In the course and conduct of their businesses, respondents have regularly extended credit (hereinafter referred to as "consumer credit accounts").

4. 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.

THE UNITED STATES BANKRUPTCY CODE

5. Under the United States Bankruptcy Code (11 U.S.C. 1-1330), a debtor may be granted a discharge in a Chapter 7 bankruptcy proceeding from debts that have arisen prior to the filing of the bankruptcy petition (hereinafter referred to as "pre-petition debts"), meaning that the debtor is no longer individually liable for these debts. The granting of a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . ." 11 U.S.C. 524(a)(2). The purpose of the injunction is to protect the debtor's "fresh start" by ensuring that no debt collection efforts are taken against the debtor personally for pre-petition debts.

6. The United States Bankruptcy Code provides, however, that a debtor may agree with a creditor that the creditor can enforce what would otherwise be a discharged debt. In other words, a debtor may reaffirm his or her pre-petition debts, as long as certain requirements are met. These so-called "reaffirmation agreements" are enforceable only if, among other things, the agreement is filed with the bankruptcy court. If the debtor is not represented by an attorney, the bankruptcy court must hold a hearing to determine that the reaffirmation agreement would not impose an undue hardship on the debtor and is in the best interest of the debtor, and must approve the reaffirmation agreement before it becomes enforceable. 11 U.S.C. 524(c) and (d).

7. If the requirements of 11 U.S.C. 524(c) and (d) are not met, an agreement to reaffirm a debt is not binding and a creditor violates the bankruptcy code if it attempts to collect that debt. 11 U.S.C. 524(a).

VIOLATIONS OF SECTION 5(a) OF THE FEDERAL TRADE COMMISSION ACT

8. From at least January 1, 1993, to June 30, 1997, respondents regularly solicited consumers who had filed for protection under Chapter 7 of the United States Bankruptcy Code to enter into agreements reaffirming some or all of their debt arising from pre-petition consumer credit accounts that would otherwise be discharged through bankruptcy proceedings.

9. In numerous instances, respondents represented, expressly or by implication, to consumers that their reaffirmation agreements

would be filed with the bankruptcy courts, as required by the United States Bankruptcy Code.

10. In truth and in fact, in many cases respondents did not file the reaffirmation agreements with the bankruptcy courts. Therefore, the representation made in paragraph nine was, and is, false or misleading.

11. In numerous instances, respondents represented, expressly or by implication, to consumers that their reaffirmation agreements were legally binding on the consumers and that the consumers were legally required to pay their pre-petition debts.

12. In truth and in fact, in many cases, the reaffirmation agreements were not legally binding on the consumers and the consumers were not legally required to pay their pre-petition debts for reasons including, but not necessarily limited to, the following: (a) respondents did not file the reaffirmation agreements with the bankruptcy courts; or (b) respondents filed the reaffirmation agreements, but the agreements were then not approved by the bankruptcy courts. Therefore, the representation made in paragraph eleven was, and is, false or misleading.

13. In the course and conduct of their businesses relating to consumer credit accounts, respondents regularly collected from consumers debts that had been legally discharged in bankruptcy proceedings and that respondents were not permitted by law to collect. Respondents' actions have caused or were likely to cause substantial injury to consumers that is not offset by any countervailing benefits and is not reasonably avoidable by these consumers. 15 U.S.C. 5(n). Therefore, respondents' collection of debts that they were not permitted by law to collect was, and is, unfair.

14. 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.

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

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

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

1.a. Respondent Montgomery Ward Credit Corporation is a Delaware corporation with its principal office or place of business at 4246 South Riverboat Road, Taylorsville, Utah.

1.b. Respondent General Electric Capital Corporation is a New York corporation with its principal executive office or place of business at 260 Long Ridge Road, Stamford, Connecticut.

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

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "*respondents*" shall mean Montgomery Ward Credit Corporation, a corporation, General Electric Capital Corporation, a corporation, their successors and assigns, and their officers, agents, representatives, and employees.

2. "*Debt*" shall mean any obligation or alleged obligation of a consumer to pay money arising out of an extension of open-end credit under a plan to finance the purchase of goods or services, such goods or services not including real estate or motor vehicles.

3. "*Debtor*" shall mean any person who owes or is claimed to owe a Debt.

4. "*Reaffirmation Agreement*" shall mean any written agreement between a respondent and a Debtor who has filed a petition under Chapter 7 of the Bankruptcy Code, the consideration for which, in whole or in part, is based on all or a part of any dischargeable prepetition Debt incurred by a Debtor.

5. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the collection of any Debt, shall not:

A. Misrepresent, expressly or by implication, to Debtors who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that Reaffirmation Agreements have been or will be filed in bankruptcy court;

B. Misrepresent, expressly or by implication, to Debtors who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that any Reaffirmation Agreement is legally binding on the consumer; or

C. Collect any Debt (including any interest, fee, charge, or expense incidental to the principal obligation) that has been legally discharged in bankruptcy proceedings and that respondents are not permitted by law to collect.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, shall not make any material misrepresentation, expressly or by implication, in the collection of any Debt subject to a pending bankruptcy proceeding.

III.

It is further ordered, That respondents, for five (5) years after the date of issuance of this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including but not limited to all Reaffirmation Agreements in connection with Debt and records sufficient to show that such Reaffirmation Agreements were filed in bankruptcy courts and were subsequently approved by bankruptcy courts as part of the underlying bankruptcy proceedings, if required by the United States Bankruptcy Code.

IV.

It is further ordered, That respondents, for five (5) years after the date of issuance of this order, shall deliver a copy of this order to all current and future officers, directors, managerial employees, and bankruptcy court representatives having responsibilities for the collection of any Debt subject to a pending bankruptcy proceeding ("Covered Persons"), and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall, for five (5) years after each such statement acknowledging receipt of the order is signed and dated, maintain and upon request make available to the Federal Trade Commission for inspection and copying such statements. Respondents shall deliver this order to current Covered Persons within thirty (30) days after the date of service of this order, and to future Covered Persons before any new Covered Person makes contact with a respondent's customer or a respondent's customer's attorney for the collection of any Debt subject to a pending bankruptcy proceeding.

V.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) in each case that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or

a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

It is further ordered, That respondents shall provide notification of all proposed settlement terms relating to allegations made by the Attorneys General of various states, any other legal actions by government entities not cited herein, and all class action lawsuits against respondents or any of their predecessors or affiliates, pending on the date that proposed respondents sign this order, that challenge conduct similar to that challenged by the Commission in this proceeding, to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, in writing, at least ten (10) days before any such proposed settlement is submitted to a court for final approval.

VII.

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

VIII.

This order will terminate on December 11, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

IN THE MATTER OF

CARE TECHNOLOGIES, INC.

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

Docket C-3840. Complaint, Dec. 14, 1998--Decision, Dec. 14, 1998

This consent order prohibits, among other things, a Connecticut-based corporation, that manufactures and distributes pharmaceuticals, from making unsubstantiated claims concerning the efficacy of its over-the-counter head lice treatments. The consent order requires the respondent to make certain disclosures in advertisements concerning the use and effectiveness of its head lice treatment products. In addition, the consent order prohibits the respondent from misrepresenting the existence, contents, or interpretations of any test, study, or research.

Participants

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

For the respondent: *Daniel Manelli, Farkas & Manelli*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Care Technologies, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Care Technologies, Inc. is a Connecticut corporation with its principal office or place of business at 10 Corbin Drive, Darien, Connecticut.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed over-the-counter pharmaceuticals to the public, including "Clear Lice Killing Shampoo" and "Clear Lice Egg Remover." Clear Lice Killing Shampoo and Clear Lice Egg Remover are "drugs," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. Respondent has disseminated or has caused to be disseminated advertisements for the Clear Lice Killing Shampoo and the Clear Lice Egg Remover, including but not necessarily limited to the attached Exhibits A through E. These advertisements contain the following statements:

A. "LICE KILLING SHAMPOO PEDICULICIDE
Kills **BOTH** lice and their eggs." (Exhibit A).

B. "Clear® Lice Egg Remover is a vegetable derived enzyme system that makes nits easier to remove after treatment by loosening the glue that bonds nits to hair.
....
Clear® Killing Shampoo - a pyrethrum extract from chrysanthemum flowers - effectively kills lice and their nits." (Exhibit B).

C. "Clear Lice Egg Remover; to save you hours of combing and tears.... Special enzymes only in Clear actually loosen lice eggs that can hide in your child's hair. . . . Trust Clear to get lice out of your life. Fast!" (Exhibit C).

D. "**Clear**® Lice Egg Remover is the fastest way to finish the hard work of removing lice eggs. Only **Clear** Lice Egg Remover has natural enzymes to un-glue lice eggs for easier comb-out. The **Clear**® System with Lice Egg Remover does the complete job. Kills lice and removes eggs. It's all you need. **Trust Clear® to get lice out of your life...fast.**" (Exhibit D).

E. "**Clear** Rinse is *quick*. It loosens lice eggs in less than 3 minutes. Nits easily slide off hair when combed.... **Clear** Rinse has been thoroughly laboratory and field tested and meets all standards for safety and effectiveness. **Clear** Rinse is *easy*. A targeted enzyme solution, it rapidly attacks and loosens lice egg cement." (Exhibit E).

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

A. Clear Lice Egg Remover loosens or unglues lice eggs from the hair.

B. Clear Lice Killing Shampoo kills one hundred percent of lice eggs.

6. In truth and in fact:

A. Clear Lice Egg Remover does not loosen or unglue lice eggs from the hair.

B. Clear Lice Killing Shampoo does not kill one hundred percent of lice eggs. Clear Lice Killing Shampoo is based on a pesticide which is not one hundred percent effective against lice eggs. As a result, purchasers are instructed to use an egg-removing comb, and to apply a second treatment in seven to ten days to kill any newly hatched lice.

Therefore, the representations set forth in paragraph five were, and are, false or misleading.

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

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

9. Through the means described in paragraph four, respondent has represented, expressly or by implication, that laboratory and field testing proves that Clear Lice Egg Remover loosens or unglues lice eggs from the hair.

10. In truth and in fact, laboratory and field testing does not prove that Clear Lice Egg Remover loosens or unglues lice eggs from the hair. Therefore, the representation set forth in paragraph nine was, and is, false or misleading.

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

EXHIBIT A

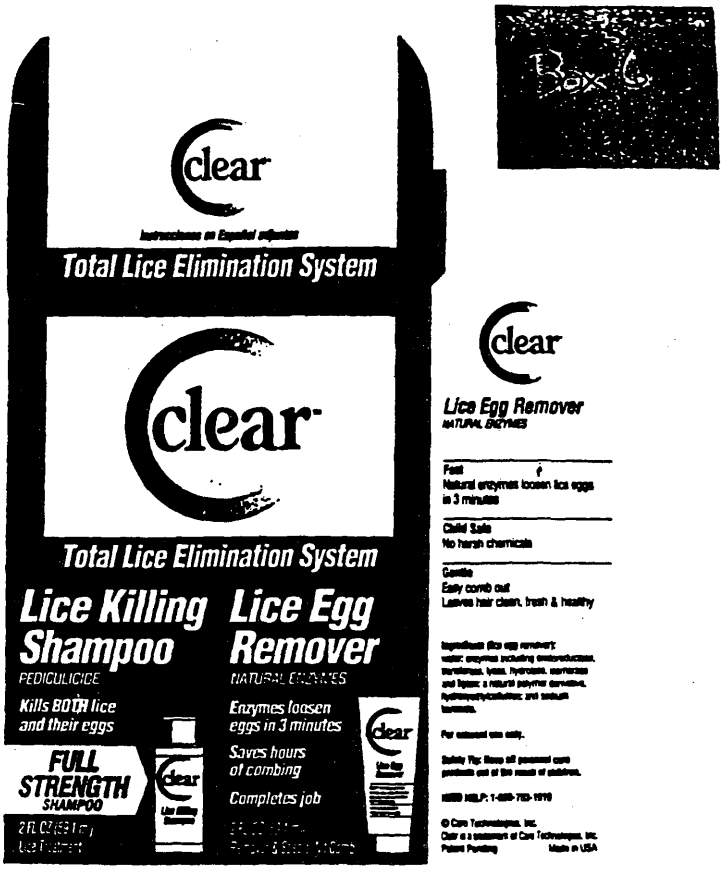


EXHIBIT A

000020
CARE

EXHIBIT B

clear®

(ear® Products

- **Clear® Lice Egg Remover is a vegetable derived enzyme system that makes nits easier to remove after treatment by loosening the glue that bonds nits to hair. An excellent nit comb is included. Clear® Lice Egg Remover contains no harsh chemicals and can be used as frequently and safely as soap and water.**
- **Clear™ Total Lice Elimination System (available in 2 oz. regular and z. family size) contains:**
  - **Clear® Killing Shampoo - a pyrethrum extract from chrysanthemum flowers - effectively kills lice and their nits.**
  - **Clear® Lice Egg Remover (nit comb also included - same as above).**

***Clear®* does the complete job so kids can get back to school...Fast!**

830 Complaint

EXHIBIT C

Client: Care Technologies

Product: Clear Systems/LER

Title: "Confusion"

Length: :30

Date: 1/23/97

Agency: Petray Consulting

Commercial No. CTCL-0013

Oh no!

Head lice on your child? Now what?

Clear ends the confusion! Because only Clear has the system -- Clear shampoo, to kill lice fast. And Clear lice egg remover, to save you hours of combing and tears.

Here's how! Special enzymes only in Clear actually loosen lice eggs that can hide in your child's hair. It's safe, it's effective, it's Clear!

Trust Clear to get lice out of your life! Fast!

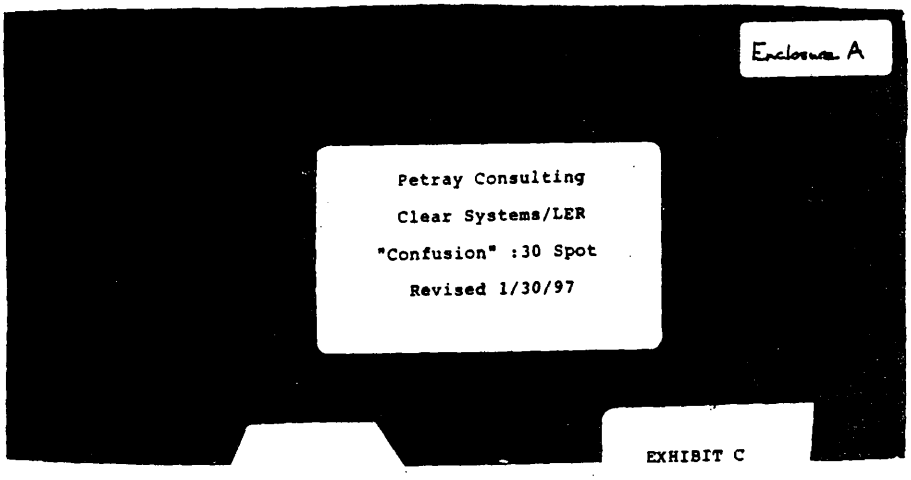


EXHIBIT D

KIDS, LICE and PARENTS.

If your child is sent home from school with head lice, don't panic.
It's not your fault but you have to solve the problem.
That means killing lice and removing their eggs. In fact, many parents don't know lice egg removal is the hardest and longest part of the job.

Clear® Lice Egg Remover is the fastest way to finish the hard work of removing lice eggs. Only **Clear** Lice Egg Remover has natural enzymes to un-glue lice eggs for easier comb-out.

The **Clear®** System with Lice Egg Remover does the complete job.

Kills lice and removes eggs.

It's all you need.

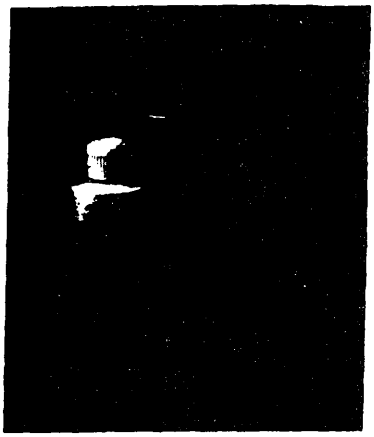
Trust Clear® to get lice out of your life...fast.

For information call 800-783-1919 or contact http://www.clearcare.com

EXHIBIT D

EXHIBIT E

At last, the first real solution for lice egg removal that is *quick, safe and easy*.



Introducing **Clear**™ cleansing rinse

For new sales and happy customers you can feel good about recommending **Clear**.

Clear Rinse is a post-pediculicide cleansing rinse for the quick and easy removal of lice eggs. It is a natural, non-toxic liquid enzyme solution. And it works. **Clear** is the first *real* solution to nit picking since the comb.

Clear Rinse is *quick*. It loosens lice eggs in less than 3 minutes. Nits easily slide off hair when combed. And **Clear** Rinse leaves the hair silky, clean smelling, and manageable.

Clear Rinse is *safe*. A natural, vegetable derived enzyme, it is chemical-free and non-toxic. **Clear** Rinse has been thoroughly laboratory and field tested and meets all standards for safety and effectiveness.

Clear Rinse is *easy*. A targeted enzyme solution, it rapidly attacks and loosens lice egg cement. **Clear** Rinse also acts on toxins left by pediculicides, helping speed their removal.

Care Technologies, Inc. 55 Holly Hill Lane Greenwich, CT 06830

Clear is a trademark of Care Technologies, Inc.

DECISION AND ORDER

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

The respondent, 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 has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Care Technologies, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 10 Corbin Drive, Darien, Connecticut.

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

ORDER

DEFINITIONS

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

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

2. "*Clear Lice Killing Shampoo*" shall mean the pediculicide marketed by respondent which contains the active ingredients of 0.33 percent pyrethrum extract and 4 percent piperonyl butoxide.

3. "*Lice egg removal product*" shall mean any product that is sold to loosen, unglue, biodegrade, or otherwise aid in the detachment of lice eggs from hair shafts.

4. "*Substantially similar product*" shall mean any pediculicide marketed by respondent which contains the active ingredients of pyrethrum extract and piperonyl butoxide, and is covered by the Food and Drug Administration's Final Monograph on OTC Pediculicide Drug Products.

5. Unless otherwise specified, "*respondent*" shall mean Care Technologies, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

6. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

7. "*Drug*" and "*device*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, including, but not limited to, any lice egg removal product.

8. "*Pesticide*" shall mean as defined in Section 2 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(u).

9. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In

addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement or promotional material, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Clear Lice Egg Remover or any lice egg removal product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product loosens, unglues, or otherwise detaches lice eggs from the hair, unless the representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Clear Lice Killing Shampoo or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that such product kills one hundred percent of lice eggs, unless the representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That, for a period of two (2) years from the date of service of this order, respondent, directly or through any corporation, subsidiary, division, or other device, in connection with

the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Clear Lice Killing Shampoo or any other substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, in print advertisements or promotional materials about the efficacy of such product in the removal or elimination of lice or the treatment of lice infestations ("triggering representation"), unless it makes the following disclosure, clearly and prominently, in such advertisements or promotional materials containing the triggering representation:

Reapplication and egg removal are required
to ensure complete effectiveness.
See label for important information.

Provided, however, that the above disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product is effective for the complete elimination of all lice and lice eggs in a single application.

Provided, further, that the above disclosure shall not be required in a particular piece of promotional material if such promotional material constitutes "labeling of a pediculicide drug product" subject to the labeling requirements of the Food and Drug Administration's Final Monograph on OTC Pediculicide Drug Products, 21 CFR 358.650.

IV.

It is further ordered, That, for a period of two (2) years from the date of service of this order, respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Clear Lice Killing Shampoo or any other substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, in advertisements communicated through an electronic medium, about the efficacy of such product in the removal or elimination of lice or the treatment of lice infestations ("triggering representation"), unless it makes the following disclosure, clearly and prominently, in the video portion of such advertisements (or in the audio portion if the advertisement is audio only) containing the triggering representation:

Two Treatments Required.

Provided, however, that if the respondent makes any representation, in any manner, expressly or by implication, about directions for use of such product in advertisements communicated through an electronic medium utilizing both video and audio, the disclosure shall be presented in both the video and the audio portions of such advertisements.

Provided, further, that the above disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product is effective for the complete elimination of all lice and lice eggs in a single application.

V.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any drug or device for the treatment of lice in humans, or any pesticide for treatment of lice in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, regarding the efficacy of such product, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence, that substantiates the representation.

VI.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any drug or device for the treatment of lice in humans, or any pesticide for treatment of lice in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

VII.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VIII.

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

A. All advertisements and promotional materials containing the representation;

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

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

IX.

It is further ordered, That respondent Care Technologies, Inc., and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and, for a period of five (5) years from the date of issuance of this order, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

It is further ordered, That respondent Care Technologies, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address.

Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

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

XII.

This order will terminate on December 14, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

STATEMENT OF CHAIRMAN PITOFSKY AND
COMMISSIONERS ANTHONY AND THOMPSON

We write to express our views about the concerns Commissioner Swindle raises regarding the disclosure remedy in these cases. The orders require that, for two years, whenever a claim is made regarding the efficacy of the lice removal products, the respondents include a disclosure about the necessity for a second application of their product. The disclosure remedy in these cases is fencing-in relief, designed to prevent purchasers of respondents' products from being deceived by *future* advertising.[1] The triggered disclosure about the need for two treatments provides additional assurance that consumers will not be misled by future ads. We are satisfied that the triggered disclosures in these orders are appropriate and reasonable.

STATEMENT OF COMMISSIONER ORSON SWINDLE

I have voted in favor of issuance of the final orders in these cases because there is reason to believe that the respondents have violated the law and most of the relief contained in the orders is necessary and appropriate. However, I continue to have concerns with regard to the need for and scope of one of the disclosure requirements contained in the orders.

The complaints include the allegation that the respondents claimed that their respective lice products eradicate a lice infestation after a single treatment. In truth, reapplication and careful combing are required to complete the treatments. To address this allegedly false claim, the orders prohibit the respondents from making, expressly or by implication, any claim that their lice treatment products work in only one treatment, unless that claim is true and substantiated. I agree that this prohibition is necessary and appropriate.

The orders, however, go further. For a period of two years, whenever the respondents make any efficacy claim for one of their lice treatment products, they must disclose "Two Treatments Required." The majority of the Commission has cast this provision as a "triggered disclosure requirement" and concluded that it is "appropriate and reasonably related to the alleged violations of

[1] It is also worth noting that the Commission has distinguished triggered disclosures such as those in these cases from corrective advertising, which is required regardless of the contents of the ad. *Removatron Int'l Corp.*, 111 FTC 206, 311-12 n. 28 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989). *See also American Home Prods. Corp. v. FTC*, 695 F.2d 681, 700 (3rd Circ. 1982).

Section 5." Even if this is a triggered disclosure requirement,[1] I do not believe that it is either necessary or appropriate.

The majority apparently believes that consumers will be misled if the respondents do not disclose that two treatments are required whenever they make an efficacy claim for their products. However, if a respondent makes a one-treatment claim that is false or unsubstantiated, the Commission can bring an action for violating the injunctive provisions of the order, and thus the two-treatment disclosure requirement would be unnecessary. On the other hand, if a respondent makes a one-treatment claim that is true and substantiated, the disclosure itself -- "Two Treatments Required" -- would be false, because the product would require only one treatment to be effective. Consequently, the disclosure requirement is not needed to prevent the respondents from making the misleading claim that their lice products work in one treatment.

Even if some sort of disclosure requirement were needed to prevent deception, the disclosure requirement imposed here is not appropriate. It appears both overbroad and inadequate in duration. The triggered disclosure must be made whenever an efficacy claim is made, but not every efficacy claim (*e.g.*, the product "works") creates the impression that the product will work in only one treatment. Without such an impression, there may well be no need to disclose that two treatments are required. Moreover, the triggered disclosure requirement is inadequate because it terminates after two years. If the disclosure in fact is necessary to prevent deception, then why does it end after two years? If the Commission decides to impose a triggered disclosure requirement to prevent future ads from being deceptive, it should be triggered by a claim that would be deceptive in the absence of the information to be disclosed and should continue as long as necessary to prevent deception.

I support the Commission's move toward stronger remedies. The injunctive provisions of these orders, together with the FDA-mandated labeling,[2] should ensure that consumers have truthful and accurate information before and after purchase. The disclosure requirement here, however, is unnecessary and inappropriate.

---

[1] The majority is correct that the requirement has the form of a triggered disclosure, but the substance of the requirement is indistinguishable from corrective advertising. The disclosure will be required whenever the respondents make any express or implied claim that their products are efficacious, which likely would include all or virtually all of the ads they run for their lice treatment products. The disclosure also is required for only a limited period of time, which is also consistent with being a corrective advertising measure.

[2] The FDA requires the following statement on the label of any shampoo formulated to treat head lice: "Apply to affected area until all the hair is thoroughly wet with product. Allow product to remain on area for 10 minutes but no longer. Add sufficient warm water to form a lather and shampoo as usual. Rinse thoroughly. A fine-toothed comb or special lice/nit removing comb may be used to help remove dead lice or their eggs (nits) from hair. A second treatment must be done in 7 to 10 days to kill any newly hatched lice."

IN THE MATTER OF

PFIZER INC.

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

Docket C-3841. Complaint, Dec. 14, 1998--Decision, Dec. 14, 1998

This consent order prohibits, among other things, a New York-based corporation, that manufactures and distributes pharmaceuticals, from making unsubstantiated claims concerning the efficacy of its over-the-counter head lice treatments. The consent order requires the respondent to make certain disclosures in advertisements concerning the use and effectiveness of its head lice treatment products. In addition, the consent order prohibits the respondent from misrepresenting the existence, contents, or interpretations of any test, study, or research.

Participants

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

For the respondent: *Hugh Latimer, Wiley, Rein & Fielding*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Pfizer Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Pfizer Inc. is a Delaware corporation with its principal office or place of business at 235 East 42nd Street, New York, New York.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed over-the-counter pharmaceuticals to the public, including "RID Lice Killing Shampoo." RID Lice Killing Shampoo is a "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. Respondent has disseminated or has caused to be disseminated advertisements for RID Lice Killing Shampoo, including but not

necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. **"RID erases head lice completely.**
MAXIMUM STRENGTH
Kills lice in just the first treatment.*[1]
MAXIMUM STRENGTH RID kills lice completely in minutes. And RID leaves no lasting active residue on the hair. RID rinses away completely. Not all lice treatments do.
The patented RID egg removal comb is proven 100% effective and can leave hair free of lice eggs[1]-a must for many schools when re-admitting children. Many schools also recommend a second treatment. RID directions state to repeat treatment 7 to 10 days later.
RID. Nothing is more effective or safer.
...
*Read label. When used as directed.
[1]Data on file, Pfizer Inc."
[The advertisement depicts a woman's hand holding a box of RID as if it were an eraser, wiping the word "LICE" off a blackboard. The box contains the following statement:
"MAXIMUM STRENGTH
RID LICE KILLING SHAMPOO
PEDICULICIDE (LICE TREATMENT)
KILLS LICE & THEIR EGGS
(HEAD LICE, CRAB LICE & BODY LICE)
-100% EFFECTI [VE is obscured by the hand]
EGG REMOVAL ['COMB' is obscured by the hand]"]
(Exhibit A)

B. **"New clinical study impacts head lice season.**
MAXIMUM STRENGTH
Proven effective in a single treatment.*[1]"
[The advertisement depicts a graph entitled "Efficacy/Lice Elimination Results at Day 7." The horizontal axis is marked "Percent Cured." The statement "**MAXIMUM STRENGTH RID 100%**" appears above the horizontal axis.]
"A randomized evaluator-blinded clinical study of 190 patients measured the efficacy of MAXIMUM STRENGTH RID, and a competitor product. The results:
• In a single treatment, RID was found 100% effective in controlling head lice (day 7 of the study; n =78).
• RID was also 100% effective after a second treatment (day 14 of the study; n =75). RID directions state to repeat treatment 7 to 10 days after the first treatment. And, RID leaves no lasting active residue.
To eliminate nits, the patented RID egg removal comb provides gentle combing action. It's proven 100% effective.
For unsurpassed efficacy and safety...recommend MAXIMUM STRENGTH RID.

To receive an abstract of the RID study, call 1-800-322-LICE.

...

Nothing is more effective or safer.

[1] 'An evaluator-blinded comparative study of the clinical effectiveness of a pyrethrin-based pediculicide with combing vs a permethrin-based pediculicide with combing.' Presented at the National Association of School Nurses Annual Meeting, June, 1995.

*Read label. When used as directed.

**Estimates of clinical effectiveness were based on percentage of patients with no live lice or nits within .25 inches of the scalp."

[The advertisement depicts a woman's hand holding a box of RID as if it were an eraser, wiping the word "LICE" off a blackboard. The box contains the following statement:

"MAXIMUM STRENGTH

RID LICE KILLING SHAMPOO

PEDICULICIDE (LICE TREATMENT)

KILLS LICE & THEIR EGGS

(HEAD LICE, CRAB LICE & BODY LICE)

-100% EFFECTI [VE is obscured by the hand]

EGG REMOVAL ['COMB' is obscured by the hand]"]

(Exhibit B)

C. Announcer: "Your child could get lice!"

[The advertisement depicts a blackboard with the word "LICE" written on it.]

Announcer: "To kill lice and their eggs..."

[The advertisement depicts a RID box with the statement "**KILLS LICE & THEIR EGGS**" on the box enlarged. The advertisement contains a statement at the bottom of the screen in a light-colored print: "Read label. Use only as directed."]

Announcer: "get Maximum Strength RID."

[The advertisement depicts a RID box.]

Announcer: "In just the first treatment,"

[The advertisement depicts a woman's hand holding a box of RID as if it were an eraser, wiping the word "LICE" off a blackboard. The advertisement contains a statement at the bottom of the screen in a light-colored print: "Two treatments required."]

Announcer: "it kills lice completely."

[The advertisement depicts the blackboard with the word "LICE" now just a smear on the blackboard, with the statement "Kills lice completely."]

Announcer: "And RID leaves no active residue behind."

[The advertisement depicts a mother hugging her child in front of school bus.]

Announcer: "Nothing"

[The advertisement depicts a woman's hand holding a box of RID as if it were an eraser, wiping the word "LICE" off a blackboard.]

Announcer: "is more effective or safer than RID."

[The advertisement depicts the RID logo on the smeared blackboard, with the statement: "Nothing is more effective."] (Exhibit C)

D. "**MAXIMUM STRENGTH RID**
LICE KILLING SHAMPOO
PEDICULICIDE (LICE TREATMENT)
KILLS LICE & THEIR EGGS
(HEAD LICE, CRAB LICE & BODY LICE)
-- 100% EFFECTIVE -- EGG REMOVAL COMB* "
(Exhibit D)

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

A. RID Lice Killing Shampoo cures lice infestations in a single treatment.

B. The RID egg removal comb is one hundred percent effective.

6. In truth and in fact:

A. RID Lice Killing Shampoo does not cure lice infestations in a single treatment. RID Lice Killing Shampoo is based on a pesticide which is not one hundred percent effective against lice eggs. Consequently, a second treatment is required in seven to ten days to kill any lice that have hatched. In addition, consumers are instructed to remove any lice eggs or "nits" from the infested person's hair.

B. The RID comb is not necessarily one hundred percent effective. Lice eggs are difficult to see and to remove. The effectiveness of the comb is largely dependent on the skill and tenacity of the comber.

Therefore, the representations set forth in paragraph five were, and are, false or misleading.

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

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

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

A. Clinical studies prove that RID Lice Killing Shampoo cures lice infestations in a single treatment.

B. Clinical studies prove that the RID egg removal comb is one hundred percent effective.

10. In truth and in fact:

A. Clinical studies do not prove that RID Lice Killing Shampoo cures lice infestations in a single treatment. The study relied upon to make this claim included the application of a single treatment along with a thorough combing that removed all lice eggs.

B. Clinical studies do not prove that the RID comb is one hundred percent effective. The studies relied upon to make this claim employed individuals trained in egg removal to comb patients' hair. There is no evidence that the same results are achievable by an average consumer.

Therefore, the representations set forth in paragraph nine were, and are, false or misleading.

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

EXHIBIT A

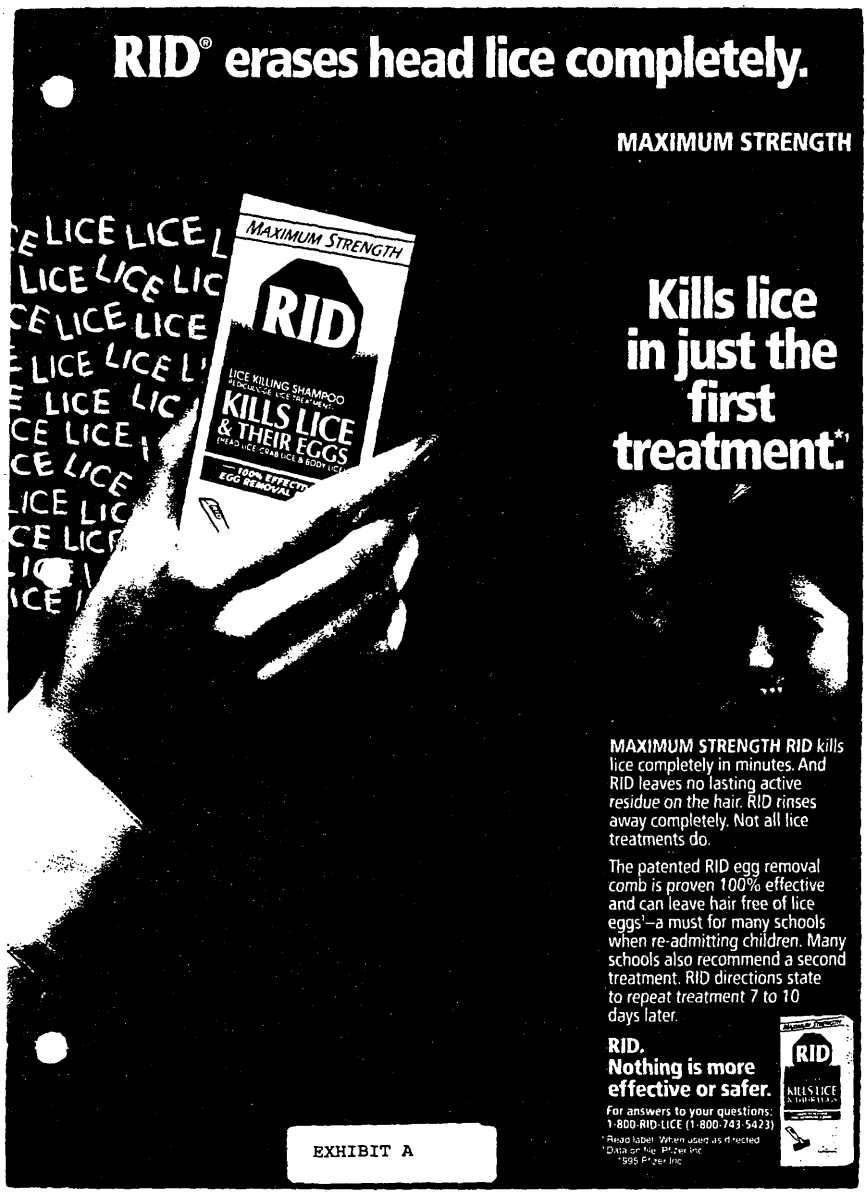

RID® erases head lice completely.
MAXIMUM STRENGTH
LICE LICE L
LICE LICE LIC
CE LICE LICE
LICE LICE L
E LICE LIC
CE LICE
CE LICE
ICE LIC
CE LICE
MAXIMUM STRENGTH
RID
LICE KILLING SHAMPOO
KILLS LICE & THEIR EGGS
100% EFFECTIVE EGG REMOVAL
Kills lice in just the first treatment.*1
MAXIMUM STRENGTH RID kills lice completely in minutes. And RID leaves no lasting active residue on the hair. RID rinses away completely. Not all lice treatments do.
The patented RID egg removal comb is proven 100% effective and can leave hair free of lice eggs[1]–a must for many schools when re-admitting children. Many schools also recommend a second treatment. RID directions state to repeat treatment 7 to 10 days later.
RID.
Nothing is more effective or safer.
For answers to your questions:
1-800-RID-LICE (1-800-743-5423)
*Read label. When used as directed.
Data on file, Pfizer Inc
©95 Pfizer Inc
RID
KILLS LICE
EXHIBIT A

EXHIBIT B

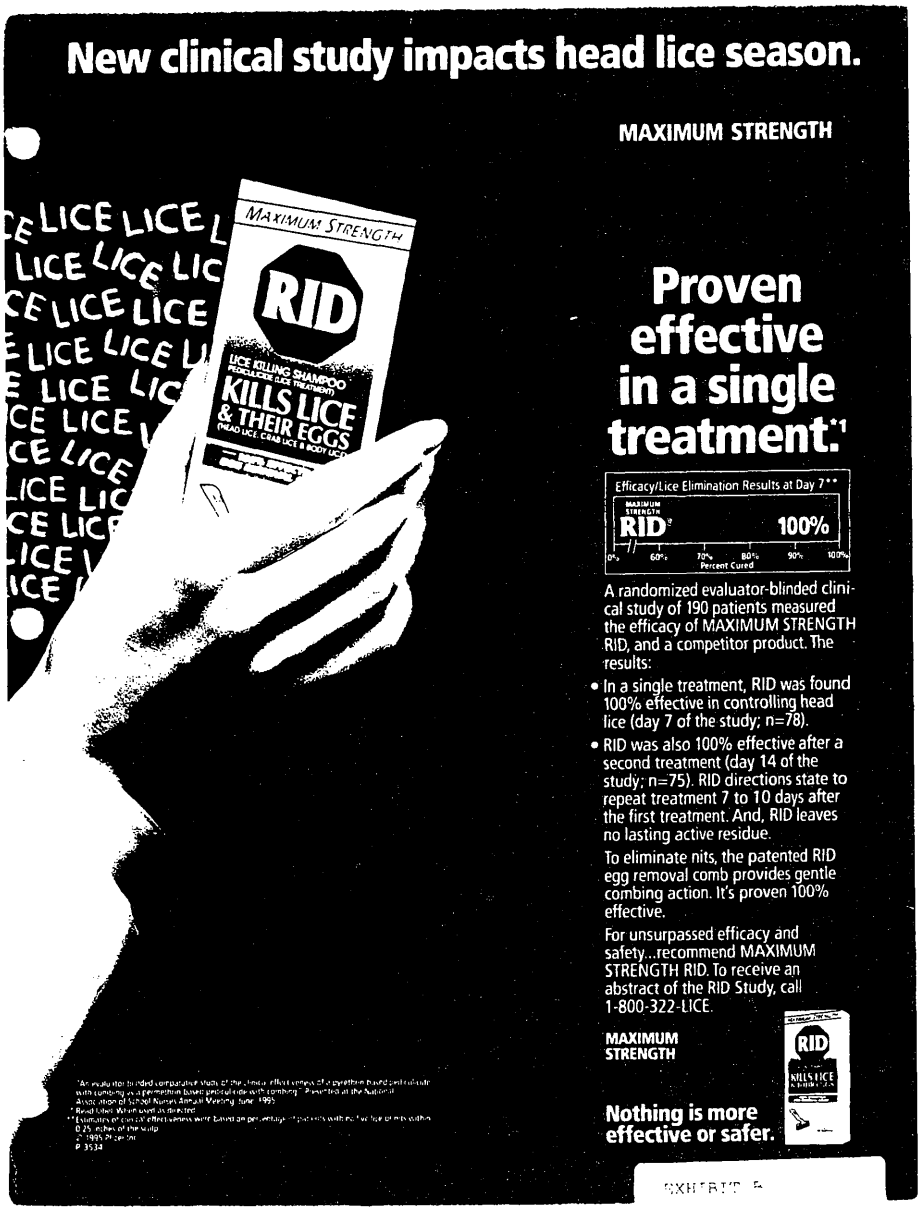

New clinical study impacts head lice season.
MAXIMUM STRENGTH
MAXIMUM STRENGTH
RID
LICE KILLING SHAMPOO
KILLS LICE & THEIR EGGS
Proven effective in a single treatment.*1
Efficacy/Lice Elimination Results at Day 7**
MAXIMUM STRENGTH RID®
100%
0%
60%
70%
80%
90%
100%
Percent Cured
A randomized evaluator-blinded clinical study of 190 patients measured the efficacy of MAXIMUM STRENGTH RID, and a competitor product. The results:
• In a single treatment, RID was found 100% effective in controlling head lice (day 7 of the study; n=78).
• RID was also 100% effective after a second treatment (day 14 of the study; n=75). RID directions state to repeat treatment 7 to 10 days after the first treatment. And, RID leaves no lasting active residue.
To eliminate nits, the patented RID egg removal comb provides gentle combing action. It's proven 100% effective.
For unsurpassed efficacy and safety...recommend MAXIMUM STRENGTH RID. To receive an abstract of the RID Study, call 1-800-322-LICE.
MAXIMUM STRENGTH
Nothing is more effective or safer.
EXHIBIT 5

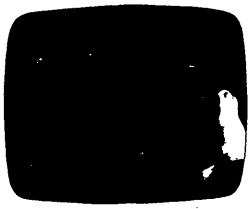
EXHIBIT C

RID®

"BLACKBOARD" :15 TV

CLIENT: PFIZER INC

COMM'L NO.: PFRD-1503



ANNCR VO: Your child could get lice!

To kill lice and their eggs...

get Maximum Strength RID.

In just the first treatment,

it kills lice completely.

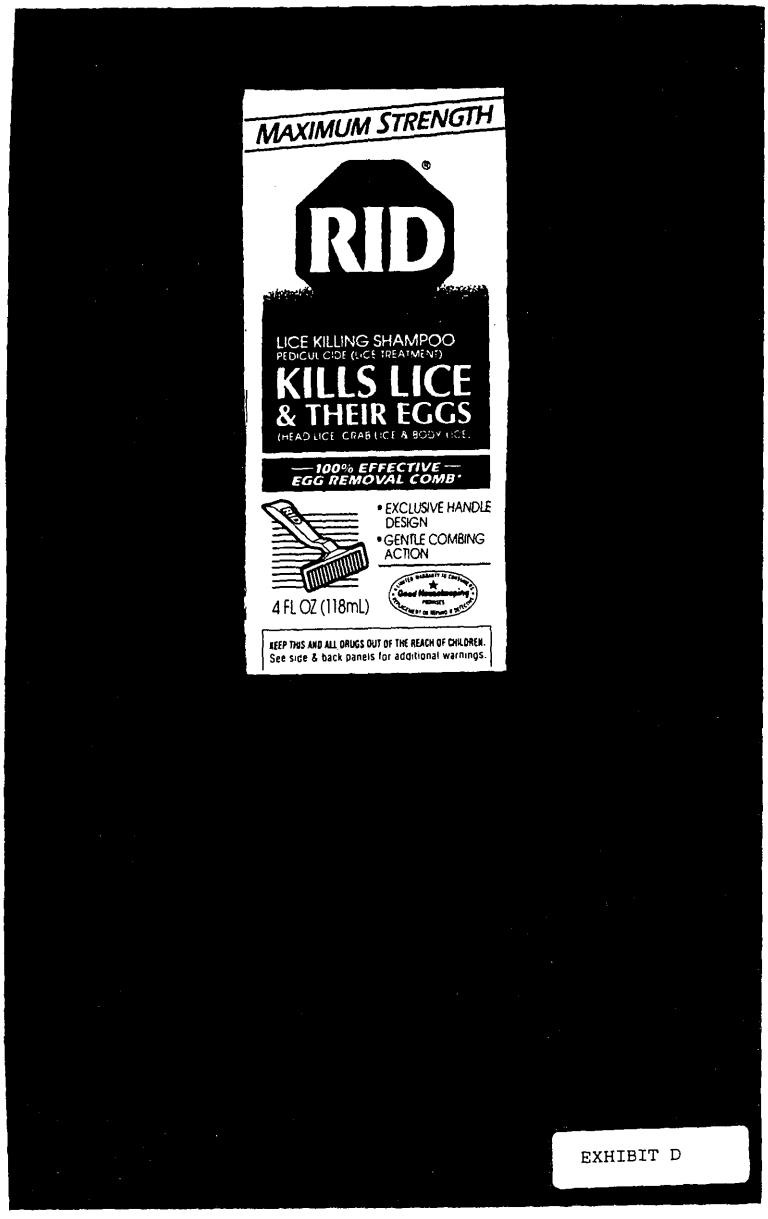
And RID leaves no active residue behind.

Nothing

is more effective or safer than RID.

SWEENEY & PARTNERS EXHIBIT C

EXHIBIT D


MAXIMUM STRENGTH
RID
LICE KILLING SHAMPOO
PEDICUL CIDE (LICE TREATMENT)
KILLS LICE
& THEIR EGGS
(HEAD LICE, CRAB LICE & BODY LICE)
100% EFFECTIVE
EGG REMOVAL COMB*
• EXCLUSIVE HANDLE DESIGN
• GENTLE COMBING ACTION
4 FL OZ (118mL)
KEEP THIS AND ALL DRUGS OUT OF THE REACH OF CHILDREN.
See side & back panels for additional warnings.
EXHIBIT D

DECISION AND ORDER

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

The respondent, 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 has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Pfizer Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 235 East 42nd Street, 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

DEFINITIONS

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

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

2. "*RID Lice Killing Shampoo*" shall mean the pediculicide marketed by respondent which contains the active ingredients of 0.33 percent pyrethrum extract and 4 percent piperonyl butoxide.

3. "*Substantially Similar Product*" shall mean any pediculicide marketed by respondent which contains the active ingredients of pyrethrum extract and piperonyl butoxide, and is covered by the Food and Drug Administration's Final Monograph on OTC Pediculicide Drug Products.

4. Unless otherwise specified, "*respondent*" shall mean Pfizer Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees.

5. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

6. "*Drug*" and "*device*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

7. "*Pesticide*" shall mean as defined in Section 2 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(u).

8. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement or promotional material, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of RID Lice Killing Shampoo, or any Substantially Similar Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product cures a lice infestation in a single application unless the representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That, for a period of two (2) years from the date of service of this order, respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of RID Lice Killing Shampoo or any other Substantially Similar Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, in print advertisements or promotional materials about the efficacy of such product in the removal or elimination of lice or the treatment of lice infestations ("triggering representation"), unless it makes the following disclosure, clearly and prominently, in such advertisements or promotional materials containing the triggering representation:

Reapplication and egg removal are required
to ensure complete effectiveness.
See label for important information.

Provided, however, that the above disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product is effective for the complete elimination of all lice and lice eggs in a single application.

Provided, further, that the above disclosure shall not be required in a particular piece of promotional material if such promotional material constitutes "labeling of a pediculicide drug product" subject

to the labeling requirements of the Food and Drug Administration's Final Monograph on OTC Pediculicide Drug Products, 21 CFR 358.650.

III.

It is further ordered, That, for a period of two (2) years from the date of service of this order, respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of RID Lice Killing Shampoo or any other Substantially Similar Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, in advertisements communicated through an electronic medium, about the efficacy of such product in the removal or elimination of lice or the treatment of lice infestations ("triggering representation"), unless it makes the following disclosure, clearly and prominently, in the video portion of such advertisements (or in the audio portion if the advertisement is audio only) containing the triggering representation:

Two Treatments Required.

Provided, however, that if the respondent makes any representation, in any manner, expressly or by implication, about directions for use of such product in advertisements communicated through an electronic medium utilizing both video and audio, the disclosure shall be presented in both the video and the audio portions of such advertisements.

Provided, further, that the above disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product is effective for the complete elimination of all lice and lice eggs in a single application.

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any drug or device for the treatment of lice in humans, or any pesticide for treatment of lice in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

V.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any drug or device for the treatment of lice in humans, or any pesticide for treatment of lice in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, regarding the efficacy of such product, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence, that substantiates the representation.

VI.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VII.

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

A. All advertisements and promotional materials containing the representation;

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

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

VIII.

It is further ordered, That respondent Pfizer Inc., and its successors and assigns shall deliver a copy of this order to each of its

principals, officers, managers, employees, agents, and representatives engaged in the preparation, review or placement of advertising or other materials covered by this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and, for a period of five (5) years from the date of issuance of this order, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IX.

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

X.

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

XI.

This order will terminate on December 14, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the

order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

STATEMENT OF CHAIRMAN PITOFSKY AND
COMMISSIONERS ANTHONY AND THOMPSON

We write to express our views about the concerns Commissioner Swindle raises regarding the disclosure remedy in these cases. The orders require that, for two years, whenever a claim is made regarding the efficacy of the lice removal products, the respondents include a disclosure about the necessity for a second application of their product. The disclosure remedy in these cases is fencing-in relief, designed to prevent purchasers of respondents' products from being deceived by *future* advertising.[1] The triggered disclosure about the need for two treatments provides additional assurance that consumers will not be misled by future ads. We are satisfied that the triggered disclosures in these orders are appropriate and reasonable.

STATEMENT OF COMMISSIONER ORSON SWINDLE

I have voted in favor of issuance of the final orders in these cases because there is reason to believe that the respondents have violated

[1] It is also worth noting that the Commission has distinguished triggered disclosures such as those in these cases from corrective advertising, which is required regardless of the contents of the ad. *Removatron Int'l Corp.*, 111 FTC 206, 311-12 n. 28 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989). *See also American Home Prods. Corp. v. FTC*, 695 F.2d 681, 700 (3rd Circ. 1982).

the law and most of the relief contained in the orders is necessary and appropriate. However, I continue to have concerns with regard to the need for and scope of one of the disclosure requirements contained in the orders.

The complaints include the allegation that the respondents claimed that their respective lice products eradicate a lice infestation after a single treatment. In truth, reapplication and careful combing are required to complete the treatments. To address this allegedly false claim, the orders prohibit the respondents from making, expressly or by implication, any claim that their lice treatment products work in only one treatment, unless that claim is true and substantiated. I agree that this prohibition is necessary and appropriate.

The orders, however, go further. For a period of two years, whenever the respondents make any efficacy claim for one of their lice treatment products, they must disclose "Two Treatments Required." The majority of the Commission has cast this provision as a "triggered disclosure requirement" and concluded that it is "appropriate and reasonably related to the alleged violations of Section 5." Even if this is a triggered disclosure requirement,[1] I do not believe that it is either necessary or appropriate.

The majority apparently believes that consumers will be misled if the respondents do not disclose that two treatments are required whenever they make an efficacy claim for their products. However, if a respondent makes a one-treatment claim that is false or unsubstantiated, the Commission can bring an action for violating the injunctive provisions of the order, and thus the two-treatment disclosure requirement would be unnecessary. On the other hand, if a respondent makes a one-treatment claim that is true and substantiated, the disclosure itself -- "Two Treatments Required" -- would be false, because the product would require only one treatment to be effective. Consequently, the disclosure requirement is not needed to prevent the respondents from making the misleading claim that their lice products work in one treatment.

[1] The majority is correct that the requirement has the form of a triggered disclosure, but the substance of the requirement is indistinguishable from corrective advertising. The disclosure will be required whenever the respondents make any express or implied claim that their products are efficacious, which likely would include all or virtually all of the ads they run for their lice treatment products. The disclosure also is required for only a limited period of time, which is also consistent with being a corrective advertising measure.

Even if some sort of disclosure requirement were needed to prevent deception, the disclosure requirement imposed here is not appropriate. It appears both overbroad and inadequate in duration. The triggered disclosure must be made whenever an efficacy claim is made, but not every efficacy claim (*e.g.*, the product "works") creates the impression that the product will work in only one treatment. Without such an impression, there may well be no need to disclose that two treatments are required. Moreover, the triggered disclosure requirement is inadequate because it terminates after two years. If the disclosure in fact is necessary to prevent deception, then why does it end after two years? If the Commission decides to impose a triggered disclosure requirement to prevent future ads from being deceptive, it should be triggered by a claim that would be deceptive in the absence of the information to be disclosed and should continue as long as necessary to prevent deception.

I support the Commission's move toward stronger remedies. The injunctive provisions of these orders, together with the FDA-mandated labeling,[2] should ensure that consumers have truthful and accurate information before and after purchase. The disclosure requirement here, however, is unnecessary and inappropriate.

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[2] The FDA requires the following statement on the label of any shampoo formulated to treat head lice: "Apply to affected area until all the hair is thoroughly wet with product. Allow product to remain on area for 10 minutes but no longer. Add sufficient warm water to form a lather and shampoo as usual. Rinse thoroughly. A fine-toothed comb or special lice/nit removing comb may be used to help remove dead lice or their eggs (nits) from hair. A second treatment must be done in 7 to 10 days to kill any newly hatched lice."

IN THE MATTER OF

MEDTRONIC, INC.

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

Docket C-3842. Complaint, Dec. 21, 1998--Decision, Dec. 21, 1998

This consent order allows Medtronic, Inc., a Minnesota-based corporation that manufactures and sells medical devices, to acquire Physio-Control International Corporation's automated external defibrillator business, and requires, among other things, that Medtronic limit its interest in SurVivaLink to that of a passive investor, and prohibits Medtronic from naming a member to SurVivaLink's Board of Directors.

Participants

For the Commission: *Norman Armstrong, Jr., Andrew J. Topps, Ann Malester, William Baer, Bart Wilson,* and *Jonathan Baker.*

For the respondent: *Philip Larson, Hogan & Hartson*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Medtronic, Inc. ("Medtronic"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting stock of Physio-Control International Corporation ("Physio-Control"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. "*Automated External Defibrillators*" means portable, automated devices used in emergency situations by persons with limited or no medical training to diagnose and treat persons suffering from sudden cardiac arrest.

2. "*SurVivaLink*" means SurVivaLink Corporation, a Minnesota corporation, with its principal place of business located at 5420 Feltl Road, Minnetonka, Minnesota. SurVivaLink is engaged in, among other things, the research, development, manufacture and sale of Automated External Defibrillators.

3. "*Investment Agreements*" means the Investment Agreement, dated April 29, 1994, by and among SurVivaLink Corporation, Medtronic, Inc. and the following shareholders of SurVivaLink: Bryon L. Gilman, Karl J.F. Kroll, Kenneth C. Maki, and Mark W. Kroll; and the Investment Agreement dated October 31, 1996, by and among SurVivaLink Corporation and Medtronic, Inc.

4. "*Respondent*" means Medtronic.

II. RESPONDENT

5. Respondent Medtronic 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 7000 Central Avenue, Northwest, Minneapolis, Minnesota. Respondent is engaged in, among other things, the research, development, manufacture and sale of a wide-range of medical devices.

6. Through the Investment Agreements, respondent owns below ten (10) percent of the overall securities in SurVivaLink, and possesses a number of rights, including but not limited to: (a) the right to receive competitively sensitive non-public information relating to SurVivaLink; (b) the right to appoint one member to SurVivaLink's Board of Directors; and (c) the right to vote on all matters requiring a shareholder vote.

7. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

8. Physio-Control is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Washington, with its principal place of business located at 11811 Willows Road, N.E., Redmond, Washington. Physio-Control is engaged in, among

other things, the research, development, manufacture and sale of Automated External Defibrillators.

9. Physio-Control is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

10. On June 27, 1998, Medtronic entered into an Agreement and Plan of Merger with Physio-Control to acquire all of the voting stock of Physio-Control in exchange for Medtronic voting stock valued at $530 million.

V. THE RELEVANT MARKET

11. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture and sale of Automated External Defibrillators.

12. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

VI. STRUCTURE OF THE MARKET

13. The market for the research, development, manufacture and sale of Automated External Defibrillators is highly concentrated as measured by the Herfindahl-Hirschman Index ("HHI"). SurVivaLink and Physio-Control are two of only three significant suppliers of Automated External Defibrillators in the United States.

14. Medtronic, through its ownership interest in SurVivaLink, and Physio-Control are actual, direct competitors in the relevant market for the research, development, manufacture and sale of Automated External Defibrillators in the United States.

VII. BARRIERS TO ENTRY

15. Entry into the market for the research, development, manufacture and sale of Automated External Defibrillators is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph sixteen, because of, among other things, the time and expense required to design and

develop a competitively viable product, obtain approvals from the United States Food and Drug Administration necessary to manufacture and sell Automated External Defibrillators in the United States, and establish a sales and distribution network.

VIII. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

A. By eliminating actual, direct and substantial competition between respondent, through SurVivaLink, and Physio-Control in the relevant market;

B. By increasing the likelihood of collusion or coordinated interaction among the firms in the relevant market;

C. By increasing the likelihood that customers of Automated External Defibrillators would be forced to pay higher prices; and

D. By reducing innovation in the relevant market.

IX. VIOLATIONS CHARGED

17. The Acquisition agreement described in paragraph ten constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

18. The Acquisition described in paragraph ten, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of Physio-Control International Corporation ("Physio-Control") and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as

amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, 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, now in further conformity with the procedure described 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 Medtronic, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Minnesota, with its office and principal place of business located at 7000 Central Avenue, Northwest, Minneapolis, 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. "*Medtronic*" or "*respondent*" means Medtronic, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Medtronic, Inc, not including SurVivaLink Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*SurVivaLink*" means SurVivaLink Corporation, a corporation organized, existing and doing business under the laws of Minnesota with its headquarters located at 5420 Feltl Road, Minnetonka, Minnesota, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by SurVivaLink Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Physio-Control*" means Physio-Control International Corporation, a corporation organized, existing and doing business under the laws of Washington with its headquarters located at 11811 Willows Road, N.E., Redmond, Washington, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Physio-Control International Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

E. "*Ownership Interest*" means any right(s), present or contingent, to hold voting or nonvoting interest(s), equity interest(s), and/or beneficial ownership(s) in the capital stock of SurVivaLink.

F. "*Voting Agreements*" means the Agreement Regarding The Election of Director by and among SurVivaLink Corporation, the purchasers of the Company's Series A Convertible Preferred Stock and the persons named in Appendix B of that agreement ("the Shareholders") and the Agreement Regarding Election of Directors made on June 12, 1997, by and among SurVivaLink and its stockholders.

G. "*The Rights of First Refusal Agreement*" means the Rights of First Refusal Agreement signed by Medtronic, Inc. on May 8, 1997.

H. "*Contractual Agreements*" means the following agreements: the Investment Agreement made and entered into as of April 29, 1994, by and among SurVivaLink Corporation and Medtronic and the following shareholders of SurVivaLink: Byron L. Gilman, Karl J.F. Kroll, Kenneth C. Maki, and Mark W. Kroll; the Investment Agreement made and entered into as of October 31, 1996, by and among SurVivaLink Corporation and Medtronic, Inc.; Voting Agreements; the Rights of First Refusal Agreement; the Amended and Restated Promissory Note dated May 12, 1997, between Medtronic and SurVivaLink; and any other agreements between Medtronic and SurVivaLink relating to Medtronic's Ownership Interest in SurVivaLink.

II.

It is further ordered, That:

A. Within ten (10) days of the date on which the Commission accepts the agreement containing consent order for public comment, respondent shall delegate its voting rights held pursuant to all of its Ownership Interests to SurVivaLink in a manner that directs and authorizes SurVivaLink to cast any votes related to such interest in each class of SurVivaLink capital stock in an amount and manner proportional to the vote of all other votes cast by other SurVivaLink shareholders in such class on a particular matter; provided, however, that in any voting matter to which either or both of the Voting Agreements may apply, such delegation shall direct and authorize SurVivaLink to cast any votes related to Medtronic's Ownership Interests in accordance with such Voting Agreement(s). Should any such delegation expire by operation of Minnesota law or otherwise, respondent shall redelegate its rights to SurVivaLink prior to such expiration. Provided, however, that respondent's delegation of its rights as to a particular Ownership Interest may terminate upon respondent's complete and absolute divestiture of that Ownership Interest.

B. Respondent shall not sell or otherwise transfer any of its Ownership Interest to an acquirer without permitting SurVivaLink the opportunity to purchase such interest in accordance with the terms of the Rights of First Refusal Agreement, including Section 6 of such agreement.

C. Respondent shall not join a partnership, limited partnership, syndicate or other group, or otherwise act in concert with any other person, for the purpose of acquiring, holding, voting, or disposing of an Ownership Interest in SurVivaLink.

D. Respondent shall not acquire or exercise any present or contingent right to acquire any additional Ownership Interest in SurVivaLink without providing thirty (30) days' prior written notice to the Commission. In the event that respondent learns that one of its respective employees, agents, or representatives has engaged in such an acquisition or exercise on his or her own initiative and not on behalf of respondent, respondent shall provide written notice of such acquisition or exercise to the Commission within ten (10) days after respondent learns of such acquisition or exercise. Nothing in paragraph II.D shall be construed to prevent Medtronic from receiving stock dividends which are issued to SurVivaLink share-

holders in proportion to their respective voting Ownership Interests. Medtronic shall provide written notice to the Commission of its receipt of any such dividend within ten (10) days of such receipt.

III.

It is further ordered, That respondent shall not:

A. Exercise any right to name, nominate or vote for a member of SurVivaLink's Board of Directors;

B. Participate in the formulation, determination or direction of any business decisions of SurVivaLink;

C. Propose corporate action requiring the approval of SurVivaLink shareholders;

D. Have any of its directors, officers or employees serve simultaneously as an officer or director of SurVivaLink;

E. Inspect or otherwise obtain access to the books and records of SurVivaLink (other than the stock register), even if respondent is entitled to such access pursuant to Minnesota Law, the Contractual Agreements, or otherwise; provided, however, that nothing in paragraph III.E shall prohibit Medtronic, after written notice to the Commission, from seeking or obtaining discovery in any litigation or other proceeding to resolve a claim between SurVivaLink and Medtronic in accordance with the procedures of the forum before which the dispute is pending. With respect to any such discovery, respondent shall enter into a protective order to prevent any information from being used for any purpose other than providing legal representation or evidence as to the particular dispute and to prevent any information from being disclosed to any person(s) not necessary to the resolution of such dispute; and

F. Obtain information from SurVivaLink other than documents available to the general public, except as permitted under paragraph III.E.

IV.

It is further ordered, That respondent shall designate an outside agent to receive such information from SurVivaLink as required to be provided by SurVivaLink pursuant to applicable state law and such additional information as would normally be provided to the other shareholders of SurVivaLink. Such information is limited to information provided to a shareholder by virtue of such shareholder's ownership of the shares of SurVivaLink and not as a result of such

shareholder's position as an officer, director or employee of SurVivaLink. Such information shall not be disseminated to respondent but may only be used by the outside agent to solicit offers for respondent's Ownership Interests or to render an opinion to the respondent as to the overall percentage and value of respondent's Ownership Interests. Such an opinion may disclose the types of information relied upon in formulating such an opinion but shall not disclose any specific information regarding SurVivaLink. Respondent shall notify the Commission and SurVivaLink as to the identity of such outside agent and any change as to the identity of the outside agent to which this information is to be sent.

V.

It is further ordered, That within ten (10) days of the date on which the Commission accepts the agreement containing consent order for public comment, respondent shall return or submit to SurVivaLink all documents, including all copies, whether created by SurVivaLink or any other person, in the possession of Medtronic that contain any trade secrets or other confidential non-public information, commercial information or financial information, other than the Contractual Agreements, received from or relating to SurVivaLink, including, but not limited to, all documents received from SurVivaLink pursuant to the Contractual Agreements.

VI.

It is further ordered, That within thirty (30) days of the date on which this order becomes final, respondent shall distribute a copy of this order to each of its U.S. based directors, officers and employees.

VII.

It is further ordered, That within ten (10) days of the date on which the Commission accepts the agreement containing consent order for public comment, respondent shall deliver a copy of this agreement to SurVivaLink by certified or registered U.S. mail.

VIII.

It is further ordered, That within sixty (60) days of the date this order becomes final and annually thereafter on the anniversary of the date this order becomes final, Medtronic shall submit to the

Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the provisions of this order. Medtronic shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this order, including a description of all substantive contacts or negotiations with SurVivaLink, including the identity of all parties contacted. Medtronic shall include in its compliance reports copies of all written communications between Medtronic and SurVivaLink, and all written communications between Medtronic and the outside agent designated in paragraph IV.

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent, respondent shall permit any duly authorized representatives of the Commission:

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

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

X.

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

XI.

It is further ordered, That this order shall terminate on the earliest of: (1) respondent's absolute and complete divestiture of all of its Ownership Interest in SurVivaLink; (2) respondent's absolute and complete divestiture of all of the assets or securities of Physio-Control held by Medtronic; or (3) on December 21, 2018.

IN THE MATTER OF

SHELL OIL COMPANY, ET AL.

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

Docket C-3843. Complaint, Dec. 21, 1998--Decision, Dec. 21, 1998

This consent order requires, among other things, the Texas-based corporation and its subsidiary to divest portions of the ANR pipeline system to an acquirer that receives the prior approval of the Commission. The consent order also requires the respondents to maintain the viability and marketability of the assets, pending the divestiture of the assets.

Participants

For the Commission: *John Hoagland, Kristen Malmberg, W. David Griggs, Thomas Carter, Morris Morkre,* and *Jonathan Baker.*

For the respondents: *Richard Brooks, Baker & Botts*, Houston, TX. and *Dan Wellington, Fulbright & Jaworski*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission") having reason to believe that respondents Shell Oil Company ("Shell") and its subsidiary, Tejas Energy, LLC ("Tejas"), through Tejas' subsidiary Transok, LLC ("Transok"), are subject to the jurisdiction of the Commission and that Tejas' acquisition of certain gas-gathering assets of ANR Field Services Company ("ANRFS") and certain gas processing and other facilities of ANR Production Company ("ANRP"), subsidiaries of The Coastal Corporation ("Coastal"), is in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. RESPONDENTS

1. Shell is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Shell Plaza, Houston, Texas.

2. Respondent Shell is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

3. Tejas is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1301 McKinney, Houston, Texas. Tejas is a wholly-owned subsidiary of Shell.

4. Respondent Tejas is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. THE PROPOSED ACQUISITION

5. Respondents, pursuant to a Letter of Intent dated January 20, 1998, among Transok, ANRFS and ANRP, entered into an agreement to acquire certain ANRFS assets consisting of natural gas pipelines, compressors and related appurtenances, and certain ANRP assets, consisting of a natural gas processing plant and other facilities.

III. THE RELEVANT MARKETS

6. The relevant line of commerce in which to analyze the effects of the acquisition is natural gas gathering services, *i.e.*, the transportation, for oneself or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or a natural gas processing plant.

7. The relevant sections of the country in which to analyze the effects of the acquisition are in the areas in and around the following

townships in Oklahoma (delineated as Township and Range) and Railroad Blocks in Texas:

a. 13N/26W and 12N/26W in Roger Mills County, Oklahoma; 11N/26W in Roger Mills and Beckham Counties, Oklahoma; and Roberts and Eddleman Block RE, Brooks and Burleson Blocks 1 and 2, and Commissioner of the Land Office State of Oklahoma Block in Wheeler County, Texas;

b. 12N/22W and 12N/21W in Beckham and Roger Mills Counties, Oklahoma; and 11N/22W in Beckham County, Oklahoma;

c. 12N/19W in Custer County, Oklahoma; and 11N/19W and 10N/19W in Washita County, Oklahoma;

d. 11N/15W and 11N/14W in Washita County, Oklahoma;

e. 10N/13W, 10N/12W, 9N/12W, 8N/12W and 8N/11W in Caddo County, Oklahoma; and

f. 6N/8W in Grady County, Oklahoma; and 6N/9W and 5N/9W in Caddo County, Oklahoma.

8. The relevant line of commerce is highly concentrated in the relevant geographic markets. The acquisition will significantly increase concentration in the relevant geographic markets set forth in paragraph seven.

9. Respondent Tejas is an actual and potential competitor of Coastal in the relevant line of commerce in the relevant geographic markets.

10. Effective entry in the relevant line of commerce in the relevant geographic markets is unlikely.

IV. EFFECTS OF THE ACQUISITION

11. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition or tend to create a monopoly in the relevant markets in the following ways, among others:

a. Actual and potential competition between Tejas and Coastal to provide natural gas gathering services to existing gas wells will be eliminated;

b. Actual and potential competition between Tejas and Coastal to provide natural gas gathering services for new natural gas wells will be eliminated;

c. The likelihood of collusion or coordinated interaction will be increased or facilitated;

d. Tejas is likely to exact anticompetitive price increases from producers in the relevant geographic market for performance of natural gas gathering services in the relevant geographic markets; and

e. Producers may be less likely to do exploratory and developmental drilling for new natural gas in the relevant geographic markets than prior to the merger.

V. VIOLATIONS CHARGED

12. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

13. The acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of certain assets of ANR Field Services Company and ANR Production Company (collectively referred to as "ANR"), subsidiaries of The Coastal Corporation ("Coastal"), by Shell Oil Company ("Shell") and its subsidiary, Tejas Energy, LLC ("Tejas"), and it now appearing that Shell and Tejas, hereinafter sometimes referred to as "respondents," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated the said Acts, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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. Shell is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Shell Plaza, Houston, Texas.

2. Tejas Energy, LLC, is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1301 McKinney, Houston, Texas.

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

ORDER

I.

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

A. "*Shell*" means Shell Oil Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Shell, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Tejas*" means Tejas Energy, LLC, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Shell, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Tejas is a wholly-owned subsidiary of Shell.

C. "*Respondents*" means Shell and Tejas, jointly and severally.

D. "*Coastal*" means The Coastal Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Nine Greenway Plaza, Houston, Texas.

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

F. "*Acquisition*" means the proposed acquisition by respondents of certain assets of ANR Field Services Company ("ANRFS") and ANR Production Company ("ANRP") (sometimes collectively referred to as "ANR"), subsidiaries of Coastal, pursuant to the Letter of Intent dated January 20, 1998, executed by ANRFS, ANRP, and Transok, LLC, a subsidiary of Tejas.

G. "*Gas Gathering*" means pipeline transportation, for oneself or other persons, of natural gas over any part or all of the distance between a well and a gas transmission pipeline or gas processing plant.

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

I. "*Related Person*" means a person controlled by, controlling, or under the common control of, another person.

J. "*Relevant Geographic Area*" means all portions of Wheeler County, Texas, within 22 miles of the Hemphill County, Texas, border; all portions of Roger Mills County, Oklahoma, within 25 miles of the Beckham County, Oklahoma, border; all portions of Beckham County, Oklahoma, within 15 miles of the Roger Mills County, Oklahoma, border; all portions of Washita County, Oklahoma, within 18 miles of the Custer County, Oklahoma, border; Custer and Caddo Counties, Oklahoma; and all Townships in Grady County, Oklahoma, within and including the boundaries 4-6N and 5-8W.

K. "*Schedule A assets*" means all of the assets listed in Schedule A of this order.

L. "*Processing*" means the separation of natural gas liquids, including propane, ethane, butanes, and pentanes-plus, from methane.

II.

It is further ordered, That:

A. Following completion of the Acquisition:

1. Prior to the divestiture of the assets listed in Schedule A, respondents shall build an eight (8) inch diameter pipeline to Tejas'

usual specifications connecting pipeline listed in Schedule A as ANR pipeline number 489-0802 and ANR pipeline number 489-0617 in Roger Mills County, Oklahoma, Township 12N 26W, Sections 20, 29, and 30. Respondents shall divest this pipeline with Area 1 assets listed in Schedule A; and

2. Respondents shall divest the Schedule A assets, absolutely and in good faith, at no minimum price, consistent with the provisions of this order, by the later of January 5, 1999, or thirty days after respondents consummate the Acquisition.

B. The divestiture shall be made only to an acquirer(s) that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Pending divestiture of the Schedule A assets, respondents shall take such actions as are necessary to maintain the viability, competitiveness and marketability of the Schedule A assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Schedule A assets, except for ordinary wear and tear.

D. To ensure the marketability of the assets to be divested, respondents shall offer the purchaser of any of the assets listed in Schedule A the opportunity to enter into an agreement with reasonable terms to process the natural gas gathered in the relevant geographic area in Tejas processing facilities for a term of up to two (2) years, cancelable at the asset purchaser's option with ninety (90) days notice.

E. 1. From the time that respondents acquire the Schedule A assets that are currently owned by ANR until their divestiture has been completed in pertinent part, respondents shall offer to purchase, gather and process gas on those Schedule A assets on the same terms and conditions offered by ANR on the date of their transfer.

2. If a producer, operator, or shipper executes a waiver of its rights under paragraph II.E.1, respondents may contract on such other terms and conditions as they may deem appropriate.

F. The purpose of the divestiture is to ensure the continued use of the Schedule A assets in the same type of business in which the Schedule A assets are used at the time of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondents have not divested the Schedule A assets in accordance with the requirements of paragraph II of this order, the Commission may appoint a trustee to divest the Schedule A assets. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, Section 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee to divest the Schedule A assets in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under paragraph III shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures of gas gathering assets. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Schedule A assets. The trustee may, in his or her discretion, or at the direction of the Commission, effect such arrangements and divest (a) any additional gas gathering assets (including, but not limited to, gas gathering lines, compressors, surface equipment, and gas purchase and gathering contracts) of the respondents located in the Relevant Geographic Area and (b) any additional assets necessary to connect

the divested assets to the buyer's existing systems or to a third-party transmission line. The trustee may select such assets pursuant to clauses (a) and (b) of this paragraph to assure the marketability, viability, and competitiveness of the Schedule A assets so as to accomplish expeditiously the remedial purposes of this order.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture(s), which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, that the Commission may extend this period only two (2) times.

5. Respondents shall provide the trustee full and complete access to the personnel, books, records and facilities related to the Schedule A assets, or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall make reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture(s) shall be made to an acquirer(s) that receives the prior approval of the Commission, provided, however, that if the trustee receives bona fide offers for any of the assets to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such assets to

the acquiring entity or entities selected by respondents from among those approved by the Commission.

7. The trustee shall serve at the cost and expense of respondents, without bond or other security unless paid for by respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule A assets.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

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

11. The trustee shall have no obligation to operate or maintain the Schedule A assets.

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

IV.

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:

A. Acquire the Schedule A assets after their divestiture, or any assets the trustee may divest pursuant to paragraph III.B.2 of this order;

B. Acquire any stock, share capital, equity, or other interest in any person engaged in gas gathering within the Relevant Geographic Area at any time within the two years preceding such acquisition; or

C. Enter into any agreements or other arrangements with any person or with two or more related persons to obtain, within any 18 month period, direct or indirect ownership, management, or control of more than five (5) miles of pipeline previously used for gas gathering and suitable for use for gas gathering within the Relevant Geographic Area.

V.

It is further ordered, That the prior notifications required by paragraph IV 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 Part 803, 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. In lieu of furnishing (1) documents filed with the Securities and Exchange Commission, (2) annual reports, (3) annual audit reports, (4) regularly prepared balance sheets, or (5) Standard Industrial Code (SIC) information in response to certain items in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, respondents shall provide a map showing the location of the pipeline whose acquisition is proposed and other pipelines used for gas gathering in the Relevant Geographic Area and a statement showing, for the most recent 12 month period for which volume information is available, the quantity of gas that flowed through pipeline whose acquisition is proposed. Respondents shall

provide the 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 (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by paragraph IV of this order 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.

VI.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II or III of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III of this order. Respondents shall include in such compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order is entered, and at such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order.

VII.

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

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondents shall permit any duly authorized representative of the Commission:

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

B. Upon five (5) days' notice to respondents and without restraint or interference from them, to interview officers, directors, employees, agents or independent contractors of respondents, who may have counsel present, relating to any matters contained in this order.

IX.

It is further ordered, That this order shall terminate on December 21, 2008.

IN THE MATTER OF

GATEWAY 2000, INC.

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

Docket C-3844. Complaint, Dec. 22, 1998--Decision, Dec. 22, 1998

This consent order prohibits, among other things, the South Dakota-based distributor and advertiser, of personal computers and software, from failing to make the text of any written warranty on a consumer product readily available for examination by prospective buyers prior to sale; from failing to provide a full refund of the purchase price of a product, including any shipping costs, insurance, handling or any other fees due to the consumer pursuant to any money-back guarantee offer made by the respondent; and requires the respondent to pay approximately $290,000 to the U.S. Treasury.

Participants

For the Commission: *Michael Rose, Brenda Doubrava, John Mendenhall,* and *Margaret Patterson.*

For the respondent: *Michael Sibarium, Winston & Strawn,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act ("the Warranty Act"), 15 U.S.C. 2301 *et seq.*, and Rules 701 and 702, 16 CFR Parts 701 ("the Disclosure Rule") and 702 ("the Pre-Sale Availability Rule"), promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gateway 2000, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Rules, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rules 701 and 702, 16 CFR 701.1 and 702, promulgated thereunder shall apply to the terms used in this complaint.

PAR. 2. Respondent Gateway 2000, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 610 Gateway Drive, North Sioux City, SD.

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

PAR. 4. Respondent is now and has been engaged in the direct marketing of personal computers throughout the United States. In the operation of its business, respondent is now and has been distributing, advertising, offering for sale and selling, among other items, IBM-compatible desktop, notebook and subnotebook personal computers, software, printers, modems, and monitors, all of which are consumer products. Therefore, respondent is a supplier of consumer products.

PAR. 5. In the ordinary course and conduct of its aforesaid business, respondent sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

VIOLATIONS OF SECTION 5(a)(1) OF THE FTC ACT

PAR. 6. Respondent has disseminated or has caused to be disseminated advertisements, promotional materials and written warranties for its products, including but not necessarily limited to the attached Exhibits 1 through 9.

Money-back Guarantee Claims

PAR. 7. The advertisements and promotional materials referred to in paragraph six, including but not necessarily limited to the attached Exhibits 2 through 6, contain the following statements:

1. GATEWAY 2000'S STANDARD FEATURES AND SERVICES . . . GUARANTEE Thirty-day money back guarantee.
2. 30-Day Money-back Guarantee . . . If you're unhappy with your Gateway 2000 purchase, for any reason, you can return the system within 30 days for a full refund.
3. THE EXTRAS - THAT DON'T COST EXTRA AT GATEWAY . . . 30-day money-back guarantee.
4. INCLUDED WITH EVERY SYSTEM: 30-day money-back guarantee.
5. You get a **30-day money-back guarantee.** If you don't like your system, send it back within 30 days for a refund.

PAR. 8. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph seven, and other statements not specifically set forth herein, respondent has represented, directly or by implication, that purchasers may return merchandise to the respondent within 30 days of its purchase, and obtain a full refund of all money paid to respondent to obtain said merchandise.

PAR. 9. In truth and in fact, when respondent determines the amount of the refund, it is its policy and practice to deduct its stated cost of shipping the merchandise to the purchaser from the money paid by consumers to the respondent. Thus, purchasers who return merchandise to respondent within 30 days of its purchase do not obtain a full refund of all money paid to respondent to obtain said merchandise.

PAR. 10. Therefore, the representations set forth in paragraph eight were, and are, false and misleading and constitute unfair or deceptive acts or practices in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

On-Site Service Claims

PAR. 11. The advertisements and promotional materials referred to in paragraph six, including but not necessarily limited to the attached Exhibits 7, 8 and 9, contain the following statements:

Standard Features and Services -- Free on-site service to most locations in the nation

THE EXTRAS That Don't Cost Extra At Gateway -- Free on-site service to most locations

INCLUDED WITH EVERY SYSTEM: Free on-site service to most locations

PAR. 12. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph eleven, and other statements not specifically set forth herein, respondent has represented, directly or by implication, that the purchasers of the warranted products, upon request to the respondent, will receive the free on-site services of a technician, except in certain geographic locations, and that respondent will send a technician regardless of whether respondent first diagnoses the problem over the telephone and whether the consumer can make the repair.

PAR. 13. In truth and in fact, regardless of geographic location, purchasers of the warranted products, upon request to respondent, did

not always receive the free on-site services of a technician; rather, it was the policy and practice of the respondent that it did not send a technician to provide on-site service until the respondent diagnosed the problem over the telephone and determined that the consumer could not make the repair.

PAR. 14. Therefore, the representations set forth in paragraph twelve were, and are, misleading and constitute unfair or deceptive acts or practices in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

Deceptive Warranty Language About Consumer Remedies

PAR. 15. In the ordinary course and conduct of its business, respondent has disseminated or has caused to be disseminated written warranties, including but not necessarily limited to the attached Exhibit 1, which contain the following language:

Under no circumstances shall Gateway 2000 be liable for any special, incidental, or consequential damages based upon breach of warranty, breach of contract, negligence, strict liability, or any other legal theory . . .

PAR. 16. Through the use of the statement referred to in paragraph fifteen, and other statements not specifically set forth herein, respondent has represented, directly or by implication, that consumers have no remedies regarding claims based upon incidental or consequential damages.

PAR. 17. In truth and in fact, some states do not allow the exclusion or limitation of incidental or consequential damages, and consumers in those states do have remedies regarding claims based upon incidental or consequential damages.

PAR.18. Therefore, the representations set forth in paragraph sixteen were, and are, false and misleading and constitute unfair or deceptive acts or practices in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

VIOLATIONS OF THE PRE-SALE AVAILABILITY RULE

PAR. 19. In the ordinary course and conduct of its business as a seller of consumer products, respondent has offered for sale to consumers consumer products with written warranties by means of a

1. The full text of the written warranty; or
2. That the written warranty can be obtained free upon specific written request, and the address where such warranty can be obtained.

PAR. 20. Section 110(b) of the Warranty Act mandates that the failure to comply with a Rule promulgated under the Warranty Act is a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1). 15 U.S.C. 2310(b). Therefore, Gateway's failure to comply with the provisions of the Pre-Sale Availability Rule, 16 CFR Part 702, constituted and now constitutes an unfair or deceptive act or practice in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

VIOLATIONS OF THE DISCLOSURE RULE

PAR. 21. In the ordinary course and conduct of its business, respondent has given or offered to give written warranties, and is therefore a warrantor as that term is defined in Section 701.1(g) of the Disclosure Rule, 16 CFR 701.1(g).

PAR. 22. In the ordinary course and conduct of its business, respondent has provided written warranties excluding incidental or consequential damages, but has failed to make, as required by Section 701.3(a)(8) of the Disclosure Rule, 16 CFR 701.3(a)(8), the following disclosure: "Some States do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you."

PAR. 23. In the ordinary course and conduct of its business, respondent has provided written warranties but has failed to make, as required by Section 701.3(a)(9) of the Disclosure Rule, 16 CFR 701.3(a)(9), the following disclosure: "This warranty gives you specific legal rights, and you may also have other rights which vary from State to State."

PAR. 24. Section 110(b) of the Warranty Act mandates that the failure to comply with a Rule promulgated under the Warranty Act is a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1). 15 U.S.C. 2310(b). Therefore, Gateway's failure to comply with the provisions of the Disclosure Rule, 16 CFR 701, constituted and now constitutes an unfair or deceptive act or practice

in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

VIOLATIONS OF THE WARRANTY ACT

PAR. 25. Section 108 of the Warranty Act provides that no supplier may disclaim or modify any implied warranty, except by limiting the duration of an implied warranty to the duration of a written warranty of reasonable duration, if the supplier makes any written warranty to the consumer with respect to a consumer product. 15 U.S.C. 2308.

PAR. 26. In the ordinary course and conduct of its business as a supplier, respondent has made written warranties, including but not necessarily limited to the attached Exhibit 1, which contain the following language:

DISCLAIMER OF WARRANTIES

THE WARRANTY STATED ABOVE IS THE ONLY WARRANTY APPLICABLE TO THIS PRODUCT. ALL OTHER WARRANTIES, EXPRESS OR IMPLIED (INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE), ARE HEREBY DISCLAIMED . . .

PAR. 27. Respondent's disclaimer of implied warranties constituted and now constitutes a violation of Section 108 of the Warranty Act, 15 U.S.C. 2308, and, pursuant to Section 110(b) thereof, 15 U.S.C. 2310(b), an unfair or deceptive act or practice in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

Commissioner Anthony recused.

EXHIBIT 1

Gateway 2000 Limited Warranty

Gateway 2000 One-Year Limited Warranty

Gateway 2000, Inc. warrants to the original purchaser that this hardware system will be free from defects in material and/or workmanship for one (1) year from the date of delivery. During the warranty period, Gateway 2000 will correct any defects in material or workmanship, or any failure of the system to conform to specifications, at no charge for labor and materials. Any replacement parts are warranted for the remainder of the original warranty or thirty (30) days, whichever is longer. The warranty period is not extended as a result of purchasing any additional parts from us or upgrading your Gateway 2000 computer. The original owner must promptly notify Gateway 2000, Inc. in writing if there is a defect in material or workmanship. Written notice in all events must be received by Gateway 2000 before expiration of the warranty period. This warranty is not transferable.

International Warranty

The Warranty for international customers is the same as for customers within the United States, with the following exceptions: On all orders for replacement parts, the customer must pay for the parts and shipping costs before the parts are shipped. When the defective parts are returned to Gateway 2000, Gateway 2000 will refund the cost of the parts — shipping charges are not refundable. Gateway 2000 is also not responsible for any customs fees, taxes or VAT that may be due. You must pay all customs fees, taxes, or VAT that may be due.

This One-Year Limited Warranty covers normal use. Gateway 2000 does not warrant or cover:

- damage during shipment other than original shipment to purchaser;
- damage caused by a disaster such as fire, flood, wind, earthquake, or lightning;
- damage caused by unauthorized attachments, alterations, modifications or foreign objects;
- damage caused by peripherals;
- defects caused by failure to provide a suitable installation environment for the hardware system;
- damage caused by the use of the hardware system for purposes other than those for which it was designed;
- damage from improper maintenance;
- damage caused by any other abuse, misuse, mishandling, or misapplication.

Gateway 2000's liability for failure to repair the hardware system to conform to the warranty after a reasonable number of attempts will be limited to a replacement of the hardware system or, at Gateway 2000's option, to a refund not to exceed the purchase price of the hardware system. These remedies are the Purchaser's *exclusive* remedies for breach of warranty.

Under no circumstances shall Gateway 2000 be liable for any special, incidental, or consequential damages based upon breach of warranty, breach of contract, negligence, strict liability, or any other legal theory. Such damages include, but are not limited to, loss of profits, loss of revenue, loss of use of the hardware system or any associated equipment, cost of capital, cost of substitute or replacement equipment, facilities or services, down time, purchaser's time, the claims of third parties, including customers, and injury to property.

DISCLAIMER OF WARRANTIES

THE WARRANTY STATED ABOVE IS THE ONLY WARRANTY APPLICABLE TO THIS PRODUCT. ALL OTHER WARRANTIES, EXPRESS OR IMPLIED (INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE), ARE HEREBY DISCLAIMED. NO ORAL OR WRITTEN INFORMATION (INCLUDING BUT NOT LIMITED TO THE 30-DAY MONEY BACK GUARANTEE), OR ADVICE GIVEN BY GATEWAY 2000, ITS AGENTS OR EMPLOYEES SHALL CREATE A WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF THIS WARRANTY.

THIS DISCLAIMER OF WARRANTIES AND LIMITED WARRANTY ARE GOVERNED BY THE LAWS OF THE STATE OF SOUTH DAKOTA.

6 Gateway 2000 Customer Support Guide

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EXHIBIT 1

EXHIBIT 2

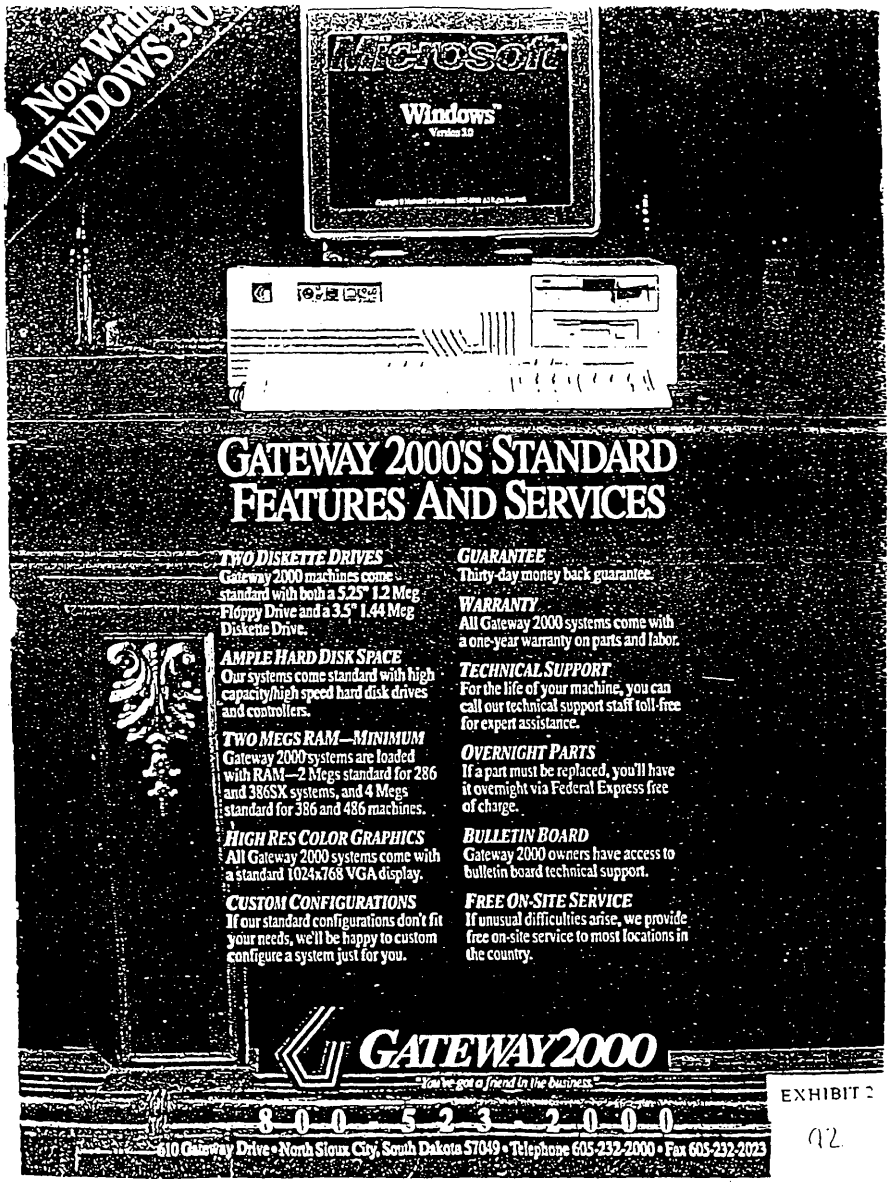

EXHIBIT 2

92

EXHIBIT 3

Gateway 2000 Assurances

Like most companies, Gateway 2000 offers a good written guarantee and warranty on all products. Unlike most companies, we treat each customer as an individual taking special care to see that your individual situation is handled fairly. Your satisfaction is our number one priority.

30-Day Money-Back Guarantee

If you're unhappy with your Gateway 2000 purchase, for any reason you can return the system within 30 days for a full refund.

One-Year Warranty

Every Gateway 2000 system comes with a one-year warranty on parts and service. If a part needs to be replaced, we'll quickly send a replacement part via overnight shipping free of charge. Beyond the warranty, we provide free telephone technical support for the life of your machine.

Free On-Site Service

If unusual difficulties occur, we can provide free on-site service to most locations in the country.

Credit Terms

You can purchase your Gateway 2000 system on C.O.D. terms or with American Express, Discover, Visa, or Mastercard. Net 30-day credit terms and leasing options are also available to qualified buyers.

New FCC and Product Development Labs

As an added assurance to you that your Gateway 2000 system will comply with all FCC certification requirements, we've just installed a new FCC testing lab in our recently expanded 70,000 square-foot manufacturing facility. We've also expanded our product development lab in which we are continually testing new components. The quest for even better price/performance computer systems never ends at Gateway.

New Sales Hours

For your convenience, we've expanded our sales hours. New sales hours are from 7 a.m. to 10 p.m. (CST) Monday through Friday and 9 a.m. to 4 p.m. Saturdays.

EXHIBIT 3

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EXHIBIT 4

GATEWAY 2000

16MHZ 286 VGA

- 80286 Processor
- 2 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 40 MB 17ms IDE Drive with 32K Cache
- 16-Bit VGA with 512K
- 14" Crystal Scan 1024 Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 1 PS/2 Mouse Port
- 124-Key AnyKey™ Keyboard
- MS DOS® 5.0

$1395

16MHZ 386SX VGA

- Intel® 80386SX Processor
- 2 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 40 MB 17ms IDE Drive with 32K Cache
- 16-Bit VGA with 512K
- 14" Crystal Scan 1024 Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 1 PS/2 Mouse Port
- 124-Key AnyKey Keyboard
- Microsoft® Mouse
- MS DOS 5.0
- MS Windows™ 3.0

$1495

20MHZ 386SX CACHE

- Intel 80386SX Processor
- 32K Cache RAM
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 80 MB 17ms IDE Drive with 32K Cache
- 16-Bit VGA with 512K
- 14" Crystal Scan 1024 Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 1 PS/2 Mouse Port
- 124-Key AnyKey Keyboard
- Microsoft Mouse
- MS DOS 5.0
- MS Windows 3.0

$1895

25MHZ 386 VGA

- Intel 80386 Processor
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 80 MB 17ms IDE Drive with 32K Cache
- 16-Bit VGA with 1 MB
- 14" Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 124-Key AnyKey Keyboard
- Microsoft Mouse
- MS DOS 5.0
- MS Windows 3.0

$2095

BEST BUYS

- Get our 33 MHz 386 Cache system, same configuration as listed, with a 120 MB IDE hard drive instead of the 200 MB drive.

$2495

- Same features as our 33 MHz 486 Cache system except this machine has 4 MB RAM, instead of 8, and a 120 MB IDE hard drive, instead of the 200 MB drive in our standard configuration.

$2845

33MHZ 386 CACHE

- Intel 80386 Processor
- 64K Cache RAM
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 200 MB 15ms IDE Drive with 64K Multi-Segmented Cache
- 16-Bit VGA with 1 MB
- 14" Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 124-Key AnyKey Keyboard
- Microsoft Mouse
- MS DOS 5.0
- MS Windows 3.0

$2795 –

25MHZ 486 CACHE

- Intel 80486 Processor
- 64K Cache RAM
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 200 MB 15ms IDE Drive with 64K Multi-Segmented Cache
- 16-Bit VGA with 1 MB
- 14" Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 124-Key AnyKey Keyboard
- Microsoft Mouse
- MS DOS 5.0
- MS Windows 3.0

$2995

33MHZ 486 CACHE

- Intel 80486 Processor
- 64K Cache RAM
- 8 MB RAM, Expands to 64 MB
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 200 MB 15ms IDE Drive with 64K Multi-Segmented Cache
- 16-Bit VGA with 1 MB
- 14" Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 124-Key AnyKey Keyboard
- Microsoft Mouse
- MS DOS 5.0
- MS Windows 3.0

$3395

The Extras – That Don't Cost Extra At Gateway

- One-year warranty on parts and labor
- Replacement parts shipped quickly via overnight shipping at no charge
- 30-day money-back guarantee
- Lifetime toll-free technical support from the service organization that won PC World's Service Excellence Award
- Free on-site service to most locations
- Free bulletin board technical support
- C.O.D. terms and major credit cards honored
- Net 30-day credit terms available to qualified commercial customers
- Leasing options available to qualified commercial customers
- MS DOS 5.0 is standard; versions 4.01 and 3.3 are available at no extra charge
- The programmable AnyKey keyboard is standard; a 101-key keyboard is also available at no extra charge

All prices are subject to change. Prices do not include shipping. *Printed on recycled paper.* *Corporate Sponsor – a program of the American Forestry Association, Box 2000, Washington, DC 20013 Call us for information on how you can support Global Releaf.*

Sales Hours: 7am-10pm Weekdays, 9am-4pm Saturdays (Central Time)
Service Hours: 6am-Midnight Weekdays, 9am-2pm Saturdays (Central Time)

intel inside

GATEWAY2000
"You've got a friend in the business"

8 0 0 - 5 2 3 - 2 0 0 0
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Now Toll-F
From Cana

EXHIBIT 4

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EXHIBIT 5

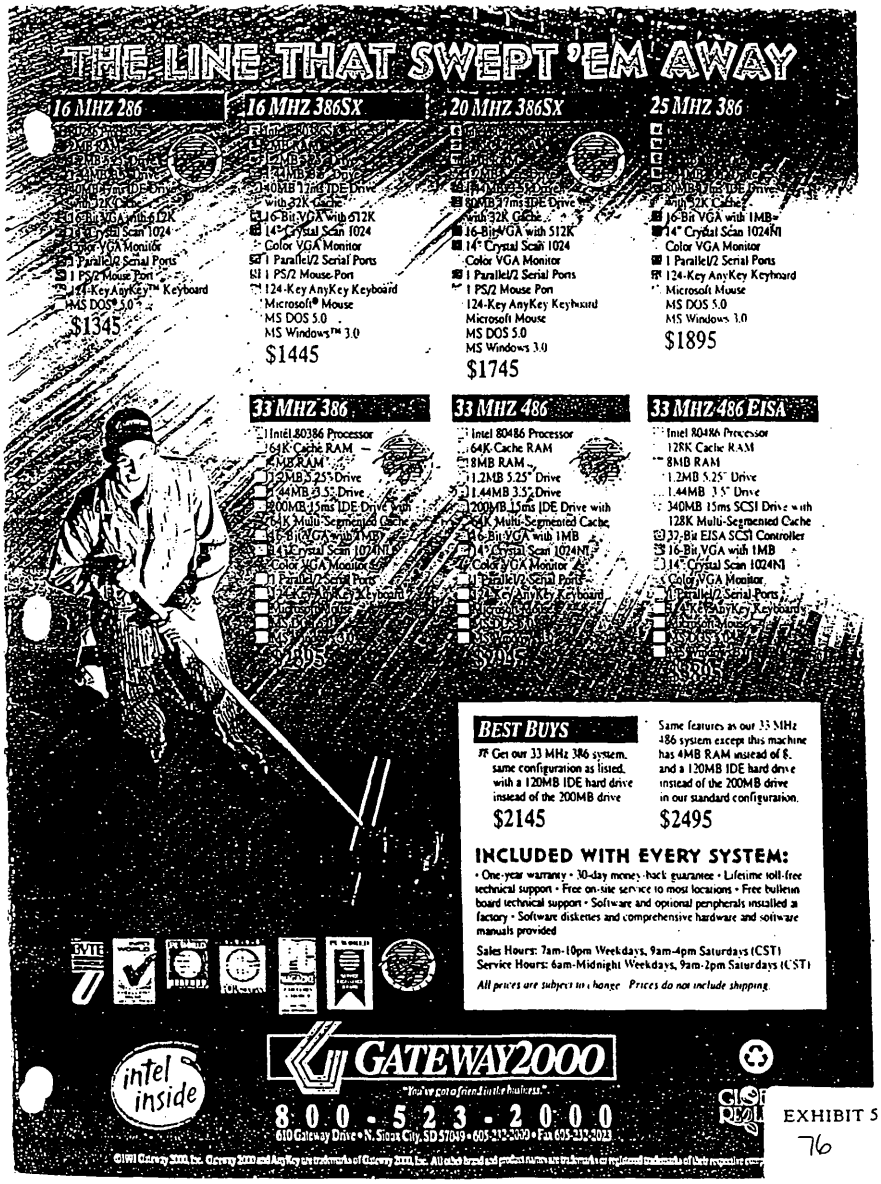


EXHIBIT 5
76

EXHIBIT 6

Gateway 2000 was a record, what would it be like? Music to your ears!

ıose Old-Time Country Values
The Low Overheads

Our album would kick off with some great Country
es because, after all, we're the original country PC
npany with the low-overhead prices. We're located

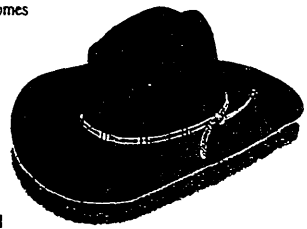
the heartland of America where our factory is
ırd by corn and bean fields. KSUX country radio,
e Super Pig, is the number
ıe station in these
ırts (no fooling).
ateway folks are
ostly midwest born
ıd raised, and it shows in our quality workmanship
ıd in the friendly, down-home way we treat our
ıstomers. We'll bend over backwards to please you.
/hen you buy from Gateway, you get the best price,
uality and service. That's a value nobody can beat.

;imme the Good Stuff –
)y Hammer and the Boys

This song is dedicated to everybody who's tired of
ıew technology becoming affordable only after it's
ıpstaged by something better. At Gateway, we offer
he l[illegible]t, newfangled technology at homespun prices.

[illegible]'s 4SX-33 makes a mighty fine Windows machine!

Baby, Let Me Baby You
by The Support Group



Every Gateway 2000 system comes with excellent after-the-sale support. You get a **30-day money-back guarantee.** If you don't like your system, send it back within 30 days for a refund. All systems come with a **one-year limited warranty** and telephone technical **support** for the life of the system from our award-winning tech department. We received *PC World's* World Class Award in 1992 for best service and support in the hardware category. And in a February 1993 survey, *PC Magazine* readers once again gave Gateway an excellent rating for service and reliability. You also get a **lifetime BBS membership** for additional technical support and online forums.

To serve you better, we've hired and trained over 500 new people for customer service, technical support, sales and manufacturing in the past five months, bringing our total number of employees to over 1,900.

We offer on-site service to most locations in the country (factory service only for notebooks). Replacement parts leave our factory as quickly as possible; we pay overnight shipping. Plus we now have **interactive documentation** on desktop systems with pictures and text right on your hard drive (in addition to comprehensive hardware and software manuals).

We make it easy for you to buy a Gateway PC, too, with convenient payment options including major credit cards and C.O.D. terms. Net 30-day terms and leasing options are also available to qualified commercial customers. All this *and* your great-looking Gateway PC comes in our distinctive, country cow-spotted box!

EXHIBIT 6

GATEWAY 254

800-846-4089

EXHIBIT 7

Gateway 2000 Systems

12MHZ 286VGA
- 80286-12 Processor
- 1 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 40 MB 17ms IDE Drive with 32K Cache
- 16 Bit VGA with 512K
- 14" Gateway Crystal Scan 1024 Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01

$1495.00

GATEWAY 386SX
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 40 MB 17ms IDE Drive with 32K Cache
- 16 Bit VGA with 512K
- 14" Gateway Crystal Scan 1024 Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01
- MS WINDOWS 3.0

$1895.00

25MHZ 386™ VGA
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 80 MB 17ms IDE Drive with 32K Cache
- 16 Bit VGA with 1 MB
- 14" Gateway Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01
- MS WINDOWS 3.0

$2395.00

25MHZ 386CACHE
- 64K Cache RAM
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 80 MB 17ms IDE Drive with 32K Cache
- 16Bit VGA with 1 MB
- 14" Gateway Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01
- MS WINDOWS 3.0

$2695.00

33MHZ 386VGA
- 64K Cache RAM
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 200 MB 15ms IDE Drive with 64K Multi-Segmented Cache
- 16 Bit VGA with 1 MB
- 14" Gateway Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01
- MS WINDOWS 3.0

$3195.00

25MHZ 486™ VGA
- 64K Cache RAM
- 8 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 200 MB 15ms IDE Drive with 64K Multi-Segmented Cache
- 16 Bit VGA with 1 MB
- 14" Gateway Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01
- MS WINDOWS 3.0

$3995.00

33MHZ 486VGA
- Same configuration as the 25 MHz 486 VGA

$4395.00

BEST BUY
- Same features as our 33 MHz 386 VGA system except this machine has an 80 MB 17ms IDE Drive instead of the 200 MB 15ms IDE Drive.

$2795.00

STANDARD FEATURES & SERVICES

- Microsoft Windows [illegible] with all 486 [illegible]
- 30-day money-[illegible] guarantee
- One-year warranty [illegible]
- Leasing options [illegible]
- [illegible]

NEW CRYSTAL SCAN 1024NI

- Our new 14" Gateway Crystal Scan 1024NI color VGA monitor comes standard with all 386 DX and 486 systems. This monitor is non-interlaced for a flawless, flicker-free display. 1024 x 768 @ 60 Hz. 800 x 600 @ 72 Hz. .28 D.P.

We custom-build each Gateway 2000 computer to customer specifications. We'll gladly provide you with a quote on your configuration. 386 and 486 are trademarks of Intel Corporation. Due to the volatility of the DRAM market, all prices are subject to change. Prices do not include shipping.

GATEWAY2000

"You've got a friend in the business."

800-523-2000

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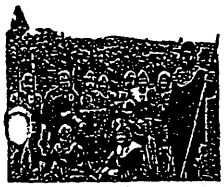
EXHIBIT 7

37

EXHIBIT 8

Ted Waitt, President: "We couldn't resist doing this [image], tongue-in-cheek ad — but our best prices will tell you we're extremely serious about doing business with you."



THE EXTRAS That Don't Cost Extra At Gateway

- One-year warranty
- 30-day money-back guarantee
- Lifetime toll-free technical support from the service organization that won PC World's Service Excellence Award
- Free on-site service to most locations
- Free bulletin board technical support
- Replacement parts sent via overnight shipping free of charge
- Leasing options available to commercial customers
- Sales hours 7am-10pm weekdays, 9am-4pm Saturdays (Central Time)
- Service hours 6am-midnight weekdays, 9am-2pm Saturdays (Central Time)
- Toll-free lines now connected for Canada too
- Custom 124-key programmable AnyKey keyboard standard with all systems
- MS DOS 5.0, featuring improved memory efficiency, enhanced/new utilities and new user shell, standard with all systems
- Flicker-free non-interlaced Crystal Scan 1024 x 768 color monitors standard with all 386 DX and 486 systems

CURTAIN CALL

The characters in our annual summer fun ad were played by a few of the 750 dedicated people who work at Gateway 2000. All photos were shot in and around our hometown of N. Sioux City, South Dakota.

Dave Russell, Director of Purchasing: "They made me play the bad guy because I'm notorious for [haggling with our vendors to get the very best prices on components — good prices we pass on to you."

Bill Clemens (left), Market Research Analyst, and Mike McClendon, Market Survey Coordinator, cooked up on the [illegible]

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"You've got a friend in the business."

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Due to the volatility of the DRAM market, all prices are subject to change. Prices do not include shipping. AnyKey, Intel, Microsoft, MS DOS and Windows are trademarks or registered trademarks of their respective companies. © 1991 Gateway 2000, Inc. Photos by G.E. Lauffenburger & Company.

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EXHIBIT 9

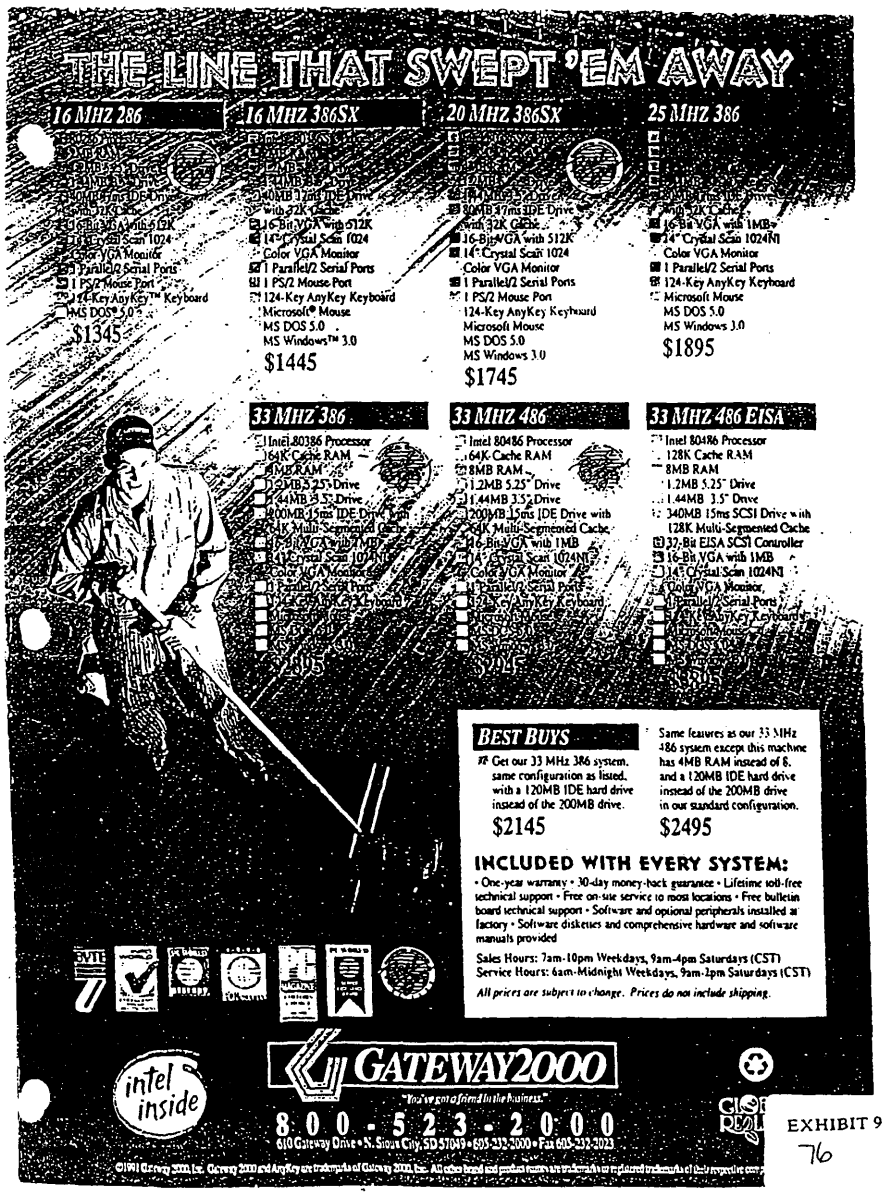

EXHIBIT 9
76

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 Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of Section 5 of The Federal Trade Commission Act ("FTC Act"); the Magnuson-Moss Warranty Act ("Warranty Act") and two Rules promulgated thereunder: the Rule concerning the Disclosure of Written Consumer Product Warranty Terms and Conditions ("Disclosure Rule"); and the Rule concerning the Pre-Sale Availability of Written Warranty Terms ("Pre-Sale Rule"). Under Section 110(b) of the Warranty Act, 15 U.S.C. 2310(b), violations of the Warranty Act or its Rules are also violations of Section 5 of the FTC Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that 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, 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:

A. Respondent Gateway 2000, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 610 Gateway Drive, North Sioux City, SD.

B. 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

1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rules 701 and 702, 16 CFR Parts 701 ("the Disclosure Rule") and 702 ("the Pre-Sale Availability Rule"), promulgated thereunder, shall apply to the terms used in this order.

2. "*On-Site Service*" shall mean the provision of the services of a qualified technician at the location of a defective or allegedly defective product sold or supplied by Gateway 2000, Inc. ("respondent") in an attempt to repair, replace, or otherwise correct a problem described by a purchaser to the respondent.

3. "*Clearly and conspicuously*" shall mean that the disclosure must be given in: (1) twelve point type where the representation that triggers the disclosure requirement is given in twelve point or larger type; or (2) the same type size as the representation that triggers the disclosure requirement where that representation is given in a type size that is smaller than twelve point type.

I.

It is ordered, That respondent Gateway 2000, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale or offering for sale of any consumer product for which the respondent offers a written warranty, do forthwith cease and desist from:

A. Excluding liability for any incidental or consequential damages arising from any consumer injury without clearly and conspicuously disclosing, as provided by Section 701.3(a)(8) of the Disclosure Rule, 16 CFR 701.3(a)(8), that some states do not allow for such exclusion;

B. Failing to disclose, as provided by Section 701.3(a)(9) of the Disclosure Rule, 16 CFR 701.3(a)(9), that certain states may give the consumer legal rights in addition to those provided by the warranty;

C. Disclaiming any implied warranty, except as provided by Section 108 of the Warranty Act, 15 U.S.C. 2308;

D. Failing to make the text of any written warranty on a consumer product readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in Section 702.3(c) of the Pre-Sale Availability Rule, 16 CFR 702.3(c).

II.

It is further ordered, That respondent, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale or offering for sale of any consumer product, do hereby cease and desist from failing to provide a full refund of the purchase price of a product, including any shipping costs, insurance, handling or any other fee or charge paid by the consumer, within seven (7) business days of the respondent's acceptance, after a reasonable opportunity for inspection, of the merchandise returned by the consumer for a refund pursuant to any money-back guarantee offer made by respondent; provided, however, that respondent may deduct a service charge or other fees such as shipping and handling costs only if respondent has disclosed that such deductions will be made, clearly and conspicuously and in close proximity to the money-back guarantee offer made by respondent.

III.

It is further ordered, That respondent, its successors and assigns, shall pay to the Federal Trade Commission, by cashier's check or certified check made payable to the U.S. Treasury and delivered to Commission counsel, Cleveland Regional Office, 1111 Superior Avenue, Suite #200, Cleveland, OH 44114, the sum of Two Hundred Eighty Nine Thousand Four Hundred Twenty Nine and 05/100 ($289,429.05) Dollars. Respondent shall make this payment on or before the tenth day following the date of service of the order. In the event of any default on any obligation to make payment under this section, interest, computed pursuant to 28 U.S.C. 1961(a), shall accrue from the date of default to the date of payment. No portion of the respondent's payment shall be deemed payment of any fine, penalty, or punitive assessment.

IV.

It is further ordered, That respondent, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale or offering for sale of any consumer product, do forthwith cease and desist from representing, in any manner, directly, or by implication, that it shall provide On-Site Service unless respondent discloses, clearly and conspicuously and in close proximity to the representation, any material limitations on obtaining On-Site Service.

V.

It is further ordered, That respondent, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale or offering for sale of any consumer product, for which the respondent offers a written warranty, do forthwith cease and desist from misrepresenting a consumer's remedies under its warranties for claims based upon incidental or consequential damages.

VI.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, deliver to each of the respondent's current directors and officers, and to all managing employees, agents, and representatives having any sales, advertising, customer service, or policy responsibility with respect to the subject matter of this order, a copy of this order to cease and desist. For a period of three (3) years thereafter, respondent shall distribute the same to all future directors and officers, and to all future managing employees, agents, and representatives within thirty (30) days after the inception of their affiliation with respondent.

VII.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, provide written instructions to all current managing employees, agents, and representatives having any sales, advertising, customer service, or policy responsibility on behalf of respondent as to respondent's specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301, *et seq.*),

including, but not limited to, Section 108 (15 U.S.C. 2308), thereof, and Rules 701 and 702, 16 CFR Parts 701 ("the Disclosure Rule") and 702 ("the Pre-Sale Availability Rule"), promulgated thereunder, and this order. For a period of three (3) years thereafter, respondent shall provide said instructions to all future such managing employees, agents, and representatives within thirty (30) days after the inception of their affiliation with respondent.

VIII.

It is further ordered, That respondent shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondent to its supervising employees, agents, and representatives having any sales, advertising, customer service, or policy responsibility on behalf of respondent pursuant to Part VII, above; (ii) all warranties on consumer products costing more than $15 for which the respondent is the warrantor; and (iii) exemplars of all advertising by the respondent.

IX.

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

X.

It is further ordered, That this order will terminate on December 22, 2018, 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.

XI.

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

Commissioner Anthony recused.

Re:Petition of Mt. Olympus Financial, Dan Horman, and Annette Horman to Quash Civil Investigative Demands -- File No.982-3543 (Mt. Olympus Financial)

August 11, 1998

Dear Messrs. Atkin and Hawkins:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4).

The Petition is denied for the reasons stated below. As also set forth below, the new deadline for Mt. Olympus Financial, L.C. and its principals, Dan and Annette Horman (together "Petitioners" or "Mt Olympus"), to respond to, and otherwise comply with, the Civil Investigative Demands ("CID") is Wednesday, August 26, 1998.

Petitioners have the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1] The filing of a request for review by the full Commission does not stay or otherwise affect the new return date -- August 26, 1998 -- unless the Commission rules otherwise. *See* 16 CFR 2.7(f).

I. SUMMARY OF THE DISPUTE

Mt. Olympus is a subprime lender. At issue in this investigation is whether Mt. Olympus violated Section 5 of the FTC Act, 15 U.S.C. 45(a); the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.*, which includes the Home Ownership and Equity Protection Act ("HOEPA"); and/or TILA's implementing regulation, Regulation Z, 12 CFR Part 226. More specifically, the Commission wants to pursue preliminary evidence it has gathered suggesting that Petitioners induced consumers to falsify their loan applications to indicate that the loans were for business purposes when, in fact, those loans were for personal, family, or household purposes. The consumer protection requirements imposed by TILA do not apply to business loans.[2]

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[1] This letter is being delivered by facsimile and by express mail. The facsimile is being provided only as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the express mail copy of this letter.

[2] The Truth in Lending Act specifically exempts certain transactions, including, "[c]redit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes . . . ." 15 U.S.C. 1603(l), *see also* 12 CFR 226.3.

At the heart of this dispute is Petitioners' refusal to honor specification 5 of the CIDs which requests access to all of Mt. Olympus' loan files for the relevant period -- approximately 110 files. Petitioners contend that they only make business loans, and, therefore, their files are not relevant to an investigation aimed at uncovering violations of TILA and HOEPA. Rather than provide access to the entire set of files, Petitioners suggest that access be limited to the files of those borrowers whom the FTC can identify as claiming that their loans were for consumer, rather than business, purposes. As explained in detail below, this is not viable alternative for several reasons, not the least of which is that borrowers' willingness to cooperate in the investigation might be chilled if they knew that they would be singled out to their lender as having provided damaging testimony or evidence.

II. BACKGROUND

On July 6, 1998, pursuant to its omnibus resolution, dated June 1, 1998, the Commission issued identical CIDs to each of the three Petitioners, requesting various documents. The June 1, 1998 resolution authorizes the use of compulsory process in non-public investigations "[t]o determine whether various unnamed subprime lenders have engaged or are engaging in acts or practices in violation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, as amended, including but not limited to the Home Ownership and Equity Protection Act of 1994, and its implementing Regulation Z, 12 CFR 226, as amended, and whether they have engaged or are engaging in unfair or deceptive acts or practices in violation of Section 5(a)(l) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(l), as amended." The resolution also authorizes investigation to determine whether action to obtain redress for injury to consumers or others would be in the public interest. All three CIDs specified a return date of July 20, 1998.

The 13 specifications contained in each CID seek various documents relating to the loans made by Mt. Olympus and Mt. Olympus' business practices generally. For example, the CIDs request documents relating to the total number of loans made, the dates of those loans, the loan amounts, the interest rates and other terms of the loan contracts, the payment status of the loans, and foreclosure activities. With respect to Mt. Olympus' business activities, the CIDs request documents relating to, among other things, the identity of Mt. Olympus' employees, complaints received from borrowers, communications

with governmental agencies, private litigation or law enforcement actions, and policies and procedures regarding compliance with TILA.[3]

Rather than produce the requested documentary materials, on or about July 20, 1998, Petitioners filed a Petition to Quash the CIDs. Petitioners assert three main arguments in support of their Petition: (1) the information sought is not within the scope of the FTC's investigation; (2) the information sought is not relevant to the matters under investigation; and (3) the requests are vague, overly broad, and unduly burdensome.[4]

Commissioner Anthony has carefully reviewed the CIDs, the Petition to Quash, the declaration of Blake Atkin, and all of the various correspondence filed with the Petition and finds that none of Petitioners' arguments support quashing the CIDs.

III. ANALYSIS

A. Scope of Investigation and Relevance of the Information Sought

Petitioners contend that they should not have to comply with the CIDs because their activities are outside of the scope of the investigation authorized by the Commission's June 1, 1998 resolution regarding subprime lenders; therefore, they add, the information sought in the CIDs cannot be relevant. Petitioners are mistaken on both of these points. As shown below, Petitioners' activities *are within the scope* of the authorized investigation, and the information sought by the CIDs *is relevant* to that investigation.

1. Scope

This investigation is intended to uncover unfair or deceptive business practices by subprime lenders. Petitioners do not dispute that Mt. Olympus is a subprime lender. Instead, they attempt to place

[3] In their submission, Petitioners repeatedly mention that they previously provided a great deal of the material sought by the CIDs in response to an April, 1998 access letter. Petition at 1-3; Atkin Affidavit ¶4. While Petitioners' prior cooperation may be commendable, there is no dispute that the CIDs seek documents that have not been previously produced, *e.g.*, all of the loan files. If Petitioners' description of the previous voluntary production is intended to suggest that the CIDs are somehow inappropriate as duplicative of the access letter, Petitioners should note that the instant CIDs contain the standard instruction intended to deal with this issue: "If any documents responsive to this CID have been previously supplied to the Commission, you may comply with this CID by identifying the document(s) previously provided and the date of submission."

[4] The first and the second argument are closely related. Petitioners addressed the two arguments together in their Petition, and those arguments are addressed together in this letter decision as well.

themselves outside of the scope of the investigation by claiming that their activities do not fall within the statutes at issue.[5]

Petitioners incorrectly define the scope of the investigation as limited to uncovering violations of TILA and Regulation Z. They attempt to dismiss the portion of the resolution regarding the FTC Act -- "[t]o determine... whether [subprime lenders] have engaged or are engaging in unfair or deceptive acts or practices in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(l)" -- as "general, vague language" that can be ignored. Petition at 5 n.2. Section 5 of the Commission's original authorizing statute - the cornerstone of the Commission's consumer protection authority -- cannot be dismissed so easily. Indeed, the Commission's investigation is not nearly so narrow as Petitioners suggest, but rather encompasses all "unfair or deceptive acts or practices" by subprime lenders as well as any specific violations of TILA and Regulation Z.

Under this proper definition of the scope of the investigation, even if Petitioners do indeed only make business loans and, therefore, are not subject to TILA, they are still within the scope of the investigation by virtue of Section 5. This fact renders moot Petitioners' argument that the loan applications it has already produced establish, as a matter of law, that it only makes business loans. It is worth noting, however, that the case law Petitioners cite in support this argument is easily distinguished. In those cases, the borrowers, in essence, deceived the lender about the purpose of the loan and later sought refuge in state usury laws applicable only to consumer transactions. Notably lacking in those cases was any evidence that the lenders required the borrowers to mischaracterize their loans as business loans or that the lenders knew that the borrowers intended to use the loan proceeds for personal uses. Here, by contrast, the Commission has evidence suggesting that, in an apparent effort to evade the requirements of TILA and HOEPA, Petitioners actively induced consumers to falsify the purpose of their loan on the loan applications despite consumers having told them that

[5] It is worth noting at the outset that the purpose of an investigation is to learn the nature of the target's *actual* activities; the target cannot deflect the investigation merely by proffering self-serving *claims* regarding its activities.

they intended to use the loan proceeds for personal, family or household purposes.[6]

Extensive case law regarding sham business loans establishes that objective manifestations of purpose, such as loan applications or affidavits attesting to a business purpose, are not determinative of the nature of the loan when the lender manipulates the loan's structure to appear as a business loan or when the lender requires the consumer to sign a false statement of business purpose in order to evade the laws designed to protect consumers. Moreover, the borrower is not estopped from denying the representations contained in a business purpose affidavit when the affidavit is executed at the request of the lender and the borrower is not informed of the implications of claiming a business purpose. The borrower's acquiescence in signing a false business purpose statement does not change the true character of the loan. *See, e.g., Brown v. Giger*, 111 Wash. 2d 76, 757 P.2d 523 (1988); *McGovern v. Smith*, 59 Wash. App. 721, 801 P.2d 250(1990); *Marashi v. Lannen*, 55 Wash. App. 820, 780 P.2d 1341(1989); *Aetna Finance Co. v. Darwin*, 38 Wash. App. 921, 691 P.2d 581 (1984); *Commercial Mortgage & Finance Co. v. Life Savings of America*, 129 Ill. 2d 42, 541 N.E.2d 661 (1989); *see also* "The Cost of Credit: Regulation and Legal Challenges," Kathleen E. Keest, National Consumer Law Center (1997 Cumulative Supplement).

2. Relevancy

Petitioners' incorrectly assert that they are outside the scope of the investigation, and, therefore, they reason, the documents sought cannot be relevant to the investigation. This relevancy argument is baseless and fails. Petitioners have made absolutely no supportable arguments, much less any showing, that the requests fall outside of the Commission's authority or this investigation's properly defined scope.

[6] Throughout their submissions, Petitioners argue, without citation to any authority, that the Commission lacks "probable cause" for its CID requests. Petition at 2, 3 and 5, Affidavit of Blake S. Atkin at ¶¶ 3, 6. First of all, as noted above, Petitioners own Petition reports that the Commission staff has explained to Petitioners' counsel on more than one occasion that staff had contacted borrowers who stated that "they were told to falsely state on the form that the loan was for business purposes when in fact it was for consumer purposes." Petition at 4; *see also* Atkin Affidavit ¶¶ 7, 12. Second, the Commission is not held to any "probable cause" standard in conducting its investigations. As the Supreme Court explained almost fifty years ago, the Commission "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). Third, even if the Commission were required to have some evidence of a potential violation before it could investigate, it would be under no obligation to reveal the existence or nature of such evidence to the target of the investigation. In short, Petitioners' lack of probable cause complaints are meritless.

Even if, as Petitioners mistakenly assert, the investigation were limited to ferreting out TILA, HOEPA, and Regulation Z violations, the information requested in the CIDs falls well within this artificially narrowed scope. The documents sought will be relevant to the issue of whether Petitioners have indeed induced consumers to falsify their applications to characterize personal loans as business loans -- that is, whether Petitioners are indeed subject to TILA. If the evidence shows that the Petitioners have made personal loans, *i.e.*, are subject to TILA, the documents sought by the CIDs will also be useful in determining the nature and extent of any TILA, HOEPA, and Regulation Z violations, *e.g.*, instances when Petitioners failed to provide material disclosures, failed to afford borrowers their right to rescind, and/or committed prohibited practices.

Petitioners further argue that only the files of borrowers who claim to have been induced to falsify the purpose of their loans are relevant, and, therefore, only those files should be sought. Petition at 7 n.3. First, as explained above, this investigation is not limited to consumer loans, but rather encompasses all unfair or deceptive acts or practices by subprime lenders -- even acts and practices involving loans made for business purposes. Thus, the premise of Petitioners' offer of this limited production -- that only the consumer loans would be relevant to the investigation -- is fatally flawed. Second, even if the Commission were *primarily* interested in investigating consumer loan practices in this instance, Petitioners' suggested limitation is still unacceptable because, among other things, (1) access to all of the files is necessary to determine which of them relate to consumer loans; (2) the target of an investigation cannot be permitted to interfere with the FTC's investigatory methods and strategies; and (3) singling out these individual borrowers to their lender threatens to chill their willingness to cooperate in the investigation by exposing them to potential retaliatory action by Petitioners.

B. Burden

Petitioners' final contention is that the requests are vague, overly broad, and unduly burdensome. Petitioners' one paragraph argument on this issue provides no valid support for this contention.

Petitioners argue that the CIDs "request numerous compilations and financial calculations to be conducted by the CID recipients which are not normally done in connection with their business."

Petition at 8. First, Petitioners neither identify the specifications they contend make such requests nor offer any evidence that those requests would be unduly burdensome to meet. Second, these are *documentary* CIDs; they do not require the respondents to *create* compilations or *perform* financial calculations, but rather merely require that Petitioners *produce documents* in their possession, custody or control that fall within the terms of the specifications.[7]

Petitioners next argue that some of the information sought can be derived from the loan applications they have already provided. While some information sought, *e.g.*, the names and addresses of borrowers, may be available from these forms, the forms do not provide all of the information sought, nor as explained at length above, are the application forms necessarily accurate regarding key points such as the type of loan -- consumer or business. Indeed, many additional documents are necessary to assess Petitioners' compliance with the statutes cited in the Commission's June 1, 1998 resolution.

Petitioners final argument seems to be that the term "covered loan" is too vague. The CIDs define this term simply and directly as: "any credit transaction that is secured by the borrower's dwelling in which [any Petitioner] is the party to which the obligation was initially payable.... The definition excepts loans financing acquisition or initial construction as well as reverse mortgage transactions. In short, this definition is neither complicated nor vague. The key concept is that the security for the loan is the borrower's residence. In other words, all of Petitioners' loans are likely to fall within this definition.

In sum, Petitioners' burden argument is rejected. Petitioners completely fail: to specify which of the particular CID requests they consider vague, overly broad, or burdensome; to explain adequately the nature of any asserted deficiencies; or to provide any evidence supporting their contention that the requests would impose an undue burden upon them. Moreover, an examination of the CIDs themselves reveals that the specifications are narrow, relevant, and focused.

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[7] Perhaps Petitioners' confusion on this point stems from the fact that some of the specifications do not require production of *every* document relating to a particular set of facts, but rather only "documents sufficient to show . . ." the facts. Ironically, this convention is used to render compulsory process requests *less* burdensome.

IV. CONCLUSION

Among the Commission's investigatory powers is the ability to use civil investigative demands to gather information and the concomitant right to enforce those demands in the federal district courts. *See* 15 U.S.C. 20. The federal courts apply a deferential standard in deciding whether to enforce compulsory process issued by the Commission, asking only whether (i) the information sought is within the Commission's authority, (ii) the information sought is reasonably relevant to the investigation, and (iii) the request is not too indefinite or unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993). While this matter is, of course, not presently before a federal court, it is worth noting that the CIDs issued here meet all three of these criteria. This is an absolutely proper and statutorily authorized investigation. These CIDs seek information that is relevant to that investigation and have been crafted to avoid placing an undue burden on Petitioners. Indeed, as set forth above, the burden and vagueness objections advanced by Petitioners are unsupported and meritless.

For the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), Petitioners are directed to comply with the Civil Investigative Demands on or before Wednesday, August 26,1998.

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