

## IN THE MATTER OF

## AMOCO OIL COMPANY

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

*Docket C-3655. Complaint, May 7, 1996--Decision, May 7, 1996*

This consent order requires, among other things, the Chicago-based corporation to possess competent and reliable scientific evidence to substantiate claims regarding the environmental benefits, engine performance, power, acceleration, or engine cleaning ability of any gasoline.

*Appearances*

For the Commission: *Michael Dershowitz and Sidney N. Knight.*

For the respondent: *Elroy H. Wolff, Sidley & Austin, Washington, D.C. and James M. Amend, Kirkland & Ellis, Chicago, IL.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Amoco Oil Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Amoco Oil Company is a Maryland corporation, with its offices and principal place of business located at 200 East Randolph Drive, Chicago, Illinois.

PAR. 2. Respondent Amoco Oil Company has advertised, offered for sale, sold, and distributed gasoline and other petroleum products including Amoco Silver 89 octane gasoline, and Amoco Ultimate 92 and 93 octane gasolines.

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

PAR. 4. Respondent has disseminated or caused to be disseminated advertisements for Amoco Silver and Amoco Ultimate

gasolines, including but not necessarily limited to the advertisements attached hereto as Exhibits A through I. The aforesaid advertisements contain the following statements and depictions:

A. A television advertisement for Amoco Ultimate:

Announcer: What's clear? Crystal clear Amoco Ultimate.

[Video: Depiction of clear liquid being poured]

What isn't? All other premium gasolines.

[Video: Depiction of colored liquids in laboratory flasks]

What's clear? Amoco Ultimate is the only premium refined an extra step to remove harmful impurities. Harmful impurities you, as a premium user, don't want.

[Video: Depiction of laboratory flask containing a dark colored viscous liquid]

[Super #1: PNA Impurities Simulated]

[Super #2: Based On Reduction In Hydrocarbon Exhaust Emissions From Extra Refining Step.]

What's clear?

Why we do it?

For unsurpassed performance and a cleaner environment. Crystal clear. Crystal clear Amoco Ultimate.

[Exhibit A]

Superscript #1 appears on the screen for approximately 1.5 seconds.

Superscript #2 appears on the screen for approximately 2.5 seconds.

B. A television advertisement for Amoco Ultimate:

Announcer: What's clear? Crystal clear Amoco Ultimate.

[Video: Depiction of clear liquid being poured]

What isn't? All other premium gasolines.

[Video: Depiction of colored liquids in, laboratory flasks]

What's clear? Amoco Ultimate is the only premium refined an extra step to remove harmful impurities other premiums leave in. Impurities that can rob your engine of performance and pollute the air.

[Video: Depiction of laboratory flask containing a dark colored viscous liquid]

[Super: Based On Reduction In Hydrocarbon Exhaust Emissions From Extra Refining Step. PNA Impurities Simulated]

What's Clear? If you use premium, now you have a reason to switch. Crystal clear. Crystal Clear Amoco Ultimate.

[Exhibit B]

Superscript appears on the screen for approximately 2.5 seconds.

C. A television advertisement for Amoco Silver:

Announcer: Hop into Amoco and take the Silver one tank test.

[Video: Depiction of dirty rabbit on top of full gas gauge]

Fill up with one Tankful of Amoco Silver; it'll clean up the filthiest fuel injectors. Not five tankfuls. Not three tankfuls. New and improved Amoco Silver with even more cleaning power does it in just one tankful or your money back.

[Video: Depiction of dirty rabbit becoming clean as fuel gauge goes to empty]

So take the Silver One Tank Test and bring back the acceleration. Bring back the power.

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[Super: For your purchase of one tankful of Amoco Silver. Eight Gallon Minimum. See your Amoco dealer for details.]

Video tagline: BRING BACK THE POWER

[Exhibit C]

D. A television advertisement for Amoco Ultimate:

Announcer: It's your car. Your baby. Your one and only. Everything about it has to be as good as gold. And when you're runnin' on Amoco Ultimate, you're running clean. Amoco Ultimate is refined an extra step for quality. And like all Amoco gasolines, Ultimate cleans clogged fuel injectors in one tankful. To keep your entire fuel intake system running clean.

[Exhibit D]

E. A radio advertisement for Amoco Silver:

Bert: Can I help you sir?

Guy: I'm here to take your test

Bert: Oh, our Amoco Silver One-Tank-Test.

\* \* \* \*

Bert: Sir, sir, you want an empty gas tank so you can fill-up with Amoco Silver.

Guy: I guess now's as good a time as any to take the test.

\* \* \* \*

Bert: Look, just one tankful of new and improved Amoco Silver...

Guy: Yes?

Bert: ... can help solve dirty-engine problems.

Guy: Solve engine problems? Oh no, science.

Bert: Now with even more cleaning power...

Guy: Ooh.

Bert: ... Amoco Silver cleans your fuel injectors as simple as A-B-C.

Guy: A-B-C! I always pick "D" -- all of the above.

Bert: Amoco Silver cleans fuel injectors in one tankful, not five or three like some gasolines.

Guy: Wow.

Bert: Or Amoco pays you back for your purchase.

\* \* \* \*

[Exhibit E]

F. A radio advertisement for Amoco Ultimate:

\* \* \* \*

Engine: ... I'm a dirty little engine. OK? There I admit it!

Woman: And you want to clean up your act.

Engine: Well that's where you come in.

Woman: Me? (TO A GUEST) Be right with you! Now, what is it?

Engine: Just give me Amoco Ultimate

Woman: Change gasolines?

Engine: Exactly. One fill-up of Amoco Ultimate will clean up my clogged fuel injectors just like that. And I won't run as sluggish as I do now.

Woman: Well, there is something to be said for clean living. Engine Then give me the good stuff!

Woman: Listen to your engine. Not only does Amoco Ultimate clean clogged fuel injectors in one tankful, it keeps your entire fuel intake system running clean.

\* \* \* \*

[Exhibit F]

G. A television advertisement for Amoco Silver:

Announcer: Ever since Ed got his new car, Streaker the dog next door, has been racing him down the road. Regular unleaded gasoline was all Ed needed to teach this dog a few tricks.

[Video: Depiction of dog chasing a new car with the car ahead of the dog]

But around 15,000 miles, a car can start to lose acceleration.

'Cause regular unleaded gasoline may not be enough.

[Video: Depiction of odometer approaching 15,000 miles as car begins to slow down and dog catches up and passes car]

Now's the time to turn to Silver. Higher octane Amoco Silver can bring back the acceleration. Bring back the power

[Exhibit G]

H. A radio advertisement for Amoco Silver:

Announcer: Remember what happened when you pressed on the accelerator when your car was new? Remember?

It ran like the wind! Charged like a champ! Even on regular unleaded gasoline. But as you put on the miles, your engine's appetite for octane can grow. Your car can begin to act sluggish. Unresponsive. And sooner than you think, as early as 15,000 miles, your car can begin to lose acceleration. Regular unleaded may not be enough. That's the time to turn to Silver! Amoco Silver is a step up from pure regular unleaded gasoline. Its higher octane can bring back the power that was there when your car was brand new. Amoco Silver may be all you'll ever need to keep your car's engine running the way it was designed to run. Amoco Silver. Bring back the power.

[Exhibit H]

I. A print advertisement for Amoco Silver:

AROUND 15,000 MILES,  
YOU'RE BOUND TO LOSE SOMETHING.  
FORTUNATELY, CARS DON'T HAVE HAIR.

As we rack up the miles, most of us start to feel sluggish. We slow down. Hair starts to thin. With the exception of this last point, the same may be true of your car. In fact, after 15,000 miles or so, some cars may actually sustain a loss of power if they run on regular gasoline. At this point, you're ready for Silver. Higher octane Amoco Silver gasoline can bring back the acceleration, bring back the power. And while we can't do a thing for thinning hair, we can provide the fuel to properly blow it back.

YOU EXPECT MORE FROM A LEADER.  
SILVER. BRING BACK THE POWER.

[Exhibit I]

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through I, respondent has represented, directly or by implication, that:

A. Amoco Ultimate gasoline is superior to all other brands of premium gasoline with respect to engine performance and environmental benefits because it is refined more than all other such brands.

B. The clear color of Amoco Ultimate gasoline demonstrates the superior engine performance and environmental benefits Amoco Ultimate provides compared to other premium brands of gasolines that are not clear in color.

C. A single tankful of Amoco Silver or Amoco Ultimate gasoline will make dirty or clogged fuel injectors clean.

D. Amoco Silver or Amoco Ultimate gasoline provides superior fuel injector cleaning compared to other brands of gasolines.

E. Automobiles driven more than 15,000 miles with regular gasoline generally suffer from lost engine power or acceleration which will be restored by the higher octane of Amoco Silver gasoline.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through I, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of section 5 (a) of the Federal Trade Commission Act.

Commissioner Starek recused.

Complaint

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EXHIBIT A

**RADIO  
TV REPORTS**

41 East 42nd Street, New York, NY 10017 (212) 309-1400

PRODUCT: AMOCO ULTIMATE GASOLINE  
TITLE: "BOY FLYING KITE"  
PROGRAM: WORLD NEWS  
STATION: ABC

**EXHIBIT A**

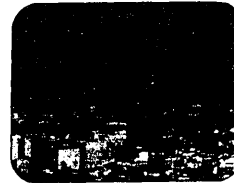
9/04/92 :30  
(NEW YORK) 6:59PM



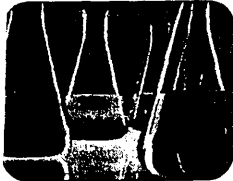
(MUSIC) ANNCR: What's clear?



Crystal clear Amoco Ultimate.



What isn't?



All other premium gasolines.



What's clear? Amoco Ultimate is the only premium



refined an extra step



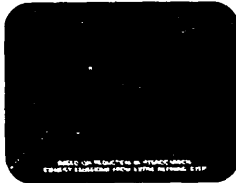
to remove harmful impurities.



Harmful impurities



you, as a premium user, don't want.



What's clear? Why do we do it?



For unsurpassed performance and a cleaner environment. Crystal clear.



Crystal clear Amoco Ultimate. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

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EXHIBIT B

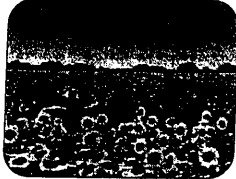
**RADIO  
TVREPORTS**

41 East 42nd Street, New York, NY 10017 (212) 309-1400

PRODUCT: AMOCO ULTIMATE GASOLINE  
TITLE: "WHAT'S CLEAR?"  
PROGRAM: HARD COPY  
STATION: CBS

**EXHIBIT B**

9/04/92 :30  
(NEW YORK) 7:27PM



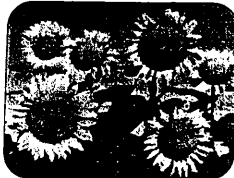
(MUSIC) ANNCR: What's clear?



Crystal clear Amoco Ultimate.  
What isn't?



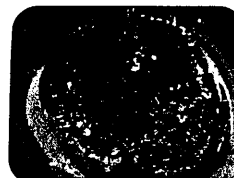
All other premium gasolines.



What's clear?



Amoco Ultimate is the only  
premium



refined an extra step to remove  
harmful impurities



other premiums leave in.



Impurities that can rob your engine



of performance and pollute the air.



What's clear? If you use premium.



now you have a reason to switch.  
Crystal clear.



Crystal clear Amoco Ultimate.  
(MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Complaint

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EXHIBIT C

**RADIO  
TVREPORTS**

41 East 42nd Street New York, NY 10017 (212) 309-1400

PRODUCT: AMOCO SILVER GASOLINE  
TITLE: "TANK TEST"  
PROGRAM: NEWS  
STATION: WXYZ

**EXHIBIT C**

05/22/91 :30  
(DETROIT) 6:36PM



(MUSIC) ANCCR: Hog into Amoco and take the Silver One Tank Test.



Fill up with one tankful of Amoco Silver;



it'll clean up the filthiest fuel injectors.



Not five tankfuls not three tankfuls.



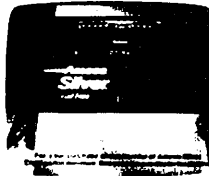
New and improved Amoco Silver with even more cleaning power



does it in just one tankful



or your money back.



So take the Silver One Tank Test and bring back the acceleration.



Bring back the power. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE



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## EXHIBIT D

EXHIBIT D

AS PRODUCED 3/25/92

**DMB&B**

AMOCO Oil Co.

Gasoline

"Runnin' Clean/East/NY"

:30 SNA 3163

3/25/92 Rev. 3

JS:mo A02P002

AORCENY

**TELEVISION CONTINUITY**

VIDEO	AUDIO
WS BEACH W/WOMAN AT SUNSET MS WOMAN SITTING BY PONTIAC WOMAN DRIVING PONTIAC MAN WIPING STEERING WHEEL WS MAN W/PICK UP TRUCK	CHORUS: YOU'RE JUST AS GOOD AS GOLD
WOMAN DRIVING CAR (& HOOD)	ANNCR: It's your car. Your baby.
MOM & BALLERINAS (WS)	Your one and only.
CU ULTIMATE SIGNAGE CAR ON ROAD (FOREST)	Everything about it has to be as good as gold. And when you're runnin' on Amoco
CU ULTIMATE SIGNAGE & PUMP (PUMP DECAL: REFINED AN EXTRA STEP)	Ultimate, you're running
WOMAN DEALER FILLING CAR	clean. Amoco Ultimate is
CU WOMAN DEALER	refined an extra step for
CU ULTIMATE SIGNAGE	quality. And like all Amoco
CU WOMAN'S FACE SMILING WS CAR DRIVING	gasolines, Ultimate cleans
CU WOMAN DRIVING	clogged fuel injectors in
CU WOMAN SMILING	one tankful. To keep your
POV OF ROAD ZOOM/CU ULTIMATE SIGNAGE WOMAN ON BEACH W/SUPER (SUPER: YOU EXPECT MORE FROM A LEADER)	entire fuel intake system
	running clean.
	CHORUS: YOU'RE JUST AS GOOD AS GOLD
	(FADE OUT)

Complaint

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## EXHIBIT E

**DMB&B**AS PRODUCEDEXHIBIT E

Amoco Oil Co.

Gasoline

"Nervous One Tank Test"

40 RA-185-60

10 9092 Rev. 7

US:bd AO1R374

AONOTT

**RADIO CONTINUITY**

SFX: GAS STATION DING DING

BERT: Can I help you, sir?

GUY: I'm here to take your test.

BERT: Oh, our Amoco Silver One-Tank-Test.

GUY: I've taken every test there is...the S.A.T., I.Q....

BERT: Sir, it's not that kind of test.

GUY: Got my number 2 pencils, 3-ring binder, and a good night's sleep.

BERT: Is your tank empty?

GUY: No, mommy always said have a big breakfast before a test. I had hash-browns, pancakes...

BERT: Sir, sir, you want an empty gas tank so you can fill-up with Amoco Silver.

GUY: I guess now's as good a time as any to take the test.

BERT: Well, that's true.

GUY: True? It's true/false. Good. That means I got a 20/20 chance.

BERT: Look, just one tankful of new and improved Amoco Silver...

GUY: Yes?

BERT: ...can help solve dirty-engine problems.

GUY: Solve engine problems? Oh no, science.

BERT: Now with even more cleaning power...

GUY: Don't.

BERT: ...Amoco Silver cleans your fuel injectors as simple as A-B-C.

EXHIBIT E

DMB&B

AS PRODUCED

Amoco Oil Co.  
Headline  
"Nervous One Tank Test"  
Ad RA-085-80  
10/9/82 Rev. 0  
CS:bd AO1R374  
AONOTT

RADIO CONTINUITY

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GUY: A-B-C! I always pick "D" -- all of the above.

BERT: Amoco Silver cleans fuel injectors in one tankful, not five or three like some gasolines.

GUY: Wow.

BERT: Or Amoco pays you back for your purchase.

GUY: So, it's not True/False.

BERT: No.

GUY: Or multiple choice.

BERT: No.

GUY: Oh, no!

BERT: What?

GUY: Essay! Let me use your pen.

BERT: That's my tire-gauge, sir.

GUY: Well, let me use it anyway.

ANNCR: Take the one-tank-test by filling up with 8 gallons or more of engine-cleaning Amoco Silver.

Complaint

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## EXHIBIT F

EXHIBIT

DMB&amp;B

AS PRODUCED 4/12/91

Amoco Oil Co.  
 Ultimate  
 "The Party"  
 :60 RA-053-60  
 5/9/91 Rev. 6  
 PB:bd A01R378  
 AOTP

**RADIO CONTINUITY**


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MUSIC: UNDER

SFX: SMALL GATHERING, VOICES IN BACKGROUND

ENGINE: Pardon me. Coming through.

WOMAN: You are one unbelievable engine! You climb out from under the hood and walk right into my party because you want to talk?

ENGINE: That's right. But I'm not sure...oh what the heck? I'm a dirty little engine. OK? There I admit it!

WOMAN: And you want to clean up your act.

ENGINE: Well that's where you come in.

WOMAN: Me? (TO A GUEST) Be right with you! Now, what is it?

ENGINE: Just give me Amoco Ultimate.

WOMAN: Change gasolines?

ENGINE: Exactly. One fill-up of Amoco Ultimate will clean up my clogged fuel injectors just like that.

SFX: SNAPS FINGERS

ENGINE: And I won't run as sluggish as I do now.

WOMAN: Well, there is something to be said for clean living.

ENGINE: Then give me the good stuff!

WOMAN: Listen to your engine. Not only does Amoco Ultimate clean clogged fuel injectors in one tankful, it keeps your entire fuel intake system running clean.

Complaint

EXHIBIT F

**DMB&B**

AS PRODUCED 4/12/91

Amoco Oil Co.

Ultimate

"The Party"

:60 RA-053-60

5/9/91 Rev. 6

PB:bd AO1R378

AOTP

**RADIO CONTINUITY**

ENGINE: (To party guest) Hey, buddy. You hear the one about the fan belt and the radia...

WOMAN: Hey! I thought you wanted to clean up your act!

ENGINE: Oh, right. Sorry.

BOWMAN: Amoco Ultimate. Your car knows.

Complaint

121 F.T.C.

## EXHIBIT G

AS PRODUCED 7/2

DMB&amp;B

## TELEVISION CONTINUITY

Amoco Oil Co. EXHIBIT G

Silver Gasoline

"Odometer/Streaker/Long Copy

Rev."

:30 AO2T516

7/22/92 SNA 3323

AOOSLCR

VIDEO	AUDIO
MAN DRIVING CAR - DOG CHASING CAR CAR WAY AHEAD OF DOG	ANNCR: Ever since Ed got his new car,  Streaker the dog next door, has been racing him down the road. Regular unleaded gasoline was all Ed needed to teach this dog a few tricks. But around 15,000 miles, a car can start to lose acceleration. 'Cause regular unleaded gasoline may not be enough. Now's the time to turn to Silver. Higher Octane Amoco Silver can bring back the acceleration. Bring back the power.
DOG CATCHES UP TO CAR AND PASSES CAR	SFX: <u>DOG BARK</u>
ODOMETER TURNS TO SILVER LETTERS	
CUT TO CU OF AMOCO SILVER PUMP	
CAR ACCELERATES WITH DOG IN CAR	
SUPER: YOU EXPECT MORE FROM A LEADER	

EXHIBIT H

EXHIBIT H

DMB&B

REVISED 3/14/91

Amoco Oil Co.  
Silver  
"Silver Symphony/Non-New"  
150  
A09R254 RA 956-60  
3/14/91

**RADIO CONTINUITY**

ANNCR:	Remember what happened when you pressed on the accelerator when your car was new? Remember?
MUSIC:	<u>POWERFUL SYMPHONY (TCHAIKOVSKY)</u> It ran like the wind! Charged like a champ! Even on regular unleaded gasoline.
MUSIC:	<u>SEGUES...</u> But as you put on the miles, your engine's appetite for octane can grow.
MUSIC:	<u>TO A 2ND SYMPHONY, SLOWER IN PACE</u> Your car can begin to act sluggish. Unresponsive.
MUSIC:	<u>SEGUES...</u> And sooner than you think.
MUSIC:	<u>TO A 3RD SYMPHONY, GLOOM AND DOOM</u> as early as 15,000 miles, your car can begin to lose acceleration. Regular unleaded may not be enough.
MUSIC:	<u>SEGUES...</u> That's the time...
MUSIC:	<u>TO THE WILLIAM TELL OVERTURE</u> to turn to Silver!

Complaint

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## EXHIBIT I

AS RECORDED IN FILE  
**DAVB&B**  
 CHANGED 3/12/90

Amoco Silver 30.

Silver

"Silver Symphony/Non New"

:60

3/14/91

AOR254

RA 956-60

**RADIO CONTINUITY**


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ANNCR: Amoco Silver is a step up from pure regular unleaded gasoline.  
 Its higher octane can bring back the power that was there when  
 your car was brand new.  
 Amoco Silver may be all you'll ever need to keep your car's  
 engine running the way it was designed to run.

MUSIC: WILLIAM TELL REACHES CLIMAX  
 Amoco Silver. Bring back the power.



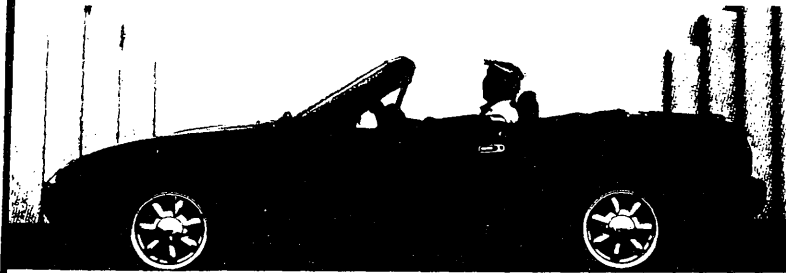
Complaint

EXHIBIT I

EXHIBIT I

AROUND 15,000 MILES,  
 YOU'RE BOUND TO LOSE  
 SOMETHING.  
 FORTUNATELY CARS  
 DON'T HAVE HAIR.

As we rack up the miles, most of us start to feel sluggish. We slow down. Hair starts to thin. With the exception of this last point,



the same may be true of your car. In fact, after 15,000 miles or so, some cars may actually sustain a loss of power if they run on regular gasoline. At this point, you're ready for Silver. Higher octane Amoco Silver® gasoline can bring back the acceleration, bring back the power. And while we can't do a thing for thinning hair, we can provide the fuel to properly blow it back.



You Expect More From A Leader

## 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 the respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the 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 Amoco Oil Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland with its offices and principal place of business located at 200 East Randolph Drive, Chicago, Illinois.

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

## ORDER

## I.

*It is ordered,* That respondent Amoco Oil Company, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of Amoco Silver 89 octane gasoline, Amoco Ultimate 92 or 93 octane gasoline, or any other gasoline in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation in any manner, directly or by implication, that:

(A) Amoco Ultimate gasoline is superior to all other brands of premium gasoline with respect to engine performance or environmental benefits because it is refined more than all other such brands;

(B) The clear color of Amoco Ultimate gasoline demonstrates the superior engine performance or environmental benefits Amoco Ultimate provides compared to other premium brands of gasolines that are not clear in color;

(C) A single tankful of Amoco Silver or Ultimate gasoline will make dirty or clogged fuel injectors clean;

(D) Amoco Silver or Ultimate gasoline provides superior fuel injector cleaning compared to other brands of gasoline;

(E) Automobiles driven more than 15,000 miles with regular gasoline generally suffer from lost engine power or acceleration which will be restored by the higher octane of Amoco Silver gasoline; or

(F) Concerns the relative or absolute attributes of any gasoline with respect to environmental benefits or with respect to engine performance, power, acceleration, or engine cleaning ability,

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based upon the

expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

For purposes of this Part, any representation, directly or by implication, that any gasoline will clean or clean up fuel injectors to a level that engine performance is not adversely affected will be deemed to be substantiated if respondent possesses and relies upon competent and reliable testing demonstrating that the flow rate of each fuel injector was returned to at least 95 percent of its original value.

Provided that, nothing in this order shall prohibit respondent from truthfully representing the numerical octane rating of any gasoline.

## II.

*It is further ordered,* That respondent Amoco Oil Company, shall within thirty (30) days after service distribute a copy of this order to all operating divisions, subsidiaries, officers, managerial employees, and all of its employees or agents engaged in the preparation and placement of advertisements or promotional sales materials covered by this order and shall obtain from each such employee a signed statement acknowledging receipt of the order.

## III.

*It is further ordered,* That for three (3) years after the last date of dissemination of any representation covered by this order, respondent Amoco Oil Company or its successors or assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials that were relied upon to substantiate any representation covered by this order; and

B. All tests, reports, studies or surveys, in respondent's possession or control that contradict any representation covered by this order.

## IV.

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

## V.

*It is further ordered,* That this order will terminate on May 7, 2016, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

## VI.

*It is further ordered,* That respondent Amoco Oil Company shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission

a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Starek recused.

## IN THE MATTER OF

## LITTON INDUSTRIES, INC.

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

*Docket C-3656. Complaint, May 7, 1996 -- Decision, May 7, 1996*

This consent order requires, among other things, the California-based corporation to divest, within ninety days, PRC, Inc.'s \$40 million systems engineering and technical assistance contract for the Navy's Aegis destroyer program. If the divestiture is not completed as required, the Commission may appoint a trustee to finalize the divestiture.

*Appearances*

For the Commission: *Ann Malester, James Holden and William Baer.*

For the respondent: *Richard Parker and David Beddow, O'Melveny & Myers, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Litton Industries, Inc. ("Litton"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting securities of PRC Inc. ("PRC"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

## I. RESPONDENT

1. Respondent Litton is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its

principal executive offices located at 21240 Burbank Boulevard, Woodland Hills, California.

## II. ACQUIRED COMPANY

2. PRC is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 1500 Planning Research Boulevard, McLean, Virginia.

## III. JURISDICTION

3. Litton and PRC are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## IV. THE ACQUISITION

4. On December 13, 1995, Litton and PRC entered into a Stock Purchase Agreement whereby Litton will acquire all of the issued and outstanding common shares of PRC for approximately \$425 million.

## V. THE RELEVANT MARKETS

5. The relevant lines of commerce in which to analyze the effects of the acquisition are: (a) the research, development, manufacture and sale of Aegis destroyers for the United States Department of the Navy ("Aegis destroyers"); and (b) the provision of systems engineering and technical assistance services to the United States Department of the Navy's Aegis destroyer program ("SETA Services").

6. The United States is the relevant geographic area in which to analyze the effects of the acquisition in both relevant lines of commerce.



## VI. STRUCTURE OF THE MARKETS

7. The market for the research, development, manufacture and sale of Aegis destroyers is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or the two-firm and four-firm concentration ratios ("concentration ratios"). Respondent is one of only two producers of Aegis destroyers in the United States.

8. The market for SETA Services is highly concentrated as measured by the HHI or concentration ratios. PRC has been the only provider of SETA Services since the inception of the Aegis destroyer program.

9. Respondent, through the acquisition, would be engaged in both the research, development, manufacture and sale of Aegis destroyers and the provision of SETA Services.

## VII. BARRIERS TO ENTRY

10. New entry into the market for the research, development, manufacture and sale of Aegis destroyers is difficult and unlikely.

11. New entry into the market for the provision of SETA Services is difficult and unlikely.

## VIII. EFFECTS OF THE ACQUISITION

12. The effects of the acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant markets set forth above in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. Respondent may gain access to competitively sensitive non-public information concerning the other Aegis destroyer manufacturer, so that actual competition between respondent and the other Aegis destroyer manufacturer will be reduced; and

b. Respondent may be in a position to disadvantage the other Aegis destroyer manufacturer, so that actual competition between respondent and the other Aegis destroyer manufacturers will be reduced.

## IX. VIOLATIONS CHARGED

13. The acquisition described in paragraph four, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The Stock Purchase Agreement described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of all of the assets and businesses of PRC Inc. ("PRC"), and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

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

1. Respondent Litton Industries, Inc. ("Litton") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 21240 Burbank Boulevard, Woodland Hills, California.

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

## ORDER

### I.

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

A. "*Respondent*" or "*Litton*" means Litton Industries, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Litton, and their respective directors, officers, employees, agents and representatives, successors, and assigns.

B. "*Ingalls*" means Ingalls Shipbuilding, Inc., a subsidiary of Litton, with its principal place of business at 100 W. River Road, Pascagoula, Mississippi, which is engaged in, among other things, the research, development, manufacture and sale of Aegis destroyers to the United States Department of the Navy, and its subsidiaries, divisions, groups and affiliates controlled by Ingalls, and their respective directors, officers, employees, agents and representatives, successors and assigns.

C. "*Bath Iron Works*" means Bath Iron Works Corporation, a subsidiary of General Dynamics Corporation, with its principal place of business at 700 Washington Street, Bath, Maine, which is engaged in, among other things, the research, development, manufacture and sale of Aegis destroyers to the United States Department of the Navy, and its subsidiaries, divisions, groups and affiliates controlled by Bath Iron Works, and their respective directors, officers, employees, agents and representatives successors and assigns.

D. "*PRC*" means PRC Inc., a Delaware corporation with its principal place of business at 1500 Planning Research Boulevard, McLean, Virginia, which is engaged in, among other things, the

provision of SETA Services to the United States Department of the Navy in support of the Aegis destroyer shipbuilding program, its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by PRC, and their respective directors, officers, employees, agents and representatives, successors, and assigns.

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

F. "*Acquisition*" means Litton's acquisition of all of the voting securities of PRC pursuant to a Stock Purchase Agreement dated December 13, 1995.

G. "*SETA Services Operations*" means all assets, properties, business and goodwill, tangible and intangible, held by PRC and used in the provision of SETA Services to the United States Department of the Navy under contract N00024-94-C-6430, including, without limitation, the following:

1. All rights, obligations and interests in contract N00024-94-C-6430 between the Naval Sea Systems Command and PRC;
2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, financial information, technical information, management information and systems, software, software licenses, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;
3. All rights, title and interests in and to owned or leased real property, together with appurtenances, licenses and permits;
4. All rights, title and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
5. All rights under warranties and guarantees, express or implied;
6. All books, records, and files;
7. All data developed, prepared, received, stored or maintained under contract N00024-94-C-6430 or any predecessor contract or subcontract to support the Aegis shipbuilding program, including the Aegis technical library; and
8. All items of prepaid expense.

H. "*SETA Services*" means systems engineering and technical assistance services provided by PRC to the United States Department of the Navy in support of the Aegis destroyer shipbuilding program.

I. "*Non-public Aegis Information*" means any information not in the public domain furnished by Ingalls or Bath Iron Works or any other company to PRC in its capacity as provider of SETA Services under contract N00024-94-C-6430 and any predecessor contract.

## II.

*It is further ordered, That:*

A. Litton shall divest, absolutely and in good faith, within ninety (90) days of the date Litton signs this order, the SETA Services Operations, and shall also divest such additional ancillary PRC assets as are necessary to assure the continued ability of the acquirer to provide SETA Services.

B. Litton shall divest the SETA Services Operations only to an acquirer that receives the prior approval of the Commission and of the United States Department of the Navy, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continued provision of SETA Services in the same manner as provided by PRC at the time of the proposed divestiture, at no increased cost to the United States Department of the Navy, and to remedy the lessening of competition alleged in the Commission's complaint.

C. Pending divestiture of the SETA Services Operations, Litton shall take such actions as are necessary to ensure the continued provision of SETA Services, and to maintain the viability and marketability of the assets used to provide SETA Services, and to prevent the destruction, removal, wasting, deterioration or impairment of the assets used to provide SETA Services, and to prevent the disclosure of Non-public Aegis Information.

D. Upon reasonable notice from the acquirer or from the United States Department of the Navy to respondent, respondent shall provide such technical assistance to the acquirer as is reasonably necessary to enable the acquirer to provide SETA Services in substantially the same manner and quality as provided by PRC prior to divestiture. Such assistance shall include reasonable consultation with knowledgeable employees and training at the acquirer's facility

for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the skills necessary to perform the SETA Services Operations. Respondent shall convey all know-how necessary to perform the SETA Services Operations in substantially the same manner and quality employed or achieved by PRC prior to divestiture. However, respondent shall not be required to continue providing such assistance for more than one (1) year from the date of the divestiture. Respondent shall charge the acquirer at a rate no more than its own costs for providing such technical assistance.

E. At the time of the execution of a purchase agreement between Litton and a proposed acquirer of the SETA Services Operations, Litton shall provide the acquirer with a complete list of all current full-time, non-clerical, salaried employees of PRC engaged in the provision of SETA Services on the date of the purchase agreement. Such list shall state each such individual's name, position, address, telephone number, and a description of the duties of and work performed by the individual in connection with the SETA Services Operations.

F. Litton shall provide the proposed acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph II.E. of this order to the extent permissible under applicable laws. For a period of six (6) months following the divestiture, Litton shall further provide the acquirer with an opportunity to interview such individuals and negotiate employment contracts with them.

G. Litton shall provide all current employees identified in paragraph II.E. of this order with financial incentives to continue in their employment positions pending divestiture of the SETA Services Operations, and to accept employment with the acquirer at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by Litton until the date of the divestiture, and vesting of all pension benefits.

H. For a period of two (2) years commencing on the date of the individual's employment by the acquirer, Litton shall not re-hire any of the individuals identified in paragraph II.E. of this order who accept employment with the acquirer.

I. Prior to divestiture, Litton shall not transfer any of the individuals identified in paragraph II.E. of this order whose

employment responsibilities involve access to Non-public Aegis Information from SETA Services Operations to any other positions.

### III.

*It is further ordered, That:*

A. Respondent shall not, absent the prior written consent of the proprietor of Non-public Aegis Information, provide, disclose, or otherwise make available to Ingalls or any other entity any Non-public Aegis Information.

B. PRC shall use any Non-public Aegis Information only in its capacity as provider of technical assistance to the acquirer, pursuant to paragraph II.D. of this order, unless PRC obtains the prior written consent of the proprietor of the Non-public Aegis Information.

### IV.

*It is further ordered, That:*

A. If Litton has not divested, absolutely and in good faith, and with the prior approval of the Commission and the United States Department of the Navy, the SETA Services Operations within ninety (90) days of the date Litton signs this order, the Commission may appoint a trustee to divest the SETA Services Operations. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Litton shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph IV shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Litton to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of Litton, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Litton has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Litton of the identity of any proposed trustee, Litton shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the SETA Services Operations.

3. Within ten (10) days after appointment of the trustee, Litton shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission and of the United States Department of the Navy. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the SETA Services Operations, or to any other relevant information, as the trustee may request. Litton shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Litton shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Litton shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission and to the United States Department of the Navy, subject to Litton's absolute and unconditional obligation to



divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order, provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission and the United States Department of the Navy determine to approve more than one such acquiring entity, the trustee shall divest the SETA Services Operations to the acquiring entity or entities selected by Litton from among those approved by the Commission and the United States Department of the Navy.

7. The trustee shall serve at the cost and expense of Litton, without bond or other security unless paid for by Litton, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Litton, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Litton, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the SETA Services Operations.

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

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

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee

issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the SETA Services Operations.

12. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the SETA Services Operations.

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

#### V.

*It is further ordered,* That respondent shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I. Said Interim Agreement shall continue in effect until the provisions in paragraphs II and III are complied with or until such other time as is stated in said Interim Agreement.

#### VI.

*It is further ordered,* That within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until Litton has fully complied with paragraphs II and IV of this order, Litton shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and IV of this order. Litton shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and IV including a description of all substantive contacts or negotiations for the divestiture required by this order, including the identity of all parties contacted. Litton shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

## VII.

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

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

B. Upon five (5) days' notice to Litton, and without restraint or interference from Litton, to interview officers, directors, or employees of Litton, who may have counsel present, regarding any such matters.

## VIII.

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

## IX.

*It is further ordered,* That, notwithstanding any other provision of this order, this order shall terminate ten (10) years from the date this order becomes final.

## APPENDIX I

## INTERIM AGREEMENT

This Interim Agreement is by and between Litton Industries, Inc. ("Litton"), a corporation organized and existing under the laws of the State of Delaware, and the Federal Trade Commission (the "Commission") an independent agency of the United States

Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

PREMISES

*Whereas*, Litton has proposed to acquire one hundred percent of the voting securities of PRC Inc., a subsidiary of Black & Decker Corporation; and

*Whereas*, the Commission is now investigating the proposed acquisition to determine if it would violate any of the statutes the Commission enforces; and

*Whereas*, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

*Whereas*, the Commission is concerned that if an understanding is not reached, preserving competition during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm and divestiture or other relief resulting from a proceeding challenging the legality of the proposed acquisition might not be possible, or might be less than an effective remedy; and

*Whereas*, Litton entering into this Interim Agreement shall in no way be construed as an admission by Litton that the proposed acquisition constitutes a violation of any statute; and

*Whereas*, Litton understands that no act or transaction contemplated by this Interim Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Interim Agreement.

*Now, therefore*, Litton agrees, upon the understanding that the Commission has not yet determined whether the proposed acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Litton agrees to execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Litton signs the Consent Agreement.

2. Litton agrees to deliver, within three (3) days of the date the Consent Agreement is accepted for public comment by the Commission, a copy of the Consent Agreement and a copy of this Interim Agreement to the United States Department of Defense and to General Dynamics Corporation.

3. Litton agrees to submit, within thirty (30) days of the date the Consent Agreement is signed by Litton, an initial report, pursuant to Section 2.33 of the Commission's Rules, signed by Litton setting forth in detail the manner in which Litton will comply with paragraphs II and III of the Consent Agreement.

4. Litton agrees that, from the date Litton signs the Consent Agreement until the first of the dates listed in subparagraphs 4.a and 4.b, it will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. The date the Commission finally issues its complaint and its Decision and Order.

5. Litton waives all rights to contest the validity of this Interim Agreement.

6. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege and applicable United States Government national security requirements, and upon written request, and on reasonable notice, to Litton made to its principal office, Litton shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Litton and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Litton relating to compliance with this Interim Agreement; and

b. Upon five (5) days' notice to Litton and without restraint or interference from it, to interview officers, directors, or employees of Litton, who may have counsel present, regarding any such matters.

7. This Interim Agreement shall not be binding until accepted by the Commission.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I agree with my colleagues that the final decision and order that the Commission issues today properly addresses the anticompetitive implications of the proposed transaction. I concur in the Commission's action except to the extent that paragraph II.B. of the proposed order makes the Department of the Navy a participant with the Commission in giving antitrust approval to any divestiture proposed under paragraph II.A. of the order.

With due deference to the Department of Defense and in full recognition that the Department of the Navy has the power to decide with which firms it will contract for the provision of goods and services vital to the national security, no persuasive argument has been presented to suggest that the Navy has or should have a role in deciding the competitive implications of a particular divestiture. In addition, no showing has been made that this case is unique, that national security issues or concerns relating to the integrity of the AEGIS destroyer program, to the extent they may be affected by this order, could not have been addressed, as they apparently have been in other defense-related transactions,<sup>1</sup> without inclusion of the Department of the Navy as a necessary participant in a decision committed by statute to the Commission.

The need to obtain technical assistance in reviewing commercial transactions in sophisticated markets is not uncommon. Nor should the Commission forget that national security is the province of the country's defense agencies. The Commission might well find it necessary to consult with the Department of the Navy both to assess the viability of a proposed buyer of the PRC assets to be divested and to ensure that a proposed transaction is not inconsistent with national security. I would have preferred, however, to accommodate that need in this case by means other than making the Department of the Navy a partner with the Commission in interpreting and applying a final order of the Commission.

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<sup>1</sup> See *Lockheed Corporation*, C-3576, decision and order (May 9, 1995); See also *ARKLA, Inc.*, 112 FTC 509 (1989).

IN THE MATTER OF

MRS. FIELDS COOKIES, INC.

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

*Docket C-3657. Complaint, May 13, 1996--Decision, May 13, 1996*

This consent order prohibits, among other things, the Utah-based corporation from misrepresenting the fat, saturated fat, cholesterol or caloric content of baked food products.

*Appearances*

For the Commission: *Phoebe Morse* and *Colleen Lynch*.

For the respondent: *Jere Webb, Stoel Rives*, Portland, OR.

COMPLAINT

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

PARAGRAPH 1. Respondent Mrs. Fields is a California corporation, with its principal office or place of business at 462 West Bearcat Drive, Salt Lake City, UT.

PAR. 2. Respondent has manufactured, advertised, labeled, offered for sale, sold and distributed Mrs. Fields Cookies, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for Mrs. Fields Cookies, including but not necessarily limited to the attached

Exhibits 1-5. These advertisements and promotional materials contain the following statements and depictions:

- A. Semi-sweet classic LOW FAT Cookies  
[depiction of cookie chips] (Exhibit 1)
- B. Chocolite LOW FAT Cookies  
[depiction of cookie chips] (Exhibit 2)
- C. Introducing our new line of LOW FAT Cookies  
(Exhibit 3)
- D. Introducing our new line of LOW FAT Cookies  
[depiction of cookie chips and Mrs. Fields' logo] (Exhibit 4)
- E. Introducing our new line of LOW FAT Cookies  
[depiction of cookie chips and Mrs. Fields' logo] (Exhibit 5)

PAR. 5. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits 1, 3, 4 and 5, respondent has represented, directly or by implication, that Mrs. Fields' "low fat" semi-sweet classic cookie is low fat.

PAR. 6. In truth and in fact, Mrs. Fields' "low fat" semi-sweet classic cookie is not low fat. This cookie contained 5.5 grams of fat per serving at the time of dissemination of the advertisements and promotional materials referred to in paragraph four. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits 2, 3, 4 and 5, respondent has represented, directly or by implication, that Mrs. Fields' "low fat" chocolite cookie is low fat.

PAR. 8. In truth and in fact, Mrs. Fields' "low fat" chocolite cookie is not low fat. This cookie contained 5.5 grams of fat per serving at the time of dissemination of the advertisements and promotional materials referred to in paragraph four. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits 3, 4



and 5, respondent has represented, directly or by implication, that Mrs. Fields' entire 1994 "low fat" line of cookies is low fat.

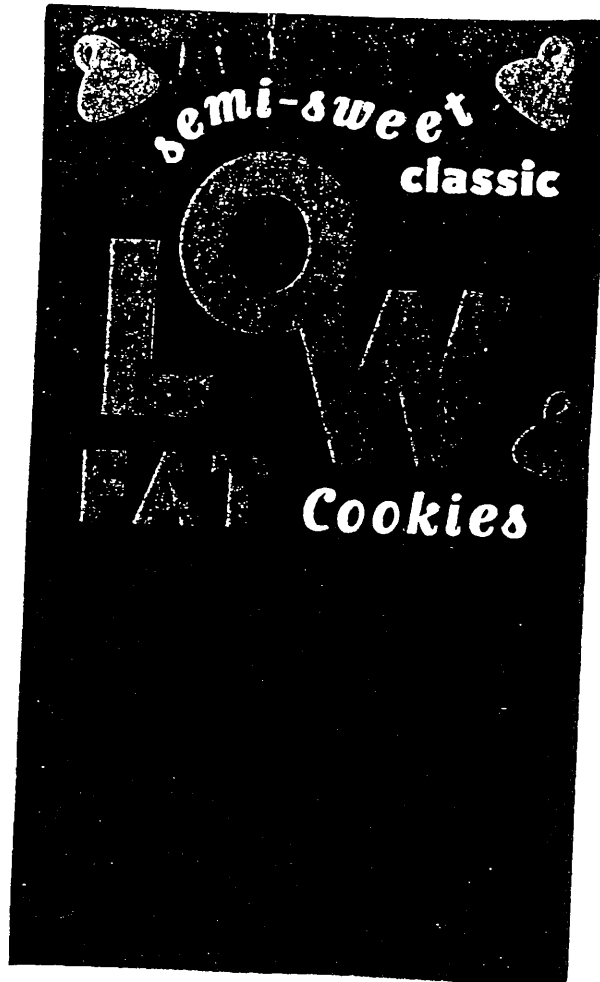
PAR. 10. In truth and in fact, Mrs. Fields' entire 1994 "low fat" line of cookies is not low fat. Only one of the three new cookies introduced as Mrs. Fields' 1994 "low fat" line of cookies was low fat at the time of dissemination of the advertisements and promotional materials referred to in paragraph four. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. The acts and practices of the respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements and promotional materials in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Complaint

121 F.T.C.

EXHIBIT 1



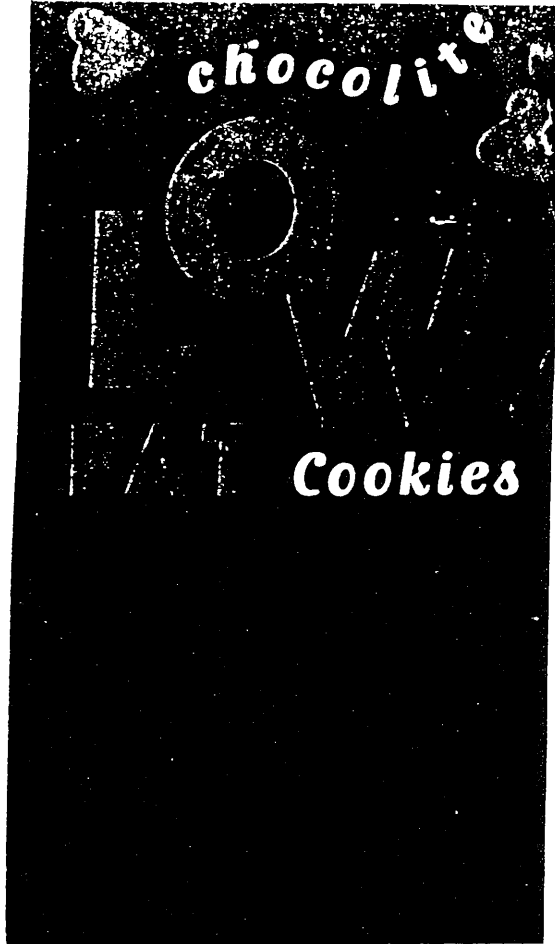
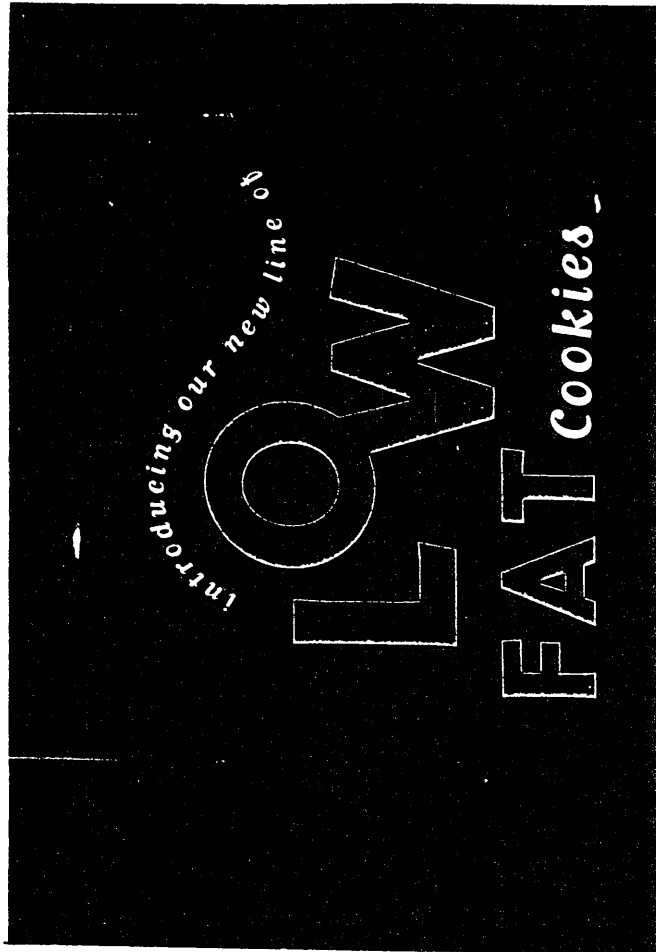


EXHIBIT 3

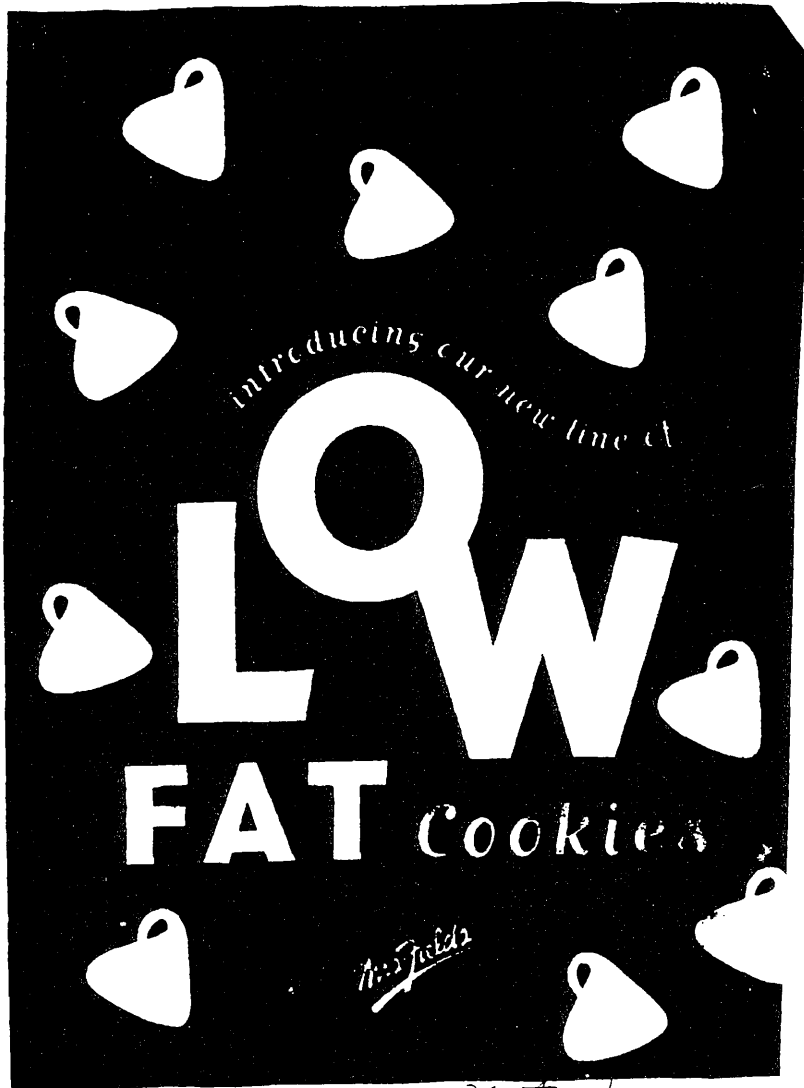


599

Complaint

EXHIBIT 4

SENT BY:



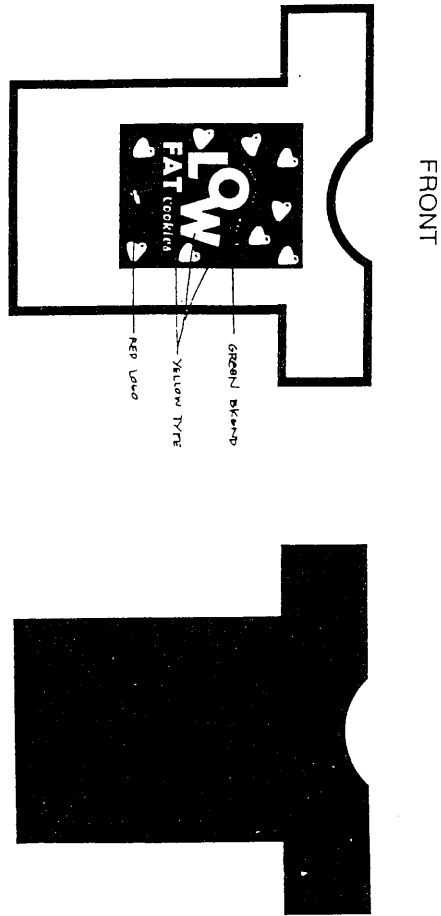
*Exhibit 4* Exhibit 4

Complaint

121 F.T.C.

EXHIBIT 5

1. show



## DECISION AND ORDER

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

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

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

1. Respondent Mrs. Fields Cookies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 462 West Bearcat Drive, Salt Lake City, UT.

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

## ORDER

## I.

*It is ordered,* That respondent Mrs. Fields Cookies, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any food in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of fat, saturated fat, cholesterol or calories in any bakery food product, whether cooked or uncooked. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

## II.

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

## III.

*If is further ordered,* That for three (3) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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



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

#### IV.

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

#### V.

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

#### VI.

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

#### VII.

This order will terminate on May 13, 2016, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

## IN THE MATTER OF

## COLUMBIA/HCA HEALTHCARE CORPORATION

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

*Docket C-3619. Consent Order, Oct. 3, 1995--Modifying Order, May 15, 1996*

This order reopens a 1995 consent order -- that permitted Columbia/HCA and Healthtrust, Inc., to merge, required the respondent to terminate its participation in a joint venture with the Orlando Regional Health System, and contained a prior-notice provision -- and this order modifies the termination provisions of the agreement to hold separate regarding the Utah Healthtrust Assets by releasing Columbia/HCA from the provision requiring it to operate the Utah assets separately from its other hospital operations in Utah once it completes the divestiture of Pioneer Valley Hospital and Davis Hospital to Paracelsus Healthcare Corporation.

## ORDER REOPENING AND MODIFYING ORDER

On December 15, 1995, Columbia/HCA Healthcare Corporation ("Columbia") filed its Petition To Reopen And Modify Order Containing Agreement To Hold Separate ("Petition") in this matter. Respondent asks that the Commission reopen this 1995 consent order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. The Petition request that the Commission reopen the order and modify the termination provisions in paragraph 2(b) of the April 21, 1995, Agreement to Hold Separate regarding the Utah Healthtrust Assets ("Utah Hold Separate"), which is attached to the order and made a part thereof. The Petition was subject to a ten-day public comment period that expired on January 22, 1996, and no comments were received. For the reasons discussed below, the Commission has determined to grant Columbia's Petition.

Columbia's Petition seeks to change the termination of the Utah Hold Separate from the date that all Schedule B Assets, as identified in the order, are divested until the date that all of the hospitals identified in Part I of Schedule B are divested. The modification is necessary because of an asset identified as Schedule B, Part II, Item 6: "Lease of 7,134 sq. ft., 150 Wright Bros. Drive, Suite 540, Salt

Lake City, Utah 84116" ("Suite 540"). The space is used by Infusamed, a home health care company providing infusion and pharmacy services that was owned by Healthtrust, Inc. when it was acquired by Columbia. The order does not require Columbia to divest the Infusamed business, and the lease is not a part of the business of Pioneer Valley.

The requested modification merely changes the date for the termination of the Utah Hold Separate. Under the order in this matter, Columbia is obligated to hold separate all of Healthtrust Utah, which includes a number of hospitals and businesses it is not required to divest, pending divestiture of three hospitals and related assets in Utah. The hospitals to be divested are identified in Part I of Schedule B and the related assets are identified in Part II of Schedule B.<sup>1</sup> Columbia seeks to have the Hold Separate terminate upon completion of the divestitures of the three hospitals.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").<sup>2</sup>

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.<sup>3</sup> In such a case, the respondent must demonstrate as a threshold matter

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<sup>1</sup> At present, the only distinction that the order makes between the Part I and Part II assets is that the acquirer of a divested Part I hospital need not give the Commission prior notification of the sale of a Part II asset to anyone who also owns a hospital in the Three County Area. See Order, paragraph IV.F.

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

<sup>3</sup> Hart Letter at 5; 16 CFR 2.51.

some affirmative need to reopen and modify the order.<sup>4</sup> For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order."<sup>5</sup> Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification.<sup>6</sup> The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.<sup>7</sup>

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

Columbia has met its burden of showing an affirmative need to reopen the order in that the continued operation of the order is causing competitive injury. Having to hold the remaining Healthtrust Utah assets separate pending a determination on the obligation to divest the lease is unnecessary to accomplish the purposes of the order and would impose significant and unforeseen costs on

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<sup>4</sup> Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter"), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207.

<sup>5</sup> *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983).

<sup>6</sup> Damon Letter at 2.

<sup>7</sup> Damon Letter at 4.

Columbia. Where the potential harm to the respondent outweighs any further need for the order, the Commission may modify the order in the public interest to allow the respondent to retain the relevant assets. Since the lease of Suite 540 appears to have no competitive significance in connection with the operation of the to-be-divested Pioneer Valley Hospital in the acute care hospital market in Utah, there is no need for the Commission to require Columbia to continue to hold the Utah Healthtrust Assets separate upon completion of the divestitures of Jordan Valley, Davis and Pioneer Valley hospitals. Thus, the modification sought by Columbia is in the public interest.

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

*It is further ordered*, That the Agreement to Hold Separate Regarding The Utah Healthtrust Assets, attached to the order in Docket No. C-3619, be, and it hereby is, modified to read as follows:

2. Respondent agrees that from the date this Agreement is accepted until the earlier of the dates listed in subparagraphs 2.a or 2.b, it will comply with the provisions of paragraph three of this Agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the last of the divestitures of the Schedule B, Part I Assets or the Utah Healthtrust Assets, as required by the consent order, is completed.

Commissioner Azcuenaga dissenting on the ground that the petitioner has not made a showing sufficient to satisfy the Commission's standard for reopening and modifying an order, and Commissioner Starek concurring in the result only.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III,  
CONCURRING IN THE RESULT

I have no difficulty concluding that the public interest warrants granting the relief requested by respondent -- a change in the termination date for the Utah Hold Separate -- in light of how transparently unreasonable it would be to withhold that relief in the

circumstances presented here. On that basis, I agree with the Commission majority that the Utah Hold Separate should be reopened and modified. Nevertheless, I concur only in that result, and not in the reasoning employed to reach it. Once again my colleagues have found it necessary to articulate -- and then find satisfied on very shaky grounds -- an "affirmative need threshold" as part of the standard for order modifications under a "public interest" standard.<sup>1</sup>

The Commission has articulated its affirmative need threshold -- with some puzzling lapses in consistency -- in more than a decade's worth of competition cases, and last year the Commission suddenly took the unfortunate step of importing the concept into the consumer protection field.<sup>2</sup> Not only does the threshold serve no discernible purpose, except perhaps to dissuade some parties from filing potentially meritorious petitions; it also imposes needless burdens on the Commission. For example, rather than simply weigh the overall costs and benefits of a requested order modification under the "public interest" rubric of Commission Rule 2.51,<sup>3</sup> the Commission and its staff must search high and low -- and occasionally engage in evidentiary prestidigitation -- to come up with the "competitive harm" that will carry a petitioner across the affirmative need threshold.<sup>4</sup> A case such as this one -- in which the affirmative need "evidence" is paltry, but the requested relief fairly cries out to be granted -- demonstrates why the Commission should summon the will to jettison the "affirmative need" concept and embrace explicitly a simple cost/benefit balancing approach to order modifications pursuant to the "public interest" standard of Rule 2.51.

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<sup>1</sup> The Commission makes the following conclusory statement: "Columbia has met its burden of showing an affirmative need to reopen the order in that the continued operation of the order is causing competitive injury. Having to hold the remaining Healthtrust Utah assets separate pending a determination on the obligation to divest the lease is unnecessary to accomplish the purposes of the order and would impose significant and unforeseen costs on Columbia." Order Reopening and Modifying Order at 3 (May 15, 1996). It would be difficult to conjure up a less substantial foundation on which to rest the determination that a respondent had crossed the mythical "affirmative need threshold."

<sup>2</sup> California and Hawaiian Sugar Co., Docket No. C-2858 (Order Reopening the Proceeding and Modifying Cease and Desist order, Jan. 17, 1995).

<sup>3</sup> 16 CFR 2.51.

<sup>4</sup> See Concurring Statement of Commissioner Roscoe B. Starek, III, in California and Hawaiian Sugar Co., Docket No. C-2858 (Jan. 19, 1995); Concurring Statement of Commissioner Roscoe B. Starek, III, in Service Corporation International, Docket No. 9071 (May 17, 1994).

Complaint

121 F.T.C.

IN THE MATTER OF

## DELL COMPUTER CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3658. Complaint, May 20, 1996--Decision, May 20, 1996*

This consent order prohibits, among other things, a Texas-based personal computer manufacturer from enforcing its patent rights against computer manufacturers using the VL-bus, a mechanism to transfer instructions between the computer's central processing unit and its peripherals.

*Appearances*

For the Commission: *Michael E. Antalics* and *William J. Baer*.

For the respondent: *Raymond Jacobsen* and *Kirin Corcoran*,  
*Howrey & Simon*, Washington, D.C.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent, Dell Computer Corporation, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Dell Computer Corporation ("Dell") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 2214 West Braker Lane, Texas.

PAR. 2. Respondent is a publicly traded for-profit corporation engaged in the innovation, development, manufacture, and sale of personal computer systems throughout the United States. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.



PAR. 3. Dell's acts and practices, including the acts and practices alleged in this complaint, are in or affect commerce as defined in the Federal Trade Commission Act.

PAR. 4. In February 1992 Dell became a member of the Video Electronics Standards Association ("VESA"), a non-profit standards-setting association composed of virtually all major U.S. computer hardware and software manufacturers.

PAR. 5. At or about the same time, VESA began the process of setting a design standard for a computer bus design, later to be known as the VESA Local Bus or "VL-bus." Like all computer buses, the VL-bus carries information or instructions between the computer's central processing unit and the computer's peripheral devices such as a hard disk drive, a video display terminal, or a modem.

PAR. 6. By June 1992 VESA's Local Bus Committee, with Dell representatives sitting as members, approved the VL-bus design standard, which improved upon then-existing technology by more quickly and efficiently meeting the transmission needs of new, video-intensive software. One year earlier, in July 1991, Dell had received United States patent number 5,036,481 (the "'481 patent"), which, according to Dell, gives it "exclusive rights to the mechanical slot configuration used on the motherboard to receive the VL-bus card." Nonetheless, at no time prior to or after June 1992 did Dell disclose to VESA's Local Bus Committee the existence of the '481 patent.

PAR. 7. After committee approval of the VL-bus design standard, VESA sought the approval of the VL-bus design standard by all of its voting members. On July 20, 1992, Dell voted to approve the preliminary proposal for the VL-bus standard. As part of this approval, a Dell representative certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed. On August 6, 1992, Dell gave final approval to the VL-bus design standard. As part of this final approval, the Dell representative again certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed.

PAR. 8. After VESA's VL-bus design standard became very successful, having been included in over 1.4 million computers sold in the eight months immediately following its adoption, Dell informed certain VESA members who were manufacturing computers using the new design standard that their "implementation of the VL-bus is a violation of Dell's exclusive rights." Dell

demanded that these companies meet with its representatives to "determine . . . the manner in which Dell's exclusive rights will be recognized . . . ." Dell followed up its initial demands by meeting with several companies, and it has never renounced the claimed infringement.

PAR. 9. By engaging in the acts or practices described in paragraphs four through eight of this complaint, respondent Dell has unreasonably restrained competition in the following ways, among others:

(a) Industry acceptance of the VL-bus design standard was hindered because some computer manufacturers delayed their use of the design standard until the patent issue was clarified.

(b) Systems utilizing the VL-bus design standard were avoided due to concerns that patent issues would affect the VL-bus' success as an industry design standard.

(c) The uncertainty concerning the acceptance of the VL-bus design standard raised the costs of implementing the VL-bus design as well as the costs of developing competing bus designs.

(d) Willingness to participate in industry standard-setting efforts have been chilled.

PAR. 10. The acts or practices of respondent alleged herein were and are to the prejudice and injury of the public. The acts or practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

Commissioner Azcuenaga dissenting.

#### DECISION AND ORDER

The Federal Trade Commission ("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 the draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing consent order, an admission by the respondent of all 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 the complaint, and waivers and other provisions as required by the Commission Rules; and

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

1. Respondent Dell Computer Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 2214 West Braker Lane, Austin, Texas.

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

## ORDER

### I.

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

A. "*Respondent*" or "*Dell*" means Dell Computer Corporation, its predecessors, subsidiaries, divisions, groups, and affiliates controlled by Dell Computer Corporation, their successors and assigns, and their directors, officers, employees, agents and representatives.

B. "*Designated representative*" means the person appointed by Dell to the standard-setting organization who communicates

respondent's position regarding respondent's patent rights related to any standard under consideration by the standard-setting organization.

C. "VESA" means the Video Electronics Standards Association, located at 2150 North First Street, Suite 440, San Jose, California.

D. "VL-bus" means the computer local bus design standard VESA established in August 1992 for the transmission of computer information between a computer's central processing unit and certain computer peripheral devices.

E. "'481 patent" means United States patent number 5,036,481.

F. "Commission" means the Federal Trade Commission.

## II.

*It is further ordered,* That, within thirty (30) days after the date this order becomes final, and until the expiration of the '481 patent, respondent shall cease and desist all efforts it has undertaken by any means, including without limitation the threat, prosecution or defense of any suits or other actions, whether legal, equitable, or administrative, as well as any arbitrations, mediations, or any other form of private dispute resolution, through or in which respondent has asserted that any person or entity, by using or applying VL-bus in its manufacture of computer equipment, has infringed the '481 patent.

## III.

*It is further ordered,* That, until the expiration of the '481 patent, respondent shall not undertake any new efforts to enforce the '481 patent by threatening, prosecuting or defending any suit or other action, whether legal, equitable, or administrative, as well as any arbitration, mediation, or other form of private dispute resolution, through or in which respondent claims that any person or entity, by using or applying VL-bus in its manufacture, use or sale of computer equipment, has infringed the '481 patent.

## IV.

*It is further ordered,* That, for a period of ten (10) years after the date this order becomes final, respondent shall cease and desist from enforcing or threatening to enforce any patent rights by asserting or alleging that any person's or entity's use or implementation of an industry design standard, or sale of any equipment using an industry design standard, infringes such patent rights, if, in response to a written inquiry from the standard-setting organization to respondent's designated representative, respondent intentionally failed to disclose such patent rights while such industry standard was under consideration.

## V.

*It is further ordered,* That, for a period of ten (10) years after this order becomes final, respondent shall maintain the procedure for assuring compliance with paragraph IV of this order, as accepted by the Commission pursuant to paragraph four of the Agreement Containing Consent Order to Cease and Desist.

## VI.

*It is further ordered,* That respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of this order, complaint and the announcement shown in Appendix A to this order to VESA, to those members of VESA that Dell contacted regarding possible infringement of the '481 patent, and to any other person or entity to whom respondent has sent notice regarding its claim that the implementation of the VL-bus standard conflicts with or infringes the '481 patent.

B. Within thirty (30) days after the date this order becomes final, distribute a copy of this order, complaint and the announcement shown in Appendix A to this order to every officer and director of respondent, and to every employee of respondent whose responsibilities include acting as respondent's designated representative to any standard-setting organization, group or similar body of which respondent is a member.

C. For a period of five (5) years after the date this order becomes final, furnish a copy of this order and complaint to each new officer and director of respondent and to every new employee of respondent whose responsibilities will or do include acting as respondent's designated representative to any standard-setting organization, group or similar body of which respondent is a member. Such copies must be furnished within thirty (30) days after any such persons assume their position as an officer, director or employee. For purposes of this paragraph VI.C., "new employee" shall include without limitation any of respondent's employees whose duties change during their employment to include acting as respondent's designated representative to any standards-setting organization, group or similar body of which respondent is a member.

D. For a period of ten (10) years after the date this order becomes final, respondent shall furnish each standard-setting organization of which it is a member and which it joins a copy of the order and respondent shall identify to each such organization the name of the person who will serve as respondent's designated representative to the standard-setting organization.

## VII.

*It is further ordered,* That respondent shall:

A. Within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to the respondent, require, file a verified written report with the Commission setting forth in detail the manner and form in which the respondent has complied and is complying with this order.

B. For a period of ten (10) years after the date this order becomes final, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by paragraphs V and VI of this order.

C. Notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in

respondent that may affect compliance obligations arising out of this order.

Commissioner Azcuenaga dissenting.

#### APPENDIX A

#### Announcement

Dell Computer Corporation has entered into a consent agreement with the Federal Trade Commission. Pursuant to this consent agreement, the Commission issued an order on [Date] that prohibits Dell from enforcing its United States patent number 5,036,481 against any company for such company's use of the Video Electronics Standards Association's VL-bus standard.

For more specific information, please refer to the FTC order itself, a copy of which is attached for your information.

General Counsel  
Dell Computer Corporation

#### STATEMENT OF THE FEDERAL TRADE COMMISSION

Today the Commission issues its complaint and (with two minor modifications) its final consent order in Dell Computer Corporation. The Commission reached this decision after a careful and thorough evaluation of the public comments received on the proposed order. Because the proposed order generated considerable public comment, we offer these views to improve understanding of this enforcement action.

The outcome of any Commission enforcement action depends on the facts of the particular case. The Dell case involved an effort by the Video Electronics Standards Association ("VESA") to identify potentially conflicting patents and to avoid creating standards that would infringe those patents. In order to achieve this goal, VESA -- like some other standard-setting entities -- has a policy that member companies must make a certification that discloses any potentially conflicting intellectual property rights. VESA believes that its policy imposes on its members a good-faith duty to seek to identify potentially conflicting patents. This policy is designed to further

VESA's strong preference for adopting standards that do not include proprietary technology.

This case involved the standard for VL-bus, a mechanism to transfer instructions between a computer's central processing unit and its peripherals. During the standard-setting process, VESA asked its members to certify whether they had any patents, trademarks, or copyrights that conflicted with the proposed VL-bus standard; Dell certified that it had no such intellectual property rights.<sup>1</sup> After VESA adopted the standard -- based, in part, on Dell's certification -- Dell sought to enforce its patent against firms planning to follow the standard.

We believe that in the limited circumstances presented by this case, enforcement action is appropriate. In this case--where there is evidence that the association would have implemented a different non-proprietary design had it been informed of the patent conflict during the certification process, and where Dell failed to act in good faith to identify and disclose patent conflicts -- enforcement action is appropriate to prevent harm to competition and consumers.<sup>2</sup>

The remedy in this case is carefully circumscribed. It simply prohibits Dell from enforcing its patent against those using the VL-bus standard.<sup>3</sup> This relief assures that the competitive process is not harmed by the conduct addressed in the Commission's complaint. Moreover, the remedy in this case is consistent with those cases, decided under the concept of equitable estoppel, in which courts precluded patent-holders from enforcing patents when they failed

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<sup>1</sup> The dissent seems to suggest that the actions of the Dell representative in submitting the certification did not bind the corporation. Dissenting statement at 25-26. Contrary to that suggestion, Dell's voting representative made his certification on behalf of the corporation. This is supported by VESA's construction of its procedures. Corporations act through their agents, and when an agent acts in his capacity as an agent, as was the case here, he acts for the corporation. *See Fletcher Cyclopedia of the Law of Private Corporations* 30, 279 (1990).

<sup>2</sup> The Commission has reason to believe that once VESA's VL-bus standard had become widely accepted, the standard effectively conferred market power upon Dell as the patent holder. This market power was not inevitable: had VESA known of the Dell patent, it could have chosen an equally effective, non-proprietary standard. If Dell were able to impose a royalty on each VL-bus installed in 486-generation computers, prices to consumers would likely have increased.

The dissent speculates that computer manufacturers could have readily shifted to a new standard. Dissenting Statement at 10. Although that alternative might be possible in some settings, it was not in this case where the market had overwhelmingly adopted the VL-bus standard.

<sup>3</sup> It also prohibits Dell from enforcing patent rights in the future when it intentionally fails to disclose those rights upon request of any standard-setting organization during the standard-setting process.



properly to disclose the existence of those patents.<sup>4</sup> In this case, Dell is precluded from enforcing the patent only against those implementing the relevant standard.<sup>5</sup>

Some of those who commented on the Agreement Containing Consent Order suggested that this matter expresses an endorsement of certain types of standards (*i.e.*, those including only non-proprietary technology versus those including proprietary technology) or of a certain form of standard-setting process. On the contrary, the Commission's enforcement action does not address, and is not intended to address, any of these broader issues.

Other commenters asked whether the Commission intended to signal that there is a general duty to search for patents when a firm engages in a standard-setting process. The relief in this matter is carefully limited to the facts of the case. Specifically, VESA's affirmative disclosure requirement creates an expectation—by its members that each will act in good faith to identify and disclose conflicting intellectual property rights. Other standard-setting organizations may have different procedures that do not create such an expectation on the part of their members.<sup>6</sup> Consequently, the relief in this case should not be read to impose a general duty to search.

Others suggested that the theory supporting this enforcement action could impose liability for an unknowing (or "inadvertent") failure to disclose patent rights. Again, the Commission's enforcement action is limited to the facts of this case, in which there is reason to believe that Dell's failure to disclose the patent was not

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<sup>4</sup> See, *e.g.*, *Potter Instrument Co., Inc. v. Storage Technology Corp.*, 641 F.2d 190 (4th Cir.), *cert. denied*, 454 U.S. 832 (1981); *Wang Laboratories Inc. v. Mitsubishi Electronics America Inc.*, 29 U.S.P.Q.2d 1481 (C.D. Cal. 1993); *Stambler v. Diebold, Inc.*, 11 U.S.P.Q.2d 1709, 1715 (E.D.N.Y. 1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989).

<sup>5</sup> The dissent seems to suggest that relief should be limited to those firms that relied on Dell's certification. Dissenting statement at 13. The equitable estoppel doctrine, which seeks to remedy harm to the aggrieved companies, would support such a limited remedy. But from the Commission's perspective, based on our responsibility to protect the competitive marketplace, broader relief is warranted.

Here the market adopted the VL-bus standard. Both those who relied on Dell's representation, and others who had to adopt the industry standard, were faced with potential harm. Absent our enforcement action, Dell could have required royalties from all firms that adopted the standard. Where the market has chosen a particular technology believed to be available to all without cost, limiting the order solely to those companies that relied on Dell's certification might not fully protect the competitive process or consumers.

<sup>6</sup> Contrary to the dissent's assertion (dissenting statement at 20), the VESA policy for dealing with proprietary standards is not "very like ANSI's patent policy." ANSI does not require that companies provide a certification as to conflicting intellectual property rights. Therefore, its policy, unlike VESA's, does not create an expectation that there is no conflicting intellectual property.

inadvertent. The order should not be read to create a general rule that inadvertence in the standard-setting process provides a basis for enforcement action. Nor does this enforcement action contain a general suggestion that standard-setting bodies should impose a duty to disclose.

Finally, some commenters suggested that private litigation is sufficient to address this type of controversy. Although there has been private litigation for failure to disclose patent rights under equitable estoppel theories, enforcement of Section 5 of the Federal Trade Commission Act also serves an important role in this type of case, where there is a likelihood of consumer harm. Moreover, unlike other antitrust statutes, Section 5 provides only for prospective relief. In fact, the judicious use of Section 5 -- culminating in carefully tailored relief -- is particularly appropriate in this type of case, in which the legal and economic theories are somewhat novel.<sup>7</sup>

One topic considered by the Commission's hearings last fall on Global and Innovation-Based Competition was the important role of standard-setting in the technological innovation that will drive much of this nation's competitive vigor in the 21st Century. The record of those hearings is replete with discussion of the procompetitive role of standard-setting organizations. The Commission recognizes that enforcement actions in this area should be undertaken with care, lest they chill participation in the standard-setting process. Nevertheless, a standard-setting organization may provide a vehicle for a firm to undermine the standard-setting process in a way that harms competition and consumers.<sup>8</sup> We believe that the commission's enforcement action in Dell strikes the right balance between these important objectives.<sup>9</sup>

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<sup>7</sup> Cf. *Charles Pfizer & Co. v. Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), cert. denied, 394 U.S. 920 (1969); Report of the American Bar Association, Section of Antitrust Law, Special Committee To Study the Role of the Federal Trade Commission 18 (Apr. 7, 1989).

<sup>8</sup> See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

<sup>9</sup> The dissent takes issue with our reliance on facts not alleged in the complaint. Dissenting statement at 21-23. It is entirely within the Commission's discretion to interpret its complaint and consent order and provide any information it deems helpful in assisting interested persons to interpret the order. Cf. Commission Rule 2.34, 16 CFR 2.34 (1996). It would be odd, indeed, for the Commission to spell out in the complaint each and every fact on which it relies when it issues a consent order. In any case, we note our disagreement with the dissent's own assessment of the record.

## DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today the Commission issues its complaint and final consent order against Dell Computer Corporation ("Dell"), accompanied by an unusual explanatory statement on behalf of the majority. The case, which was touted in the Commission's press release soliciting public comment as "precedent-setting," has aroused a high degree of interest. Several thoughtful comments have been received.

The complaint against Dell does not articulate a violation of Section 5 of the FTC Act under any established theory of law. Under any novel theory, the competitive implications of the conduct alleged remain unclear. As confirmed by the comments we have received, a host of questions needs to be resolved before the Commission creates a new antitrust-based duty of care for participants in the voluntary standards-setting process.<sup>1</sup>

The statement of the majority appears intended to respond to the concerns raised in the comments. Unfortunately, it does not resolve those concerns. Instead, by failing to take a clear stand on what legal standard it intends to apply, the majority creates more confusion. In its explanatory statement, the majority tries to have it both ways: it manages at once to suggest that this case is based on a traditional theory, which requires a showing of intent, and at the same time to say that this case is based on a novel theory, apparently to explain the absence of any showing or allegation of intent. The complaint and order combined with the explanatory statement of the majority give rise to troubling implications about the duty of care in the standards-setting process.

## I. FACTUAL BACKGROUND

This is a case about alleged abuse of the standards-setting process by a patent holder. The facts alleged in the complaint are not complex. The Video Electronics Standards Association ("VESA") is a private standards-setting organization, including as members both computer hardware and software manufacturers. In 1991 and 1992, VESA developed a standard for a computer bus design, called the VESA Local Bus ("VL-bus"). The bus carries information and instructions between the computer's central processing unit and

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<sup>1</sup> My dissenting statement when the order was first published invited comment on these issues. See Dissenting Statement of Commissioner Mary L. Azcuenaga in this matter (October 30, 1995).

peripheral devices. In August 1992, VESA conducted a vote to approve its VL-bus standard. The VESA ballot required each member's authorized voting representative to sign a statement that "to the best of my knowledge," the proposal did not infringe the member company's intellectual property rights.<sup>2</sup>

According to the Commission's complaint, after adoption of the standard, the VL-bus design was incorporated in many computers. The complaint alleges that Dell subsequently asserted that the "implementation of the VL-bus [by other computer manufacturers] is a violation of Dell's exclusive [patent] rights." For purposes of antitrust analysis, it is important to note that the complaint does not allege that Dell's representative to VESA had any knowledge of the coverage of Dell's relevant patent (known as the "481" patent) or of the potential infringement by the VL-bus at the time he cast the ballot.

Nothing in the limited information available to the Commission suggests that Dell had any greater role in the development and promulgation of the VESA VL-bus standard than that described in the minimal factual allegations in the complaint. For example, the complaint does not allege that Dell proposed or sponsored the standard, that Dell urged others to vote for the standard, that Dell employees participated in drafting the standard, that Dell employees were present, in person or online, during the committee drafting sessions, that Dell steered the VESA committee toward adopting a standard that incorporated Dell technology, or that Dell had any hand whatsoever in shaping the standard.

The sole act for which Dell is charged with a violation of law is that Dell's voting representative, in voting to adopt the standard, signed a certification that to the best of his knowledge, the proposed standard did not infringe on any relevant intellectual property.

## II. INTENTIONAL FRAUD OR ABUSE OF THE STANDARDS PROCESS

This might have been a routine antitrust case. A traditional antitrust analysis of Dell's conduct would have centered on two

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<sup>2</sup> The ballot contained the following certification:

I certify that I am the VESA member listed at the top of this ballot, or am authorized by such member to submit this ballot. By casting this vote I also certify that, to the best of my knowledge, this proposal does not infringe on any trademarks, copyrights, or patents, with the exception of any listed on the comment page. I understand that my vote and any comments will become public.

questions: whether Dell intentionally misled VESA into adopting a VL-bus standard that was covered by Dell's '481 patent and whether, as a result of the adoption of such a standard, Dell obtained market power beyond that lawfully conferred by the patent. If Dell had obtained market power by knowingly or intentionally misleading a standards-setting organization, it would require no stretch of established monopolization theory to condemn that conduct. Indeed, Section IV of the order against Dell seems to address precisely such a traditional antitrust violation. It prohibits Dell's enforcement of intellectual property rights only if in response to a written inquiry "respondent intentionally failed to disclose such patent rights" during the standards-setting process. (Emphasis added). The public comments, the majority, and I all seem to agree that Section 5 of the Federal Trade Commission Act ("FTC Act") prohibits knowing deception of standards makers to acquire market power and other intentional abuses of the standards process. If the case had gone only this far, it likely would not have elicited comment or controversy.<sup>3</sup>

The novelty of the case against Dell, the reason it has been characterized as precedent-setting, is that the order prohibits Dell from enforcing the '481 patent without any allegation in the complaint that Dell intentionally and knowingly misled VESA and without any allegation that Dell obtained market power as a result of the misstatement at issue.<sup>4</sup> The complaint does not allege that Dell's voting representative was aware either of the patent or of the potential infringement at the time the vote was taken.

The way in which the Commission handles the factual questions of intent and knowledge is critical to the policy issue at the core of this case, which is the nature and extent of the duty under Section 5 of the FTC Act of a member of a standards-setting organization in the

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<sup>3</sup> A party who has engaged in intentional and knowing misleading conduct in the standards process may be estopped from asserting a patent. See *Stambler v. Diebold Inc.*, 11 U.S.P.Q. 1709, 1714 (E.D.N.Y. 1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989) (individual inventor sat on an ANSI committee without disclosing his patent "after concluding that the proposed thrift and MINTS standards infringed on his patent"); *Wang Laboratories Inc. v. Mitsubishi Electronics America Inc.*, 29 U.S.P.Q. 1481, 1495 (C.D. Cal. 1993) (allegation that "Wang persuaded JEDC to adopt its memory '30-pin' module configuration as the industry standard, without disclosing the pending patent application on said module"). See also *Potter Instrument Co. v. Storage Technology Corp.*, 207 U.S.P.Q. 763 (E.D.Va. 1980), *aff'd*, 641 F.2d 190 (4th Cir. 1981), *cert. denied*, 454 U.S. 832 (1981).

<sup>4</sup> The majority in its statement asserts that "once VESA's VL-bus standard had become widely accepted, the standard effectively conferred market power upon Dell as the patent holder." Statement at 2, n.2. It is reasonable to assume that the majority crafted its statement with care, and this sole reference to market power does not suggest that Dell wrongfully obtained market power, but rather that the standard conferred it.

standards-setting process. It is one thing to prohibit a knowing misrepresentation or an intentional manipulation; under that standard, it is clear how to avoid liability. It is quite another matter to base liability on constructive knowledge or unsubstantiated inferences. It is possible to assert that Dell "must have" known of the patent, because obviously some people at Dell did know about the patent.<sup>5</sup> That sort of logic leads to a strict liability standard, under which a company would place its intellectual property at risk simply by participating in the standards-setting process. No matter how much money, time and talent a company might devote to avoiding mistakes in the certification process, a mistake still would be possible and potentially very costly.

By finding a violation of Section 5 in the absence of any allegation of a knowing or intentional misrepresentation, the Commission effectively imposes a duty of disclosure on Dell beyond what VESA required. The Commission may have the authority to do this but the question is whether it is advisable. VESA might have required, but did not, that each voting representative certify, on behalf of the entire company, that nothing in its entire patent portfolio overlapped with the standard and have made the certification binding regardless of any mistakes or subsequent, good faith discoveries.<sup>6</sup> Had that been the standard, the process of collecting votes likely would have been quite prolonged and, perhaps, even impossible. Nevertheless, VESA could have structured its process in this more exacting way. Perhaps there is a good reason why it did not.

The theory of antitrust liability for intentional abuse of the standards process is similar to the monopolization theory applied in cases of fraud on the Patent and Trademark Office ("PTO"). In addition, although the decisions of the Court of Appeals for the Federal Circuit in patent cases are not controlling in cases under

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<sup>5</sup> Knowing of the patent is not the same as knowing that the standard would infringe the patent. One might expect this to be particularly true in high technology industries. The majority does not address this issue, although it would appear to be relevant in adopting a duty of care not based on intent. Another relevant question is what to do about an informed opinion, later disputed, that a standard would not infringe a patent. It would not be difficult to think of numerous other questions relevant to defining the duty of care.

<sup>6</sup> One view is that because the VESA ballot required a certification that the person signing is authorized to vote, the statement "to the best of my knowledge" refers to Dell's collective corporate knowledge rather than the personal knowledge of the voting representative. But the complaint did not adopt that construction of the ballot. Instead, paragraph seven of the complaint alleges that the "Dell representative certified in writing that, to the best of his knowledge," the standard did not infringe Dell's intellectual property claims. (Emphasis added.) See discussion at 25-26, below.

Section 5 of the FTC Act, it may be useful to consider the principles in those cases.

Two standards have been applied by the courts, respectively, in determining fraud on or inequitable conduct before the PTO. First, to prove fraud on the PTO necessary to make an unlawful monopolization claim, based on the Supreme Court's decision in *Walker Process*, a party must make out a common law fraud claim, including proof of a material misrepresentation, intentionally made to deceive, and reasonably relied on by the PTO.<sup>7</sup> Second, although the showing of inequitable conduct as a defense to a patent infringement claim is less rigorous than that necessary to establish common law fraud, the Court of Appeals for the Federal Circuit nonetheless requires clear and convincing evidence that the patent applicant failed to disclose material information known to the applicant, or that the applicant submitted false information with the intent to act inequitably.<sup>8</sup> Patent law is not within the institutional expertise of the Commission, but it would seem useful to study the history and policy underlying these strict requirements for establishing liability before setting forth in a different direction and creating new theories under Section 5 of the FTC Act.

### III. ANTICOMPETITIVE EFFECTS

A second notable omission from the Dell complaint is any allegation that the company acquired or extended market power.<sup>9</sup> Instead, paragraph nine of the complaint alleges that Dell unreasonably restrained competition in four ways: (1) industry

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<sup>7</sup> See, e.g., *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965); *Argus Chemical Corp. v. Fibre Glass-Evercoat, Inc.*, 812 F.2d 1381, 1384-85 (Fed. Cir. 1987). In *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), the court found, by analogy to *Walker Process*, that the Commission had authority to order compulsory licensing of a patent obtained by fraud and remanded for a hearing de novo. The compulsory license was upheld. See *American Cyanamid Co.*, 72 FTC 623, 684-85 (1967), *aff'd sub nom. Charles Pfizer & Co.*, 410 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969). Section 6 of the Antitrust Guidelines for the Licensing of Intellectual Property (April 6, 1995) states that enforcement of patents "obtained by inequitable conduct that falls short of fraud under some circumstances may violate Section 5 of the Federal Trade Commission Act."

<sup>8</sup> See, e.g., *Heidelberger Druckmaschinen v. Hantscho Commercial Products, Inc.*, 21 F.3d 1068, 1073 (Fed. Cir. 1994); *Labounty Manufacturing, Inc. v. ITC*, 958 F.2d 1066, 1076 (Fed. Cir. 1992); *SmithKline Diagnostics, Inc. v. Helena Labs.*, 859 F.2d 878, 891 (Fed. Cir. 1988); *Specialty Composites v. Cabot Corp.*, 845 F.2d 981, 991 (Fed. Cir. 1988); *FMC Corp. v. Manitowoc Co.*, 835 F.2d 1411, 1415 (Fed. Cir. 1987).

<sup>9</sup> The complaint does not identify or allege any relevant product or geographic market. Usually, the antitrust analysis of particular practices begins with the identification of relevant product and geographic markets.

acceptance of the VL-bus "was hindered"; (2) systems using the VL-bus "were avoided"; (3) uncertainty concerning the acceptance of the VL-bus design standard "raised the costs of implementing the VL-bus design" and "of developing competing bus designs"; and (4) "willingness to participate in industry standards-setting efforts have [sic] been chilled." Assuming the allegations are true, none of them suggests that Dell acquired the power to control price and output in a relevant antitrust market.<sup>10</sup> Indeed, if, as appears from the allegations to be the case, computer producers readily could switch to bus designs that do not incorporate Dell's technology, no monopoly seems possible. The first three allegations regarding delay in acceptance of the standard, avoidance of systems using the VL-bus, and uncertainty about the bus standard, all relate to the speed and breadth of industry acceptance of the standard. Assuming that industry acceptance of the bus was slower or less extensive than it otherwise would have been, those effects do not necessarily translate into higher prices of computers for consumers, restricted output of computers in any relevant geographic market, or any other harm to consumers or competition.

Although the complaint does not allege that Dell acquired market power, the majority asserts in its explanatory statement that "once VESA's VL-bus standard had become widely accepted, the standard effectively conferred market power upon Dell as the patent holder." Statement at 2, n.2. It is worth noting that even here the majority does not allege that Dell did anything to acquire market power. In addition, the majority fails to identify the relevant market in which market power assertedly was "conferred." Dell is a producer of computers, and the press release announcing that the order had been accepted for public comment stated that Dell restricted competition "in the personal computer industry." Perhaps the majority actually does mean to find that Dell has market power in the personal computer industry; if so, some explanation is needed to make the finding more plausible, and an allegation to that effect in the complaint would seem to be in order.

The fourth allegation in the complaint, that Dell "chilled" willingness to participate in standards-setting, is particularly odd. Under the Dell order, a participant in a VESA-like standards process would be well advised not only to review its patent portfolio carefully

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<sup>10</sup> Market power is the ability to raise prices above the competitive level. *NCAA v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984).



before permitting its voting representative to sign a ballot, but if it has valuable intellectual property to protect, it might well consider not voting at all. The danger that voting on a standard might result in the loss of a company's intellectual property rights may dissuade some firms from participating in the standards-setting process in the first place.<sup>11</sup> That would be a curious result indeed for an order resting on a complaint that alleges, as an anticompetitive effect, that "[w]illingness to participate in industry standard-setting efforts ha[s] been chilled."

#### IV. REMEDY

The relief imposed by the majority seems unnecessarily harsh. The order prohibits Dell from enforcing its '481 patent against any firm using the patented technology to implement the VL-bus design for the life of the patent. In effect, the order requires Dell to provide a global royalty-free license to any firm that may have used the technology in the past, or may use it in the future, to implement the standard. The explanatory statement of the majority indicates that the relief is "carefully limited to the facts of the case," because VESA's disclosure requirement "creates an expectation by its members" that intellectual property rights will be disclosed. Statement at 3. This emphasis on an "expectation" sounds like a private patent estoppel case, not a competition case brought in the interest of the public. In any event, the complaint did not allege an "expectation" by VESA members as an element of the offense or of the competitive effects.

The private remedy of patent estoppel should suffice to remedy expectations based on Dell's conduct by barring inappropriate enforcement of a patent claim. The three elements of patent estoppel are: (1) a misleading communication by way of words, conduct or silence by a knowledgeable patentee; (2) reliance by another party on the communication; and (3) material prejudice to the other party if the patent holder is allowed to proceed. *E.g.*, *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1041-43 (Fed. Cir. 1992). If Dell's vote with its accompanying certification was misleading, and if another VESA member relied on the certification to its material prejudice, then the other firm may assert estoppel as a

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<sup>11</sup> Several of the comments the Commission received assert that the Dell order will chill participation in the standards-setting process.

bar to any claims under the patent. The Commission order, however, bars Dell from enforcing its patent without regard to whether the infringer relied on the miscommunication or whether the infringer would be materially prejudiced. If, as the majority suggests in its explanatory statement, an "expectation" is a critical underpinning of the remedy, it seems curious to bar enforcement of the patent without some better proof of expectation.

The anticompetitive effects alleged in the complaint were all highly ephemeral; they involved a delay in industry acceptance of the VL-bus design standard, avoidance of systems using the standard, and increased costs due to uncertainty about acceptance of the VL-bus and development of competing bus designs. As a practical matter, a Commission order, entered in 1996, can do little to correct any uncertainty and delay that might have occurred in early 1993, when Dell asserted the claim. Presumably, companies have long since decided what bus design to select. In a "precedent-setting" matter such as this one, the Commission should attempt to identify the relevant competitive interests and strike a fair balance among them. An order limiting enforcement of an undisclosed patent for an ample period of time to permit modification of the standard to eliminate the patent conflict would be less draconian than the majority's permanent ban on enforcement and seems more proportional to the alleged harm.

#### V. PUBLIC COMMENTS

Eleven thoughtful comments reflecting diverse viewpoints in the business community have been received. The comments contain a wealth of information and analysis, and I commend them in their entirety to anyone with an interest in this area. The comments reflect an unusual degree of concern and apprehension about the implications of the order. Several of the nation's most significant standards-setting organizations have written to state their opposition to the broad implications of the order and its possible chilling effect on the participation of firms with broad patent portfolios in the standards-setting process. VESA and a few other groups, however, support this or an even stronger order.

Seven commenters strongly opposed the imposition on participants in the standards-setting process of any duty to identify and disclose patents. The American National Standards Institute

("ANSI"), an umbrella organization that accredits standards development organizations, supported liability for failure to disclose relevant patents only insofar as a firm "intentionally and deliberately fails to disclose . . . in an attempt to gain an unfair advantage." ANSI opposed the imposition of any affirmative duty to identify and disclose patents, because it would chill participation in standards development. ANSI also expressed concern that the Dell remedy, which could be characterized as forfeiture of patent rights or mandatory licensing, might harm the United States' position in international negotiations.<sup>12</sup> Five standards development organizations and an intellectual property law bar association filed comments that supported all or parts of ANSI's comment.

The American Intellectual Property Law Association ("AIPLA"), a national bar association of intellectual property attorneys, supported the reconciliation of the rights of standards users and owners of intellectual property as set forth in ANSI's patent policy.<sup>13</sup> AIPLA agreed with ANSI that unless limited to egregious facts, the Dell order will discourage industry cooperation in standards-setting.<sup>14</sup> Because patent disputes in the standards as in other contexts are highly fact specific, AIPLA said that private patent estoppel litigation is a better forum than a Section 5 proceeding to resolve such disputes. AIPLA noted that the Dell remedy constitutes a forfeiture of patent rights or compulsory licensing and said that the remedy is too drastic and inappropriate for many situations.

Several other commenters also endorsed a standard that requires a showing of intent, including the Electronic Industries Association ("EIA"), the Telecommunications Industry Association ("TIA"), the Standards Board of the Institute of Electrical and Electronic Engineers ("IEEE"), and the Alliance for Telecommunications Industry Solutions, Inc. (ATIS).<sup>15</sup>

ANSI addressed the dangers of imposing liability on the basis of an unintentional failure to disclose a patent or of imposing an affirmative obligation to search patent portfolios. For firms with

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<sup>12</sup> The majority has not addressed this concern.

<sup>13</sup> See p. 17, below.

<sup>14</sup> If limited to egregious facts, the order could not apply to this case, which does not involve intent.

<sup>15</sup> ATIS's Committee T1 develops standards for the national telecommunications network. Committee T1 ballots, like VESA ballots, request disclosure of relevant patents "based on the best knowledge at the time of the T1 member casting the ballot." It is significant that ATIS rejected a stricter standard requiring disclosure because that would place an "enormous and unreasonable" burden on participants.

hundreds of employees involved in standards-setting and with tens of thousands of patents, an affirmative obligation to search for patents would present the choice of either avoiding standards-setting or placing their intellectual property at risk. Several other commenters expressed the same concern. The EIA and TIA warned of a "profound chilling effect" on standards-making if Dell is extended to situations of negligent failure to disclose. The Standards Board of the IEEE similarly commented that if "a 'disclose it or lose it' approach becomes the test, the very robust standards-setting activities in industry today will be quickly truncated to a minimal level." Others expressed similar concerns.

The ANSI patent policy reconciles the interests of patent owners with the users of standards. The policy provides that the patent holder must supply ANSI with either:

1. A general disclaimer to the effect that the patent holder does not hold and does not anticipate holding any invention the use of which would be required for, compliance with the proposed standard, or

2. A written assurance that either:

a) A license will be made available to applicants desiring to utilize the license for the purpose of implementing the standard without compensation to the patent holder, or

b) A license will be made available to applicants under reasonable terms and conditions that are demonstrably free of unfair discrimination.<sup>16</sup>

ANSI specifically anticipates and addresses the situation in which intellectual property that bears on a standard is discovered after the standard is adopted. "Under ANSI's patent policy, the patent holder is then required to provide the same assurances to ANSI that are required in situations where patents are known to exist prior to the standard's approval. If those assurances are not forthcoming or if potential users can show that the policy is not being followed, the standard may be withdrawn through the appeals process."<sup>17</sup> Several other commenters follow this ANSI policy. Indeed, the patent policy

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<sup>16</sup> ANSI comment at 6-7.

<sup>17</sup> *Id.* at 7.

attached to the VESA comment appears for all practical purposes to be like the ANSI policy.

Two commenters took issue with the statement quoted in the press release announcing the consent order for public comment that "[o]pen, industry-wide standards also benefit consumers because they can be used by everyone without cost." The ITI and the Standards Board of the IEEE disagreed with the view that open standards are standards without cost, observing that the common meaning of an open standard includes standards that incorporate patented technology licensed by the patent owner. It appears from the explanations in the comments that the statement in the Commission's press release was simply a mistake based on a lack of knowledge, rather than an attempt to effect a major change in the way business is done, with the attendant costs and dangers of such a change. The primary significance of this issue is that it illustrates that the Commission does not have a great deal of experience in this area and should tread carefully.

Four comments, including one anonymous comment, supported the imposition of a duty to search for and disclose patents during the standards-setting process. The American Committee for Interoperable Systems ("ACIS") argued that it is appropriate to place the burden to search for patent/standard conflicts on the patent holder because the patent holder is in the better position to determine if its patent reads on the standard. ACIS downplayed the concern about chilling participation in the development of standards and noted that participation in standards-setting is motivated by commercial self-interest and "is not a form of charitable or community service."<sup>18</sup> Bay Networks, Inc., also appears to support a strict liability standard. It would require firms participating in standards-setting to identify and disclose intellectual property rights or waive any such rights needed to practice the standard. Bay Networks argued that a requirement to license on reasonable and nondiscriminatory terms may not be sufficient, because firms may disagree about the meaning of these terms.

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<sup>18</sup> One of the four comments supporting a more rigorous duty to search for and disclose patents was filed anonymously. As the Court of Appeals for the District of Columbia Circuit has observed, anonymous appearances raise "profound questions of fundamental fairness and perhaps even due process." *United States v. Microsoft Corp.*, 1995-1 Trade Cas. ¶ 71,027 at 74,828 (D.C. Cir. 1995). Nevertheless, I note that the anonymous commenter proposed "an affirmative duty . . . to conduct a search using reasonably diligent efforts to uncover any relevant patents."

VESA favored imposition of a "general duty of members of standards associations to disclose the existence of intellectual property rights (or potential rights) that the member is aware of . . ." In VESA's view, the disclosure duty should not be limited to the engineers involved in the standards-setting process. Instead, VESA favors "implying a duty to disclose on the organization that is participating in the standard-setting activities, as opposed to simply limiting that duty to the engineers involved." VESA would put the burden of showing good faith on the party "belatedly" asserting a patent or other intellectual property rights. The VESA Board Policy for dealing with proprietary standards is very like ANSI's patent policy, which is quoted at pages 6-7 of the ANSI comment.<sup>19</sup> It is not clear why the VESA patent policy was not sufficient to deal with the facts of this case.

Several comments applauded Commission action to halt intentional misrepresentations or intentional abuse of the standards process. These comments appear to be based on the erroneous assumption that the Commission's complaint against Dell alleges knowing, intentional deception of VESA, and they do not address the specific question of conduct that is not based on an allegation of intent or knowing misrepresentation.

#### VI. THE STATEMENT OF THE MAJORITY

"Because the proposed order generated considerable public comment" and in an attempt "to improve understanding of this enforcement action," the majority has issued an explanatory statement of its decision. Statement at 1. Unfortunately, the statement does not clarify the decision; if anything, it sows greater confusion. The majority attempts to confine the decision to "the

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<sup>19</sup> The majority attempts to distinguish VESA's patent policy from ANSI's patent policy on the ground that VESA's certification "create[s] an expectation that there is no conflicting intellectual property." Statement at 3, n.6. The majority seems to confuse VESA's ballot with VESA Board Policy No. 109, which like the ANSI patent policy, does not provide for "certification" regarding intellectual property. Like VESA, many ANSI-accredited standards-setting organizations request disclosure of intellectual property conflicts. For example, ATIS commented that its ballots "request the disclosure of patents relevant to the matter being balloted based on the best knowledge at the time of the TI member casting the ballot." ATIS Comment at 3-4. In the EIA and TIA, "[c]ommittee and subcommittee chairs ask during the meetings whether any parties are aware of any patents that relate to the contributions under discussion." EIA/TIA Comment at 3. Under the majority's rationale, ANSI-accredited standards-setting organizations that inquired about patent conflicts would thereby create "expectations" that should result in forfeiture of subsequently discovered intellectual property rights. It appears that their concern over this very point is what prompted those organizations to comment on the order.

limited circumstances presented by this case," but those are precisely the circumstances that necessitate setting a new legal standard in order to find Dell's conduct unlawful. The only unique aspect of the case is the majority's use for the first time of a legal standard that omits the element of intent, a standard that, as the commenters recognized, will have widespread applicability.

The majority in its statement alleges facts that are not contained in the complaint that is part of the settlement to which Dell has agreed. To explain this unusual procedure, the majority cites Commission Rule 2.34, 16 CFR 2.34, which provides that when the Commission seeks public comment on a consent order, it "will make available an explanation of the . . . order . . . and any other information which it deems helpful in assisting interested persons to understand the terms of the order." Statement at 4, n.9. The Analysis To Aid Public Comment, to which Rule 2.34 refers, does not become part of the Commission's permanent record of the case, and usually contains the following disclaimer:<sup>20</sup>

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

FTC Operating Manual, Ch. 6, Illustration 7. The Commission's Operating Manual, although not binding, provides:

The purpose of [the Analysis To Aid Public Comment] is to advise the public concerning the nature of the law violations alleged and the remedies or other basis for disposition and settlement. Any substantive statement must be based upon the agreement documents, although paraphrasing in a few words the substance of a long provision is often appropriate. The focus of this analysis is upon the public impact and anticipated effects, including competitive effects, of the proposed settlement.<sup>21</sup>

FTC Operating Manual, Ch. 6.10.6 (emphasis added). It is one thing for the majority to provide information explaining an order; it is quite another to attempt under cover of Rule 2.34 to suggest support for allegations necessary to establish liability, such as intent or market power, that are entirely missing from the complaint. A more

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<sup>20</sup> Inexplicably, the disclaimer was omitted in this case.

<sup>21</sup> This is not to say that the majority can never say anything beyond what is appropriate for inclusion in the Analysis To Aid Public Comment, but the majority should keep in mind that the consent agreement, within its four corners, contains the final decision and order of the Commission. If the majority wants to amend its decision, the proper course is to amend the decisional document.

important reference in this regard would seem to be Commission Rule 3.11, 16 CFR 3.11, which provides that a Commission complaint "shall contain . . . a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be a violation of law . . ." <sup>22</sup>

Setting aside for the moment the process questions raised by alleging new facts in a separate statement, the new factual allegations raise even more questions about the basis for liability in this case. For example, the majority says in its statement that VESA has a "strong preference for adopting standards that do not include proprietary technology." Statement at 1. This assertion, perhaps included to heighten some sense of transgression, adds a questionable spin in characterizing VESA's policy. In fact, VESA recognizes that a standard sometimes will include proprietary technology and that a proprietary interest in a proposed standard will not necessarily preclude adoption of such a standard. The comment filed on VESA's behalf by counsel makes this point, and the VESA Patent Policy (Board Policy No. 109) attached to VESA's comment expressly states in the first paragraph: There is no objection in principle to a VESA proposal or standard that includes the use of patented technology if it is justified for technical reasons." (Emphasis added.) VESA Board Policy No. 109 spells out clearly how it will deal with a standard that requires the use of patented technology, and its procedure appears similar in significant respects to the policies of other standards organizations. On examination, this new factual assertion contributes nothing to a theory of liability.

In its statement, the majority also asserts, for the first time, that if VESA had been informed of Dell's patent during the certification process, VESA "would have implemented a different non-proprietary design." Statement at 1. The majority's assertion is either a throw-away line, or it opens a Pandora's box of difficult technical questions. The complaint does not allege that other equally useful and valuable technologies for implementing the standard were available, and it does not allege that VESA would have adopted a different approach had it known of the Dell patent. The majority also offers the slightly different statement that "had VESA known of the Dell patent, it could have chosen an equally effective, nonproprietary standard." Statement at 2, n.2. Well, maybe. It is possible, as the majority

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<sup>22</sup> To return to my initial observation about the case, the complaint against Dell does not allege a violation under any established theory of law. See p. 1, above.



suggests, that Dell's invention was one of an array of equally useful and valuable technical alternatives; if so, VESA might have selected an alternative without compromising the standard. It is also possible, however, that Dell's product was technically superior or more efficient, and if so, that a standards-setter might prefer the patented design, even though it would involve the payment of royalties to the inventor. We do not know and can only speculate.

The majority's reliance on supposed technological alternatives is troubling. We have not reviewed the technical merits of Dell's patent vis-a-vis the alternatives, but, in any event, I seriously question whether Section 5 liability should be based on such an assessment. Antitrust enforcement agencies are ill suited to evaluating the technical merits and economic value of patents.

A third new factual allegation is the majority's assertion that "Dell certified [to VESA] that it had no [conflicting] intellectual property rights." Statement at 1. Paragraph seven of the complaint, however, attributes the certification to "a Dell representative." This difference between "Dell" and "a Dell representative" is more significant than at first may appear. The complaint allegations regarding the voting certification are carefully confined to Dell's voting representative.<sup>23</sup> The majority, however, with this statement attributes Dell's corporate wide knowledge, which presumably is all inclusive, to its voting representative. This in turn would mean that the voting representative had constructive knowledge of the '481 patent at the time he signed the certification. In other words, by substituting "Dell" for "a Dell representative" with respect to the certification, the majority suggests that Dell intentionally misled VESA.<sup>24</sup> On reflection, it is obvious why Dell did not agree to a complaint allegation like that contained in the majority's statement. This is the first hint in the statement that the majority now might like to suggest that this case does involve intentional conduct.

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<sup>23</sup> The majority also says that "Dell's voting representative made his certification on behalf of the corporation," because he was acting in his capacity as an agent. Statement at 1, n.1. This discussion assumes the majority's conclusion. No one contests the validity of the vote cast by Dell's voting representative. Instead, the question is whether, under Section 5 of the FTC Act, the knowledge of the corporation is imputed to the voting representative with respect to this particular certification. The majority's discussion of agency law assumes a strict liability standard inconsistent with its assertion elsewhere (Statement at 3) that we should not infer from this case a general duty to search. It is impossible to discern on which of the majority's inconsistent statements we should rely. If footnote 1 in the majority's statement accurately reflects the majority's position, surely we should alert the press, because this case is precedent-setting, indeed.

<sup>24</sup> See discussion at 7, n.6, above.

A fourth new factual allegation in the majority statement is that "Dell failed to act in good faith to identify and disclose patent conflicts." Statement at 2. This assertion seems plainly to be responsive to the concerns expressed by the commenters about abandoning the intent standard, and it brings us directly back to the issue on which this case turns. The statement that Dell did not act in good faith seems to suggest that Dell's conduct was intentional. Having mentioned an absence of good faith, the majority adds that the decision in this case "should not be read to impose a general duty to search." Statement at 3. It would appear that the majority, seeking to assuage the commenters, hopes to suggest that it has not changed the traditional standard based on intent. Unfortunately, there are three reasons why this cannot be true. First, this is a consent order and Dell did not agree to a complaint allegation that it intentionally misled anyone. For a majority of the Commission now to assert in a statement separate from the complaint and order that there was intent would raise serious questions of fundamental fairness.<sup>25</sup>

The second reason we know that the majority has not employed traditional analysis lies in the express observation that this is the "type of case, in which the legal and economic theories are somewhat novel." Statement at 4. The third reason we know that the majority has not employed a traditional analysis comes from the single sentence that articulates the majority's new standard: the majority asserts that "there is reason to believe that Dell's failure to disclose the patent was not inadvertent." Statement at 3 (emphasis added). Hmmm. . . . The "not inadvertent" standard is not easy to place. If Dell has not consented to an allegation of intent and if this case is "somewhat novel," then "not inadvertent" surely does not mean intentional. Therefore, "not inadvertent" apparently means something that lies somewhere between avoiding intentional misconduct and the general duty to search that the majority specifically rejects.

The choice of the phrase "not inadvertent" seems carefully crafted not to say that Dell acted knowingly or intentionally. "Not inadvertent" is not a familiar legal standard of conduct. Negligence is the legal characterization of conduct that seems closest to the standard of the majority. Negligence, however, implies a violation of some duty of care, presumably in this case a duty to identify and disclose patents. But that brings us back again to the general duty to

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<sup>25</sup> To state the obvious, if intent is required to establish liability, the Commission has only two choices, either to dismiss the case or to renegotiate the consent agreement with Dell.

search that the majority rejects. Unfortunately, the majority does not enlighten us further, except to conclude that its decision "strikes the right balance." I beg to differ.

I do not favor a departure from the usual requirement that intent must be shown to establish liability. But looking beyond the merits, the decision of the majority is still faulty. The majority fails to articulate its standard in any comprehensible way, much less to explain why it is appropriate in the name of competition to upset a standards-setting process that seems to be well established and working well. When the Commission issues an order based on an adjudicative record, it is held accountable for its decision through the process of judicial review. When the Commission issues a consent order, it must hold itself accountable in the public interest by addressing the issues in a serious and rigorous manner. In carrying out this fundamental responsibility, the Commission has failed even to begin.

I dissent.

Complaint

121 F.T.C.

IN THE MATTER OF

BENCKISER CONSUMER PRODUCTS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3659. Complaint, May 22, 1996--Decision, May 22, 1996*

This consent order prohibits, among other things, the Connecticut-based company from misrepresenting that a portion of the revenue from the sale of any household cleaning product is donated to any organization. If the respondent chooses to make such claims in the future, the consent order requires the respondent to clearly and prominently disclose the method of determining the amount of the donation.

*Appearances*

For the Commission: *Thomas B. Carter, James R. Golder and Gary D. Kennedy.*

For the respondent: *Herbert C. Ross, Oppenheimer, Wolff & Donnelly, New York, N.Y.*

## COMPLAINT

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

PARAGRAPH 1. Respondent Benckiser Consumer Products, Inc. is a Delaware corporation with its principal office or place of business at Corporate Centre I, 55 Federal Road, Danbury, Connecticut.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed household cleaning products, under the tradename EarthRite, and other products to the public.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product hangtags, for its EarthRite products, which include the following statement:

One percent of EarthRite's proceeds are donated to non-profit organizations working to restore and preserve our natural environment.

PAR. 5. Through the use of the statement contained in the advertisements referred to in paragraph four, including but not necessarily limited to the product hangtag, respondent has represented, directly or by implication, that respondent donates some portion of its revenue from the sale of EarthRite products to non-profit environmental organizations.

PAR. 6. In truth and in fact, respondent has not donated any portion of its revenue from the sale of EarthRite products to non-profit environmental organizations. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statement contained in the advertisements referred to in paragraph four, including but not necessarily limited to the product hangtag, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 (a) of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Dallas Regional Office proposed to present to the Commission for its

consideration and which, if issued by the Commission, would charge respondents with violation of Section 5 of the Federal Trade Commission Act, as amended; and

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

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

1. Respondent Benckiser Consumer Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Corporate Centre I, 55 Federal Road, in the City of Danbury, State of Connecticut.

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

#### ORDER

##### I.

*It is ordered*, That respondent Benckiser Consumer Products, Inc., a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or

distribution of any household cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any portion of the revenues from the sale of such household cleaning product is donated to any organization; provided, however, respondent will not be in violation of this Part I if it truthfully represents that a portion of the revenues from the sale of such household cleaning product is donated to an organization and discloses, clearly, prominently, and in close proximity to such representation, the method of determining the amount of such donation. A disclosure shall be deemed to be "in close proximity" to a representation if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the advertisement or part of the package on which the representation appears.

## II.

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

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

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

## III.

*It is further ordered,* That respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and

placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

IV.

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

V.

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

VI.

*It is further ordered*, That this order will terminate on May 22, 2016, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though



the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

## IN THE MATTER OF

## THE VONS COMPANIES, INC., ET AL.

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

*Docket C-3233. Consent Order, Aug. 29, 1988--Modifying Order, May 24, 1996*

This order reopens a 1988 consent order that settled allegations that The Vons Companies' ("Vons") acquisition of three Safeway divisions with stores in southern California and Nevada violated federal antitrust laws. This order modifies the consent order by replacing the 1988 order's prior-approval provision for acquisitions of supermarkets in Las Vegas, Nevada, or in numerous specified cities and towns in California, with a prior-notice provision for such acquisitions.

## ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, The Vons Companies, Inc. ("Vons" or "respondent"), one of the respondents named in the consent order issued by the Commission on August 29, 1988, in Docket No. C-3233 ("order"), filed its Petition To Reopen and Modify Consent Orders ("Petition") in this matter.<sup>1</sup> Vons asks that the Commission reopen and modify the prior approval requirements of the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").<sup>2</sup> The order requires Vons to seek the prior approval of the Commission to acquire any retail grocery store in a number of California cities and towns and in the city of Las Vegas, Nevada.<sup>3</sup> In addition, paragraph IV(B) of the order contains a proviso that requires Vons to give the Commission 30-days' prior

<sup>1</sup> In its Petition, Vons also requested that the order in Docket No. C-3391 be reopened and similarly modified. The Commission has determined to deny Vons' Petition as to that order and has notified Vons by letter as to the reasons for its denial.

<sup>2</sup> 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

<sup>3</sup> Although SSI Associates, L.P. ("SSI") and Safeway Stores, Incorporated ("Safeway"), a subsidiary of SSI, are also respondents, the order's prior approval provisions only apply to Vons. Order at ¶ IV(A) and ¶ IV(B).

written notice of certain acquisitions. The Petition further requests that the Commission clarify that "prior written notice" under paragraph IV(B) means a letter to the Secretary of the Commission and does not mean Hart-Scott-Rodino type notice and wait procedures.<sup>4</sup> The thirty-day public comment period on Vons' Petition expired on January 8, 1996. No comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

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<sup>4</sup> Petition at 1 and 3.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that Vons, SSI and Safeway had entered into an agreement, that, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by substantially lessening competition in the retail sale and distribution of food and grocery items in retail grocery stores in certain localized markets in California.<sup>5</sup>

The complaint alleged that a substantial lessening of competition would result from the elimination of direct competition between Vons and Safeway in the relevant markets; the increase in the likelihood that Vons would unilaterally exercise market power in the relevant markets; and the increase in concentration and in the likelihood of collusion in certain already highly concentrated markets.

The presumption is that setting aside the prior approval requirements in this order is in the public interest. However, there has been no showing that the competitive conditions that gave rise to the complaint and the order no longer exist. Moreover, the relevant markets are localized and the acquisition price of a retail grocery store could fall well below the HSR size-of-transaction threshold. Therefore, the record evidences a credible risk that Vons could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraphs IV(A) and IV(B) of the order to substitute a prior notification requirement for the prior approval requirement.<sup>6</sup>

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<sup>5</sup> The relevant sections of the United States are the following areas in California: Barstow; Yucca Valley; Camarillo; South San Diego County; Santa Clarita Valley; Coachella Valley; Santa Barbara; Montecito; and Goleta. Complaint ¶ 11.

<sup>6</sup> Vons has stated that it has no objection to the substitution of prior notification provisions for the prior approval provisions of the order.

In addition to a prior approval requirement, paragraph IV(B) contains a proviso which requires Vons to give 30-days' written notice to the Commission prior to completing certain acquisitions. Such notice is not required to be given in accordance with the "Prior Notification to the Commission" procedure (as defined below) that is a part of the order, as now modified. Rather, the Commission's Rules of Practice and Procedure prescribe, and continue to prescribe, the method by which Vons must file such notice with the Commission. See 16 CFR 4.2 & 4.4. Therefore, the order, as modified, does not require Vons to follow the "Prior Notification to the Commission" procedure when providing notice to the Commission in those circumstances covered by the order's paragraph IV(B) proviso prior notice requirement.

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

*It is further ordered*, That paragraph IV(A) of the order be, and it hereby is, modified, as of the effective date of this order, to read, as follows:

(A) For a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Vons shall cease and desist from acquiring, without Prior Notification to the Commission (as defined below), directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six (6) months of the date of the offer by Vons to purchase the facility, or any interest in a retail grocery store, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store, in the following cities or towns:

Las Vegas, Nevada  
Bakersfield, California  
Santa Clarita, California  
Camarillo, California  
Ventura, California  
Thousand Oaks, California  
Victorville, California  
Barstow, California

Carlsbad, California  
Vista, California  
Escondido, California  
Poway, California  
Rancho Bernardo, California  
South San Diego County,  
California (that portion of San  
Diego County, California that

<p>Coachella Valley, California (an area including the cities and towns of Palm Springs, Palm Desert, Indian Wells, Indio, Cathedral City, Rancho Mirage, La Quinta, and Coachella) Yucca Valley, California Solana Beach, California</p>	<p>is south of the Miramar Naval Air Station) Santa Barbara, Montecito and Goleta, California Palmdale, California Lancaster, California Simi Valley, California Moreno Valley, California</p>
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Provided, however, that this paragraph IV(A) shall not be deemed to require Prior Notification to the Commission for the construction of new facilities by Vons or the purchase or lease by Vons of a facility that has not been operated as a retail grocery store at any time during the six (6) month period immediately prior to the purchase or lease by Vons in those locations.

"Prior Notification to the Commission" required by paragraphs IV(A) and IV(B) shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification Form"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Vons and not of any other party to the transaction. Vons shall provide the Notification Form to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Vons shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, Vons shall not be required to provide Prior Notification to the Commission pursuant to this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

*It is further ordered*, That paragraph IV(B) of the order be, and it hereby is, modified, as of the effective date of this order, to read, as follows:

(B) For a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Vons shall cease and desist from acquiring, without Prior Notification to the Commission (as defined in paragraph IV(A)), directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six (6) months of the date of the offer to purchase the facility, or any interest in a retail grocery store, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates any retail grocery store in: (1) the city of San Bernardino, California; or (2) the city of Riverside, California; or (3) the counties of Los Angeles and Orange, California; provided, however, that upon thirty (30) days prior written notice to the Commission, Vons may acquire, directly or indirectly, through subsidiaries or otherwise, any such retail grocery stores, so long as, in any twelve (12) month period, commencing on the date this order becomes final and continuing thereafter for ten (10) years, the number of such retail grocery stores acquired, directly or indirectly, does not exceed: (1) two in the city of San Bernardino, California; (2) two in the city of Riverside, California; and (3) ten in the counties of Los Angeles and Orange, California. Provided further, however, that these prohibitions shall not relate to the construction of new facilities by Vons or the purchase or lease by Vons of a facility that was not operated as a retail grocery store at any time during the six (6) month period immediately prior to the purchase or lease by Vons in those locations.