IN THE MATTER OF

MICHIGAN ASSOCIATION OF OSTEOPATHIC PHYSICIANS & SURGEONS, INC.

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

Docket C-3112. Complaint, July 26, 1983—Decision, July 26, 1983

This consent order requires a Michigan professional association, among other things, to cease inhibiting competition by restricting or advising member physicians against the truthful advertising of fees and services, and by declaring such activities unethical. The association must timely repeal any provision of its Code of Ethics and policy statements which are inconsistent with the prohibitions contained in the order, and publish revised versions of these documents. However, the order does not prohibit the association from enforcing reasonable guidelines governing advertising or solicitation which it reasonably believes to be false or deceptive. The order further requires the association to mail to all present and future members a letter notifying them of the consent agreement and its provisions, and send to each of its component and affiliate societies a copy of the order.

Appearances

For the Commission: *Cynthia E. Smith* and *Eric L. Prahl.*

For the respondent: *Robert L. Weyhing, III, Clark, Klein & Beaumont,* Detroit, Mich.

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 the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and 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 Michigan Association of Osteopathic Physicians & Surgeons, Inc. ("MAOP&S") is a corporation formed pursuant to the laws of the State of Michigan, with its mailing address at 33100 Freedom Road, Farmington, Michigan.

PAR. 2. Respondent is a professional association formed to represent the interests of osteopathic physicians and surgeons who practice in Michigan. Respondent has approximately two thousand, one hundred forty-seven (2,147) members, constituting a substantial majority of osteopathic physicians and surgeons in Michigan.

Par. 3. Respondent is a divisional society of the American Osteopathic Association, Inc.

Par. 4. Members of respondent are engaged in the business of providing medical health care services for a fee. Except to the extent that competition has been restrained as herein alleged, members of respondent have been, and are now, in competition among themselves and with other physicians and surgeons.

Par. 5. Respondent is organized for the purpose, among others, of guarding and fostering the interests of its members. Respondent engages in activities which further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

Par. 6. In the conduct of their business, members of respondent receive and treat patients from other states and counties, receive substantial sums of money from the federal government and from private insurers for rendering medical services, which money flows across state lines, and prescribe medicines which are shipped in interstate commerce. The acts or practices described below are in interstate commerce, or affect interstate activities of respondent's members, third parties who pay for medical services, other third parties, and some patients of respondent's members, and are in or affect commerce, within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

Par. 7. Respondent has acted as a combination of at least some of its members, or has conspired with at least some of its members, to foreclose, frustrate, and eliminate competition among osteopathic physicians and surgeons in the State of Michigan by:

A. prohibiting its members from truthfully advertising their services to the public, from distributing truthful information about their fees and services, and from otherwise soliciting patients' business; and

B. coercing individual members into abandoning their efforts to truthfully advertise their services, to distribute truthful information about their fees and services, and to otherwise solicit patients' business.

Par. 8. Respondent has engaged in various acts or practices in furtherance of this combination or conspiracy, including, among other things:

A. adopting and implementing written and unwritten codes of ethics that prohibit efforts by its members to truthfully advertise their services in the Yellow Pages or in other media, or to otherwise distribute truthful information to the public about their fees and services; by virtue of such ethical restraints, members are prohibited from advertising, among other things, their fees, whether they accept Medicare assignment of benefits, whether they accept credit cards, their professional training and experience, their business hours and office locations, and their knowledge of languages other than English;

B. publishing statements made by some of MAOP&S' officials advising members that advertising is unethical;

C. sending letters to individual members who truthfully advertise their fees and/or services, or who otherwise solicited patients' business, advising members that advertising is unethical and/or in "poor taste," thereby tending to discourage such advertising and/or solicitation;

D. summoning individual members to meetings of respondent's Bureau of Ethics, and threatening at those meetings to take disciplinary or other action to compel members to cease truthfully advertising their fees or services or otherwise soliciting patients' business; and

E. attempting to prohibit sellers of advertising space from accepting truthful advertisements from MAOP&S members.

PAR. 9. Through the combination or conspiracy and the acts or practices described above, members of respondent have agreed not to, and do not, advertise their services or otherwise solicit patients' business, and certain individual members of respondent have been coerced into abandoning advertising their services or otherwise soliciting patients' business. Such advertising and solicitation enables physicians to compete on the basis of price, quality, and convenience, and enables individual patients to choose among osteopathic physicians and surgeons on the basis of price, quality, or convenience. Consequently:

A. competition among osteopathic physicians and surgeons for patients has been foreclosed, frustrated, and eliminated; and

B. consumers have been deprived of the benefits of competition among osteopathic physicians and surgeons. In particular, patients have been deprived of truthful information about osteopathic physicians' and surgeons' fees and services, including, among other things, whether they accept Medicare assignment of benefits, whether they accept credit cards, their professional training or experience, their business hours and office locations, and their knowledge of languages other than English.

PAR. 10. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices which violate Section 5 of the Federal Trade Commission Act. Such combination or conspiracy is continuing, and will continue, absent the entry against respondent of appropriate relief.

Decision and Order

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Michigan Association of Osteopathic Physicians & Surgeons, Inc., 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 33100 Freedom Road, in the City of Farmington, State of Michigan.

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

Order

I

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

A. *MAOP&S* means respondent Michigan Association of Osteopathic Physicians & Surgeons, Inc., its component and affiliate societies, its delegates, trustees, councils, committees, Bureau of Ethics, officers, representatives, agents, employees, successors, and assigns.

B. *Physician* means any individual duly licensed to engage in the practice of osteopathic medicine and/or surgery.

II

It is ordered, That MAOP&S shall cease and desist from, directly or indirectly or through any corporate or other device:

A. restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms, or conditions of sale of physicians' services, or of information about physicians' services, facilities, or equipment which are offered for sale or made available by physicians or by any organization with which physicians are affiliated;

B. restricting, regulating, impeding, declaring unethical, interfering with, or advising against the solicitation, through advertising or by any other means, of patients, patronage, or contracts to supply physicians' services, by any physician or by any organization with which physicians are affiliated; or

C. inducing, urging, encouraging, or assisting any physician or any medical association, group of physicians, hospital, insurance carrier, telephone company, or any other non-governmental organization, to take any of the actions prohibited by this part of the Order.

Nothing contained in this part of the Order shall prohibit MAOP&S from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that MAOP&S reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.

III

It is further ordered, That MAOP&S shall:

A. for a period of three (3) years after this Order becomes final, provide each new member of MAOP&S with a copy of the letter in the form shown in Appendix A at the time the member is accepted into membership;

B. within sixty (60) days after this Order becomes final, send by first-class mail to each of its present members a copy of the letter in the form shown in Appendix B;

C. within sixty (60) days after this Order becomes final, send by first-class mail to the Michigan Bell Telephone Company supervisor in charge of professional advertising a copy of the letter in the form shown in Appendix C;

D. within sixty (60) days after this Order becomes final, publish a copy of the Order, with such prominence as feature articles are regularly published, in the *Michigan Osteopathic Journal* and the MAOP&S *Newsletter,* or in any successor publications;

E. within sixty (60) days after this Order becomes final, send by first-class mail to each of its component and affiliate societies, a copy of this Order;

F. within ninety (90) days after this Order becomes final, remove from its *Code of Ethics,* its *Interpretation of the Code of Ethics,* and any other existing policy statements or guidelines of MAOP&S, any provision, interpretation, or policy statement which is inconsistent with this Order; and, within one hundred twenty (120) days after this Order becomes final, publish in the *Michigan Osteopathic Journal* and the MAOP&S *Newsletter* or in any successor publications, the revised versions of such documents, statements, or guidelines;

G. within one hundred twenty (120) days after this Order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which MAOP&S has complied with this Order;

H. for a period of five (5) years after this Order becomes final, maintain records adequate to describe in detail any action taken in connection with the activities covered by Part II and Part III.A of this Order, including, but not limited to, any advice or interpretations rendered with respect to advertising or solicitation involving any of its members;

I. one year after this Order becomes final, and annually thereafter for a period of two (2) years, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with the activities covered by Part II and Part III.A of this Order, including, but not limited to, any advice or interpretations rendered with respect to advertising or solicitation involving any of MAOP&S' members; and

J. include in all compliance reports, as required by Part III.G and I, such information and documentation as may be required to show compliance with this Order.

IV

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

APPENDIX A

Dear Doctor:

This letter is to inform you of recent developments concerning the issue of physician advertising. In March, 1982, the Supreme Court upheld the Federal Trade Commission's Order prohibiting the American Medical Association from restricting physician advertising and solicitation.

In recognition of this precedent, the Michigan Association of Osteopathic Physicians & Surgeons, Inc. entered into a Consent Agreement with the Federal Trade Commission on November 1, 1982. This Agreement was entered into as a result of an investigation initiated by the FTC concerning MAOP&S' alleged restraint of competition by means of its ethical restrictions on physician advertising and solicitation. The Agreement is for settlement purposes only and does not constitute an admission by MAOP&S that the law has been violated.

In accordance with this Consent Agreement, MAOP&S revised its Code of Ethics in October, 1982. Under the revised code, MAOP&S does not restrict its members from advertising or soliciting patients. MAOP&S does not restrict its members from advertising the prices, terms, or conditions of sale of physicians' services, facilities, or equipment. MAOP&S may, however, enforce reasonable guidelines governing advertising or solicitation which MAOP&S reasonably believes to be false or deceptive.

As a new member, you have received a copy of the revised Code of Ethics.

Thank you for your cooperation.

Sincerely,

____

President

APPENDIX B

Dear Doctor:

This letter is to inform you of the most recent developments concerning the issue of physician advertising. The Supreme Court recently affirmed the Federal Trade Commission's Order, as modified by the U.S. Court of Appeals for the Second Circuit, prohibiting the American Medical Association from restricting physician advertising and solicitation.

In recognition of this precedent, the Michigan Association of Osteopathic Physicians & Surgeons, Inc. is in the process of revising its Code of Ethics.

Under the new code, MAOP&S will not restrict its members from advertising or soliciting patients. MAOP&S will not restrict its members from advertising the prices, terms, or conditions of sale of physicians' services or information about physicians' services, facilities, or equipment. MAOP&S may, however, enforce reasonable guidelines governing advertising or solicitation which MAOP&S reasonably believes to be false or deceptive.

The revisions to the Code of Ethics will appear in the *Michigan Osteopathic Journal* and in the MAOP&S *Newsletter.*

Thank you for your cooperation.

Sincerely,

____

President

APPENDIX C

Dear _________:

This letter is to inform you of the most recent developments concerning the issue of physician advertising. The Supreme Court recently affirmed the Federal Trade Commission's Order, as modified by the U.S. Court of Appeals for the Second Circuit, prohibiting the American Medical Association from restricting physician advertising and solicitation.

In recognition of this precedent, the Michigan Association of Osteopathic Physicians and Surgeons, Inc. is in the process of revising its Code of Ethics.

Under the new Code, MAOP&S will not restrict its members from advertising or soliciting patients. MAOP&S will not restrict its members from advertising the prices, terms, or conditions of sale of physicians' services or information about physicians' services, facilities, or equipment. MAOP&S may, however, enforce reasonable guidelines governing advertising or solicitation which MAOP&S reasonably believes to be false or deceptive.

Accordingly, MAOP&S will not seek to restrict truthful advertising in the telephone book. In particular, MAOP&S will not seek to restrict such things as the size, color, or format of such advertising.

Thank you for your cooperation.

Sincerely,

____

Chairman
Department of Judiciary and Ethics

IN THE MATTER OF

SANSUI ELECTRONICS CORPORATION

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

Docket C-2754. Consent Order, Oct. 24, 1975—Modifying Order, Aug. 1, 1983

This order reopens the proceeding and modifies the Commission's order issued on October 24, 1975 (86 F.T.C. 995) by modifying Paragraph I (11), so as to allow the company to impose nondiscriminatory standards on the kind of retailers its distributors and dealers can serve.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED ON OCTOBER 24, 1975

By a petition filed on March 23, 1983, Sansui Electronics Corporation ("Sansui") requests that the Commission reopen the proceeding in Docket No. C-2754 and modify Paragraph I (11) of the order issued by the Commission on October 24, 1975 so that the order would no longer prohibit Sansui from restricting transshipment by sellers of its products. Pursuant to Section 2.51 of the Commission's Rules of Practice, Sansui's request was placed on the public record for comments. One comment was received.

On March 8, 1983, the Commission issued a modified order in *U.S. Pioneer Electronics Corporation,* Docket No. C-2755 [101 F.T.C. 372], allowing Pioneer (one of Sansui's competitors) to prevent transshipment of its products to dealers who do not meet reasonable, nondiscriminatory standards of promotion, service and display. The *Pioneer* and *Sansui* orders contain most favored respondent clauses pursuant to which the Commission may modify the respective orders to bring them into conformity with less stringent restrictions imposed on the respondents' competitors.

In view of the Commission's action in *Pioneer* and upon consideration of Sansui's request and supporting materials, the Commission now finds that Sansui would likely suffer significant competitive injury unless the order is modified to conform to the *Pioneer* order in accordance with Sansui's request. Such modification would be in the public interest.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that Paragraph I (11) of the order in Docket No. C-2754 be modified to read as follows:

Preventing or prohibiting any independent dealer or distributor from reselling his products to any persons or group of persons, business or class of businesses, except as expressly provided herein. This order shall not prohibit respondent from establishing lawful, reasonable, and nondiscriminatory minimum standards for its dealers, including standards that relate to promotion and store display, demonstration, inventory levels, service and repair, volume requirements and financial stability, nor shall this order prohibit respondent from requiring its dealers who sell respondent's products for resale to make such sales only to dealers who maintain such minimum standards.

IN THE MATTER OF

THE COCA-COLA COMPANY

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

Docket C-3113. Complaint, Aug. 3, 1983—Decision, Aug. 3, 1983

This consent order requires a major soft drink manufacturer to timely divest Doric Foods Corporation to a Commission-approved buyer. Respondent is barred from acquiring any concern engaged in the manufacture of drinks, punches and ades, without prior Commission approval for a period of ten years.

Appearances

For the Commission: *Paul R. Zamolo* and *Bill W. Bourland.*

For the respondent: *Robert A. Keller,* in-house counsel, Atlanta, Ga.

COMPLAINT

Pursuant to the provisions of the Clayton Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that The Coca-Cola Company, a corporation subject to the jurisdiction of the Commission, has violated 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 by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

1. For the purposes of this Complaint, *Coca-Cola* means The Coca-Cola Company, a Delaware corporation with its principal offices at 310 North Avenue, Atlanta, Georgia, as well as its directors, officers, agents and employees, and its divisions, subsidiaries, successors and assigns.

2. Respondent Coca-Cola is a Delaware corporation with its principal offices located at 310 North Avenue, N.W., Atlanta, Georgia.

3. Coca-Cola's total net sales for the year ending December 31, 1981, were approximately $5.9 billion.

4. At all times relevant herein, Coca-Cola has engaged in activities in and affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, and Section 4 of the Federal Trade Commission Act, as amended.

5. Doric Foods Corporation ("Doric") is a Florida corporation and wholly owned subsidiary of Associated Coca-Cola Bottling Co., Inc. ("Associated") with its principal offices at Robie Avenue, P.O. Box 986, Mount Dora, Florida.

6. Doric's total sales for the year ending December 31, 1981, amounted to $54.9 million.

7. On May 10, 1982, Coca-Cola, Associated Coca-Cola Enterprises, Inc. ("Associated Coca-Cola"), a wholly owned subsidiary of Coca-Cola; Root Company, a Delaware Corporation; and Chapman S. Root, Chairman and Chief Executive Officer of Associated and the beneficial owner of all of the capital stock of Root Company, entered into a stock purchase agreement pursuant to which Associated Coca-Cola will purchase all of the shares of Associated beneficially owned by Root Company, representing approximately 57.5% of the shares outstanding. On May 28, 1982, Associated Coca-Cola commenced a tender offer to purchase any and all of the outstanding shares of Associated. By the terms of the stock purchase agreement, Root Company is obligated to tender all of the shares of Associated owned by it in response to this offer. On May 27, 1982, Associated Coca-Cola and Coca-Cola Bottling Transactions, Corp., a Delaware corporation ("Transactions Corp.") and a wholly owned subsidiary of Associated Coca-Cola, entered into a merger agreement providing for the merger of Associated and Transactions Corp., or another entity designated by Coca-Cola. Pursuant to the merger agreement, any shares of stock of Associated not acquired by Associated Coca-Cola pursuant to the tender offer, the stock purchase agreement, or otherwise, will be converted into the right to receive $35.93 per share in cash, subject to dissent and appraisal rights.

8. Prior to Coca-Cola's acquisition of Associated, Coca-Cola and Doric were for many years direct and substantial competitors of one another.

9. The acquisition set forth in Paragraph 7 herein may have had the effect of substantially lessening competition or tending to create a monopoly in a line of commerce in a section of the country.

10. The acquisition by Coca-Cola of Doric, for the reasons set forth herein, constitutes 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).

Chairman Miller dissented.

Decision and Order

The Federal Trade Commission, having initiated an investigation of the acquisition by The Coca-Cola Company of Associated Coca-Cola

Bottling Co., Inc., and its subsidiaries, including Doric Foods Corporation (hereinafter "Doric"), and The Coca-Cola Company having been furnished thereafter with a copy of a draft of the 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 Coca-Cola Company 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), arising out of the acquisition of Doric; and

The Coca-Cola Company, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by The Coca-Cola Company 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 Coca-Cola Company 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 Coca-Cola Company has 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 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. The Coca-Cola Company is a Delaware corporation with its principal offices located at 310 North Avenue, Atlanta, Georgia.

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

ORDER TO DIVEST AND OTHER RELIEF

I.

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

A. *Coca-Cola* means The Coca-Cola Company, a Delaware corporation with its principal offices located at 310 North Avenue, Atlanta, Georgia, as well as its directors, officers, agents and employees, and its divisions, subsidiaries, controlled affiliates, successors and assigns.

B. *Doric* means Doric Foods Corporation, a Florida corporation and wholly owned subsidiary of Associated Coca-Cola Bottling Co., Inc., with its principal offices at Robie Avenue, P.O. Box 986, Mount Dora, Florida, as well as its directors, officers, agents and employees, and its divisions, subsidiaries, successors and assigns.

C. *Drinks, punches and ades* means non-carbonated, ready to serve, naturally or artificially flavored fruit drinks, fruit punches or fruit ades which contain 50% or less fruit juice and are customarily sold under refrigeration to the consumer.

II.

It is further ordered, That within one year from the date on which this Order becomes final, Coca-Cola shall divest itself absolutely and in good faith of all of its right, title and interest in Doric including any additions to Doric that may have occurred since its acquisition by Coca-Cola. Divestiture shall be made only to an acquiror approved in advance by the Federal Trade Commission. The purpose of the divestiture required by this paragraph is to assure the continued operation of Doric as a drink, punch and ade manufacturer. Pending divestiture, Coca-Cola shall take all measures necessary to maintain Doric in its present condition and prevent any deterioration except for normal wear and tear of any of the assets to be divested which may impair their present operating abilities or market value.

III.

It is further ordered, That for a period of ten (10) years from the date on which this Order becomes final, Coca-Cola shall not acquire, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the stock or assets of, or any other interest in, any individual, firm, partnership, corporation or other legal or business entity which is engaged directly or indirectly in the manufacture and sale of drinks, punches and ades.

IV.

It is further ordered, That within ninety (90) days from the date on which this Order becomes final and every ninety (90) days thereafter until the divestiture required by paragraph II of this Order is completed, Coca-Cola shall submit to the Federal Trade Commission a written report setting forth in detail the manner and form in which Coca-Cola intends to comply, is complying, and has complied with the terms of this Order and such additional information relating thereto as may from time to time be required. All compliance reports shall include, among other things that may be required, a summary of all contacts and negotiations with potential acquirors, the identity of all such potential acquirors, and copies of all documents reflecting communications to and from such potential acquirors. In addition, Coca-Cola shall submit annual reports in writing with respect to the other requirements of this Order.

V.

It is further ordered, That Coca-Cola notify the Federal Trade Commission at least thirty (30) days prior to any proposed corporate changes, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance with the obligations arising out of this Order.

Chairman Miller dissented.

IN THE MATTER OF

XEROX CORPORATION

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

Docket 8909. Consent Order, July 29, 1975—Modifying Order, Aug. 22, 1983

This order reopens the proceeding and modifies paragraph XVI of the Commission's order issued on July 29, 1975 (86 F.T.C. 364, *modified,* 91 F.T.C. 728, *modified further,* 100 F.T.C. 455), by deleting provisions that prohibited the company from promoting or taking orders for the sale or lease of any new office copier more than 3 months before its commercial availability.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED ON JULY 25, 1975

By a petition filed on April 22, 1983, respondent Xerox Corporation ("Xerox") requests that the Commission reopen the proceeding in Docket No. 8909 and modify Paragraph XVI of the order issued in this case to terminate approximately two years early its prohibition against Xerox promoting new copiers more than three months before their commercial availability. Paragraph XVI presently is scheduled to expire on July 29, 1985. Pursuant to Section 2.51 of the Commission's Rules of Practice, the petition was placed on the public record for comments. No comments were received.

Upon consideration of Xerox's request and supporting materials, and other relevant information, the Commission finds that the public interest warrants reopening and modification of the order.

In view of the changes that have taken place in the United States copier industry over the last decade, including the entry of numerous new competitors and Xerox's diminished market position, the order's prohibition against advance product announcement and promotion by Xerox is no longer needed to assure competition in the United States copier market. Advance new product announcements by Xerox, in light of these industry changes, no longer pose any danger of allowing Xerox to gain or perpetuate a monopoly or otherwise limit competition in the relevant market. Moreover, continuation of the order's prohibition against advance product announcement and promotion by Xerox appears to hamper Xerox's ability to compete and, consequently, reduces interbrand competition and deprives buyers of the opportunity to make informed decisions concerning their copier needs.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that Paragraph XVI of the Commission's order be modified to read as follows:

XVI

It is further ordered, That during the period ending 10 years after the date of issuance of this Order at the time *Xerox* announces that it will take orders for the lease of an *office copier* in the United States, it shall also announce the selling price of such *office copier.*

IN THE MATTER OF

TRANS UNION CREDIT INFORMATION COMPANY

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR CREDIT REPORTING ACTS

Docket C-3114. Complaint, Aug. 25, 1983—Decision, Aug. 25, 1983

This consent order requires a Chicago-based computerized consumer credit reporting agency and its credit bureaus, among other things, to review its credit reporting system to detect and remedy, where feasible, significant inaccuracies in information maintained or reported by the system. The company is prohibited from furnishing reports to investigative agencies, government law enforcement agencies and others who are not properly certified, or to those whom respondent has reason to believe would use the information for impermissible purposes. The company must advise users of the reports that anyone obtaining credit information under false pretenses is subject to a fine and/or imprisonment under federal law. In making file disclosures to properly identified consumers, respondent must disclose the nature and substance of all information retained on the consumer, however recorded. The company must also reinvestigate disputed credit information; advise the consumer of the results of its reinvestigation; and record corrected information within a reasonable period of time. Reports must also contain clear and accurate dispute statements or summaries of such statements filed by consumers. Further, when responding to a telephonic request for information, respondent must read the dispute statement prior to disclosing the challenged information. Additionally, respondent is prohibited from purging any consumer file containing credit account information that is solely non-derogatory and whose most recent date of activity is less than five years old, unless it advises users of the reports that such purges are performed periodically.

Appearances

For the Commission: *David Federbush, Marie A. Meyer* and *C. Lee Peeler.*

For the respondent: *Oscar Marquis,* in-house counsel, Chicago, Ill. and *Elroy Wolff, Sidley & Austin,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, hereinafter referred to as the "Commission," pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.,* as amended, the Fair Credit Reporting Act, Public Law 91-508, 15 U.S.C. 1681 *et seq.,* and by virtue of the authority vested in it by said Acts, having reason to believe that Trans Union Credit Information Company, hereinafter referred to as "respondent," has violated the provisions of said Acts, and believing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

Definitions

For the purposes of this complaint and Order, the terms *consumer, consumer report, consumer reporting agency,* and *person* are defined as set forth in Section 603 of the Fair Credit Reporting Act, Public Law 91–508, 15 U.S.C. 1681a (1980). The term *consumer file* or *file* refers to a record owned and maintained by respondent in its data base to store information on a designated consumer, and all information contained in that record. The data base may contain no, one, or more than one, consumer file on a given consumer. The information in no, one, or more than one, consumer file may be furnished to a user requesting a consumer report on a designated consumer.

Derogatory information refers to public record information and to credit accounts containing manner of payment ratings of 3 (pays (or paid) in more than 60 days, but not more than 90 days, or two payments past due); 4 (pays (or paid) in more than 90 days, but not more than 120 days, or three or more payments past due); 5 (pays (or paid) in 120 days or more); 7 (making regular payments under wage earner plan or similar arrangement); 08 (repossession); 8A (voluntary repossession); 8D (legal repossession); 09 (bad debt; placed for collection); 9B (collection account); and RJ (rejected).

Display algorithm means the automated matching rule used by respondent's system to compare personal identifiers contained in inquiries with those contained in consumer files in the data base for the purpose of determining whether the files should be reported in response to inquiries.

Merge algorithm means the automated matching rule used by respondent's system to compare personal identifiers contained in account information furnished by subscribers, or files contained in the data base, with identifying information contained in (other) files in the data base for the purpose of determining whether the account information should be merged into, or the other files merged together with, specific files in the data base.

PARAGRAPH 1. Respondent Trans Union Credit Information Company ("Trans Union") is a corporation organized, existing and doing business by virtue of the laws of the State of Delaware, with its principal place of business located at 111 West Jackson Boulevard, Chicago, Illinois. Respondent owns a number of credit bureaus located in a number of states and manages, directs and controls their activities. For the purpose of this complaint and Order, a reference to respondent includes its owned bureaus. This complaint and Order apply only to Trans Union Credit Information Company and its owned bureaus.

PAR. 2. Respondent, Trans Union in the ordinary course and conduct of its business, is and has regularly been engaged in the practice of assembling information bearing on consumers' creditworthiness, credit standing, and credit capacity for the purpose of furnishing, for monetary fees, consumer reports to third parties. These reports contain information including but not limited to credit account payment information obtained from credit grantors, banks, and other consumer reporting agencies, as well as public record information. Credit grantors and others use the information contained in these reports for the purpose of evaluating the consumer's eligibility for credit, employment, insurance, and other transactions entered into by the consumer primarily for personal, family, or household purposes. Respondent is thus a consumer reporting agency, as defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. Respondent, from its owned bureaus located in approximately thirteen states, causes consumer reports to be distributed through the mail, by telephone and by teleprinter machine to its customers located throughout the United States, and in the ordinary course and conduct of its business regularly sends and receives substantial numbers of communications including consumer reports across state lines through the means and facilities of interstate commerce. Respondent thus maintains a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. The Commission therefore has jurisdiction over the subject matter of this proceeding and over respondent, as provided by Section 621 of the Fair Credit Reporting Act and as provided by Section 5 of the Federal Trade Commission Act.

PAR. 4. All of the acts and practices alleged herein took place or are taking place in the ordinary course and conduct of respondent's business and have occurred subsequent to April 25, 1971, the effective date of the Fair Credit Reporting Act. A reference to an act, practice or violation occurring at the present time may include acts, practices or violations which occurred in the past but were discontinued subsequent to the initiation of the Commission's investigation of computerized consumer reporting agencies.

COUNT I

Alleging violations of the Fair Credit Reporting Act, the allegations of Paragraphs One through Four are incorporated by reference.

PAR. 5. Respondent has accepted a number of private investigative and detective agencies as subscribers to its consumer reporting services.

PAR. 6. In a number of instances, consumer reports obtained by the subscribers referred to in Paragraph Five have been used for purposes other than those permitted by Section 604(3) of the Fair Credit Reporting Act.

PAR. 7. With respect to a number of subscribers referred to in Paragraph Five, respondent has not had such subscribers identify the nature of their businesses or certify the purposes for which they sought respondent's reports before respondent furnished reports to them.

PAR. 8. By and through the acts and practices alleged in Paragraphs Five, Six, and Seven, respondent has violated Section 607(a) of the Fair Credit Reporting Act by failing to require prospective users of its reports to identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose.

PAR. 9. Respondent has furnished consumer reports to a number of subscribers referred to in Paragraph Five which have identified the nature of their businesses and the purposes for which they sought respondent's reports, without having first made a reasonable effort to verify the nature of their businesses and the purposes certified.

PAR. 10. By and through the acts and practices alleged in Paragraphs Five, Six, and Nine, respondent has violated Section 607(a) of the Fair Credit Reporting Act by failing to make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report.

PAR. 11. With respect to a number of the subscribers referred to in Paragraph Five, respondent knew that the subscriber was a detective or private investigative agency and thus had reasonable grounds for believing that the nature of the subscriber's detective or private investigative activities provides many instances in which the information in a consumer report could be used by the subscriber for purposes other than those listed in Section 604 of the Fair Credit Reporting Act. Respondent furnished consumer reports to such subscribers without obtaining from them, at the time of each request for a consumer report, a written or oral certification of the specific purpose(s) for which the report was sought and that the report would be used for no other purpose(s).

PAR. 12. By and through the acts and practices alleged in Paragraphs Five, Six, and Eleven, respondent has violated Section 607(a) of the Fair Credit Reporting Act by furnishing consumer reports to persons it had reasonable grounds for believing would not use such reports for purposes listed in Section 604 of the Act.

PAR. 13. By and through the acts and practices alleged in Paragraphs Five, Six, and Eleven, respondent has violated Section 607(a) of the Fair Credit Reporting Act by failing to follow reasonable procedures designed to limit the furnishing of consumer reports to purposes listed in Section 604 of the Act.

COUNT II

Alleging violations of the Fair Credit Reporting Act, the allegations of Paragraphs One through Four are incorporated by reference.

PAR. 14. Respondent has granted membership, as subscribers to its consumer reporting services, to a number of government law enforcement agencies.

PAR. 15. In a number of instances, consumer reports containing more information than each consumer's name, address, former addresses, places of employment and former places of employment have been furnished by respondent to the government law enforcement agencies referred to in Paragraph Fourteen, and have been used by such agencies for law enforcement or other purposes not permitted by Section 604 of the Fair Credit Reporting Act.

PAR. 16. Respondent has furnished consumer reports to a number of the agencies referred to in Paragraph Fourteen without having first made a reasonable effort to verify the nature of their businesses and the purposes they certified for seeking respondent's reports.

PAR. 17. By and through the acts and practices alleged in Paragraphs Fourteen, Fifteen, and Sixteen, respondent has violated Section 607(a) of the Fair Credit Reporting Act by failing to make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report.

PAR. 18. With respect to a number of the government agencies referred to in Paragraph Fourteen, respondent had reasonable grounds for believing that the nature of the agencies' law enforcement activities provide many instances in which the information in consumer reports could be used by the agencies for purposes other than those permitted by Section 604 of the Fair Credit Reporting Act.

PAR. 19. Despite the circumstances described in Paragraph Eighteen, respondent has furnished consumer reports containing information in excess of a consumer's name, address, former addresses, places of employment and former places of employment to such government law enforcement agencies without obtaining from the agencies, at the time of each request for a consumer report, a written or oral certification of the specific purpose(s) for which the report is being sought and that the report will be used for no other purpose(s).

PAR. 20. By and through the acts and practices alleged in Paragraphs Fourteen, Fifteen, Eighteen and Nineteen, respondent has violated Section 607(a) of the Fair Credit Reporting Act by furnishing consumer reports to persons it had reasonable grounds for believing would not use such reports for purposes listed in Section 604 of the Act.

PAR. 21. By and through the acts and practices alleged in Paragraphs Fourteen, Fifteen, Eighteen and Nineteen, respondent has violated Section 607(a) of the Fair Credit Reporting Act by failing to follow reasonable procedures designed to limit the furnishing of consumer reports to purposes listed under Section 604 of the Act.

PAR. 22. In several instances, respondent has furnished consumer reports containing information in excess of a consumer's name, address, former addresses, places of employment and former places of employment to government investigative agencies which have certified to respondent that the purposes for which they would use such reports would be investigative.

PAR. 23. By and through the acts and practices alleged in Paragraphs Fourteen, Fifteen, Eighteen, and Twenty-Two, respondent has failed to comply with Section 607(a) of the Fair Credit Reporting Act by furnishing consumer reports to persons whom it had reasonable grounds for believing would not use the reports for a purpose listed in Section 604.

PAR. 24. By and through the acts and practices alleged in Paragraphs Fourteen, Fifteen, Sixteen, and Twenty-Two, respondent has failed to comply with Section 604 of the Fair Credit Reporting Act by furnishing consumer reports to persons which it does not have reason to believe intend to use the information for a purpose listed in Section 604(3) of the Act.

COUNT III

Alleging violations of the Fair Credit Reporting Act, the allegations of Paragraphs One through Four are incorporated by reference.

PAR. 25. Respondent has purged derogatory credit account information, concerning accounts placed for collection or accounts charged to profit and loss, from its data base within seven years from the date the account was indicated closed by the credit grantor or the date the account's status was last verified, whichever is earlier. Certain credit grantors have not indicated the dates such accounts were actually closed but have periodically submitted to respondent information verifying the status of such accounts as charged to profit and loss or placed for collection.

PAR. 26. Prior to September, 1978, respondent took no independent action to fix in consumer files the dates such accounts were first reported to respondent as placed for collection or charged to profit and loss or to otherwise ensure that the dates used by its system as purge dates for such accounts were not advanced to later dates each time such credit grantors submitted information verifying the status of such accounts. As a result, in a number of instances, respondent failed to purge items from consumer files either within seven years from the dates such accounts were actually charged to profit and loss or placed for collection, or within seven years from the date that credit grantors first submitted to respondent information indicating such accounts had reached the indicated derogatory status.

PAR. 27. By and through the acts and practices described in Paragraphs Twenty-Five and Twenty-Six, respondent has violated Section 607(a) of the Fair Credit Reporting Act by failing to maintain reasonable procedures designed to avoid violations of Section 605.

PAR. 28. Subsequent to September, 1978, respondent modified its procedures to assign in consumer files, as the purge date for newly submitted accounts charged to profit and loss or placed for collection but bearing no date closed supplied by the credit grantor, the first date information indicating that such accounts were charged to profit and loss or placed for collection is submitted to respondent. With respect to information concerning such accounts already contained in the data base but bearing no date closed supplied by the credit grantor, respondent in the latter half of 1978 or early 1979 assigned as a purge date the most recent date verified reflected in the file. Respondent thus assigned purge dates for information concerning a number of accounts charged to profit and loss or placed for collection which were subsequent to either the actual dates such accounts were charged to profit and loss or placed for collection or the dates that credit grantors first submitted to respondent information indicating that such accounts had reached the indicated derogatory status.

PAR. 29. By and through respondent's assignment of purge dates to accounts placed for collection or charged to profit and loss which respondent knew or reasonably should have known were incorrect, respondent failed to follow reasonable procedures to avoid violations of Section 605 of the Fair Credit Reporting Act and therefore violated Section 607(a) of the Fair Credit Reporting Act.

PAR. 30. Respondent has reported accounts charged to profit and loss or placed for collection, through the circumstances referred to in Paragraph Twenty-Six, more than seven years from the dates the accounts were actually placed for collection or charged to profit and loss or from the dates the information that the accounts were placed for collection or charged to profit and loss were first submitted to respondent.

PAR. 31. By and through the acts and practices referred to in Paragraph Thirty, respondent has violated Section 605 of the Fair Credit

Reporting Act by reporting accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

COUNT IV

Alleging violations of the Fair Credit Reporting Act, the allegations of Paragraphs One through Four are incorporated by reference.

PAR. 32. Respondent, in some of its owned bureaus, uses teleprinter terminals to provide consumers disclosures of the contents of files maintained in respondent's data base concerning them in response to requests made pursuant to Section 609 of the Fair Credit Reporting Act. These same bureaus also furnish a substantial number of consumer reports to subscribers by use of cathode ray tube ("CRT") terminals operated by employees of respondent. The display algorithm point score threshold for making consumer disclosures by teleprinter terminal is a number of points higher than the threshold for display of files accessed through a CRT terminal. Furthermore, for individual inquiries, a teleprinter will display only the two highest scoring files at or above the threshold while a CRT operator can choose to report to the inquiror zero, one, or two of the six highest scoring files at or above the threshold. Thus, when making disclosure to consumers by teleprinter terminal respondent does not disclose to the consumer information on the consumer contained in: (a) files which score at or above the threshold for display on a CRT terminal but below the threshold for display on a teleprinter terminal; and (b) files which score at or above the threshold for display on a teleprinter terminal but which are not among the two highest scoring files retrieved in response to the inquiry.

PAR. 33. By and through the acts and practices described in Paragraph Thirty-Two, respondent has violated Section 609 of the Fair Credit Reporting Act by failing to disclose to any consumer upon request and proper identification the nature and substance of all information recorded and retained on that consumer regardless of how the information is stored.

COUNT V

Alleging violations of the Fair Credit Reporting Act, the allegations of Paragraphs One through Four are incorporated by reference.

PAR. 34. Respondent has issued to inquirors teleprinter reports containing information on a consumer for which a dispute statement has been filed by the consumer pursuant to Section 611(b) of the Fair Credit Reporting Act, but which do not contain that statement but rather an instruction to the inquiror to contact the bureau to obtain the statement. If the inquiror does not on its own initiative contact the bureau and request the dispute statement, respondent does not supply it to the inquiror.

PAR. 35. By and through the acts and practices alleged in Paragraph Thirty-Four respondent, in a number of instances in which it has furnished consumer reports containing information for which the consumer has filed a dispute statement, has violated Section 611(c) of the Fair Credit Reporting Act by failing to clearly note that such information is disputed by the consumer and provide either the consumer's dispute statement or a clear and accurate codification or summary thereof.

PAR. 36. In a number of instances in which respondent has codified or summarized the consumer's dispute statement, the codification or summary is not clear and accurate.

PAR. 37. By and through the acts and practices described in Paragraph Thirty-Six, respondent has violated Section 611(c) of the Fair Credit Reporting Act by failing, when a dispute statement is filed, to clearly note in any subsequent consumer report containing the information in question, that the information is disputed by the consumer and provide either the consumer's dispute statement or a clear and accurate codification or summary thereof.

COUNT VI

Alleging violations of the Fair Credit Reporting Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Four are incorporated by reference.

PAR. 38. Respondent represents in its contracts with credit grantors who supply consumer information on computer tapes that, with respect to maintenance of the data base, respondent will cause its owned bureaus to maintain the credit information supplied by said bureaus in the data base.

PAR. 39. Respondent from time to time, at the request of its owned bureaus, purges significant numbers of entire consumer files meeting criteria specified by the bureau from that portion of respondent's data base pertaining to that bureau. Pursuant to this procedure, respondent has in the past purged from portions of its data base consumer files which contain only identifying information on the consumer, non-derogatory credit account information with most recent date of verification exceeding a specified age (frequently no greater than one year), and no inquiries recorded within a recent specified time period. The effect of such purges is to remove from respondent's data base substantial numbers of consumer files containing credit account information that is non-derogatory but which pertain to accounts which have been inactive during a recent time period, frequently no greater than one year.

PAR. 40. Respondent fails to disclose to actual or prospective users either that it purges the categories of consumer files described in Paragraph Thirty-Nine from its data base or the criteria used in making such deletions from the data base.

PAR. 41. Credit grantors normally give positive consideration to non-derogatory accounts reported on a consumer. Respondent's practice of intentionally deleting from the data base a substantial number of consumer files containing non-derogatory information is material to: a) credit grantors' decisions to purchase respondent's reports; and b) the manner in which credit grantors interpret respondent's reports in making credit evaluation decisions on consumers.

PAR. 42. The acts or practices discussed in Paragraphs Thirty-Eight, Thirty-Nine, Forty, and Forty-One have the tendency to mislead such users and therefore constitute unfair or deceptive acts or practices in or affecting commerce and therefore violate Section 5 of the Federal Trade Commission Act.

PAR. 43. Respondent, by purging from its data base non-derogatory information it receives from its subscribers on consumers without notifying its users that it follows the acts and practices described in Paragraph Thirty-Nine, issues consumer reports that misrepresent the extent of the non-derogatory account information on consumers submitted to it by its subscribers. Respondent thereby violates Section 607(b) of the Fair Credit Reporting Act by failing to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

COUNT VII

Alleging violations of the Fair Credit Reporting Act, the allegations of Paragraphs One through Four are incorporated by reference.

PAR. 44. Numerous consumers have communicated directly to respondent, pursuant to Section 611 of the Fair Credit Reporting Act, disputes which were not frivolous or irrelevant concerning the accuracy or completeness of information contained in consumer files. In a number of instances, respondent's bureaus have failed to reinvestigate the disputed information and record its current status within a reasonable period of time from receipt of the consumer's dispute or, when finding such information to be inaccurate or no longer verifiable, have failed to delete the information within a reasonable period of time from receipt of the consumer's dispute.

PAR. 45. By and through the acts or practices alleged in Paragraph Forty-Four respondent has violated Section 611(a) of the Fair Credit Reporting Act.

COUNT VIII

Alleging violations of the Fair Credit Reporting Act, the allegations of Paragraphs One through Four are incorporated by reference.

PAR. 46. Respondent has issued to subscribers significant numbers of consumer reports containing one or more files on individuals other than the individual on whom the subscriber inquired.

PAR. 47. Respondent has been made aware by its owned bureaus, or its own research, of certain types of instances of files being issued on the wrong person or of information which gave it reason to believe that significant numbers of files were being issued on the wrong person. The types of errors include: reporting files on parents in response to inquiries on their children living at the same address; reporting files on seniors in response to inquiries on juniors and vice versa; reporting files on consumers living in different cities or at addresses bearing different zip codes from the consumers inquired on; reporting files on consumers with different social security numbers from the ones inquired upon; and issuing reports containing two files that pertain to different individuals.

PAR. 48. Respondent knew or reasonably should have known that there were measures it could take, such as modifying elements of its display algorithm, that might reduce the occurrence of the types of errors described in Paragraph Forty-Seven.

PAR. 49. Respondent has failed to take reasonable steps to attempt to reduce the number of errors of the types described in Paragraph Forty-Seven.

PAR. 50. By and through the acts and practices described in Paragraphs Forty-Seven, Forty-Eight, and Forty-Nine, respondent has violated Section 607(b) of the Fair Credit Reporting Act by failing to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

PAR. 51. By and through the acts and practices described in Paragraphs Forty-Seven, Forty-Eight, and Forty-Nine, respondent has violated Section 607(a) of the Fair Credit Reporting Act by failing to follow reasonable procedures designed to limit the furnishing of consumer reports to purposes listed under Section 604 of the Act.

PAR. 52. Respondent has issued to subscribers significant numbers of consumer files containing information about an individual other than the one the subscriber inquired on as well as information about the consumer inquired on.

PAR. 53. Respondent is aware that consumers have communicated to respondent's owned bureaus, in the exercise of their disclosure, reinvestigation and dispute rights under Section 611(a)(c) of the Fair

Credit Reporting Act, allegations that files maintained on them by respondent or furnished to subscribers making inquiries on them contained, in addition to information about them, information that was not about them. Respondent has also been made aware by its own research of significant numbers of instances in which it has reported a file containing mixed information about two consumers.

PAR. 54. Respondent knew or reasonably should have known of measures it could take, such as modifying elements of its merge algorithms, that might reduce the occurrence of the type of error described in Paragraph Fifty-Three.

PAR. 55. Respondent has failed to take reasonable steps to attempt to reduce the number of errors of the type described in Paragraph Fifty-Three.

PAR. 56. By and through the acts and practices described in Paragraphs Fifty-Two, Fifty-Three, Fifty-Four and Fifty-Five, respondent has violated Section 607(b) of the Fair Credit Reporting Act by failing to follow reasonable procedures to assure maximum possible accuracy of information concerning the individual about whom the report relates.

COUNT IX

Alleging violations of the Fair Credit Reporting Act, the allegations of Paragraphs One through Four are incorporated by reference.

PAR. 57. Respondent obtains most of its information on consumers on computer tapes supplied by credit grantors. Respondent processes the information on those tapes into its data base by means of a special computer program designed for the individual credit grantor. As a result of processing the credit grantor tapes through such programs, respondent's system prints out separate sets of statistics for the credit grantors. For most credit grantors, these statistics include an itemization of the number of accounts supplied bearing each of the manner of payment codes used by the credit grantor to rate the consumer's timeliness in making payments on his or her credit account.

PAR. 58. Respondent has been made aware that a significant amount of consumer account information containing erroneous or possibly erroneous manner of payment codes has been supplied by credit grantors or processed into respondent's data base.

PAR. 59. Respondent knew or reasonably should have known that regular review by respondent of the manner of payment code statistics described in Paragraph Fifty-Seven could identify actual or possible systematic errors in manner of payment codes as submitted to respondent by credit grantors or as generated by respondent's procedures for processing the information contained in credit grantors' computer tapes into the data base, thereby permitting respondent to reduce the amount of incorrect manner of payment codes being processed into its data base or take reasonable steps to correct erroneous manner of payment codes that have been incorporated in the data base and that could be identified by such regular review.

PAR. 60. Respondent has not regularly reviewed and taken remedial action based on the manner of payment code statistics mentioned in Paragraph Fifty-Seven or followed alternative regular procedures for identifying and remedying actual or possible systematic errors in manner of payment codes submitted to respondent by credit grantors or generated by respondent's procedures for processing the information contained in credit grantors' tapes into the data base.

PAR. 61. By and through the acts and practices described in Paragraphs Fifty-Eight, Fifty-Nine, and Sixty, respondent has violated Section 607(b) of the Fair Credit Reporting Act by failing to follow reasonable procedures to assure maximum possible accuracy of information concerning the individual about whom the report relates.

PAR. 62. The acts and practices set forth in this complaint as violations of the Fair Credit Reporting Act constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act pursuant to Section 621(a) of the Fair Credit Reporting Act.

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 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 Fair Credit Reporting 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 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 facts as alleged in the complaint are true or that any 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 the complaint should issue stating its charge 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 it complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Trans Union Credit Information 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 111 West Jackson Boulevard, in the City of Chicago, State of Illinois.

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

It is hereby ordered, That respondent Trans Union Credit Information Company ("Trans Union" or "respondent"), a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the furnishing of consumer reports by its owned bureaus derived from consumer files owned by Trans Union, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

I. Failing to maintain reasonable procedures designed to limit the furnishing to private investigative or detective agencies of consumer reports to the purposes listed under Section 604 of the Fair Credit Reporting Act ("FCRA"). For the purpose of this Order such procedures consist of:

A. Requiring all users to certify in writing, before respondent furnishes any consumer reports to such users, the nature of their businesses, the purpose(s) for which they will use respondent's consumer reports and that the consumer reports will be used for no other purpose. For current users for which respondent does not possess such certifications, respondent shall obtain such certifications within six months of the date this Order becomes effective.

B. Making reasonable efforts to verify the identity of a prospective user, the nature of its business and its proposed uses of respondent's reports prior to furnishing consumer reports to such user.

C. Requiring private investigative agencies and detective agencies to certify in writing or orally at the time of each request for a consumer report:

1. The specific purpose or purposes for which each consumer report is sought;

2. That the information will be used for no other purpose; and

3. That the user understands that Federal law provides that a person who obtains information from a consumer reporting agency under false pretenses shall be fined no more than $5,000 or imprisoned not more than one year or both.

If the user's certification is oral rather than in writing, respondent shall either (1) request the user to confirm the certification in writing within ten business days after such request or (2) maintain a written record of the identity of the requestor, the date of the request, the identity of the consumer (name and address) on whom the consumer report was requested and the purpose(s) certified for the request. For any such user for which respondent requests subsequent written certification rather than maintains a written record, respondent may not furnish additional consumer reports if it does not receive such certification within the ten day period. In such cases, additional consumer reports may be furnished after the written certification is received.

Private investigative agencies and detective agencies do not, for the purpose of this provision, include credit bureaus that prepare or issue investigative consumer reports, as that term is defined in Section 603(e) of the FCRA.

D. 1. With respect to each prospective user, after six months from the date this Order becomes effective, either (1) consulting the current telephone yellow pages for the geographical areas in which respondent sells consumer reports for a listing of all detective agencies, private investigative agencies, investigators, and security services, or (2) conducting an on-site inspection of the premises of such user, in order to determine whether it is a detective agency or private investigative agency, and is thus a user from which the certification described in (C) above must be obtained.

2. With respect to current users, within six months from the effective date of this Order, either (1) consulting the current yellow pages for the geographical areas in which respondent sells consumer reports and determining whether any of the businesses listed therein as detective agencies, private investigative agencies, investigators, or security services are current subscribers, or (2) conducting on-site inspections of the premises of such current users, in order to determine, for each current user, whether it is a detective agency or a private investigative agency and is thus a user from which the certification described in (C) above must be obtained.

E. Furnishing a consumer report to any detective agency or private investigative agency when that agency has not certified a specific permissible purpose for obtaining that consumer report or when respondent has otherwise received notice that such agency is seeking to obtain the consumer report for a purpose that is not permissible under Section 604 of the FCRA. For the purpose of this provision, certifications of specific permissible purposes include, but are not limited to, certifications of one of the purposes listed in Section 604(3)(A)–(D) of the FCRA.

II. Failing to maintain reasonable procedures designed to limit the furnishing of consumer reports to government agencies, or departments of government agencies, which have as a principal function the enforcement of civil or criminal laws and which do not in the ordinary course of business regularly extend credit or insurance for personal, family or household use or evaluate consumers' eligibility for licenses or government benefits for which the agency is required by law to consider the applicant's financial responsibility or status, to the purposes listed under Section 604 of the FCRA. For the purpose of this Section respondent is required to cease and desist from:

A. Failing to require such agencies or departments to certify either in writing or orally at the time of each request for a consumer report:

1. The specific purpose or purposes for which each consumer report is sought;
2. That the information will be used for no other purpose; and
3. That the user understands that Federal law provides that a person who obtains information from a consumer reporting agency under false pretenses shall be fined no more than $5,000 or imprisoned not more than one year or both.

If the user's certification is oral rather than in writing, respondent shall either: (1) request the user to confirm the certification in writing within ten business days after such request; or (2) maintain a written record of the identity of the requestor, the date of the request, the identity of the consumer (name and address) on whom the consumer report was requested and the purpose(s) certified for the request. For any such user for which respondent requests subsequent written certification rather than maintains a written record of the certification, respondent may not furnish additional consumer reports if it does not receive such certification within the ten day period. In such cases additional consumer reports may be furnished after the written certification is received.

The requirements of Section II of this Order do not apply to requests by government agencies for information limited to the consumer's name, address, former addresses, places of employment and former places of employment.

B. Furnishing a consumer report to any such government agency or department when it has not certified a specific permissible purpose for obtaining that consumer report or when respondent has otherwise received notice that such agency or department is seeking to obtain the consumer report for a purpose that is not permissible under Section 604 of the FCRA.

For the purpose of this provision, certifications of specific permissible purposes include, but are not limited to, certifications of one of the purposes listed in Section 604(3)(A)–(D) of the FCRA.

III. A. Failing to follow reasonable procedures to avoid issuing any consumer report, except as authorized by Section 605(b) of the FCRA, containing any account placed for collection or repossession or charged to profit and loss whose date (month and year) so placed or charged, or if not available whose date (month and year) first furnished to or received by respondent, antedates the report by more than seven years.

B. 1. Failing to follow reasonable procedures designed to assure that, for each account placed for collection or repossession or charged to profit and loss entered into the data base, the date (month and year) the item first reached the indicated status or, if not supplied, the date (month and year) the item was first furnished to or received by respondent, is inserted into the data base as the purge date for such item.

2. Failing to follow reasonable procedures designed to assure that such purge dates are not advanced by the submission by credit grantors or collection agencies of subsequent information about the accounts in question.

C. 1. Within one hundred eighty (180) days of the effective date of this Order, respondent shall:

(a) produce a computer dump of all accounts with the corresponding names and addresses of the consumers in whose files they are maintained in the data base bearing a manner of payment code "08", "8A", "8D", "09", or "9B" and bearing purge dates of July 1978 through March 1979;

(b) mail, to each credit grantor or collection agency for which account information meeting the criteria described in (a) above exists in respondent's data base, a completed copy of the form letter included as Exhibit A to this Order, requesting that the recipient review or permit respondent to review the actual dates closed or placed for collection or repossession of accounts held by the recipient and meeting the criteria described in (a) above. The letter shall contain an estimate of the number of credit grantor's or collection agency's accounts to be reviewed.

If the credit grantor or collection agency has not replied to the letter within forty-five (45) days of the date it was mailed respondent shall, within fifteen (15) days of the expiration of that 45 day period, send a follow-up letter again requesting that the recipient perform the review or permit respondent to perform the review.

If the recipient replies that it will perform this review, respondent shall deliver to it, within two weeks of receipt of that reply, that portion of the computer dump described in (a) above that pertains to accounts held or handled by the recipient. If the credit grantor or collection agency replies that it will permit respondent to perform this review, respondent shall commence such review within sixty (60) days of receipt of the credit grantor's or collection agency's reply.

2. (a) For those accounts for which the credit grantor or collection agency responds, or respondent determines, upon performing the review, as having an earlier date on which the indicated status was reached or the item was first furnished to respondent than the purge date contained in the data base, respondent shall replace the purge date contained in the data base with such earlier date.

(b) For accounts held by those credit grantors or collection agencies which do not respond to either of the letters described in 1(b) above, or respond that they will not perform the review or permit respondent to perform the review, respondent may maintain the purge dates contained in the data base, except as respondent is otherwise required to change or delete such date pursuant to the consumer dispute and reinvestigation procedures of Section 611 of the FCRA.

D. For any of respondent's bureaus, with respect to that portion of the data base pertaining to such bureau or any part of that portion of the data base, respondent may, as an alternative to performing the procedures described in (C) above, purge all accounts bearing one of the above-mentioned manner of payment codes and a purge date falling within the above-designated period.

IV. A. 1. Failing, upon request and proper identification of any consumer, to clearly and accurately disclose to the consumer the nature, substance and source of all information on that consumer recorded and retained by respondent regardless of how the information is stored.

2. Failing, in any bureau that furnishes any consumer report(s) to a user or users by means of a cathode ray tube (CRT) terminal, to make disclosure to consumers as required by (A)(1) above by CRT terminal using the same point score threshold, and allowing for display of the same number of files whose score equals or exceeds that

threshold, as the CRT terminal(s) used for furnishing consumer reports to users.

V. Failing, when issuing a consumer report containing information with respect to which the consumer has filed a dispute statement pursuant to Section 611(b) of the FCRA, to clearly note in any subsequent consumer report containing the information in question that such information is disputed by the consumer and provide to the user either the consumer's statement or a clear and accurate codification or summary thereof, and in particular:

A. Failing, for each written or printed consumer report issued containing information with respect to which the consumer has filed a dispute statement, to provide in the consumer report itself the dispute statement or a clear and accurate codification or summary thereof.

B. Failing, in each consumer report issued by telephone containing information with respect to which the consumer has filed a dispute statement, to read to the inquiror the contents of the dispute statement, or a clear and accurate codification or summary thereof, before reading the disputed information, and to refuse to read the disputed information if the inquiror does not permit the dispute statement or the codification or summary thereof to be so read.

C. Failing, for each consumer report issued by telephone concerning a consumer who has filed a dispute statement, to maintain a record of the identity of the consumer, the identity of the inquiror and the date the dispute statement or codification or summary thereof was supplied to the inquiror, unless respondent previously incorporated such dispute statement or codification or summary thereof in the consumer's file in the data base.

VI. Purging from the data base or any portion thereof, after one hundred eighty (180) days from the date this Order becomes effective, consumer files containing credit account information that is solely nonderogatory and whose most recent date(s) of activity is (are) less than five years old, unless respondent:

A. Delivers, by first class mail or in person, a separate printed notification to the user's (other than another credit bureau) personnel listed below. This notification shall state that respondent's bureaus from time to time perform such purges and that respondent will, upon written request, disclose in writing the dates and criteria of any purges performed within the past two years on the portion(s) of respondent's data base pertaining to the bureau(s) from which the user principally purchases respondent's reports, as well as any other bureau for which the user requests such information. This notification shall also contain a recommendation that the information contained in it be transmitted to the user's employee in charge of developing consumer credit or benefit evaluation criteria and employee who supervises the consumer credit application or benefit evaluation process.

1. Any individual who is to execute a subscriber contract or agreement with respondent on behalf of any person, business, or government agency.

The notification may be delivered to this person together with the contract or agreement form to be signed.

2. Within thirty days after the execution of such contract for any prospective user, and within one hundred eighty (180) days after the effective date of this Order for any user authorized to obtain consumer reports from respondent, such user's individual in charge of consumer credit or benefit operations. For any previous user not authorized, as of the effective date of this Order, to obtain consumer reports from respondent, respondent need not deliver the notification until thirty (30) days after that user is reauthorized to obtain consumer reports.

The notification shall not be delivered to this person together with any billing invoice.

B. Upon written request from an existing or prospective user (other than another credit bureau), makes the disclosure specified in (A) above, with the exception that respondent need not make the disclosure for such purges as may have been performed prior to the effective date of this Order, and for which, as of that date, it was not in possession of records. In the case of that exception, respondent need only disclose instead that there may have been purges performed prior to that date, for which it no longer has the exact dates or criteria.

C. Inserts into the consumer's file (including, when necessary, reestablishing a file on the consumer), upon the consumer's request, any item of account information when a consumer, disputing the completeness of his or her file, indicates he or she has such account under his or her name, and when that account is held by a subscriber to respondent's consumer reporting services and is verifiable.

Section VI of this Order does not apply to purges of files on consumers whose current addresses, as reflected in the file, do not fall within the geographic area covered by the portion of the data base in which the files are maintained. It does not apply to purges of files performed as part of a purge by respondent of all files in a portion of the data base pertaining to a specific geographic area. It does not apply to purges of files performed at the request of consumers to whom those files pertain, and it also does not apply to purges of trade line information performed at the specific request of a subscriber to which it pertains.

VII. Failing, when the completeness or accuracy of any item of information contained in his or her file (as defined in Section 603(g) of the FCRA) is disputed by a consumer and that dispute is directly conveyed to respondent by the consumer, to:

A. Reinvestigate and record the current status of that information within a reasonable period of time after the dispute is directly conveyed, unless respondent has reasonable grounds to believe the dispute is frivolous or irrelevant;

B. Inform the consumer of the results of the reinvestigation, orally or by placing the results in first class mail, within a reasonable period of time after the completion of the reinvestigation.

It is further ordered, That respondent shall:

VIII. A. Have its management, and the staff of its Cronus Support, Quality Control and Systems and Programming Departments, continue to review its credit reporting system. Such review will include the detection and remedying of significant inaccuracies in information maintained or reported by the system. During the period from thirty-six (36) months to five (5) years from the effective date of this Order, respondent will document the procedures it uses for such review, the results of such review, and measures it takes to increase accuracy.

B. 1. Review the display algorithm of its credit reporting system with respect to its functions of distinguishing between seniors and juniors; consumers with the same last name and first initial living at the same address; consumers with the same last name, first initial and house number and living at different addresses; consumers with the same last name and first initial and having different social security numbers; and preventing display of "B" files that pertain to different consumers than the "A" files displayed. Respondent shall also review the merge algorithms of its credit reporting system with respect to their functions of preventing mixing in the same file of information on juniors and seniors or individuals otherwise having the same last name.

2. Determine, for each of the functions mentioned in (B)(1), whether the measures specified in the initial compliance report filed concurrently with this Order are feasible and effective in increasing the accuracy of respondent's computerized credit reporting system. Such determination shall be made on the basis of a documented cost-benefit analysis (*i.e.* dollar expenditures or decrease in reporting information pertaining to the consumer inquired on versus decrease in reporting information not pertaining to the consumer inquired on).

3. Compliance with the cost-benefit analyses referred to in (B)(2) with respect to display algorithm changes (aside from ascertaining dollar expenditures) shall be made by conducting empirical studies employing methodology similar to that used by respondent in the

empirical studies it previously conducted [(a) through (d) below describe that methodology] to determine whether a display algorithm change would result in retrieval of additional files in response to inquiries. Compliance with the cost-benefit analyses with respect to merge algorithm changes shall be made by conducting similar empirical studies to determine whether such changes could reduce merger into individual files of information pertaining to different consumers below that occurring presently without reducing to an undue extent the merger into individual files of information that pertains to the same consumer.

The methodology for the display algorithm cost-benefit analyses includes:

(a) compiling a sample of captured inquiries actually made by users and inquiries devised by respondent that adequately addresses the relevant variables and is large enough to provide a basis for determining the effect of the measure(s) over the general population of inquiries and data base files;

(b) processing these inquiries against the data base using the existing display algorithm;

(c) examining the files retrieved from the data base to determine which do and which do not pertain to the consumer inquired on and analyzing what changes in the display algorithm would result in retrieval of fewer files not pertaining to the consumers inquired on;

(d) devising modified display algorithm(s) and testing them to determine if they reduce retrieval of files not pertaining to the consumer inquired on, without reducing to an undue extent retrieval of files pertaining to the consumer inquired on.

4. For each function, if respondent determines pursuant to (B)(2) and (B)(3) above that the measure(s) specified in the initial compliance report are feasible and effective in increasing accuracy, respondent shall implement such measure(s) or alternative measure(s) that respondent determines, pursuant to the above-described type of cost-benefit analysis, are as or more effective in increasing accuracy as the measure(s) specified in the initial compliance report.

5. If respondent determines that any of the measures listed in the initial compliance report, after performing the relevant cost-benefit analysis, is not effective in increasing accuracy beyond that produced by respondent's current algorithms, respondent need not make that change.

6. For each function described in (B)(1), multiple measures need not be implemented if they have only substantially identical, and not supplemental, effects on accuracy.

Any actions required under Section VIII (B) of this Order shall be completed within eighteen (18) months of the effective date of this Order.

C. 1. During the period from eighteen (18) months to twenty-four (24) months from the effective date of this Order, and on a one-time basis only, take reasonable steps to identify other types of significant inaccuracies that may be occurring concerning reporting information pertaining to consumers other than the ones inquired on, other than those inaccuracies which are caused by a credit grantor's isolated and non-systematic errors in recording information concerning a consumer's account, or which involve a disagreement between the consumer and the credit grantor over the time or amounts of payments made by the consumer on the account, or which involve disputes over the quality of goods or services purchased. These steps include (a) having the managers of respondent's bureaus document the types of such inaccuracies reported to those bureaus by credit grantors or other users of respondent's reports during that period and (b) examining, for each of respondent's bureaus, the consumer relations files established for the first, third, and fifth months of that six month period.

The bureaus shall prepare and forward to respondent's Computer Division written summaries of the types of such inaccuracies identified pursuant to (a) or (b). The bureaus shall also attach actual examples of reports containing those types of inaccuracies.

2. Devise measure(s) that can reduce the occurrence of the types of inaccuracies identified pursuant to (C)(1) above.

3. Implement those of the measures devised pursuant to (C)(2) above that respondent determines to be feasible and effective in decreasing the occurrence of the types of inaccuracies identified pursuant to (C)(1) above on the basis of documented cost-benefit analyses, as described in Section (B) above.

For each type of inaccuracy identified pursuant to (C)(1) above, multiple measures need not be implemented if they have only substantially identical, and not supplemental, effects on accuracy.

Any actions required under Order Section VIII (C)(2) and (3) shall be completed within the period of twenty-four (24) to thirty-six (36) months from the effective date of this Order.

It is further ordered, That respondent shall:

IX. A. 1. Immediately, upon the date this Order becomes effective, begin to develop systematic procedures, whether performed by computer or otherwise, to perform the functions described in (2) below.

2. After eighteen (18) months from the effective date of this Order, ascertain, each time a credit grantor computer tape is processed and for each manner of payment code contained in the account informa-

tion submitted, the number of accounts bearing that code, and to review those statistics and compare them to previous months' statistics for that credit grantor as a means of detecting likely systematically erroneous codes submitted by the credit grantor or otherwise inserted into the data base.

If the above-mentioned comparison process is automated, respondent shall within eighteen (18) months of the effective date of this Order provide to the Commission the criteria employed in such comparison.

3. After eighteen (18) months from the effective date of this Order, provide the credit grantor printed copies of the statistics described in (A)(1) above following any significant change in the computer program used to process the credit grantor's account information into the data base or whenever respondent determines that the statistics for that credit grantor are, in respondent's good faith judgment based upon its experience gained pursuant to its obligations under Section IX (A)(1) of this Order, significantly different from previous statistics.

4. After eighteen (18) months from the effective date of this Order, if respondent has reasonable grounds for believing, based on the review described in (A)(2) above or otherwise, that any credit grantor is supplying systematically erroneous manner of payment codes or that systematically erroneous manner of payment codes are being produced by respondent's procedures for processing the information on credit grantor tapes into the data base, take reasonable steps to correct the erroneous codes entered into the data base and take reasonable steps to assure that:

(a) subsequent tapes submitted by that credit grantor do not contain systematic transcription or formatting errors that cause erroneous manner of payment codes to be processed into the data base; and

(b) respondent's credit grantor tape translation programs or other procedures for processing information into the data base do not by themselves, or in conjunction with the types of problems described in (a) above, generate erroneous manner of payment codes.

With respect to any tapes submitted to respondent which contain account information pertaining to more than one credit grantor and whose processing results in the printing out of aggregate manner of payment code statistics rather than statistics for each credit grantor, the requirements contained in (A) (1)–(4) above with respect to individual credit grantors shall apply instead to the supplier of the tape. With respect to any credit grantor that furnishes more than one tape to respondent in any month, respondent is not required to aggregate all monthly statistics for that credit grantor but shall rather treat the statistics generated from each tape separately.

B. Alternatively, respondent may satisfy its obligations under Section IX of this Order by instituting other reasonable procedures to detect and correct systematic errors in manner of payment codes as submitted by credit grantors or otherwise processed into respondent's data base.

Respondent may institute alternative procedures only if it determines after reasonable documented inquiry that the alternative procedures will be substantially as effective as the procedures described in (A) above.

It is further ordered, That respondent shall submit to the Commission, within seven (7) months after the date of service of this Order, a compliance report detailing the actions respondent has already taken and intends to take to comply with each of the provisions of the Order. Respondent shall also maintain for a period of five (5) years from the effective date of this Order, unless a shorter time period is specified, and make available upon written request made by Commission staff:

1. A printout of respondent's computer maintained subscriber listing, current as of the date of receipt of Commission staff's request.
2. The written certifications and records called for by Sections (I)(A) and (C) and II(A) of this Order, for the most recent twenty-four (24) month period.
3. The records specified in Section V(C) of this Order, for the most recent twelve (12) month period.
4. Such written requests as are received from users pursuant to Section VI(B) of this Order, for a period of twelve (12) months from the date received.
5. Documentation required by Section VIII(A) of this Order and documentation generated for the purpose of, in the course of conducting, or as a result of any of the analyses, determinations, reviews, identifications, examinations, implementations, information gathering and other actions called for by Section VIII(B) and (C) of this Order.
6. With respect to the monthly statistics mentioned in Section IX(A) of this Order, respondent shall maintain records of such statistics for six months after their generation. Upon written request made by Commission staff, respondent shall prepare with respect to each individual subscriber tape (or with respect to each tape containing information from multiple credit grantors whose processing produces only aggregate statistics) and for the designated month(s) a summary form indicating the percentage change, positive or negative, in the number of accounts processed into the data base under each manner of payment code. Respondent shall, for each summary form, designate the

subscriber (or tape supplier) by a consistently used identifying number rather than by name. Respondent shall make a special indication on the form when it pertains to a tape that produces only aggregate statistics for multiple credit grantors.

This provision does not require respondent to supply any documents or information to the Commission that would identify the subscriber to which the above mentioned statistics or reports pertain.

7. The documented inquiry called for by Section IX(B) of this Order, if Section (B) is followed as an alternative to Section (A).

8. Any and all written or printed materials used by respondent to make any of the disclosures or notifications mentioned in provisions of this Order, except those required by Order Section VII and except that with respect to Order Section III, respondent shall, for twelve (12) months after completion of its obligations under that section, maintain and make available upon written request by Commission staff: the number of credit grantors, and the number of accounts, contained in the computer dump produced pursuant to Section III(C)(1)(a); the number of letters sent to credit grantors; and the number of credit grantors or collection agencies that responded to the letters under III (C)(1)(b); the number of credit grantors or collection agencies that performed the review themselves; the number of credit grantors or collection agencies for which respondent performed the review; which bureaus, if any, determined to purge all or some of the relevant accounts rather than contact the credit grantors or collection agencies; and the number of accounts entirely purged and the number of accounts for which changed purge dates were inserted in the data base.

It is further ordered, That respondent shall maintain, for a period of five (5) years from the effective date of this Order, the computer dump required under Order Section III(C)(1)(a), copies of the letters sent to credit grantors or collection agencies, and written responses received and respondent's records of oral responses received pursuant to Order Section III(C)(1)(b).

It is further ordered, That respondent's obligations under Section VI of this Order shall terminate five (5) years from the date this Order becomes effective. Respondent's obligations under Section IX of this Order shall terminate five (5) years from the date respondent completes implementation of the procedures required by Section IX(A)(1)–(4), or Section IX(B), of this Order.

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

It is further ordered, That the respondent shall forthwith distribute a copy of this Order to each of its management personnel and to each of the management personnel of each of its owned bureaus.

EXHIBIT A

Trans Union Credit Information Company

Dear (Credit Grantor/ Collection Agency name)

We are contacting you to request your assistance in verifying dates for certain consumer account information that (name) has supplied to Trans Union Credit Information Company as a subscriber to Trans Union's credit reporting services. As you know, Trans Union's computerized credit reporting system is designed to purge itself of most adverse information on consumers within seven years from the date the item reached the indicated adverse status. To perform this function, the system fixes a date in the data base for each item of adverse information (the "purge date"). In the latter part of 1978 and early 1979, Trans Union instituted new procedures for fixing the purge date for accounts that are rated "08", "8A", or "8D" (repossessions), "09" (bad debt; placed for collection) or "9B" (collection account). Trans Union currently is reviewing all accounts in its data base that have one of the above manner of payment ratings and purge dates falling between July 1978 and March 1979 in an effort to assure that such purge dates are correct.

Our own research indicates that there are (number) such accounts reported by (name) currently maintained in our data base. To verify the correctness of the purge dates we have fixed for these accounts, and make any required changes, it will be necessary to review your records concerning these accounts to determine the dates on which the accounts actually reached the indicated status. We have a listing of accounts you have supplied to us which meet the criteria described above which we will provide to you. We request that you then review your records and inform us, for each of these accounts, of the month and year on which each such account first reached the indicated status, if different from the date contained in the listing. We also request that you inform us as to which accounts (if any) you cannot, from your records, determine the applicable date. Alternatively, if (name) would prefer that Trans Union perform this review of your records, we would be willing to supply Trans Union personnel to do so.

We request that you advise us within 30 days whether this information is available and, if so, whether (name) would be willing to participate in this review. Upon your affirmative response we will forward you the listing of accounts to be reviewed or arrange date(s) on which our personnel will review your records. Your cooperation would be most appreciated. If you have any questions, please contact (name of Trans Union contact person) at (phone number).

Sincerely,

____

IN THE MATTER OF

RSR CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8959. Final Order, Dec. 2, 1976—Modifying Order, Sept. 12, 1983

This order reopens the matter in Docket 8959 and modifies the Commission's order issued on Dec. 2, 1976 (88 F.T.C. 800), *modified,* Nov. 13, 1981 (98 F.T.C. 872), to provide for the appointment of a trustee who shall effect divestiture of all assets (with certain specified exceptions) constituting the lead-recycling plants in Dallas, Tex. and Seattle, Wash. The order also renumbers Paragraphs V, VI, VIII, Paragraphs XVII, XVIII and XIX, respectively.

DECISION AND ORDER MODIFYING CEASE AND DESIST ORDER IN DOCKET NO. 8959

On December 2, 1976, the Federal Trade Commission, pursuant to Section 11 of the Clayton Act, issued the order in this case against RSR Corporation requiring, among other things, that RSR Corporation divest itself of certain assets. On November 16, 1981, the Commission modified its order to provide that the assets to be divested shall be RSR Corporation's Dallas, Texas, and Seattle, Washington, lead-recycling plants. These plants were to have been divested on or before November 16, 1982, to an acquirer or acquirers approved by the Commission. As of the date of this order, neither plant has been divested by RSR Corporation.

After full consideration of the record and of information provided to it by RSR Corporation and others, the Commission has determined that further modification of the order is in the public interest because, under the circumstances, it will provide an expeditious means of achieving the purpose of its order in this matter, namely, the restoration of competition in the secondary-lead market. The Commission believes that divestiture of the plants was not accomplished within the prescribed period largely because RSR Corporation failed to make a good-faith effort to achieve divestiture. The Commission further believes that entrusting the divestiture to a trustee will ensure that such an effort is made. Moreover, respondent has agreed to a proposed Final Judgment providing for payment of civil penalties in settlement of a complaint alleging that respondent failed to divest the Dallas and Seattle plants by November 16, 1982. The Commission has forwarded the complaint and proposed Final Judgment to the Department of Justice for filing. Accordingly, the Commission on this date has issued an order to show cause why (1) Paragraphs V, VI, and VIII of the order in Docket No. 8959 should not be modified to renumber those Paragraphs XVII, XVIII, and XIX respectively, and (2) why Paragraphs I, II, III, IV, and VII of the order in Docket No. 8959 should not be modified as set forth below. The proposed modification was accepted by respondent.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that the order in Docket No. 8959 be modified (1) to renumber Paragraphs V, VI, and VIII of the order in Docket No. 8959 Paragraphs XVII, XVIII, and XIX respectively, and (2) that Paragraphs I, II, III, IV, and VII of the order in Docket No. 8959 be modified as set forth below.

I.

As used in this Modified Order:

A. *RSR* means RSR Corporation, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns.

B. *Assets of the Dallas Plant* means all assets, title, properties, interest, rights and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, machinery, equipment, customer lists, and other property of whatever description, except as listed in Appendix A* hereto, that comprise the Dallas, Texas, lead recycling plant owned by an RSR subsidiary.

C. *Assets of the Seattle Plant* means all assets, title, properties, interest, rights, and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, machinery, equipment, customer lists, and other property of whatever description, except as listed in Appendix A hereto, that comprise the Seattle, Washington, lead recycling plant owned by RSR subsidiaries.

D. *Assets* means the Assets of the Dallas Plant and the Assets of the Seattle Plant.

E. *Environmental Approval* means approval as to the acquirer in all respects from the Environmental Protection Agency and/or other appropriate governmental agency having jurisdiction over environmental matters, including the filing by the acquirer with the Environmental Protection Agency and/or other appropriate governmental agency having jurisdiction over environmental matters of a Part A application for a hazardous waste permit and the affirmative demon-

* Not reproduced herein. Copies of all Appendices and Exhibits are available for inspection in Room 130, Public Reference Branch, Federal Trade Commission, 6th St. and Pa. Ave., N.W., Washington D.C. 20580.

stration to such agencies by the acquirer that it meets the financial responsibility standards pursuant to applicable environmental laws, regulations, and administrative practices.

F. *Commission Approval* means acquirer approval from the Federal Trade Commission.

G. *Approvals* means Environmental Approval and Commission Approval.

II.

RSR shall divest the Assets in accordance with and subject to the terms and provisions of this Modified Order to an acquirer(s) approved in advance by the Federal Trade Commission. The Assets may be divested as a unit or the Assets of the Dallas Plant may be divested to one acquirer and the Assets of the Seattle Plant to another acquirer.

III.

The Commission shall appoint a Trustee for the purpose of effecting divestiture(s) of the Assets in accordance with the provisions of this Modified Order to an acquirer(s) who represent(s) in good faith that the Assets will be used as plants engaged in the production of recycled bulk lead, lead alloys, and lead products. RSR will transfer to the Trustee, within one week of the Trustee's appointment all powers necessary to permit the Trustee to execute on behalf of RSR the deeds and assignments contained in Exhibit III annexed hereto and otherwise to divest the Assets as provided in this Modified Order. In connection with such divestiture, RSR shall be required to make no warranties other than warranties of title.

IV.

The Trustee shall be empowered to find a prospective acquirer(s) for and, upon receipt of all Approvals, to sell, transfer, and convey the Assets to such acquirer(s) in accordance with this Modified Order (unless in either case, prior to the appointment of the Trustee hereunder, RSR shall have divested the Assets of the Dallas Plant or the Assets of the Seattle Plant). The Trustee shall hold such power in Trust for purposes of effecting divestiture(s) of the Assets, pursuant to and in accordance with the terms of this Modified Order. The Trustee shall find a single acquirer for the Assets of the Dallas Plant and a single acquirer for the Assets of the Seattle Plant, except that one acquirer may acquire both the Assets of the Dallas Plant and the

Assets of the Seattle Plant. The Trustee shall attempt to find an acquirer(s) for the Assets as soon as possible and shall attempt to obtain the best possible price for the Assets, *provided, however,* the Trustee is not required to obtain a minimum price.

V.

The Trustee shall allow a prospective acquirer(s) to exclude from the acquisition of the Assets specific leases (with the exception of the lease between Murph Metals Incorporated and Bestolife Corporation) and operating contracts and arrangements (except that applicable NLRB rules and regulations shall govern regarding the acquirer(s)'s rights of excluding labor contracts from the acquisition of the Assets). The leases and operating contracts and arrangements included in the Assets of the Dallas Plant and in the Assets of the Seattle Plant to be transferred (unless excluded pursuant to this Paragraph) to the acquirer(s) pursuant to this Modified Order are listed in Exhibits I and II hereto, respectively. The acquirer(s) shall notify the Trustee (who shall immediately notify RSR) in writing at the time the acquirer(s) commits to acquire the Assets of the Dallas Plant or the Assets of the Seattle Plant, or both, whether the acquirer(s) elects to exclude from the acquisition some or all of the leases and operating contracts and arrangements of the plant(s) being acquired and shall irrevocably specify which leases and operating contracts and arrangements are to be excluded at such time of commitment. If no such notification is received by the Trustee at the time of commitment, the acquirer(s) shall be deemed to have agreed to take assignment of all the leases and operating contracts and arrangements. If the acquirer(s) elects not to take assignment of any said lease or contractual obligation, then RSR shall not be required to transfer the related leased assets or any rights thereunder to the acquirer(s). In the event the acquirer of the Assets of the Dallas Plant elects not to include the Dallas plant oxygen contract in the Assets to be acquired, then RSR, upon reasonable notice to the acquirer, may exercise whatever rights RSR has under the Dallas plant oxygen contract to remove the machinery and equipment leased by RSR from Airco under that contract, provided that RSR shall do so in such a way that no material damage is done to the remaining Assets of the Dallas Plant. The acquirer shall permit RSR at no charge to enter the property during normal working hours to remove such machinery and equipment. RSR shall be under no obligation to renew any lease or operating contract that expires during the Trusteeship.

VI.

If the Trustee obtains a prospective acquirer(s) for the Assets of the Dallas Plant and/or the Assets of the Seattle Plant and all the necessary Approvals are obtained within the required period (as provided in Paragraph XI herein), the Trustee shall, at the Closing (herein referred to as the "Closing") of such sale(s), execute and deliver warranty deeds and assignments necessary to transfer and convey the Assets to the acquirer(s) in the forms annexed as Exhibit III hereto, appropriately completed to insert therein only the name of the transferees, dates, any inventories to be purchased (pursuant to Paragraph VIII), and leases and operating contracts and arrangements not to be transferred (pursuant to Paragraph V). Such documents and the license agreement referred to in Paragraph VII shall constitute the sole instruments of conveyance and transfer and the sole agreements which the Trustee on behalf of RSR shall be required to execute and deliver for purposes of consummating divestiture of the Assets pursuant to this Modified Order. Prior to Closing, the acquirer(s) shall perform such inspection of the Assets as may be necessary to determine, to the acquirer's(s) satisfaction, that the Assets to be conveyed and transferred to the acquirer(s) at Closing hereunder conform in all respects to the requirements of this Modified Order and, absent fraud, acceptance by the acquirer(s) at Closing of such warranty deeds and assignments shall constitute conclusive acknowledgement by the acquirer of such conformance, *provided however,* nothing in this paragraph shall affect the Commission's right to seek civil penalties for violation of any provision of this Modified Order. All sale proceeds shall be paid to the Trustee by the acquirer(s) upon delivery to the acquirer(s) of the executed warranty deeds and assignments. Pending distribution of the sale proceeds, the Trustee shall deposit the same in an interest bearing account at InterFirst Bank in Dallas, Texas. The Closing shall be held at a place determined by the Trustee and shall occur within 20 business days following receipt of all Aprovals provided for under Paragraph XI. After approval by the Commission of the Trustee's account and payment to the Trustee of any outstanding monies due to the Trustee, any remaining monies including any interest thereon shall be paid to RSR.

VII.

The Trustee shall be empowered to grant on behalf of RSR to the acquirer(s) of the Assets, at the option of such acquirer(s), a nonexclusive license (in the form annexed as Exhibit IV), subject to a reasonable royalty not to exceed 2%, to all of RSR's patented sulphur removal and battery recycling processes; *provided, however,* that in the event the acquirer(s) of either the Assets of the Dallas Plant or the Assets of the Seattle Plant is a battery manufacturer, RSR shall only be required to grant such patent licenses to such an acquirer(s) for use at the acquired plant; and *further provided,* that RSR is not required to grant such licenses to an acquirer(s) that is a primary lead producer.

VIII.

The Trustee shall be empowered to make available for purchase to a prospective acquirer(s) of the Assets some or all (at the acquirer's(s') option) of the respective Plant's inventories (other than inventories required to be returned by RSR and its subsidiaries under tolling contracts) for consideration (payable to the Trustee at the Closing in lawful currency of the United States) in addition to any amounts that may be paid for the Assets. For purposes, hereof, inventories shall include all categories listed in RSR's letter to the Federal Trade Commission dated February 9, 1983 and shall include the specific types of items set forth in the enclosures to that letter. The February 9th letter, along with enclosures, is annexed as Exhibit V hereto. The acquirer(s) shall notify the Trustee (who shall immediately notify RSR) in writing within five business days after Approvals as to the specific inventory items and quantities the acquirer(s) shall purchase. If no such notification is received by the Trustee, the acquirer(s) shall be deemed to have agreed to purchase no inventory. Approximately five days prior to Closing, RSR shall conduct a physical inventory of the inventories to be purchased by the acquirer(s) at the Closing. The acquirer(s) shall verify the quantities of inventory at the time of the physical inventory and shall confirm such verification in writing. The price to be paid by the acquirer(s) to the Trustee for said inventories shall be the First-In, First-Out (FIFO) cost as carried on the respective accounting records of the Dallas or Seattle plant at the end of the month preceding the time of Closing, and shall be payable to the Trustee at the time of Closing in lawful currency of the United States in addition to the amount that is paid for the Assets. The value and amount of inventory may increase or decrease in the normal course of business, except only that the value of the "Maintenance Stores Inventories" and "Inventoried Supply Items" to be made available to a purchaser shall not be less than the total value of such items as of December 31, 1982 as presented in the above said February 9th letter and enclosures, *provided* that RSR shall replace in kind any item that is removed from "Maintenance Stores Inventories" and "Inventoried Supply Items" for any purposes other than maintenance or supply of the plant to which the item belongs. RSR shall have the right to remove other items from the categories labeled "Maintenance Stores Inventories" and "Inventoried Supply Items" as long as RSR replaces the value of the items removed. In addition, RSR shall make available to the acquirer(s) prior to the Closing at no charge enough space to bring in and store its (their) own inventory and shall grant the acquirer(s) reasonable access to the Assets to bring in and store such inventory.

IX.

RSR shall provide reasonable information and assistance as may be requested by the Trustee and as required by this Modified Order. Such assistance shall include providing written information and data, allowing access to the Dallas and Seattle plants, allowing access to records relating to the Assets of the Dallas Plant and the Assets of the Seattle Plant, providing personnel for tours and inspections, and providing personnel for answering questions. The Trustee or its agents shall be present at all times during any interaction between representatives of RSR and prospective acquirers. The prospective acquirer(s) shall agree to RSR's usual confidentiality provisions and tour procedures. The Trustee shall have access to all information and data previously provided by RSR or its agents to the Commission relating to prior efforts to divest the Assets.

X.

RSR shall continue to operate the Dallas and Seattle Assets for its own account during the Trusteeship and shall not knowingly cause or permit the deterioration of the Dallas and Seattle Assets in a manner that impairs the marketability of any such Assets. RSR may, but shall not be required to, make capital expenditures for the improvement of any such Assets.

XI.

The term of the Trusteeship shall be 150 days, commencing from the day following the Commission appointment of the Trustee or from September 15, 1983, whichever occurs first, and ending at 11:59 p.m. (Dallas time) on the 150th day. The Trustee shall have 150 days to find an acquirer(s) for the Assets and to obtain acquirer Approvals. The Trustee shall require any prospective acquirer to demonstrate that such acquirer has present financial capability to acquire and operate the Assets proposed to be acquired by such acquirer. If no acquirer(s) has been found or if Approvals have not been obtained within the 150 days, the Trusteeship shall automatically end at the expiration of such 150 day period. The Trustee shall require that a prospective acquirer file any necessary requests, applications, or notices in connection with obtaining the Approvals not later than 30 days after the Trustee's acceptance of the acquirer's written, binding and enforceable commitment to acquire the Assets proposed to be acquired by such acquirer, unless the Commission for good cause shown, shall extend such 30 day period. The term of the Trusteeship may be extended by 60 days beyond such 150 day period if the Trustee demonstrates to the Commission that such an extension is necessary to enable the Trustee to obtain the Approvals, *provided* that a prospective acquirer has made a written, binding and enforceable commitment to acquire the Assets of the Dallas Plant or the Assets of the Seattle Plant, or both, subject only to the three conditions specified below, within such 150 day term of the Trusteeship. The period of time may be further extended for an additional 30 days if the Trustee demonstrates to the Commission that such extension is necessary to enable the Trustee to obtain Environmental Approval, *provided* that all requirements for the first 60 day extension have been met and *provided* the Commission has approved the acquirer. *Provided* that all Approvals have been given, the term of the Trusteeship shall be extended to (and solely for purposes of consummating) the Closing as provided in Paragraph VI. No other extension shall be granted. These timing restrictions and extensions apply individually to each plant being sold. The Trustee or prospective acquirer shall not request Approvals unless a prospective acquirer has made a written, binding and enforceable commitment to purchase the Assets of the Dallas Plant or the Assets of the Seattle Plant, or both, subject only to the following three conditions: 1) transfer and conveyance of the Assets at Closing in substantially the same condition as at the time of the acquirer's commitment, except for ordinary wear and tear, 2) Commission Approval of said acquirer, and 3) Environmental Approval of said acquirer.

Provided, however, That if the acquirer shall have made a written, binding and enforceable commitment (subject only to the three conditions specified above) in a time less than the 150 day period, and if Commission Approval or Environmental Approval has been denied, then the Trustee shall be granted the number of days equal to 150 days minus the number of days expired to the date when the prospective acquirer made a written, binding and enforceable commitment to acquire the Assets of the Dallas Plant or the Assets of the Seattle Plant, or both, subject only to the three conditions specified above, in order for the Trustee to again seek to obtain another acquirer. This process (including extensions for Approvals) may repeat itself until a full 150 days, on a cumulative basis, shall have been expired, at which time the provisions in Paragraph XII apply. This process applies to the Assets of each of the Plants individually.

XII.

Upon the divestiture of the Assets of both the Dallas and Seattle Plants, or if either or both the Dallas or Seattle Assets have not been divested to an acquirer(s) within the time periods as provided in Paragraph XI, then the Trusteeship shall automatically terminate and RSR shall be completely relieved of all further divestiture requirements in Docket 8959. The term of the Trusteeship (including any extensions thereof as hereinabove provided) shall apply to the Assets of each plant individually, not jointly.

XIII.

The Trustee shall be compensated and reimbursed by RSR in a manner as follows:

1. The Trustee shall be paid a flat fee of $35,000, payable $7,000 per month commencing 30 days after appointment.
2. The Trustee shall be paid an incentive of $40,000, to be paid to the Trustee in proportion to the number of plants available to the Trustee to divest for which the Trustee accomplishes divestiture.
3. The Trustee shall be reimbursed monthly for all expenses, the aggregate of which shall not exceed $25,000.
4. The Trustee shall be reimbursed for an additional $25,000 of expenses if such expenditures are approved by the Commission.
5. Under no circumstances shall RSR be required to pay and/or reimburse in aggregate an amount greater than $125,000 to the Trustee.

XIV.

Pursuant to the above requirements, none of the assets, properties, rights, privileges and interest of whatever nature, tangible or intangible, acquired or added by RSR, shall be divested, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or under the control, direction or influence of RSR, or anyone who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of the capital stock of RSR or to anyone who is not approved in advance by the Federal Trade Commission.

XV.

Within forty-five (45) days from the effective date of this Modified Order and every thirty (30) days thereafter until the Trusteeship shall have terminated (as provided in Paragraph XII), the Trustee shall submit a verified report in writing to the Commission with copies to RSR, setting forth (a) a specification of the steps taken by the Trustee to make public the availability for purchase of the Assets, (b) a list of all persons or organizations to whom notice of availability for purchase has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all internal memoranda, offers, counter-offers, communications and correspondence concerning said divestiture. Such information shall be marked confidential and shall be afforded confidentiality according to the Commission's Rules of Practice. Additionally, the Trustee shall provide such other reports of efforts to divest the Assets as may be required by the Commission.

XVI.

In the event RSR, as a result of the enforcement of a bona fide lien, mortgage, deed of trust or other form of security, reacquires possession of any of the divested Assets, RSR shall so notify the Commission within 30 days of such repossession, and within one year thereafter shall divest the reacquired Assets in accordance with the terms and conditions set by the Commission.

IN THE MATTER OF

THE ECHLIN MANUFACTURING COMPANY, INC., ET AL.

Docket 9157. Interlocutory Order, Sept. 13, 1983

ORDER

By motion dated September 1, 1983, respondent Echlin Manufacturing Co., Inc. requested that the Honorable Montgomery K. Hyun, an administrative law judge of this Commission, disqualify and remove himself from this proceeding pursuant to Section 3.42(g)(2) of the Commission's Rules of Practice in Adjudicative Proceedings. On September 2, 1983, Judge Hyun declined to disqualify himself and certified Echlin's motion to the Commission together with a statement of the reasons for his decision not to disqualify himself.

Respondent's motion to disqualify fails to state any legally cognizable basis for the disqualification of Judge Hyun or to identify any reason why Judge Hyun would be unable to afford all parties a fair and unbiased hearing in this matter.

The real concern underlying respondents' motion is the pretrial substitution of the administrative law judge assigned to this matter. Respondents' challenge to this interlocutory decision of the Chief Administrative Law Judge has not been certified to the Commission and is, therefore, not properly before us for review. Nevertheless, we note that the Chief Administrative Law Judge is authorized by Section 3.43(b) of the Commission's Rules to assign the presiding administrative law judge to each proceeding. Judge Barnes has stated that he reassigned Judge Hyun in this case to assure the effective and efficient operation of the Office of Administrative Law Judges. This is a permissible reason for the exercise of the ALJ's discretion. *See Tractor Training Service v. FTC*, 227 F.2d 420 (9th Cir. 1955) (substitution of hearing examiners after trial commenced approved in the interests of economy).

Accordingly, respondent Echlin's motion to disqualify is hereby denied.

It is so ordered.

IN THE MATTER OF

BORDEN, INC.

MODIFIED FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8978. Final Order, Nov. 7, 1978—Modified Final Order, Sept. 16, 1983

In settlement of judicial review proceedings resulting from the entry of a Commission cease and desist order after full adjudicatory proceedings, this agreed-to modification requires a producer of processed lemon juice to refrain, for a period of seven years, from pricing its product below its variable costs for the product in any sales district. "Variable costs" are defined as all costs which the firm could have chosen not to incur during the relevant time period. The relevant time period consists of all consecutive fiscal quarters in which the firm's prices failed to cover its total costs, and thus vary with the duration of any price reduction. The firm is also required to file annual compliance reports detailing its market share, costs and net revenues. The Modified Final Order takes the place of an order previously entered by the Commission (92 F.T.C. 669), which was affirmed by a court of appeals in a judgment that was the subject of a petition for a writ of certiorari in the Supreme Court. *Borden, Inc. v. FTC,* 674 F.2d 498 (1982).

MODIFIED FINAL ORDER

The Commission having considered the proposal of Borden, Inc., to terminate the proceedings for judicial review of the order to cease and desist entered herein on November 7, 1978; the Commission and Borden, after receiving public comments on a proposed order, having agreed upon the provisions of a final order modifying the order of November 7; and the Court of Appeals for the Sixth Circuit, in accordance with an order of the Supreme Court, having remanded the case to the Commission for entry of the order to which the parties agreed; accordingly,

It is hereby ordered, That the Commission's Order in this matter, dated November 7, 1978, is hereby revised to read as follows:

ORDER

It is ordered, that Respondent, in connection with the production, marketing and sale of processed lemon juice in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

Selling ReaLemon brand reconstituted lemon juice at a price or prices so that Respondent's net revenue during any fiscal quarter for any sales district is below Respondent's variable cost of the product sold in that quarter and sales district.

For purposes of this Order only, the following definitions shall apply:

A. *Total cost* means the sum of all costs properly attributable to sales made by Respondent of ReaLemon brand reconstituted lemon juice during the relevant fiscal quarter in the relevant sales district.

1. *Total costs,* and its various elements, shall be calculated in the same manner as reflected in Respondent's accounting records as of January 1, 1983. With respect to elements of cost incurred over geographic markets that do not coincide with Respondent's sales districts, such elements of cost shall be allocated to a sales district on the basis of unit volume sold during the relevant quarter in the relevant sales district, or on the basis of identifiable factors that make allocation to a particular sales district proper, or on the basis of a combination of these two approaches. Similarly, with respect to allocations of elements of cost which, as of January 1, 1983, were made only annually, such elements of cost shall be apportioned to the relevant quarter on the basis of the unit volume sold during that quarter in the relevant sales district, or on the basis of identifiable factors that make allocation to a particular quarter proper, or on the basis of a combination of these two approaches. The methods of allocation chosen shall be uniform for all sales districts and for all quarters for which an annual compliance report must be submitted. The methods shall not be changed without prior notice to the Commission.

2. The cost of spot television advertising purchased for a station in a particular sales district shall be allocated to the sales district in which the station is located. The costs of all television advertising other than spot television shall be allocated to the relevant sales district for the relevant time period on the basis of the volume of unit sales in that district.

B. *Variable cost* means the sum of all costs included within total cost which Respondent could have avoided during the relevant time period.

1. A cost, whether an element of cost or a portion of an element of cost, shall be considered as one which Respondent could have avoided if, during any part of the relevant time period, Respondent could have chosen not to incur that cost consistent with prudent business practices, and without violating contractual or other legal commitments.

2. The relevant time period, for any fiscal quarter and sales district in which Respondent's net revenue in that quarter and sales district was below its total cost, shall be the period composed of that quarter

and any consecutive preceding quarters in which Respondent's net revenue in that sales district was also below its total cost. The relevant time period for any other fiscal quarter and sales district shall be the period composed of that quarter.

C. *Net revenue* means gross revenue to Respondent resulting from sales of ReaLemon brand reconstituted lemon juice, net of returns and allowances, cash discounts, and trade promotions. "Net revenue" and its various elements shall be calculated in the same manner as reflected in Respondent's accounting records as of January 1, 1983.

D. *Fiscal quarter* means the period which coincides with Respondent's standard accounting quarters.

E. *Sales district* means each of the geographic subdivisions of the country, designated, identified and used as such by Respondent in its sales and accounting records [currently twenty-two (22)]. If the sales districts are changed, the Commission will be notified.

F. *Trade promotions* means discounts or other financial incentives to the grocer or wholesaler, such as buying allowances or retailer coupons. *Trade promotions* (regardless of the manner in which that term is used by Borden in its accounting records) shall not be considered as a *cost* and shall be considered a reduction in net revenue.

G. *Unit* means one case of 12 bottles of ReaLemon brand reconstituted lemon juice in the 32 ounce size, or an equivalent volume of ReaLemon brand reconstituted lemon juice bottled in different sizes.

H. *Respondent* means Borden, Inc., its successors and assigns, officers, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, affiliate, division, or other device.

It is further ordered, that this Order shall remain in effect for seven years from the date it becomes final. During that period, Respondent shall file annual compliance reports with the Commission within 60 days of the end of its fiscal year. Each annual report shall include, for each sales district in which Respondent sold ReaLemon brand reconstituted lemon juice: (a) Copies of A.C. Nielsen market survey reports, or substantially similar market survey reports, detailing the quarterly and annual market shares of ReaLemon brand reconstituted lemon juice and the quarterly and annual market shares of its branded and private label competitors, (b) an accounting quarterly of its total costs for ReaLemon brand reconstituted lemon juice, and (c) an accounting quarterly of its net revenue from sales of ReaLemon brand reconstituted lemon juice.

Each annual report shall also include, for each sales district and fiscal quarter in which Respondent's net revenue for such sales district and fiscal quarter was below its total cost, proof that Respondent's net revenue in that district and quarter exceeded Respondent's variable costs of the product sold in that district and quarter.

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK

I have voted to enter this order upon instruction of the court of appeals. Nevertheless, as I stated in opposing the Commission's decision not to support our 1978 order before the Supreme Court, this modified order represents for all practical purposes an abandonment of the Commission's role in policing predatory pricing by a monopolist. Although the Commission is today issuing a document with order provisions written on it, they are so lenient and so unenforceable that it is highly unlikely we could ever establish a violation no matter what Borden did.

It is well recognized that rules against predatory pricing must be carefully circumscribed to avoid prohibiting or deterring healthy competitive pricing. Thus, the Commission has been selective in bringing monopolization cases and finding liability over the last decade or more. On the other hand, as small businesses will readily attest, dominant firms sometimes do punish or attempt to destroy a smaller rival through predatorily low prices and the result is to destroy competition, not make it more vigorous. One of the most likely situations for this to occur is when a monopolist prices below cost with the intent to destroy a small new entrant and there are significant barriers to future entry by others. These were the circumstances in Borden and resulted in a unanimous finding of liability.

There have been no monopolization cases brought by the Commission under this administration, and its most significant policy decision in this area has been to undercut this order after it was affirmed by the court of appeals. It is one thing to enforce cautiously predatory pricing rules so as to stop only anticompetitive behavior. It is quite another to abandon concern about predatory pricing altogether.

IN THE MATTER OF

DAIRYMEN, INC.

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

Docket 9143. Complaint, July 31, 1980—Final Order, Sept. 20, 1983*

This Final Order dismisses the complaint issued against one of the nation's largest raw milk processors. The Commission found that the record did not support a finding that Dairymen's 1978 acquisition of Farmbest Foods, Inc. violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

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 Dairymen, Inc., a corporation subject to the jurisdiction of the Commission, has violated 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 Munford, Inc., a corporation subject to the jurisdiction of the Commission, has violated Section 5 of the Federal Trade Commission 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 in that respect as follows.

DEFINITIONS

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

a. The term *fluid milk* refers to the following products (including products sold in large container sizes to hotels, restaurants and institutions): (i) packaged fluid whole milk, partially skim milk (approximately two percent butterfat or less) and skim milk, (ii) buttermilk and cultured fluid milk products (excluding yogurt) and (iii) flavored milk and flavored milk drinks. These products are generally referred to by the dairy industry as Class I milk products.

b. The term *SMSA* refers to *Standard Metropolitan Statistical Area* as designated by the Office of Management and Budget. [2]

c. The *Tri-City market* refers to the Johnson City-Kingsport-Bristol, Tennessee SMSA. This area is composed of the Tennessee counties of

* Complaint as to Munford, Inc. *dismissed* 100 F.T.C. 533.

Carter, Hawkins, Sullivan, Unicoi and Washington and the Virginia counties of Scott and Washington and the Virginia portion of the city of Bristol.

d. The *Knoxville market* refers to the Knoxville, Tennessee SMSA. This area is composed of the counties of Anderson, Blount, Knox and Union.

e. The *Birmingham market* refers to the Birmingham, Alabama SMSA. This area is composed of the counties of Jefferson, St. Clair, Shelby and Walker.

f. The *Montgomery market* refers to the Montgomery, Alabama SMSA. This area is composed of the counties of Autauga, Elmore and Montgomery.

g. The *Columbus market* refers to the Columbus, Georgia SMSA. This area is composed of the Alabama county of Russell and the Georgia county of Chattahoochee and the Georgia city of Columbus.

ACQUISITION

2. Beginning in early 1978, Munford, Inc., ("Munford") entered into negotiations with Dairymen, Inc., ("DI") to sell Munford's wholly owned subsidiary, Farmbest Foods, Inc., ("Farmbest"). These negotiations culminated in a stock purchase agreement between Munford and DI, dated September 1, 1978.

3. Under the terms of that agreement, Munford sold all the stock of Farmbest to DI for approximately $5.884 million in cash, plus the assumption and repayment by DI of approximately $13 million in Farmbest-related debt. On September 1, 1978, Farmbest was merged into DI's fluid milk processing subsidiary, Flav-O-Rich, Inc., ("Flav-O-Rich").

ACQUIRING COMPANY

DI

4. Respondent DI is a corporation organized and existing under the laws of the State of Kentucky with its principal office at 10140 Linn Station Road, Louisville, Kentucky. At all times relevant herein, DI was engaged in commerce as "commerce" is defined in the Clayton Act, and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

5. DI is the third largest milk marketing cooperative in the United States and has almost 6,500 dairy farmer members in 14 southeastern states. DI is principally engaged in the [3] distribution and sale of raw milk. Also, through its wholly owned subsidiary, Flav-O-Rich (described below in paragraphs 9–12), DI is engaged in the processing and sale of fluid milk. DI's other operations include laboratories for the

testing of raw milk, a tanker fleet repair facility and plants manufacturing ice cream, cheese and butter, among other products. In 1979, DI had assets of approximately $175 million.

6. During its fiscal years ending August 31, 1977, 1978 and 1979, DI's approximate consolidated sales were, respectively, $658, $662 and $785 million. During each of these fiscal years, DI marketed nearly five billion pounds of raw milk.

7. DI distributes raw milk in Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia and West Virginia.

8. Since its founding in 1968, DI has merged with or acquired the following dairies and cooperatives having processing plants (the year of the merger or acquisition is shown in parentheses):

a. Supreme Milk Company, Canton, Mississippi (1968);
b. Burke Farmers Cooperative, Morganton, North Carolina (1968);
c. Yadkin Valley Cooperative, North Wilkesboro, North Carolina (1969);
d. Wells Dairies Cooperative, Columbus, Georgia (1970);
e. Irvindale Dairies, Atlanta, Georgia (1970);
f. South Georgia Dairy Cooperative, Quitman, Georgia (1970);
g. Flav-O-Rich, Inc., Fayette, Alabama (1971);
h. Realicious Dairies, Inc., Columbus, Mississippi (1971);
i. Walker Farms, Inc., Stoneville, Mississippi (1972);
j. Westover Dairies, Inc., Lynchburg, Virginia (1972);
k. Leatherwood Company, Bluefield, West Virginia (1973); **[4]**
l. Golden Glow Dairies, Albany, Georgia (1973);
m. Happy Valley Farms, Inc., Rossville, Georgia (1973);
n. Cloverleaf Dairies, Monroe, Louisiana (1973);
o. Green Brothers Dairy, Bastrop, Louisiana (1973);
p. Hayesdale Farms, Dothan, Alabama (1973);
q. Chappell's Products, Inc., Campbellsville, Kentucky (1973);
r. Chappell's Dairy, Harlan, Kentucky (1973);
s. Long Meadow Dairies, Durham, North Carolina (1974);
t. The Milk House, Winnsboro, Louisiana (1974);
u. Wolfe Enterprises, Knoxville, Tennessee (1974);
v. United Dairies, Greensboro, North Carolina (1975);
w. B&B Dairy Products Company, Brookhaven, Mississippi (1975);
x. Jersey Farms, Nashville, Tennessee (1976);
y. Consolidated Dairies, Inc., Birmingham, Alabama (1976);
z. Brown's Dairy, Bowling Green, Kentucky (1976);
aa. Strader's Dairy, Hiseville, Kentucky (1976);
bb. Midwest Farms, Paducah, Kentucky (1976);
cc. Ehrler's Dairy, Louisville, Kentucky (1977); **[5]**

dd. Superior Dairies, Statesville, North Carolina (1977);
ee. Ryan Milk Company, Murray, Kentucky (1978);
ff. Ideal Pure Milk Company, Evansville, Indiana (1978);
gg. Farmbest, Jacksonville, Florida (1978);
hh. Avalon Dairies, Inc., Fayetteville, Tennessee (1979);
ii. C.A Stewart's Dairy, Inc., Bogalusa, Louisiana (1980);
jj. Pelican Creamery Co., New Iberia, Louisiana (1980); and
kk. Superior Dairies, Inc., Jacksonville, Florida (1980).

Flav-O-Rich

9. Flav-O-Rich, a corporation organized and existing under the laws of the State of Kentucky, is the wholly owned dairy processing subsidiary of DI. Its principal office is at 10140 Linn Station Road, Louisville, Kentucky. At all times relevant herein, Flav-O-Rich was engaged in commerce as "commerce" is defined in the Clayton Act and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

10. Flav-O-Rich is controlled by DI. DI makes, and is responsible for, all of Flav-O-Rich's significant policy decisions.

11. Flav-O-Rich is engaged in the processing and sale of fluid milk in the southeastern United States. At the time of the Farmbest acquisition, it operated 17 dairy plants in Alabama, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Tennessee and Virginia. Flav-O-Rich markets numerous dairy products including fluid milk, ice cream, yogurt, whipping cream and cottage cheese.

12. During the years ending December 31, 1976, 1977 and 1978, Flav-O-Rich had approximate total sales of, respectively, $186, $213 and $272 million. For its fiscal year ending August 31, 1978, Flav-O-Rich processed over one billion pounds of fluid milk. **[6]**

ACQUIRED COMPANY

Munford

13. Respondent Munford is a corporation organized and existing under the laws of the State of Georgia with its principal office at 68 Brookwood Drive, N.E., Atlanta, Georgia. At all times relevant herein, Munford was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

14. Munford is a diversified company with the largest portion of its business in convenience stores. At the time of the acquisition, Munford operated or franchised over 1,000 convenience food store units throughout the southeastern United States under the name Majik Markets. Munford's approximate total sales during its fiscal years ending January 1, 1976, December 30, 1976 and December 29, 1977

were, respectively, $273, $335 and $340 million. In 1977, Munford had total assets of approximately $126 million.

Farmbest

15. Prior to the acquisition, Farmbest, a corporation organized and existing under the laws of the State of Delaware, was the wholly owned subsidiary of Munford. Munford had acquired Farmbest from IU North America, Inc., in 1975. Farmbest's principal office was at 7901 Baymeadows Way, Jacksonville, Florida. At all times relevant herein, Farmbest was engaged in commerce as "commerce" is defined in the Clayton Act and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

16. Farmbest's approximate total sales during its fiscal years ending January 1, 1976, December 30, 1976 and December 29, 1977 were, respectively, $102, $103 and $105 million. Farmbest's approximate net income during these years was, respectively, $1.2, $1.5 and ($.5) million. For the first eight months of 1978, Farmbest had sales of approximately $73 million and a net income of approximately $.3 million. On December 29, 1977, Farmbest had assets of approximately $24 million.

17. Prior to the acquisition, Farmbest distributed and sold over 250 dairy items including fluid milk, cream, ice cream, cottage cheese, yogurt, sour cream and fruit drinks. It had five dairy plants and thirty distribution centers. Fluid milk was processed at plants in Jacksonville and St. Petersburg, Florida; Bristol, Virginia; and Montgomery, Alabama. Ice cream was manufactured in Jacksonville, Florida and Sylacauga, Alabama. The Bristol plant manufactured most of Farmbest's cultured products such as cottage cheese, yogurt and sour cream.

18. Prior to the acquisition, Farmbest was engaged in the processing and sale of fluid milk in the southeastern United [7] States. During the 12 months prior to the acquisition, Farmbest processed almost a half billion pounds of fluid milk. It distributed dairy products in Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia and Puerto Rico.

BARRIERS TO ENTRY

19. The number of fluid milk processors has declined since 1950. Nationally, there were 8,195 processors in 1950, but only 1,439 by 1976.

20. There are high barriers to entry into the processing and sale of fluid milk, including economies of scale and entrenchment of established fluid milk processors in their markets. Often a dairy's brand recognition will contribute toward solidifying its market position, and

in their respective southeastern markets, both Flav-O-Rich and Farmbest have consumer recognized brands.

21. DI's vertical integration into dairy processing also creates a barrier to entry in those markets where it is both a processor and a major raw milk supplier. Potential entrants are deterred from entering a market in which they will have to compete with a vertically integrated cooperative from whom they must obtain all or a significant portion of their raw milk supplies.

TRADE AND COMMERCE

22. A relevant line of commerce is the processing and sale of fluid milk.

23. The Tri-City, Knoxville, Birmingham, Montgomery and Columbus markets are relevant sections of the country. Prior to the acquisition, Flav-O-Rich and Farmbest were actual competitors in the processing and sale of fluid milk in each of these markets. During September 1, 1976 through August 31, 1978 ("1976–78"), both Flav-O-Rich and Farmbest normally ranked among the four largest dairy processors in each of these markets. Their combined shares in each market exceeded 20%.

24. Concentration is high in the relevant line of commerce in the Tri-City, Knoxville, Birmingham, Montgomery and Columbus markets. During 1976–78, top four processor concentration normally exceeded 75% and top eight often was 100%.

25. Furthermore, prior to the acquisition, Flav-O-Rich and Farmbest were competitors in other metropolitan areas in the states of Alabama, Georgia, Kentucky, North Carolina, Tennessee, Virginia and West Virginia. [8]

EFFECTS

26. The effect of the acquisition of Farmbest by DI may be substantially to lessen competition or to tend to create a monopoly in the processing and sale of fluid milk in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

a. actual competition between Flav-O-Rich and Farmbest has been eliminated;

b. Farmbest was eliminated as an independent competitor and consumers have been denied the benefits of the competitive vigor of Farmbest;

c. high barriers to entry have been increased;

d. high levels of concentration have been increased;

e. other dairy mergers and acquisitions may be triggered in response to the anticompetitive pressures created by this acquisition.

VIOLATIONS

27. For the foregoing reasons, by acquiring Farmbest, DI violated Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

28. For the foregoing reasons, by entering into and consummating the stock purchase agreement, DI and Munford violated Section 5 of the Federal Trade Commission Act, as amended.

FINAL ORDER RETURNING MATTER TO ADJUDICATION AND DISMISSING COMPLAINT

On July 31, 1980, the Commission issued an administrative complaint alleging that Dairymen, Inc. ("Dairymen") and Munford, Inc. ("Munford") violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission when Dairymen acquired Farmbest Foods, Inc. ("Farmbest") from Munford in 1978. On November 4, 1982, this matter was withdrawn from adjudication so that the Commission could consider a proposed consent. On March 25, 1983, the staff of the Bureau of Competition and the Bureau of Economics forwarded their analyses and recommendations to the Commission regarding the proposed consent.

At the time this action was filed, the Commission had been monitoring the Class I milk processing industry for more than twenty-five years. In the first ten years of its corporate existence, Dairymen acquired over thirty-one Class I milk processing plants in the southern United States. None of these individual acquisitions were challenged either by the Commission or by the Department of Justice ("Department") under Section 7 of the Clayton Act; however, in 1973, the Department brought a civil action against Dairymen alleging that it violated Section 2 of the Sherman Act and Section 3 of the Clayton Act by various [2] acts affecting the upstream raw milk industry.[1]

[1] As part of the complaint, the Government alleged that eighteen of these acquisitions evidenced Dairymen's intent to monopolize the market in Grade A milk in the southeastern United States by foreclosing raw milk competitors from access to processing facilities and thereby forcing non-member producers either to join Dairymen's cooperative or to exit the raw milk market. The Government, however, did not seek to ban Dairymen from making future acquisitions in the relevant market. The District Court entered a supplemental judgment dismissing the attempted monopolization portion of the Government's complaint. The Sixth Circuit Court of Appeals in a *per curiam* opinion reversed the District Court's attempted monopolization holding, instructing the District Court in the correct legal standard and directing it to determine relevant geographic submarkets for evaluating the attempted monopolization allegation on the basis of "commercially significant areas in which [Dairymen's] customers could turn to other suppliers." *United States v. Dairymen, Inc.*, 660 F.2d 92 (6th Cir. 1981).

On remand, the District Court found that the Government had met its burden of showing that Dairymen had the requisite specific intent to monopolize a relevant submarket of five southeastern states (Kentucky, Tennessee, Georgia, Louisiana and Mississippi), but that the Government had failed to show a dangerous probability of success. The District Court held the evidence was insufficient to show that Dairymen had the power to control

(footnote cont'd)

This matter was in litigation throughout the development of the Commission's case concerning the Farmbest acquisition.

The Commission's complaint alleged that the Farmbest acquisition substantially lessened competition in the sale of Class I milk products in five standard metropolitan statistical areas ("SMSAs"): Johnson City-Kingsport-Bristol, Tennessee-Virginia; Knoxville, Tennessee; Birmingham, Alabama; Montgomery, Alabama; and Columbus, Georgia-Alabama. The evidence adduced in discovery to date, however, tends to support geographic markets of broader scope. For example, products were shipped 135 miles from the Bristol plant, 200 miles from the Montgomery plant, 140 miles from the Columbus, Georgia, plant and 195 miles from the Knoxville plant. The recent findings by the District Court on remand in *U.S. v. Dairymen, Inc., supra,* also suggest broader geographic markets at the processing level. In that case the evidence showed that raw milk handlers in the five southeastern states market have purchased milk outside of that territory—sometimes from as far away as Wisconsin and Minnesota.[2] On the [3] other hand, our record does not conclusively rebut the plausibility of more confined markets. Shipments data are incomplete; thus, we are unsure of the frequency of or reason for the longer shipments. The proposed testimony of trial witnesses uniformly perceives the relevant geographic markets to be "local", although the scope of that definition is unclear.

The fact that the contours of the relevant geographic markets in milk processing are unclear raises the concern that the Farmbest acquisition has not had anticompetitive effects. Other factors strengthen that concern. The record indicates that entry barriers into milk processing are not high. A steady and substantial decline in the number of dairy processors for well over a decade has made numerous physical facilities available. Brand loyalty appears to be an insignificant competitive factor: witnesses do not emphasize it and Flav-O-Rich has not used the Farmbest name since the acquisition. Thus, the apparent lack of entry into the market appears to be due to increasing scale economies, rather than to any market power exercised by Dairymen Inc.[3] These factors, coupled with the lack of other evidence of anticompetitive effects, have dissipated our initial concern about this acquisition. Therefore, because the record does not support a finding that the acquisition is likely to injure competition, the Commission no longer has reason to believe that respondent violated Section 7 of the

prices or exclude competitors in the relevant five-state market. *United States v. Dairymen, Inc.,* Civil Action No. C 7634A (W.D. Ky. June 9, 1983, slip op. at 14–15).

[2] *United States v. Dairymen, Inc., supra,* slip op. at 5.

[3] The District Court decision on remand in *Dairymen* also supports this view. The Court there held that Dairymen did not have the power to raise or fix prices or exclude competitors in the five Southeastern states market. *Dairymen, supra,* slip op. at 14–15.

Clayton Act or Section 5 of the Federal Trade Commission Act. Therefore,

It is ordered, That this matter be returned to adjudication and

It is further ordered, That the complaint issued in the matter be, and it hereby is, dismissed.

Chairman Miller did not participate in the decision of the Commission. Commissioner Pertschuk voted in the negative.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK

I dissent from the Commission's decision to reject a proposed settlement and dismiss the complaint in this matter. The settlement that the Bureau of Competition has recommended was reached between complaint counsel and respondents shortly before trial was to begin, and consequently, we are not presented with a complete trial record. However, we have ample evidence showing there is reasonable support for the allegations in the 1980 complaint. Moreover, the relief in the proposed consent agreement provides for a reasonable resolution of this litigation by requiring Dairymen, which has been a prolific acquirer of smaller dairy processors, to obtain prior approval for future acquisitions for a limited period.[1] Therefore, the proper course is to accept the agreement for public comment.

The principal objection of the majority to accepting this agreement is the argument that the geographic markets may be substantially larger than the SMSA markets alleged in the complaint. The majority does not know what the appropriate market is but suggests indirectly that it may be a five-state area, in order to include points to which processed milk was [2] shipped from the five SMSA's—points that are in some instances 200 miles away.[2]

The problem with the majority's theorizing that the market must be at least large enough to accommodate any shipping is that this reasoning leads to a market for milk processing that is likely to be the North American continent. If we examined the processed milk shipping patterns from the hypothetical five-state market (which we have not), I have little doubt we would find that milk is shipped outside the area. If we expanded the circle to include those shipments, we would find more shipments outside that area, and so on. In short, the majority has created an impossible-to-meet standard for geographic mar-

[1] Dairymen, one of the largest Class I milk processors in the southeast U.S., acquired thirty-one Class I milk plants in the southeast between its formation in 1968 and the acquisition of Farmbest in 1978. Since then, it has acquired eight more processing facilities.

[2] The majority makes an extensive reference to separate litigation involving the raw milk market, but the court's analysis of different allegations and a different product market is of limited use in deciding upon market definition here.

kets. Furthermore, it has ignored evidence more than adequate to support the result of this proposed settlement.

The point is not to draw a market that captures all shipping, but one that captures enough of it to reflect the basic dynamics of price competition. Thus, Professors Elzinga and Hogarty have argued in influential articles that the relevant questions are: (1) whether the great majority of products sold in the area were produced there, and (2) whether most production in the area was sold there.[3] At the time of trial preparation, [3] the staff did not have complete evidence on shipments, but they did have information showing that in four of the five markets more than 80% of milk sold in the SMSA was processed there in the year before the acquisition. In addition, several industry officials were prepared to testify that, notwithstanding the distances across which processed milk is shipped, prices in each SMSA varied independently from prices in the others and that from a business perspective they felt the individual SMSA's were separate markets. One processor told the staff that a Dairymen executive had tried to get him to fix prices in Knoxville and, further, had told him that the Nashville processors had been able to raise the price of wholesale milk in that SMSA by an agreement. If these cities were both in one large, multi-state market, such differences in pricing dynamics could not occur.

Commissioner Douglas argues that Farmbest and Flav-O-Rich cannot be part of an SMSA market if their plants are not located within the SMSA. This proposition is equivalent to stating that no geographic area can be a relevant market if there are shipments in from the outside or, alternatively, that sales of companies with shipments into a relevant geographic market from an outside plant cannot be considered as in the market. Neither of these conclusions is correct (otherwise, for example, no foreign manufacturer's imports into the U.S. would be considered as part of a U.S. market). [4]

Commissioner Douglas further argues that more than 50% of the production of Flav-O-Rich and Farmbest in any SMSA is shipped outside the SMSA (except in the case of Birmingham). Assuming this observation to be true (since, again, we have no trial record), the percentage shipped outside the SMSA's by these two companies does not tell us about shipments outside the SMSA's by all companies producing there. In addition, the "little out from inside" half of the Elzinga-Hogarty test is less dispositive than the "little in from the outside" half, because it turns on factual assumptions that may not hold true. The significance of shipments outside the area is that they

[3] *See* Elzinga and Hogarty, "The Problem of Geographic Market Delineation in Antimerger Suits," 18 *The Antitrust Bulletin* 45–81 (1973) and "The Problem of Geographic Market Delineation Revisited: The Case of Coal," 23 *The Antitrust Bulletin* 1–18 (1978). The first article suggests a 75% standard for both factors; the second suggests 90% might be more appropriate.

might be diverted inside the area if prices are increased as a result of interdependent or collusive pricing. However, this theoretical market self-correction requires disrupting existing supply contracts and customer relationships, and therefore may not occur or occur only after substantial delay. Moreover, the possibility of diverting production into the area gives even less comfort when the major "exporter" is the (now merged) dominant firm, which stands to benefit from higher prices and reduced output.

If the SMSA's (or SMSA's plus the immediate surrounding areas) are relevant markets, the acquisition substantially increased market concentration levels. The table below shows how market shares increased after the acquisition:

	Herfindahl Index		
City	**Pre-Acquisition**	**Post Acquisition**	**Change**
Columbus	3763	3986	223
Montgomery	2815	2928	112
Birmingham	2615	2824	210
Knoxville	1843	2296	454
Tri-Cities	3322	4107	785 [5]

All these market share figures meet the Justice Department's "likely to challenge" standards.

The majority also argues that entry barriers are not high because there are unused plants available. Yet the majority also says that lack of entry is due to economies of scale, suggesting that the unused facilities are inefficient and that the requirement of sufficient scale is itself a barrier. Moreover, I do not believe that we should insist on proof of substantial barriers to entry here, because such large increases in market share resulted from the acquisition.[4]

Whenever issues are complex and the results of litigation are difficult to predict, the parties often have heightened incentives to compromise and settle their differences. Complaint counsel and Dairymen followed that course here. Yet it is precisely because of the complexity of the issues and inability to predict a certain outcome that the majority now reasons that the settlement must be rejected. Their principal mistake is to introduce a proof standard that will often be impossible to meet and is likely to doom many settlements that are in the public interest. This consent agreement should be accepted as a reasonable end to this litigation.

[4] The majority's conclusion that entry barriers are low is based, in part, upon the belief that "[b]rand loyalty appears to be an insignificant competitive factor," as shown by Dairymen's abandonment of the Farmbest trade name. The majority has demonstrated the danger of deciding issues such as this without the benefit of an adjudicative record: Dairymen is presently using the Farmbest trade name on its aseptically packaged, shelf-stable milk, a new product in which Dairymen has invested millions of dollars in research, development, new production facilities and advertising.

CONCURRING STATEMENT OF COMMISSIONER GEORGE W. DOUGLAS

I fully endorse the analysis in the Commission Order in this matter. However, I would like to provide some additional analysis of the geographic market issues that Commissioner Pertschuk raises in his dissenting statement.

Commissioner Pertschuk supports treating five separate SMSAs—Columbus, Georgia; Montgomery, Alabama; Birmingham, Alabama; Knoxville, Tennessee; and Bristol, Tennessee (Tri-City)—as separate geographic markets in this case. However, this approach would not be consistent with treating Farmbest and Flav-O-Rich, the Dairymen processor subsidiary, as actual horizontal competitors, and would therefore logically require dismissing the complaint altogether.[1] Phillip Areeda and Donald Turner, among others, have noted that different areas can be treated as separate markets when the price of the relevant product differs from one area to another and price movements among those areas are relatively uncorrelated.[2] In its Merger Guidelines, the Justice Department has applied that approach to merger analysis, pointing out that

> the purpose of geographic market definition is to establish a geographic boundary that roughly separates firms that are important factors in the competitive analysis of a merger from those that are not.[3]

This implies that if each SMSA is treated as a separate market, then two firms that produce and sell the relevant product only in different SMSAs do not compete to a significant degree with one another, because the price that each firm charges does not significantly affect the price that the other firm charges. A merger between two such firms would be unlikely to substantially lessen actual horizontal competition. [2]

At the time of the acquisition, Farmbest operated processing plants in Bristol and Montgomery, while Flav-O-Rich operated processing plants in Columbus, Knoxville, and Birmingham. None of the five SMSAs included both a Farmbest and a Flav-O-Rich plant. These facts mean that Commissioner Pertschuk's approach requires accepting two conflicting hypotheses about each SMSA; the Knoxville SMSA, where Farmbest does not have a processing plant, provides an example. On the one hand, Commissioner Pertschuk suggests that the Knoxville SMSA should be treated as a separate geographic market.

[1] The complaint alleges only that the acquisition might eliminate actual competition between Farmbest and Flav-O-Rich in the five cited SMSAs. *Dairymen, Inc.*, Docket No. 9143 (Complaint), at 8–9.

[2] P. Areeda & D. Turner, II *Antitrust Law* 335 (1978).

[3] *Justice Department Merger Guidelines* (June 14, 1982), *reprinted in* 42 ATRR Special Supplement (June 17, 1982), at S–5.

This means by definition that shipments by firms such as Farmbest into the Knoxville SMSA are so inconsequential that they will not significantly affect prices and price movements within the SMSA. On the other hand, Commissioner Pertschuk suggests that shipments by Farmbest into the Knoxville area are so substantial that Flav-O-Rich's acquisition of Farmbest may substantially lessen competition within the Knoxville SMSA. These conflicting hypotheses cannot be reconciled, and accepting the first therefore logically requires rejecting the second and dismissing the complaint.[4]

Commissioner Pertschuk also suggests that the test developed by Professors Elzinga and Hogarty supports treating each SMSA as a separate geographic market. However, that test requires considering both (1) the percentage of the relevant product *sold* in a postulated market that is also produced there *and* (2) the percentage of product *produced* in a postulated market that is also sold there. Commissioner Pertschuk notes that substantial percentages of the processed milk that is sold in the five SMSAs are also produced there. [3] However, the record evidence also shows that both Farmbest and Flav-O-Rich sold large percentages of the milk they processed in each SMSA—well over fifty percent in four of the five SMSAs in 1977—in areas outside the SMSAs in which the milk was processed.[5] These data strongly suggest that the relevant geographic markets are substantially larger than the SMSAs upon which Commissioner Pertschuk relies.

Finally, the Commission's experience in *Southland Corp.* supports relying upon larger geographic markets. After the Commission sued to enjoin the acquisition at issue in that case, the District Court rejected its effort to define the relevant geographic market as the San Antonio SMSA. The Court noted that processing plants in areas as much as 345 miles away sold milk in San Antonio, and that plants located in San Antonio sold milk in areas as far away as Austin (77 miles), Laredo (153 miles), Waco (178 miles), and Houston (197 miles).[6]

In conjunction with the other evidence that the Commission Order discusses, these factors support the Commission determination that the complaint in this matter should be dismissed.

---

[4] Commissioner Pertschuk suggests that this argument implies that no geographic area could be treated as a separate market if shipments from outside its boundaries were made into the area. That implication should not be drawn from the argument. The key question is not whether *any* shipments are made into a given area, but rather whether the shipments from outside are or could be substantial enough to significantly influence prices and price movements within the SMSA. If they are—and they certainly seem to be in this case—then larger areas should be treated as the relevant geographic markets.

[5] Commissioner Pertschuk suggests that the "little out from inside" half of the Elzinga-Hogarty test is "less dispositive" than the "little in from outside" half. However, Professors Elzinga and Hogarty have not taken that position; they consider both halves of their test to be equally important. Moreover, it seems unlikely that "existing supply contracts and customer relationships" would make it any more difficult to change the magnitude of shipments *to* other areas than to change the magnitude of shipments *from* other areas.

[6] *FTC* v. *Southland Corp.*, 471 F.Supp. 1, 2–4 (D.D.C. 1979).

IN THE MATTER OF

BORG-WARNER CORPORATION, ET AL.

MODIFYING ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 8 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9120. Final Order, June 23, 1983—Modifying Order, Sept. 22, 1983

On September 22, 1983, the Federal Trade Commission modified its Final Order issued against Borg-Warner Corporation on June 23, 1983 (101 F.T.C. 863). The modification alters the reporting requirements of the annual director screening provisions contained in Paragraph IV of the Order.

OPINION OF THE COMMISSION

BY BAILEY, *Commissioner:*

Pursuant to Commission rule 3.55, 16 CFR 3.55 (1982), respondents in this proceeding filed on August 11, 1983, a "Petition for Reconsideration" ("Petition") of the Commission's final order in this matter. Respondents also filed a "Motion for Order Staying Effective Date of Decision and Tolling Statutory Time Period for Seeking Appellate Review." On August 19, 1983, complaint counsel filed their "Opposition to Respondents' Petition for Reconsideration." On September 2, 1983, respondent Borg-Warner filed a "Motion for Leave to File Reply," and on September 6, 1983, the remaining respondents also sought to file a reply to complaint counsel.

In their petition, respondents ask that the Commission reconsider and withdraw its June 23, 1983, final order in this matter, or in the alternative that the order be modified "to eliminate errors and unnecessary ambiguities." In their separate motion for a stay of the order, respondents ask the Commission, pending resolution of the issues contained in their reconsideration petition, to toll the sixty (60) day period by which respondents must file any petition for review of the Commission's decision and final order.[1]

Complaint counsel urge that the order not be withdrawn, but while they oppose some of the clarifying modifications proposed by respondent as unnecessary, complaint counsel do not oppose them all. Complaint counsel take no position on the issue of staying the order or tolling the running of the statutory period for review.

Respondent's main argument is that to justify the entry of its order

[1] Commission rule 3.55 states that petitioning for reconsideration of a decision or order does not affect the 60 day statutory period (running from, in this case, the July 22, 1983 service date) within which respondents may petition for federal court review, unless the Commission orders a stay of the effective date of a decision or order, or tolls the running of the statutory period for filing for judicial review.

in this matter, the Commission must demonstrate a "cognizable danger of a recurrent violation"[2] that is greater than that demonstrated in *TRW v. FTC* 647 F.2d 942 (9th Cir. 1981). [2] In *TRW*, the court, while affirming the finding of a Section 8 violation and rejecting respondent's *de minimis* commerce defense, set aside the proposed order as an abuse of the Commission's discretion. Respondents argue that the only element distinguishing the present case from *TRW* is the Commission's conclusion that the record does not show that respondents have a screening procedure to guard against future interlocking directorate possibilities, and that they have not offered assurances that they will comply in the future with the provisions of Section 8 of the Clayton Act. For the first time in this five year proceeding respondents now make the argument that respondent Borg-Warner established a formal Section 8 screening procedure in March 1979, the year *after* issuance of the Commission's complaint. Respondents add that this new procedure supplants an earlier one that had actually screened (and approved) the seating on respondent corporate boards of the two individual directors found liable in this case. With regard to the respondent Bosch corporations' Section 8 compliance, respondents offer no specific evidence of a formal screening procedure, but assure the Commission of sensitivity to Section 8 obligations on the part of the Bosch corporations, and note the availability of counsel should the unlikely need arise for Section 8 screening.

Rule 3.55 is quite specific as to what constitutes grounds for the Commission's reconsideration of a final order. It states in pertinent part: "Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

Both complaint counsel's proposed draft order submitted to the ALJ in 1980 and the ALJ's proposed order in his initial decision contained screening procedure provisions similar to those adopted by the Commission. Yet, at no time in this proceeding heretofore has respondent Borg-Warner made known the existence of the screening procedure described in the Longtin affidavit, despite ample opportunity to do so, and despite numerous other written and oral submissions that did become part of the record of this proceeding.[3] [3] Thus, at the very outset, respondents have failed to meet the requirements of the rule

[2] *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953).

[3] In Respondent's Joint Appeal Brief (RAB), filed September 2, 1980, respondents attacked the reporting provisions contained in the ALJ's initial decision, labeling them as "elaborate and burdensome" and "wholly inappropriate." Yet, respondents made no mention of the existence of the screening procedures outlined in the Longtin affidavit (RAB, 52). It is hard to see how the screening and reporting procedures that the Commission included in its final order present any truly "new" questions in the sense of rule 3.55.

under which they seek relief.[4]

But a further detailed consideration of respondent's main argument demonstrates the incorrectness of respondent's assertion that the Commission in this case is subject to the *TRW* precedent where the court declined to enter an order on that record. Contrary to the assertions of respondents, there are substantial differences both in the facts and in the orders of the two cases. Unlike the *TRW* situation, where the director in question discontinued one of the interlocked directorships "before being apprised of the FTC investigation," 647 F.2d 954, and seven months before issuance of the Commission's complaint, respondent Hans Merkle remains to this day an interlocked director between Borg-Warner and Bosch GmbH, the controlling parent of Bosch U.S. The Commission found this interlock in violation of Section 8 of the Clayton Act, and the continued existence of this interlock is itself a justification for some form of order. Moreover, Merkle was interlocked between Borg-Warner and its competitor Bosch U.S. until near the end of the trial in this case. The *TRW* court made it clear that the explicit circumstance of the director's early resignation was a major justification for the court's attitude towards relief. *Id.*

The question of further injunctive relief was carefully considered by the Commission in the majority decision.[5] In several respects, the order is narrower than the order proposed by the ALJ in his initial decision (Slip Op. at 31) [101 F.T.C. at 942 (1983)]. Much of the relief in the Commission's order—including the resignation of respondent [4] Merkle—is not even triggered until and unless the competition found by the Commission is restored between the respondents. The screening procedure in the order is justified by the lack of record evidence of any timely response to the need for Section 8 screening procedures by any of respondents, unlike the facts of *TRW*. The order is applicable only to a limited line of automotive aftermarket parts, except with regard to interlocks between the named corporate respondents. In *TRW* the order extended to all products and services. While the ban against interlocks between the corporate respondents is without dollar limitations, interlocks between corporate respondents and other competing corporations require that any such interlocks involve at least $5 million in commerce on the part of one of the

[4] The decision of the Court of Appeals for the Ninth Circuit in *TRW, supra*, upon which respondents rest their main argument, was decided *after* briefing and oral argument in this case on appeal to the Commission. It might therefore be argued that respondent has had no opportunity earlier than now to argue the relevance of *TRW*. But on January 6, 1982, in a reply brief filed in connection with a motion to dismiss this proceeding, respondents discussed *TRW* in relation to another issue in this case. In choosing to wait until the present to add their thoughts on *TRW* to the remedy questions that have existed throughout this proceeding, respondents lack credence that they have had no opportunity heretofore to argue *TRW*.

[5] Contrary to respondents' assertion that the Commission's decision is a "plurality opinion," both the decision and the order were issued by recorded 3–2 Commission vote.

corporate entities involved. No such dollar limitations were contained in the *TRW* order.[6] Thus, the Commission has drawn a narrow order that is much more limited in effect than the order that was set aside in *TRW*.

The Commission's finding of a cognizable danger of recurrent violation turns on the combination of factors in this record that distinguishes it from *TRW*. Even with respondents' new filing, we have no way now of assuring that respondent Borg-Warner's "new" post-complaint screening procedures are any more effective than the alleged informal screening that failed to rule out the Bacher and Merkle interlocks, despite record evidence of corporate knowledge of the competitive products common to both Borg-Warner and Bosch U.S. The director involved in *TRW* had sought Section 8 counsel prior to the board membership in question, and had passed this screening because the particular competition in focus in that case did not even come into existence until well after the director had been seated. The *TRW* court was persuaded of the "sincerity and good faith" associated with the facts of the screening procedure there. 647 F.2d at 954. Here there is no assurance that the previously undisclosed Borg-Warner post-complaint screening procedures—apparently born of this litigation, although, ironically, never part of it until now—will long survive it. Nor has the "current efficacy" of these procedures been subject to the kind of scrutiny that the *TRW* court was able to give the pre-complaint screening procedures that were a part of the adjudicative record of that litigation. There is no evidence even now of any formal Bosch screening procedures, and the strongest indication of any Section 8 compliance program on the part of Bosch seems to date from November 1981 (Thompson affidavit).[7] The existing Merkle interlock between Borg-Warner and Bosch GmbH, the persistence of the interlock with Bosch U.S. until late in this proceeding, and the **[5]** adoption of formal screening procedures after issuance of the Commission's complaint, all justify the Commission's very narrow order in this proceeding. Many of the arguments respondents have relied upon favoring withdrawal of the order are coincidental with the commencement of this litigation, a record of belated Section 8 sensitivity that itself establishes the need for some modest injunctive relief.

As an alternative to withdrawal of the Commission's June 23, 1983 order, respondent seeks various order modifications, some of which are unopposed by complaint counsel. First, respondents argue that

[6] In addition to these differences between the Commission's order and the one issued by the ALJ, the Commission limited the term of the ALJ's perpetual order to ten years.

[7] Bosch U.S.'s screening procedure, for instance, amounts to "counseling current and potential directors to avoid outside directorships which might come within the proscription of Section 8." "Respondents Robert Bosch GmbH's, Robert Bosch Corporation's and Hans L. Merkle's Reply to the Opposition to Petition for Recommendation," September 6, 1983 at 2–3.

the annual director screening provision contained in paragraph IV of the order does not track the requirements of order paragraphs I(b) and II(b), to the effect that future interlocks between corporate respondents and other corporations be barred only in the event of a volume of competitive commerce in automotive parts for the aftermarket exceeding $5 million on either leg of any such prospective interlock. These dollar limitations on proscribed director interlocks are not applicable to interlocks between Borg-Warner and any Bosch corporation in any competitive line of commerce, which are subject to an outright ban. Respondents rely on language in the Commission's opinion (Slip Op. at 31) [101 F.T.C. at 942] to the effect that some dollar amount limitation relative to annual screening of directors is appropriate in the order relative to paragraphs I(b) and II(b).

There are, therefore, distinctly two different situations the order's reporting requirements need guard against. It was the Commission view that the existing reporting requirement of paragraph IV, which required the reporting of all products and services of all common corporate directorships, was the simplest survey approach to insure against either kind of offending overlap. However, complaint counsel do not oppose a modification of the reporting requirements that more specifically tracks the narrower order proscription alluded to in the Commission's opinion. Therefore, the annual director screening provisions of the order will be modified with respect to that portion of the annual reports dealing with directors of named respondents who are also directors of other corporations.[8] It will be respondents' obligation to assure that directors are screened so as to record only those interlocks with other corporations 1) where both the interlocked respondent firm and the other corporation produce automotive parts for the aftermarket, and 2) where the amount of annual sales of such parts by either such other corporation *or* Borg-Warner or Bosch corporate respondent exceed $5 million. [6]

Respondents' second major argument for modification of the order is that its coverage be limited to interlocks involving competition between companies in sales in the United States. Respondents' concern is that order paragraphs I(b) and II(b) do not make clear that the proscribed interlocks between corporate respondents and other corporations are confined to competitive products produced or sold in the United States. The Commission's opinion generally speaks of commerce in the United States in discussing the law violations found in the case, although the final order reaches corporations that do not sell in the United States if they substantially control subsidiaries that do.

[8] The modification bifurcates the old paragraph IV of the June 23, 1983 order into a new paragraph IV, applicable only to respondent Borg-Warner, and a new paragraph V, applicable to respondent Bosch Corporations. (Old order paragraphs V and VI are accordingly renumbered VI and VII, respectively).

In addition to the context of the opinion, we believe the order's definition of competition, both when it speaks of a corporation's "business and location" in competition with another firm and when it speaks of such an interlock's potential to violate a U.S. antitrust law further clarifies the necessary competitive product coverage of the order as commerce in the United States, even if such commerce is that of a controlled subsidiary of a foreign parent. The Commission's order may be construed by reference both to the Commission's complaint and the findings of fact accepted in its decision. *Ostler Candy Co. v. FTC,* 106 F.2d 962, 966 (10th Cir. 1939) *cert. denied* 309 U.S. 675 (1940).

Respondent's third request is to ask for a change in the use of the term "board of management" in the order so that it applies only to respondent Bosch GmbH, whose board of management is approximate to the U.S. term "board of directors." Respondents argue that the Commission's use of terms other than "boards of directors" invites confusion, unless confined to Bosch GmbH's "board of management," since a variety of technical terms similar to "board of management" are typical of foreign corporate structures, and yet are not truly equivalents of the U.S. term, "boards of directors." It is simply the Commission's intention to extend the order's coverage to boards of directors of U.S. corporations or their functional equivalents in foreign corporate structures. While the use of a single term or even two terms may not exhaust the lexicon of "board" synonyms, we believe the intent of the law and of the Commission's decision make the context of the Commission's order clear. Nevertheless, the Commission will insert into the order a new definitional phrase for "boards of directors" that seeks to clarify this point. References to "board of management" will be deleted in the order except in the definitional section, where specific reference to "board of management" is confined to Bosch GmbH. [7]

Other minor changes sought by respondents will also be made by the Commission, including deletion of the second use of the term "any individual" in the prefatory language in paragraph II of the order, use of corrected cross-references to substantive order paragraphs I and II appearing in the annual director screening provisions of the order, and deletion of references to "service" markets in paragraphs I(b) and II(b) of the order.

The modifications of the Commission's order in this proceeding obviate the need for further consideration of respondent's motion for a stay of the final order or for a tolling of the time within which to file for federal court review of this matter pursuant to 15 U.S.C. 45(c). The order, as herein modified, shall be reissued as of this date. Completion of service of this modified order will therefore recommence the statutory time within which respondents may seek judicial review.

As stated in the above opinion, respondents' Petition for Reconsideration is granted in part and denied in part. In all other respects, the Commission denies respondents' requested relief.

DISSENTING STATEMENT OF CHAIRMAN JAMES C. MILLER III[1]

When the Commission issued its original order in this matter, I dissented on several grounds. In sum, I urged the Commission to remand the case to the Administrative Law Judge for an expedited hearing on the issues of whether any likely anticompetitive effects of the challenged interlock were more than *de minimis* in nature, whether the proceeding was legally moot, and whether complaint counsel had successfully borne its burden of showing that injunctive relief was warranted. Subsequently, respondents filed a motion for reconsideration, alleging that the Commission's initial order was based on the erroneous premise that the corporate respondents had no effective director screening programs to guard against Section 8 violations.[2]

None of the arguments or alleged facts in the motion for reconsideration and the accompanying affidavits have altered my original position. Indeed, they have strengthened my belief that remand is the appropriate course here.

The motion for reconsideration, together with complaint counsel's response and the majority's opinion, add yet another unsettled issue to those requiring further administrative hearings. Hence, I would now add the existence and effectiveness of the corporate respondents' director screening programs to those issues on which remand is necessary.[3] [2]

I regret to find that the Commission majority has decided to issue an order on the basis of even greater uncertainty than was apparent when I filed my previous dissent in this matter.

ORDER MODIFYING FINAL ORDER

An opinion and final order in this matter having been issued on June 23, 1983 [101 F.T.C. 863 (1983)]; respondents having been served by mail with the said opinion and order on July 22, 1983; respondents

[1] Commissioner George W. Douglas joins in this statement.

[2] In the alternative, respondents moved that the Commission clarify, correct, and narrow the Commission's original order in various ways. I do not dissent from those portions of today's majority opinion that grant certain of those changes. If an order must issue, this modified order is certainly an improvement. However, I dissent because I believe it inappropriate for the Commission to issue *any* order against these respondents, given the uncertain and sparse state of the current record.

[3] While the existence of an effective director screening process is obviously a relevant issue, I am not content simply to accept as fact the assertions made on this issue in the respondents' motion for reconsideration and in the accompanying affidavits. I believe prudence would dictate further evidentiary hearings on the point.

having petitioned for reconsideration of said opinion and order on August 11, 1983; and the Commission, for the reasons stated in the accompanying opinion, having determined to grant in part, and deny in part, respondents' petition for reconsideration;

It is ordered, That the final order to cease and desist be, and hereby is, modified as follows:

Modified Final Order

This matter has been heard by the Commission upon the appeals of respondents and complaint counsel from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in its opinion issued June 23, 1983 [101 F.T.C. at 919 (1983)], the Commission has determined to deny the appeal as to respondents and as to complaint counsel. The Commission further has determined to grant in part but to deny in part respondents' petition for reconsideration of this order. Accordingly, [2]

It is further ordered, That the findings of fact and initial decision of the Administrative Law Judge be adopted insofar as not inconsistent with the findings of fact and conclusions of law contained in the June 23, 1983 opinion.

The following definitions shall apply in this order:

Bosch Corporation means Robert Bosch Corporation (Bosch U.S.), Robert Bosch GmbH (Bosch GmbH), their controlled subsidiaries, or the successors or assigns of either corporation.

Competitor means a corporation that by virtue of its business and location is in competition with the subject corporation, so that elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

Board of Directors means the board of directors of any United States corporation, the board of management of Bosch GmbH, or the functional equivalent of a board of directors of any other foreign corporation.

I

It is ordered, That respondent Borg-Warner and its successors and assigns shall forthwith cease and desist from having, and in the future shall not have, any individual serve as a director who

(a) serves at the same time on the board of directors of any Bosch Corporation as long as such corporation is a competitor in the production or sale of any product or service with Borg-Warner; or

(b) serves at the same time on the board of directors of any corporation as long as such corporation is a competitor of Borg-Warner in the production or sale of automotive parts for the aftermarket, and as long as the revenues of either corporation derived from the product market or markets in which they are competitors exceed five million dollars; or

(c) fails to submit to Borg-Warner any statement required by paragraph IV of this order.

The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

II

It is further ordered, That respondents Bosch GmbH and Bosch U.S. and their successors and assigns shall forthwith cease and desist from having, and in the future shall not have, any individual serve on their board of directors who [3]

(a) serves at the same time on the board of directors of Borg-Warner, as long as Borg-Warner is a competitor in the production or sale of any product or service with the Bosch Corporation on whose board the director sits; or

(b) serves at the same time on the board of directors of any corporation as long as such corporation is a competitor of the Bosch Corporation on whose board the director serves in the production or sale of automotive parts for the aftermarket, and as long as the revenues of either corporation derived from the product market or markets in which they are competitors exceed five million dollars; or

(c) fails to submit to Bosch GmbH or Bosch U.S. any statement required by paragraph V of this order.

The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

III

It is further ordered, That respondent Hans L. Merkle shall forthwith cease and desist from serving, and in the future shall not serve, as a director both of Borg-Warner and of any Bosch Corporation that is a competitor of Borg-Warner. The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

IV

It is further ordered, That within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, respondent Borg-Warner shall obtain a written, certified statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for reelection) and from each nominee for a directorship or seat on the board of directors (who is not then a director) showing

(a) the name and home mailing address of each director or nominee; and

(b) in the case of any director who then serves as a director, or has been nominated to serve as a director at the time of the statement, of any Bosch Corporation, the name and principal office mailing address of such Bosch Corporation, and a listing of each product produced or sold by such Bosch Corporation. [4]

(c) in the case of any director who then serves as a director, or has been nominated to serve as a director at the time of the statement, of any other corporation that produces or sells automotive parts for the aftermarket, as defined by the Commission in its opinion, the name and principal office mailing address of each such other corporation, and a listing of each such automotive aftermarket part product, *provided* that the revenue derived from the production or sale of such product by either such other corporation(s) or Borg-Warner exceeds five million dollars.

The requirements of this paragraph shall not apply to elections of directors occurring after ten (10) years from the effective date of this final order.

Nothing in this paragraph shall be construed to relieve respondents of their obligations under paragraph I(a) above due to any error or omission contained in any written statement received pursuant to this paragraph.

V

It is further ordered, That within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, respondents Bosch GmbH and Bosch U.S. shall obtain a written, certified statement from each member of their board of directors (except directors whose terms expire at the next election and who are not standing for reelection) and from each nominee for a directorship or seat on the board of directors (who is not then a director) showing

(a) the name and home mailing address of each director or nominee, and

(b) in the case of any director who then serves as a director, or has been nominated to serve as a director at the time of the statement, of Borg-Warner Corporation, a statement that the director serves on such corporation, and a listing of each product produced or sold by Borg-Warner Corporation.

(c) in the case of any director who then serves as a director, or has been nominated to serve as a director at the time of the statement, of any other corporation that produces or sells automotive parts for the aftermarket, as defined by the Commission in its opinion, the name and principal office mailing address of each such other corporation, and a listing of each such automotive aftermarket part product, *provided* that the revenue derived from the production or sale of such product by either such other corporation(s) or Bosch Corporation exceeds five million dollars. [5]

Provided, however, That in complying with the provisions of paragraph V(b) or (c), the information to be furnished to Bosch GmbH concerning its directors may be limited to those corporations engaged in commerce within the United States and those products sold or offered for sale by such corporations within the United States.

The requirements of this paragraph shall not apply to elections of directors occurring after ten (10) years from the effective date of this final order.

Nothing in this paragraph shall be construed to relieve respondents of their obligations under paragraph II(a) above due to any error or omission contained in any written statement received pursuant to this paragraph.

VI

It is further ordered, That within forty-five (45) days of the effective date of this final order, and annually for a period of ten (10) years thereafter, respondents Borg-Warner, Bosch GmbH, and Bosch U.S. shall file with the Commission separate, written reports setting forth in detail the manner and form in which each has complied with this order. Copies of the statements obtained pursuant to paragraphs IV and V of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph.

VII

It is further ordered, That respondents Borg-Warner, Bosch GmbH, and Bosch U.S. shall notify the Commission at least thirty (30) days prior to any change in the corporations or in their relationships to each other such as dissolution, assignment, or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other change in the corporations which may affect compliance obligations arising out of this order. The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

Chairman Miller and Commissioner Douglas dissented.