

## LONDON INTERNATIONAL GROUP, INC.

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

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

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

*Appearances*

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

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

## COMPLAINT

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

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

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

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

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

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

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

**Ramses®. a trusted companion.**

\*Ramses® regular strength condoms."

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

B. "WOMEN PREFER THE STRONG SENSITIVE TYPE.

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

**Ramses. A Trusted Companion.**

\*Ramses regular strength condoms."

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

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

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

\*Ramses regular strength condoms."

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

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

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

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

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

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

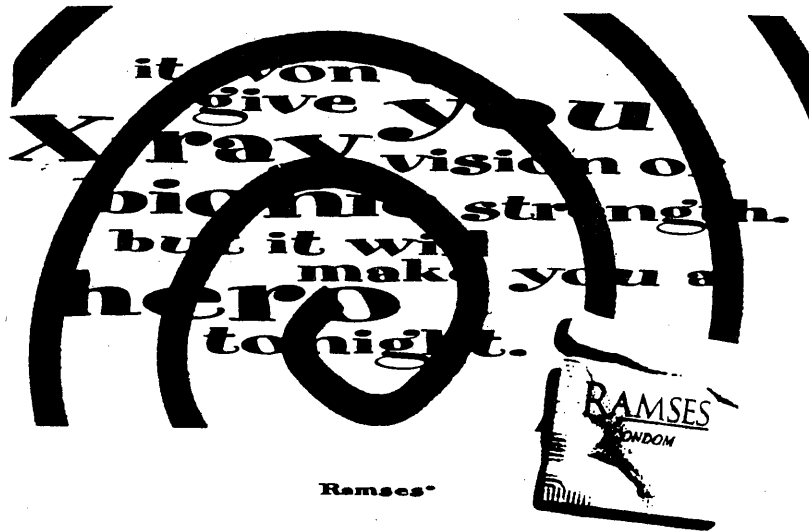
8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Complaint

125 F.T.C.

EXHIBIT A

EXHIBIT A



gives you the

sensitivity and natural

feeling you want. and because it's 30x

stronger than the leading brand, it performs like a

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

EXHIBIT B

EXHIBIT B

**WOMEN  
PREFER  
STRONG  
SENSITIVE  
TYPE**

000065LI  
9623004

Provides both strength and sensitivity with  
ultra natural feel. And 30% more strength\*  
the leading brand. Now all you need to do is  
not to cry. Ramses. A Trusted Companion.

\*Ramses regular      Distributed by L      © 2002, FL 342

EXHIBIT C

EXHIBIT C

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

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

000064LI  
9623004

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

## DECISION AND ORDER

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

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

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

1. Respondent London International Group, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 3585 Engineering Drive, in the City of Norcross, State of Georgia.

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

## ORDER

## DEFINITIONS

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

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

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

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

#### I.

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

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

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

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

#### II.

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

A. All advertisements and promotional materials containing the representation;

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

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

### III.

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

### IV.

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

## V.

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

## VI.

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

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

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

IN THE MATTER OF  
GUINNESS PLC, ET AL.

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

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

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

*Appearances*

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

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

COMPLAINT

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

I. RESPONDENT GUINNESS PLC

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

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

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

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

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

## II. RESPONDENT GRAND MET

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

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

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

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

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

## II. RESPONDENT DIAGEO

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

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

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

## III. THE MERGER

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

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

## IV. TRADE AND COMMERCE

A. *Relevant Product Markets*

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

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

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

### *B. Relevant Geographic Markets*

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

### *C. Conditions of Entry*

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

## V. MARKET STRUCTURE

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

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

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

## VI. EFFECTS OF THE MERGER

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

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

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

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

## VII. VIOLATIONS CHARGED

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

## DECISION AND ORDER

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

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

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

1. Respondent Guinness plc was a corporation organized, existing, and doing business under and by virtue of the laws of the

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

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

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

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

#### ORDER

##### I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

f. All price lists for Dewar's;

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

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

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

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

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

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

representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees;

m. All rights under warranties and guarantees, express or implied, relating to Dewar's;

n. All books, records, and files, relating to Dewar's; and

2. All assets, properties, business and goodwill, tangible and intangible, owned or controlled by Grand Met, anywhere in the world, used in the manufacture, distribution, marketing, and sale of gin under any trade name or trademark that incorporates the term "Bombay," including, without limitation, the following:

a. The trade name or trademark "Bombay" and all trademarks, trade dress, trade names, and logos associated with the sale of any "Bombay" gin;

b. The Bombay profit and loss statements, Bombay contribution statements and Bombay advertising, promotional and marketing spend records;

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

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

e. Copies of all product testing required by any regulatory authority relating to Bombay;

f. All price lists for Bombay;

g. Molds currently in use for bottling Bombay in its various sizes sufficient to produce 800,000 9-liter cases of Bombay per year;

h. All inventories of finished case goods and packaging relating to Bombay;

i. To the extent transferable or assignable, all rights, titles, and interests in and to the contracts relating to Bombay entered into in the ordinary course of business, including but not limited to the contract between Grand Met and Greenalls Group plc as relating to Bombay, with customers (together with associated bid and performance bonds), other distillers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

j. All rights under warranties and guarantees, express or implied, relating to Bombay; and

k. All books, records, and files, relating to Bombay.

H. "*Merger*" means the proposed merger of Grand Met and Guinness pursuant to the merger agreement dated May 11, 1997, leading to the creation of Diageo.

## II.

*It is further ordered, That:*

A. Respondents shall divest, absolutely and in good faith, within six (6) months from the date the agreement containing consent order is signed by respondents, all of the Assets To Be Divested; with the assets described in paragraphs I.G.1 going to a single acquirer and the assets described in paragraphs I.G.2 also going to a single acquirer (who may be the same acquirer as the acquirer of the assets described in paragraph I.G.1),

1. Provided, however, that if the Commission, in its sole discretion, determines that the acquirer of any of the Assets To Be Divested does not require any or all of the distillery capacity, cooperage services, or inventory of or storage capacity for aged, distilled malt and grain whiskies referred to in paragraphs I.G.1(i) - (k) in order to fulfill the purposes of this order (including as a result of other arrangements made by the acquirer such as supply agreements with respondents or others as approved by the Commission), then respondents shall not be required to divest such assets,

2. Provided further, that to the extent that the Assets To Be Divested include ownership interests in distilled spirits distributors, respondents shall not be required by virtue of anything contained in this order to divest such ownership interests,

3. Provided further, that to the extent that any document or other material included within the Assets To Be Divested contains information concerning a brand other than Dewar's or Bombay, such other information need not be provided, and

4. Provided further, that if any document or other material included within the Assets To Be Divested is required to be retained by respondents by requirements of law, or for tax purposes or for defending products liability lawsuits, respondents may retain a copy of such material for use only for such purposes.

B. Respondents shall make best efforts to ensure the continued and uninterrupted supply of Bombay to the acquirer by its existing supplier, Greenalls Group plc ("Greenalls"), under the terms of the existing contract between Greenalls and Grand Met. In the event Greenalls does not agree to supply the acquirer under terms acceptable to the acquirer, to ensure the acquirer an uninterrupted supply of Bombay at supply levels consistent with the terms of the contract with Greenalls, at the request of the acquirer, respondents shall produce and bottle Bombay in England for the acquirer using the same production methods, type of equipment, and recipe as those used by Greenalls for the production of Bombay, through September 30, 2001, or such shorter or longer time period as respondents and the acquirer may mutually agree. Respondents shall charge the acquirer, for a period of twelve (12) months from the date of the divestiture, no more than the prices for Bombay charged by Greenalls as of the date the agreement containing consent order is signed. Thereafter, through September 30, 2001, respondents may charge the acquirer prices in accordance with the terms in the existing contract between Grand Met and Greenalls.

C. The purposes of the order are to remedy the lessening of competition resulting from the merger as alleged in the Commission's complaint, and to ensure the continued use of the Assets To Be Divested in the same businesses in which the Assets To Be Divested are engaged at the time of the merger.

D. Respondents shall divest the Assets To Be Divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

E. Pending divestiture of the Assets To Be Divested, respondents shall take such actions as are necessary to maintain the viability and marketability of the Assets To Be Divested and the ability to compete at the same levels of sales, profitability, and market share as prior to the merger, subject to prevailing market conditions, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Assets To Be Divested, except for ordinary wear and tear.

F. Respondents shall comply with all terms of the Asset Maintenance Agreement, attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as respondents have divested all the Assets To Be Divested as required by this order.

## III.

*It is further ordered, That:*

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets to be Divested within six (6) months of the date respondents sign the agreement containing consent order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

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

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

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

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph

III.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph 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 expeditiously the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in Section II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

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

commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

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

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

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

11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

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

#### IV.

*It is further ordered,* That respondents shall, for a period of one year from the date of the divestiture pursuant to this order, or for such shorter period as the acquirer shall determine, make available, at no cost to the acquirer, such technical assistance and know-how as the acquirer shall require to enable the acquirer to produce Dewar's Scotch or Bombay gin according to current production processes and formulas.

#### V.

*It is further ordered,* That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of Sections II, III, and IV of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Sections II, III, and IV of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply

with Sections II, III, and IV of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

#### VI.

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

#### VII.

*It is further ordered,* That, for the purpose of determining or securing compliance with this order, upon written request to counsel, respondents shall permit any duly authorized representative of the Commission:

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

B. Upon five days' notice to counsel for respondents and without restraint or interference from respondents, to interview officers, directors, or employees of respondents, who may have counsel present.

#### APPENDIX I

##### ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement is by and among Guinness plc ("Guinness"), a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 39 Portman Square, London, England W1H 0EE, Grand Metropolitan plc ("Grand Met"), a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG, the successor of Guinness and Grand Met,

Diageo, and the Federal Trade 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 FOR AGREEMENT

*Whereas*, Guinness and Grand Met, pursuant to an agreement dated May 11, 1997, agreed to merge; and

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

*Whereas*, the Commission has reason to believe that the agreement would violate Section 5 of the Federal Trade Commission Act, and that the merger contemplated by the agreement, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, statutes enforced by the Commission; and

*Whereas*, if the parties accept the attached Agreement Containing Consent Order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

*Whereas*, the purpose of this agreement and of the consent order is to preserve the Assets To Be Divested pending the divestiture to the acquirer approved by the Commission under the terms of the order, in order to remedy any anticompetitive effects of the merger; and

*Whereas*, Guinness's and Grand Met's entering into this agreement shall in no way be construed as an admission by Guinness or Grand Met that the proposed merger is illegal; and

*Whereas*, no act or transaction contemplated by this agreement shall be deemed immune or exempt from the provisions of the antitrust laws, or the Federal Trade Commission Act, by reason of anything contained in this agreement;

*Now, therefore*, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will terminate Guinness' obligation to give twenty (20) days' notice to the Commission's staff prior to consummating the merger with Grand Met, the parties agree as follows:

#### TERMS OF AGREEMENT

1. Guinness and Grand Met agree to execute, and upon acceptance by the Commission of the Agreement Containing Consent

Order for public comment agree to be bound by, the attached Consent Order.

2. Unless the Commission brings an action to seek to enjoin the proposed merger pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed merger, Guinness and Grand Met will be free to close the merger after 11:59 p.m. on the date the Commission accepts the Consent Order for public comment.

3. Guinness and Grand Met agree that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 3.a - 3.b they will comply with the provisions of this Agreement:

a. Three 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. On the day the divestitures set out in the Consent Order have been completed.

4. From the time Guinness and Grand Met sign this Agreement until the divestitures set out in the Consent Order have been completed, Guinness, Grand Met, and Diageo shall take such actions as are necessary to maintain the viability and marketability of the Assets To Be Divested and the ability to compete at the same levels of sales, profitability, and market share as prior to the merger, subject to prevailing market conditions, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Assets To Be Divested except for ordinary wear and tear.

5. Should the Federal Trade Commission seek in any proceeding to compel Guinness, Grand Met, or Diageo to divest themselves of the Assets To Be Divested or to seek any other injunctive or equitable relief, Guinness, Grand Met, and Diageo shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the merger. Guinness, Grand Met, and Diageo also waive all rights to contest the validity of this Agreement.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to counsel for Guinness, Grand Met, and Diageo, the aforesaid Guinness, Grand Met, and Diageo

shall permit any duly authorized representative or representatives of the Commission:

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

b. Upon five (5) days' notice to counsel for Guinness or Grand Met or Diageo and without restraint or interference from them, to interview officers or employees of Guinness, Grand Met, and Diageo, who may have counsel present, regarding any such matters.

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

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA  
CONCURRING IN PART AND DISSENTING IN PART

Today, the Commission accepts a consent order settling allegations that the merger of Guinness PLC and Grand Metropolitan PLC would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The complaint alleges as antitrust product markets: (1) "premium Scotch," which is defined as "blended Scotch whisky that is made and bottled in Scotland, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of the Johnnie Walker Red, Dewar's White Label, and J&B Rare brands," and (2) "premium gin," which is defined as "gin that is made and bottled in England, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of Tanqueray, Bombay Original, and Bombay Sapphire brands." I cannot support the complaint as written.

Although at first glance the markets may seem overly creative, if not gerrymandered, the complaint merits our careful attention. For reasons that are not apparent, the proposed product markets exclude brands not marketed throughout the United States, if there are any, that compete head to head with the national brands. By definition, the "premium gin" product market also excludes domestically bottled gin brands, if any, that are sold at prices comparable to Tanqueray and Bombay. I see no reason for these seemingly arbitrary exclusions.

More importantly, the price limitations in the product markets do not seem justifiable. As recognized in Commission precedent, competition occurs along a continuum of prices. In *Heublein, Inc.*, 96 FTC 385 (1980), for example, the Commission dismissed the complaint based on findings in an "all wine" market and the table, dessert and sparkling wine submarkets. As then Commissioner Pitofsky stated in the Heublein opinion, although the competitive offerings of the wine industry were not altogether homogeneous, "those diverse products nevertheless may 'appropriately be designated as a market' for antitrust analysis." 96 FTC at 576 quoting *Coca Cola Bottling Co. of New York, Inc.*, 93 FTC 110 (1979).

Despite my disagreement with the allegations in the complaint, I find reason to believe that the merger of Guinness PLC and Grand Metropolitan PLC would violate the law on the basis of a broader market and that an order to remedy the lessening of competition in the broader market would be appropriate. The divestiture of the Dewar's Scotch and Bombay gin brands will have some remedial effect in the broader market, and for that reason, I have voted to accept the order.

## IN THE MATTER OF

## S.C. JOHNSON &amp; SON, 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-3802. Complaint, April 20, 1998--Decision, April 20, 1998*

This consent order requires, among other things, S.C. Johnson & Son, Inc., a Wisconsin-based manufacturer and seller of household cleaning products, to divest certain assets relating to stain and soil remover products and glass cleaner products it would gain in the acquisition of DowBrands.

*Appearances*

For the Commission: *Steven Bernstein, Yolanda Gruendel, Ann Malester and William Baer.*

For the respondent: *Mark Kovner, Kirkland & Ellis, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, S.C. Johnson & Son, Inc. ("S.C. Johnson"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire certain assets of the home care and home food management businesses of DowBrands Inc., DowBrands L.P. and DowBrands Canada Inc. (hereinafter collectively "DowBrands"), entities subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

## I. DEFINITIONS

1. "*Soil and stain remover products*" means products that are designed to pretreat soiled and stained clothing prior to washing in order to aid in the cleaning of the soiled or stained area of the clothing.

2. "*Glass cleaner products*" means products that are designed primarily to clean glass and mirrors, but which may also be used to clean other surfaces.

## II. RESPONDENT

3. Respondent S.C. Johnson is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its principal place of business located at 1525 Howe Street, Racine, Wisconsin.

4. Respondent is engaged in, among other things, the manufacture and sale of soil and stain remover products and glass cleaner products.

5. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## III. THE ACQUIRED COMPANY

6. DowBrands Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 9550 Zionsville Road, Indianapolis, Indiana. DowBrands L.P. is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2030 Dow Center, Midland, Michigan. DowBrands Canada Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 250 6th Avenue S.W., Suite 2200, Calgary, Alberta T2P 3H7.

7. DowBrands is engaged in, among other things, the manufacture and sale of soil and stain remover products and glass cleaner products.

8. DowBrands is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## IV. THE ACQUISITION

9. On October 27, 1997, S.C. Johnson entered into Asset Purchase Agreements with DowBrands to acquire certain assets of DowBrands' home care and home food management businesses for approximately \$1.125 billion ("Acquisition").

## V. THE RELEVANT MARKETS

10. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

- (a) The research, development, manufacture and sale of soil and stain remover products; and
- (b) The research, development, manufacture and sale of glass cleaner products.

11. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

## VI. STRUCTURE OF THE MARKETS

12. The market for the research, development, manufacture and sale of soil and stain remover products is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The post-merger HHI is 5,646 points, which is an increase of 2,730 points over the premerger HHI level. S.C. Johnson and DowBrands are the two leading suppliers of soil and stain remover products in the United States.

13. S.C. Johnson and DowBrands are actual competitors in the relevant market for the research, development, manufacture and sale of soil and stain remover products in the United States.

14. The market for the research, development, manufacture and sale of glass cleaner products is highly concentrated as measured by the HHI. The post-merger HHI is 4,920 points, which is an increase of 1,180 points over the premerger HHI level. S.C. Johnson and DowBrands are the two leading suppliers of glass cleaner products in the United States.

15. S.C. Johnson and DowBrands are actual competitors in the relevant market for the research, development, manufacture and sale of glass cleaner products in the United States.

## VII. BARRIERS TO ENTRY

16. Entry into either the market for the research, development, manufacture and sale of soil and stain remover products or the market for the research, development, manufacture and sale of glass cleaner products is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph seventeen because of, among other things, the difficulty of developing a new product, gaining brand name recognition and customer acceptance, and establishing a network of retail distributors.

