

IN THE MATTER OF  
BIOPRACTIC GROUP, INC.

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

*Docket C-3148. Complaint, Dec. 12, 1984—Decision, Dec. 12, 1984*

This consent order requires a Riegelsville, Pa. corporation, among other things, to cease representing that any new drug or device provides relief from the inflammation and joint stiffness associated with arthritis and other musculoskeletal ailments, unless such claims are substantiated by competent and reliable evidence. The Order also bars the company from making unsubstantiated claims that any drug or device has been praised as an effective treatment for arthritis and similar ailments by doctors, medical centers and athletic teams; or that any such product has been reported to be an important breakthrough in pain management in newspaper and magazine articles or on TV or radio. The company is additionally required to maintain records substantiating product claims, and to provide all personnel involved in the preparation of advertising and promotional materials with a copy of the Order.

*Appearances*

For the Commission: *William Haynes and Nancy Warder*

For the respondent: *Pro se.*

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 Biopractic Group, Inc. (Biopractic), a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH. 1. Respondent Biopractic is a corporation with its office and principal place of business located at 328 Easton Road, Riegelsville, Pennsylvania.

PAR. 2. Respondent is now and has been engaged in the manufacturing, advertising, offering for sale, sale and distribution of Therapeutic Mineral Ice. In connection with the manufacture and marketing of Therapeutic Mineral Ice, respondent is now and has been engaged in the dissemination, publication, and distribution of advertisements and promotional material for the purpose of promoting the sale of

Therapeutic Mineral Ice for human use. As advertised, Therapeutic Mineral Ice is a "drug" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 3. Respondent causes Therapeutic Mineral Ice when sold to be transported from its place of business in various states to purchasers located in other states. Respondent maintains, and at all times mentioned herein has had, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, and at all times mentioned herein, respondent has been and now is in substantial competition in or affecting commerce with corporations, firms, and individuals engaged in the manufacture or marketing of health care products.

PAR. 5. In the course and conduct of its business, respondent has disseminated and caused the dissemination of certain advertisements and promotional materials for Therapeutic Mineral Ice, such as the advertising material attached hereto as Exhibit A, through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Through the use of the advertisements and promotional materials referred to in Paragraph Five, and others not specifically set forth herein, respondent represented, and now represents, directly or by implication, that:

a. Therapeutic Mineral Ice has been praised as an effective treatment for arthritis and other musculoskeletal ailments by medical doctors, leading medical centers, professional athletic teams, and the United States and Russian Olympic track teams; and

b. Therapeutic Mineral Ice has been reported to be an important new breakthrough in pain management in news reports of the Associated Press and in news stories in the *National Enquirer*, *Globe*, and *Star*.

PAR. 7. In truth and in fact:

a. Therapeutic Mineral Ice has not been praised as an effective treatment for arthritis and other musculoskeletal ailments by medical doctors, leading medical centers, professional athletic teams, and the United States and Russian Olympic track teams; and

b. Therapeutic Mineral Ice has not been reported to be an important new breakthrough in pain management in news reports of the Associated Press and in news stories in the *National Enquirer*, *Globe* and *Star*.

Therefore, the representations set forth in Paragraph Six were and are false, deceptive, misleading, and unfair, and the advertisements

and promotional materials referred to in Paragraph Five were and are misleading in material respects, and have constituted and now constitute false advertisements.

PAR. 8. Through the use of the advertisements and promotional materials referred to in Paragraph Five and others not specifically set forth herein, respondent represented, and now represents, directly or by implication, that:

a. Therapeutic Mineral Ice will provide relief from the inflammation and joint stiffness that characterizes arthritis and other musculoskeletal ailments; and

b. Therapeutic Mineral Ice stimulates the beta-endorphins present in the human body.

PAR. 9. Through the use of the advertisements and promotional materials referred to in Paragraph Five, respondent has represented and now represents directly or by implication that, at the time the representations set forth in Paragraph Eight were made, it possessed and relied upon a reasonable basis for those representations.

PAR. 10. In truth and in fact, respondent did not, at the time the representations set forth in Paragraph Eight were made, possess and rely upon a reasonable basis for those representations. Therefore, the representation set forth in Paragraph Nine was and is unfair and deceptive.

PAR. 11. The use by respondent of the aforesaid unfair and deceptive representations and the dissemination of the aforesaid false advertisements and promotional materials has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and has induced, or is likely to induce, directly or indirectly, the purchase of Therapeutic Mineral Ice.

PAR. 12. The facts and practices of respondent, as herein alleged, including the dissemination of the aforesaid false advertisements and promotional materials, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair and deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

Commissioner Bailey voted in the negative. Commissioner Azcuenaga abstained.

**Doctors at leading Medical Pain Centers reveal amazing new anti-inflammatory ICE THERAPY treatment for control of Arthritic, Rheumatic pain.**  
**Associated Press, National Inquirer, Globe Star, report on important new break-through in pain management.**

Called "cryotherapy", Doctor's hail this important new "pain-icing" technique as a remarkable, yet safe and simple answer to controlling inflammation, a major cause of the stiffness, swelling and pain associated with Rheumatism and Arthritis. Inflammation means heat... so it makes no sense to treat inflammation with more heat, or heat-creating products such as methylsalicylate, Capsicum, wintergreen, which can actually aggravate the problem. Only ice can counter this heat or inflammation.

Modern Biochemistry has now created a product that actually "ices pain away".

Called Therapeutic Mineral Ice, this new discovery utilizes a unique combination of tested and proven ingredients in a totally absorbent new gel formula. It's the only formula of its kind in the world and it attacks and fights pain like nothing ever has before. In fact, with Therapeutic Mineral Ice many people report they can now cope with and endure and function with their pains controlled... and enjoy life once again. YES, NOW FOR THE FIRST TIME, YOU CAN CONTROL PAIN AND END THE FEELING THAT PAIN CONTROLS YOU. You simply apply Therapeutic Mineral Ice externally to the afflicted area as often as needed and with complete safety. It goes to work immediately. Starts relieving inflammation and pain on contact. Brings blessed relief day and night.

**New Therapeutic Mineral Ice Reduces Dependence On Aspirin, Drugs, All Medication**

You hurt, but why punish the rest of your body to reach the pain? Since nature is the true healer and pain fighter, it makes sense to use a product that works with nature. New Therapeutic Mineral Ice provides that assistance... helps your body stimulate the Beta-Endorphins, nature's own pain fighters. Breaking the pain cycle allows your body to

feel of aches soon follows. Therapeutic Mineral Ice actually helps nature fight pain better than pain fighters.

The doctor's arthritis and Rheumatism is not limited to pain, but agonizing swelling as well. Therapeutic Mineral Ice understands this. With Therapeutic Mineral Ice, you can triumph over swelling, stiffness and fatigue. You need not be caged in an aching body because Therapeutic Mineral Ice miraculously "ices pain away"... actually helps to restore the freedom of movement without inflammation... without stiffness... without pain. Remember, inflammation is considered the key to the pain problem and Therapeutic Mineral Ice is the anti-inflammatory pain fighter.

**Doctors, Medical Pain Centers, Physical Therapists, Nurses Clinics, Professional Athletic Teams, U.S. And Russian Olympic Track Teams Praise "Ice Therapy"**

The simplest management of pain is preferred by the medical profession. Physicians have a motto: "Primum non nocere" which means "above all, do no damage."

Now, so many have been able to eliminate the harsh, damaging internal drugs and the irritating, conflicting external heat rubs. These things can often bring little relief and prove to be very expensive. Therapeutic Mineral Ice provides a totally new and different kind of answer to the Doctor's management of pain. And it is comparatively inexpensive. Doctors now recognize that effective relief can be delivered through the skin and need not be taken internally. Therapeutic Mineral Ice provides all the beneficial relief of non-steroid, anti-inflammatory agents, helping to reduce inflammation, swelling, stiffness and pain, without the side effects and expense of other drugs or drug products you have tried.

**Therapeutic Mineral Ice, The Amazing Pain Fighter, Is Not Only Painless, It Also Is Designed To Fight Other Inflammation, Swelling And Pain Problems. See Also: Consider: Small, Portable, For Relief Of Pain Of Other Problems.**

**PAIN Comes From Many Sources. It's the body's way of telling you there's something wrong. Because Therapeutic Mineral Ice is such a potent pain fighter, contact with it will dramatically reduce many of the same symptoms you can feel. Inflammation and Swelling: Sciatica, Bursitis, Neuritis, Nerve Pain and Headaches, muscle strain, back pain, stiff neck and muscle spasms... skin problems like Poison Ivy, Herpes, Simplex, Rash and Tuberculosis. And Therapeutic Mineral Ice, a cool, clear, absorbent gel, stands between you and your pain with no stain to body or clothes, no grease, no unpleasant after smell. Only you know you have it on. Sleep with it on in complete comfort, apply during the day and put your clothes on immediately. No waiting for it to dry or absorb. Be with friends and family attend social functions: BRING THERAPEUTIC MINERAL ICE WITH YOU AND YOU'LL ALWAYS HAVE COMFORT AT HAND. IT'S A**

**VERY SPECIAL SECRET FRIENDS ALWAYS READY TO HELP.**

**Since There's Probably No Known Cure For Arthritis And Rheumatism, The Only Thing You Can Do To Relieve The Symptoms Of Inflammation, Swelling, Stiffness And Pain Should Not Be A Copy Of Prohibitive Expense.**

So often you have taken very expensive drugs that do little to relieve the inflammation and pain. And many times, later costly products have helped little, even you have had the physical and medical attention. Therapeutic Mineral Ice has no such price-prohibitive. On the contrary, the price has been perpetually kept down, so it can be available to as many as possible. Many thousands know that Therapeutic Mineral Ice brings the promised, continuing relief at a price they can afford. Furthermore, we guarantee you relief or your money will be refunded with no questions asked. Just mail us the jar with the unused portion for a full refund. Therapeutic Mineral Ice promises you relief or you pay nothing. Again, there is no cure for Arthritis and Rheumatism, but until there is, there is Therapeutic Mineral Ice. Send for it today. Start enjoying life more tomorrow... a tomorrow free of pain.

**MAIL YOUR ORDER TODAY!**

The Biopractic Group Inc.  
P.O. Box 338  
Riegelsville, PA 18077

Please send me \_\_\_\_\_ jar(s) of Therapeutic Mineral Ice in the 8.0z (one-half pound) size. (An average 30-day supply). If not fully satisfied, I understand my purchase price will be refunded upon return of jar with unused portion. Enclosed is \$8.95 plus \$1.00 handling... total of \$9.95 for each jar.  
Total \_\_\_\_\_ (check or money order only).

Name \_\_\_\_\_  
Address \_\_\_\_\_ Apt. # \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Sorry, no C.O.D.'s, cash or charge.

## DECISION AND ORDER

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

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

1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 328 Easton Road, in the city of Riegelsville, State of Pennsylvania.

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

## ORDER

## I

*It is ordered*, That respondent Biopractic Group, Inc., a corporation, its successors, assigns, officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any "drug" or "device," as those terms are defined

in the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing that such product

- a. Provides relief from the inflammation and joint stiffness that characterizes arthritis and other musculoskeletal ailments;
- b. Stimulates the beta-endorphins present in the human body;
- c. Has been praised as an effective treatment for arthritis and other musculoskeletal ailments by medical doctors, leading medical centers, professional athletic teams, or Olympic teams; or
- d. Has been reported to be a breakthrough in pain management in articles in newspapers, magazines, or in television or radio news reports;

unless at the time of the dissemination of such representation respondent possesses and relies upon adequate substantiation for such representation, including, for the representations described in subparts a and b, competent and reliable scientific or medical evidence in the form of at least two independently conducted, well-controlled, double-blinded clinical studies that conform to acceptable designs and protocols, are conducted by persons who are qualified by training and experience to conduct such studies, and substantiate the representations made by the respondent. *Provided, however*, with respect to any such representation set forth in subparts a and b above for over-the-counter drugs, if the Food and Drug Administration publishes any tentative or final standard which establishes conditions under which a product is safe and effective, then, in lieu of the two double-blinded clinical studies, respondent may possess and rely upon such standard (until such standard is superseded) if it substantiates the representation.

## II

*It is further ordered*, That respondent maintain, for at least three (3) years beyond the last dissemination of any advertisement or promotional material covered by this order, complete business records demonstrating compliance with this order. Such records shall include, but not be limited to, copies of and dissemination schedules for all advertisements and promotional materials; and documents that substantiate or that contradict or qualify any claim made in advertising, promoting or selling any product covered by this order.

## III

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

## IV

*It is further ordered,* That the respondent shall forthwith distribute a copy of this order to each of its operating divisions, and to all present and future personnel, agents, or representatives who are engaged in the preparation and dissemination of advertisements and promotional materials and that the respondent shall secure from each such person a signed statement acknowledging receipt of the order.

## V

*It is further ordered,* That the respondent shall, within sixty (60) days after this order becomes final, 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 Bailey voted in the negative. Commissioner Azcuenaga abstained.

Complaint

104 F.T.C.

IN THE MATTER OF

B.A.T INDUSTRIES, LTD., ET AL.

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

*Docket 9135. Complaint, May 13, 1980—Final Order, Dec. 17, 1984*

This Order affirms the Initial Decision of the Administrative Law Judge and dismisses the FTC complaint alleging that acquisition of Appleton Papers, Inc., the leading U.S. producer of chemical carbonless paper (CCP) by B.A.T Industries, Ltd. ("B.A.T") had violated Sec. 7 of the Clayton Act and Sec. 5 of the FTCA, by eliminating the potential for competition between the two companies in the U.S. CCP market. For reasons set forth in its Opinion, the Commission held that the record showed no "clear proof" that B.A.T would have entered the U.S. CCP market independently had it not acquired Appleton.

*Appearances*

For the Commission: *Steven A. Newborn, John V. Lacci, Sandra G. Wilkof* and *Daniel J. Yakoubian*.

For the respondents: *David Schechter*, in-house counsel, *Jay Topkis, Daniel J. Beller, Eric M. Freedman, and Daniel Victor, Paul, Weiss, Rifkin, Wharton & Garrison*, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that B.A.T Industries, Ltd. ("BAT"), and Appleton Papers, Inc. ("Appleton"), respondents herein, have violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45) through the acquisition by BAT of the assets of the Appleton Papers Division of NCR Corporation ("NCR"), and that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45)), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this Complaint, the following definition will apply:

*Chemical carbonless paper* ("CCP") is any product which uses a

chemical imaging system to transfer an image from one sheet of a multipart business form to another when pressure is applied to the top sheet.

## II. BAT

2. BAT is a United Kingdom company having its registered office in London, England.

3. BAT is a multinational holding company with interests in paper, tobacco, cosmetics and retailing. BAT's holdings in the United States include Brown and Williamson Tobacco Company, Gimbel Brothers, Saks Fifth Avenue and Germaine Monteil.

4. In 1978, BAT had sales in excess of 6,676,000,000 pounds sterling (or approximately \$13.0 billion) and had total assets of approximately \$7 billion. In 1977, BAT ranked as the 43rd largest industrial company in the world and the 11th largest industrial company outside the United States.

5. The Wiggins Teape Group, Ltd. ("Wiggins Teape"), a wholly-owned subsidiary of BAT, is the largest manufacturer of fine and specialty papers in the United Kingdom and is the largest exporter, in value, of paper products from the United Kingdom. It operates mills in the United Kingdom and several other countries. In 1978, [2] Wiggins Teape had sales of approximately 461,000,000 pounds sterling (or approximately \$920 million.)

6. "Idem" brand CCP is Wiggins Teape's most important paper product and its highest profit generator. Wiggins Teape is the second largest producer of CCP (in terms of tonnage) in the world. In 1977, Wiggins Teape accounted for approximately 45% of CCP production in the United Kingdom and Europe with over \$200 million in sales. Prior to BAT's acquisition of Appleton, Wiggins Teape did not produce or sell CCP in the United States.

7. At all times relevant herein, BAT sold and shipped its products throughout the United States and was a corporation engaged in commerce as commerce is defined in the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

## III. APPLETON

8. Appleton is a Delaware corporation having its principal office and place of business in Appleton, Wisconsin.

9. Appleton, formerly the Appleton Papers Division of NCR, is a major producer of CCP and coated papers used in the graphic arts and publishing industry. In 1977, Appleton accounted for \$271 million in sales.

10. Appleton is the world's largest producer of CCI\* (in terms of

tonnage) and presently has approximately 55% of U.S. domestic sales. Appleton is also the major licensor of CCP technology in the world. In 1977 Appleton had \$171 million in sales of CCP.

11. NCR is a Maryland corporation having its principal office and place of business in Dayton, Ohio. NCR produces and sells, among other products, computers and other business machines and systems. In 1977, NCR had approximately \$1.625 billion in sales and \$2.3 billion in total assets.

12. At all times relevant herein, Appleton sold and shipped its products throughout the United States and was a corporation engaged in commerce as commerce is defined in the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

#### IV. THE ACQUISITION

13. On or about June 30, 1978, BAT, through its wholly-owned indirect subsidiary, Lentheric, Inc. (since renamed Appleton Papers, Inc.), purchased from NCR the Appleton Papers Division for a purchase price of \$280 million. As a result of the acquisition, BAT acquired the assets of Appleton and the patents held by NCR relating to the manufacture of CCP, and control over the licenses issued under such patents.

#### V. TRADE AND COMMERCE

##### A. *Relevant Market*

14. The relevant product market is the manufacture and sale of CCP. [3]

15. The relevant geographic market in the United States as a whole.

##### B. *Market Structure*

16. In 1978, U.S. industry sales of CCP totaled approximately \$250 million.

17. The U.S. CCP market is a highly concentrated industry with a four-firm concentration ratio of approximately 96%. The top two firms, Appleton and Mead, accounted for 86% of industry sales in 1977. Only five firms produced CCP in the United States in 1977, and only four of those firms produced CCP other than for their own consumption.

18. The barriers to entry into the production and sale of CCP are extremely high.

19. The production of CCP is a highly technical field that is protect-

ed by U.S. patents of Appleton and other domestic carbonless producers.

20. The high technology requirements of the CCP market constitute substantial barriers to entry into the industry. The manufacture of CCP requires encapsulation technology, sophisticated coating technology, and manufacturing know-how. It is extremely difficult to develop a commercially acceptable CCP technology. Such development is an expensive undertaking and can take anywhere from 3 to 10 years to complete. The new entrant also runs the substantial risk that its attempts to develop a viable technology will be unsuccessful.

21. The new entrant into the CCP market must make a substantial capital investment for specialized encapsulation, coating and other equipment.

*C. BAT Was A Significant Actual Potential Entrant Into  
The U.S. CCP Market*

22. Objective factors demonstrate that at the time of the acquisition BAT was an actual potential entrant into the production and sale of CCP in the United States.

23. From the late 1950's until BAT's acquisition of Appleton, Wiggins Teape (which was acquired by BAT in 1972) manufactured CCP under license from NCR. Wiggins Teape was one of the first manufacturers of CCP, and was the only NCR licensee outside the United States that was permitted to use NCR's encapsulation technology. The license gave BAT the exclusive right to manufacture CCP under NCR's patents and know-how worldwide, except for the United States, Canada and Japan, and the nonexclusive right to sell CCP worldwide except for the United States and Canada. The license also provided for a continuous, complete and timely exchange between NCR and BAT of all information constituting carbonless know-how and all other information helpful in the development, manufacture or sale of CCP.

24. On or about June 1, 1977, BAT gave NCR notice of termination of the aforesaid license, effective July 1, 1980. Thus, after July 1, 1980, BAT would have been free of the license provisions which restricted it from manufacturing or selling CCP in the United States. The right to use unpatented know-how would have survived the termination of the license.

25. The size of the U.S. CCP market, its high growth in comparison to other paper products, and its considerable profit potential provided substantial incentives for BAT's entry into the U.S. market. [4]

26. BAT, by reason of its size and financial resources, its independent carbonless technology, and its expertise in the production and sale of CCP, was capable, at the time of the acquisition, of entering

the U.S. CCP market in the near future by means other than the acquisition of Appleton.

27. Feasible means existed by which BAT could have entered the U.S. CCP market, including the establishment of manufacturing facilities in the United States, joint ventures or licensing relationships with U.S. firms not already in the CCP market, acquisition of a toehold firm, or export of CCP into the U.S.

28. Due to BAT's financial resources, its CCP technology and marketing expertise, and the concentrated nature of the U.S. CCP market, it is likely that BAT would have entered the production or sale of CCP in the United States through means other than the acquisition of Appleton, and that such entry would have exerted a procompetitive effect on the market and preserved the potential for the significant future deconcentration of the industry.

*D. BAT Is One Of The Few Most Likely Entrants Into The Market*

29. The CCP industry is a highly technical industry which requires that a new entrant develop a sophisticated capsule technology and substantial production expertise before the entrant can establish a position in the market.

30. BAT's longstanding license with NCR provided BAT with the most extensive knowledge of a total CCP technology in the world, excluding Appleton.

31. BAT's substantial expertise in CCP technology and its large technical staff had allowed BAT to develop elements of its own carbonless technology and to achieve technological independence from NCR, as well as to develop substantial production expertise.

32. NCR's other CCP licensees had not been given access to a total carbonless paper technology and are dependent on their licensor (now BAT) for technical assistance, especially with respect to a supply of carbonless capsules, one of the most difficult aspects of CCP production.

33. Because of the difficulty, expense and risk involved in developing CCP technology, the expense of constructing manufacturing facilities, and the scale requirements of efficient production, few firms, if any, other than BAT, are likely to enter the production of CCP for sale to others in the United States.

VI. EFFECTS

34. The effects of the acquisition of Appleton by BAT may be substantially to lessen competition or to tend to create a monopoly in the production and sale of CCP throughout the United States in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and the effects of the acquisition may be unreasonably to restrain trade and

to hinder competition unduly in the production and sale of CCP in the United States thereby constituting a restraint of trade and an unfair act and practice and an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways among others:

(a) Substantial potential competition between BAT and Appleton and between BAT and other producers of CCP in the United States will be eliminated; [5]

(b) The potential for substantial deconcentration of the U.S. CCP market as a result of BAT's likely alternative entry into the U.S. market will be eliminated;

(c) The competitive benefits of internal expansion and innovation by BAT may be eliminated;

(d) The already high barriers to entry into the U.S. CCP market may be heightened or increased;

(e) The dominant position of Appleton in the U.S. CCP market may be further strengthened by virtue of BAT's financial resources, and its substantial technological and production expertise with respect to CCP; and

(f) Customers of CCP and ultimate consumers of that product may be denied the benefits of free and open competition in the market.

#### VII. VIOLATIONS CHARGED

35. The acquisition of Appleton by BAT constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18) and of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

#### INITIAL DECISION BY

MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

NOVEMBER 21, 1983

#### I

#### STATEMENT OF THE CASE

The complaint in this proceeding was issued on May 13, 1980. It charges that B.A.T Industries, Limited ("B.A.T")<sup>1</sup> [2] and Appleton Papers, Inc. ("Appleton"), respondents herein, have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by reason of B.A.T's acquisition of Appleton in 1978.

<sup>1</sup> On July 8, 1981, the official name of respondent B.A.T was changed to B.A.T Industries PLC. Transcript 8905.

According to the complaint, the relevant product market is the manufacture and sale of chemical carbonless paper ("CCP"), a coated paper used to make multi-part business forms in which images are transferred by a chemical reaction from top to middle to bottom sheets through the application of manual or mechanical pressure. The United States as a whole is the alleged relevant geographic market.

The complaint charges that at the time of the acquisition, B.A.T through its Wiggins Teape Group, Ltd. subsidiary ("Wiggins Teape" or "WT"), a paper manufacturer with headquarters in the United Kingdom, was the largest producer of CCP outside of the U.S. Appleton was said to be the largest manufacturer of CCP within the U.S. There is no allegation in the complaint that Appleton and WT were competitors in the U.S. before the acquisition. Nor is any charge made that WT was perceived as a potential entrant on the edge of the U.S. CCP market. The complaint is grounded solely on the theory that B.A.T (or WT) was a significant "actual" potential entrant into the U.S. market. In support of this theory the complaint alleges, in summary form, the following: [3]

- The U.S. CCP market was concentrated at the time of the acquisition, and there were high entry barriers into this market.
- Objective factors demonstrate that WT had the capability and incentive to enter the United States CCP market.
- Feasible means existed by which WT could have entered the U.S. CCP market, including establishment of new manufacturing facilities, a joint venture or licensing relationship with U.S. firms, acquisition of a toehold firm, or export of CCP to the U.S.
- It was likely that WT would have pursued one of the alternative means of entry had it not acquired Appleton.
- WT was one of the few most likely entrants into the U.S. CCP market.
- The effect of the Appleton acquisition was anticompetitive in that deconcentration of the U.S. CCP market as a result of WT's likely alternative entry was eliminated, entry barriers may have been heightened, and Appleton's dominance of the U.S. CCP market was heightened.

Respondents' answer, dated July 25, 1980, denies the allegations of the complaint relating to definition of the [4] relevant product market (respondents argue for a market consisting of all papers used to make multi-part business forms) as well as the elements of the actual potential theory outlined above.<sup>2</sup>

<sup>2</sup>The answer also raises the affirmative defense of laches and questions the Commission's in personam jurisdiction over B.A.T as well as the Commission's subject matter jurisdiction over B.A.T's acquisition of a U.S. firm. None of these affirmative defenses were pressed during the hearings or in the post-hearing briefs.

In the prehearing stage both sides were allowed extensive discovery, requests for admissions and interrogatories were answered, and stipulations were filed. Upon completion of the discovery stage, hearings were held for the purpose of ruling on objections and to receive into evidence documents which did not require supporting testimony. The case-in-chief began on February 16, 1982, and was completed on February 25, 1982. The defense case was presented between March 22, 1982, and July 9, 1982. A hearing for the receipt of rebuttal evidence was held on January 25, 1983. Surrebuttal evidence was received on February 24, 1983. The record, which was closed on February 25, 1983,<sup>3</sup> consists of 9,150 transcript pages and 1,337 trial [5] exhibits. During the hearings all counsel were given full opportunity to be heard and to cross-examine the witnesses.

Proposed findings of fact and briefs were filed by both sides on May 16, 1983. Answering briefs were filed on June 17, 1983, and responses were filed on July 8, 1983.

After reviewing all the evidence as well as proposed findings and briefs submitted by the parties, and based on the entire record, including my observation of the demeanor of witnesses, I make the following findings of fact:<sup>4</sup> [6]

<sup>3</sup> The unusually long gap between the opening of the hearings and the closing of the record is attributable to the adjournments granted during the defense case and before the start of complaint counsel's rebuttal. These delays were occasioned by the extensive preparation undertaken by both sides in creating, and attempting either to discredit or to defend, the economic "models" which are treated in Findings 102 to 120.

<sup>4</sup> Proposed findings not adopted in the form proposed or in substance are rejected, as either not supported by the entire record, or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record: "CX" or "CPX" (complaint counsel's exhibit or physical exhibit); "RX" or "RPX" (respondents' exhibit or physical exhibit). Testimony is cited by name of witness, followed by transcript page as in "Sheehy 3465-67." ALJ Exhibit 1, preceding the CX's and ALJ Exhibit 2, preceding the RX's, are indices of all documentary exhibits which give description, source, status, date received or rejected, transcript reference, and in camera status.

Because of the highly sensitive cost data relied upon by both sides, especially in the economic "models" discussed in the Findings, a large volume of material, both exhibits and testimony, was placed in camera. It should be noted, however, that the Omnibus In Camera Order issued on February 25, 1982 which governs all in camera exhibits and testimony provides as follows:

It should be clearly understood that nothing contained in this Order in any way limits the public use of this material in decisions written by the Administrative Law Judge, the Commission, or reviewing courts. While I have no intention of making unnecessary disclosures, whether or not to publish in my Initial Decision all or part of the material contained in in camera exhibits must be left solely to the discretion of the Administrative Law Judge, and I must reserve the right to exercise this discretion without consulting any party or third party.

The Omnibus In Camera Order also provides that in camera status shall be removed three years after the date on which the record was closed, that is, on February 25, 1986. In camera exhibits are indicated by use of italics as in RX 355A-C.

The appearances of the witnesses were as follows:

<u>Name</u>	<u>Called By</u>	<u>Tr. Pages</u>
Gary McMullen Mitchell Business Forms, Inc. (Forms Printer)	Complaint Counsel ("c.c.")	241-421

(footnote cont'd)

## Initial Decision

104 F.T.C.

(footnote continued from previous page.)

<u>Name</u>	<u>Called By</u>	<u>Tr. Pages</u>
W. Smith Duplex Products, Inc. (Forms Printer)	c.c.	422-652
Robert H. Reeves Standard Register Co. (Forms Printer)	c.c.	655-864
P.C. Smith Mead Corp. (CCP Manufacturer)	c.c.	865-1107
George O. Langlais Nashua Corp. (CCP Manufacturer)	c.c.	1108-1196 [7]
Joseph R. Kershaw Nashua Corp. (CCP Manufacturer)	c.c.	1198-1340
Ira Horowitz Univ. of Florida (Retained Economic Expert)	c.c.	1341-1642
Thomas A. Roth SCM Allied/Egry Business Systems (Forms Printer)	c.c.	1643-1802
John J. Hangen Appleton (President)	Respondents ("resp.")	1803-2355
Patrick G.M. Best Wiggins Teape (Chairman & Managing Director)	resp.	2356-2827
Vera M. Elliott Wiggins Teape (Finance & Planning Coordinator, retired, Dec. 1981, and retained to assist respondents in this litigation)	resp.	2828-3404, 6547-6982, 6983-8028
Patrick Sheehy B.A.T. (Deputy Chairman)	resp.	3405-3600
Pascal J. Ricketts B.A.T. (Director and General Counsel)	resp.	3601-3778
Joseph F. Ramey 3M Corp. (CCP Manufacturer)	resp.	3779-3917
Robert G. Hummell Burroughs Corp. (Forms Printer)	resp.	3918-4052
Robert A. Shade Shade Information Systems, Inc. (Forms Printer)	resp.	4053-4146 [8]
Maxwell A. Clampitt Clampitt Paper Co. (Paper Merchant)	resp.	4147-4220
William G. Eichner Reynolds & Reynolds Co. (Forms Printer)	resp.	4221-4294
Richard D. Mustari UARCO, Inc.	resp.	4295-4486

## II

## FINDINGS OF FACT

*Identity Of Respondents And The Challenged Acquisition*

1. B.A.T, the 28th largest industrial company outside of the United States, is a diversified, publicly-held, United Kingdom limited firm, with its headquarters located in London, England.<sup>5</sup>

2. In fiscal 1977, B.A.T had sales of approximately \$11 billion and assets of \$6 billion.<sup>6</sup> About 53% of its assets were deployed in the tobacco business, 19% in retailing, 10% in paper, 2% in cosmetics, and 16% in miscellaneous activities.<sup>7</sup> Operating profits in 1977 were \$827 million.<sup>8</sup>

3. Geographically, 29% of B.A.T's fiscal 1977 sales were derived from the U.S. and Canada, 14% from the U.K., 23% from Europe, 23% from Latin America, 6% from Asia, 4% from Africa, and 1% from Australia.<sup>9</sup> [10]

<u>Name</u>	<u>Called By</u>	<u>Tr. Pages</u>
Theodore Dimitriou Wallace Business Forms, Inc. (Forms Printer)	resp.	4487-4573
Peter Pohly Beekman Paper Co. (Paper Merchant)	resp.	4574-4648
Robert W. Brogee Systemedia Group, NCR Corp. (Forms Printer)	resp.	4649-4791
Peter H. Smolka Burns, Doane, Swecker & Mathis (Retained Patent Attorney)	resp.	4792-4959 5740-5967
William C. Anderson Blake, Mofitt & Towne, Inc. (Paper Merchant)	resp.	4960-5056
Lynn Sushito-Topel Lexecon, Inc. (Retained Statistician)	resp.	5057-5249
Donald Cummings Wiggins Teape (Business Strategist)	resp.	5250-5739
William J. Baumol New York and Princeton Universities (Retained Economic Expert)	resp.	5968-6546
Robert Hietpas Appleton (Assistant Comptroller)	resp.	7381-8686 8967-9150 [9]

<sup>5</sup> Complaint and Answer ¶2; RX 391B.

<sup>6</sup> RX's 637G, K.

<sup>7</sup> RX 637K.

<sup>8</sup> RX's 637G, K.

<sup>9</sup> RX 637K.

4. Presently, B.A.T's U.S. holdings include Appleton (paper), Brown and Williamson (tobacco), Gimbels, Marshall Field, and Saks Fifth Avenue (retailing), Germaine Monteil and Yardley (cosmetics).<sup>10</sup> Sales in the U.S. and Canada were approximately \$3 billion in fiscal 1977.<sup>11</sup> The U.S. holdings of B.A.T are administered through Batus, Inc., a Delaware corporation which is responsible for initiating and carrying out U.S. strategies and policies for B.A.T.<sup>12</sup>

5. Since 1970, B.A.T has owned the Wiggins Teape Group, Ltd. ("WT"), a U.K. firm which has engaged in paper merchandising and manufacturing since 1756.<sup>13</sup> WT's sales in 1978 were approximately \$920 million.<sup>14</sup> WT produces and sells its products (a variety of specialty, writing, and industrial papers) primarily in Europe. In addition, it owns paper merchants in Japan, Hong Kong, Singapore, Malaysia, the Phillipines, and Indonesia, and it has paper mills or coating facilities in Australia, India, Argentina, and South Africa.<sup>15</sup> [11]

6. WT's line of coated papers includes the "Idem" brand of CCP. In 1977, WT sold 85,000 metric tons of "Idem"; it was the largest producer of CCP in the U.K. and Europe (about 45% of the total sales), and it was second only to Appleton among the world's CCP producers.<sup>16</sup>

7. After serving for two years as the European contract coater for NCR (Appleton's parent company and the U.S. inventor of CCP) WT began the production of CCP for its own account in 1956. From 1956 until May 5, 1978, (the date of the Appleton acquisition challenged herein) WT continued its production of CCP under a series of licenses from NCR. These licenses limited WT to the manufacture and sale of CP (*i.e.*, CCP made pursuant to the NCR technology) within Europe and designated areas outside of the U.S. By the terms of the licenses, WT had access to NCR's patents, technology, and know-how; moreover, in the actual operation of the licensing arrangement, WT and Appleton were in close contact about the technological problems which inevitably arise during the course of CCP manufacture.<sup>17</sup>

8. WT has never produced or sold CCP in the U.S.<sup>18</sup> [12]

9. NCR Corporation, a Maryland corporation with its headquarters in Dayton, Ohio, is primarily engaged in the manufacture of computers, office machines, and related products. In addition, through its

<sup>10</sup> CX 274B (¶2).

<sup>11</sup> RX's 637G, K.

<sup>12</sup> Sheehy 3424.

<sup>13</sup> Best 2376.

<sup>14</sup> Complaint and Answer ¶ 5.

<sup>15</sup> Complaint and Answer ¶ 5; Best 2377, 2383, 2393-99.

<sup>16</sup> Finding 90; CX's 82E, T-U.

<sup>17</sup> Hangen 1924-218; CX 14X.

<sup>18</sup> Complaint and Answer ¶ 6; Best 2413.

Systemedia Division, NCR produces business forms.<sup>19</sup> NCR's sales were approximately \$2.3 billion in 1977.<sup>20</sup>

10. From experimentation begun in 1938, NCR eventually developed a commercially marketable CCP in 1954. In 1954 and 1955, it contracted out the manufacture of the product to several coaters, including Appleton Coated Paper Company, a Wisconsin paper coating firm, Mead Corporation, a major integrated paper company, and WT, the U.K. paper firm. NCR acquired Appleton in 1970, and in 1971 merged it with another former CCP contract coater and paper producer, Combined Paper Mills Co., to form Appleton Papers, Inc. as its CCP manufacturing and selling arm. In 1973, Appleton Papers, Inc. became the Appleton Papers Division of NCR.<sup>21</sup>

11. At the time of the subject acquisition in 1978, NCR's Appleton Papers Division had facilities for the manufacture and distribution of CCP in Appleton, Wis. (paper coating), Combined Locks, Wis. (pulp making, paper making, paper coating), Roaring [13] Spring, Pa. (pulp making, paper making, paper coating), Harrisburg, Pa. (warehousing and paper cutting), and Portage, Wis. (capsule production).<sup>22</sup> From its coating facilities in Wisconsin and Pennsylvania, Appleton shipped to customers located throughout the U.S.<sup>23</sup>

12. In 1978, the Appleton division of NCR produced approximately 213,000 tons of CCP, from which it realized revenues in excess of \$236 million.<sup>24</sup> At the time of the subject acquisition in 1978, Appleton was by far the largest producer of CCP in the U.S., accounting for approximately 60% of the CCP resale market.<sup>25</sup>

13. On or about May 5, 1978, B.A.T and NCR entered into an agreement in principle for the acquisition by B.A.T of all the assets of NCR's Appleton Papers Division including plants, equipment, patents, and unpatented know-how. On June 30, 1978, the acquisition was consummated at a cost of \$299 million. [14] After the acquisition, Appleton Papers Division became Appleton Papers, Inc. an incorporated Delaware subsidiary of Batus.<sup>26</sup>

14. With the acquisition of Appleton, B.A.T became the world's largest producer of CCP, accounting for over 40% of world-wide production.<sup>27</sup>

<sup>19</sup> Brogee 4651-52; RX's 496Z-78, 588B.

<sup>20</sup> CX 274B (¶7); RX 588Z-19.

<sup>21</sup> Hangen 1812-14; CX's 2A, 82H, 274C (¶10).

<sup>22</sup> CX's 35A-Z-12; RX's 16W-X.

<sup>23</sup> Complaint and Answer ¶ 12; CX 274F (¶26).

<sup>24</sup> CX's 274Z-23-Z-24 (¶50).

<sup>25</sup> Finding 49; CX 329A.

<sup>26</sup> Ricketts 3642; CX's 1A-Z-235, 274C (¶12), 274D (¶¶15, 16, 18). The acquisition was made through a Batus subsidiary, Lenthric, Inc., whose name was changed to Appleton Papers, Inc. after the acquisition.

<sup>27</sup> CX 82T.

*Commerce*

15. At all times relevant to this proceeding, B.A.T and Appleton were engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and the Federal Trade Commission Act, as amended.<sup>28</sup>

*Relevant Product Market*

16. CCP is a complex coated paper used to make multi-part business forms which record information on several sheets of paper simultaneously, thus facilitating the transmission of data to customers and throughout a business organization.<sup>29</sup> [15]

17. The typical CCP business form is made up of a set of three sheets: a top sheet coated on the back ("CB"), a middle sheet coated on both front and back ("CFB"), and a bottom sheet with a coated front ("CF"). Two-part sets omit the CFB sheet. If the business form consists of more than three parts, all of the additional intermediate sheets are CFB.<sup>30</sup>

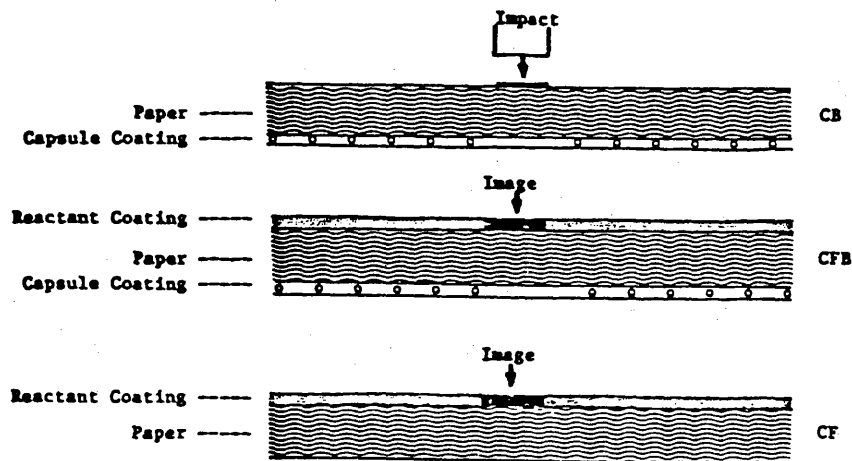
18. CCP is activated when the pressure applied to the CB sheet ruptures the microscopic capsules which are coated on the back of this top sheet, thereby releasing a color former. An image is created as the color former reacts chemically with the resin-based or clay-based coreactant which is coated on the front of the CFB sheet. Simultaneously, the pressure applied to the CB sheet ruptures the microscopic capsules on the back of the CFB sheet, causing an image to be formed on the coreactant-coated CF sheet.<sup>31</sup> The process may be illustrated as follows: [16]

<sup>28</sup> Complaint and Answer ¶12; CX's 274B, F(¶12, 3, 26).

<sup>29</sup> CX's 262A-Z-68.

<sup>30</sup> CX's 262Z-26, Z-29, 274D-E(¶19).

<sup>31</sup> McMullen 307, P.C. Smith 914, Langlais 1117-18, 1120-21; CX's 262Z-26, 274D,E(¶19). A product closely related to the CCP described in the text, but currently of minor commercial significance, is so-called "self-contained CCP." It combines both color former and color developer within one sheet of paper with the result that pressure applied to the sheet will produce an image on the back of the sheet. CX's 262Z-26, 274D,E(¶19).



Source: *RX 314H*

19. In addition to CCP, multi-part business forms are commonly made from bond paper (known in the industry as "forms bond") interleaved with carbonized tissue. Since the carbonized tissues are discarded after use, the product (a combination of forms bond and carbonized tissue) is known as one-time carbon paper or "OTC." When pressure is applied to the top sheet of the OTC set, an image is transferred mechanically (not chemically as in CCP) from the back of each interleaved sheet of carbonized tissue to the front of each adjacent sheet of bond paper.<sup>32</sup> [17]

20. While both CCP and OTC are used to make multi-part business forms, there is clustered around CCP a technology, a pricing structure, an industry-wide perception of competitive realities, as well as specialized customers and some unique applications, which constitute a viable relevant market for the purpose of gauging the effect of the subject acquisition (Findings 21-34).

21. Appleton and other U.S. CCP producers treat the manufacture and sale of CCP as a separate market in planning business strategy (including expansion of productive capacity) and in assessing their

<sup>32</sup> W. Smith 500; CX's 262Z-12-Z-23. For purposes of this initial decision, I have treated together, as apparently the forms and CCP industries do, OTC and mechanical transfer paper. Mechanical transfer paper (not a significant factor in the multi-part forms industry) uses in place of carbon interleaf a bond paper coated with carbon material. McMullen 315-16, W. Smith 435, Roth 1671.

competitive strength.<sup>33</sup> Similarly, B.A.T analyzed the Appleton acquisition in the context of a market consisting only of CCP competitors, and concluded that "Appleton dominates this market."<sup>34</sup>

22. CCP manufacture is an extremely difficult form of paper coating. If the CCP production is integrated into paper making, the coating takes place after a bond of paper or "web" has been produced. Alternatively, rolls of base paper produced elsewhere are coated by the CCP manufacturer. With respect to the difficulty of this coating operation, the entire record fully supports the opinion of WT managers who believe that CCP "is [18] easily the most complex product which is made in high volume in the paper industry."<sup>35</sup> While complexities (for example, maintaining the quality of the base paper and perfecting the coreactant) exist throughout the CCP manufacturing process, the most difficult problems arise from the costing of the CB sides which involves the microencapsulation of dyes and solvents and the subsequent coating of the base paper with these delicate capsules.<sup>36</sup>

23. The microencapsulation and coating of capsules, which is at the heart of CCP technology, requires unique facilities, custom-designed equipment, and specialized raw materials [19] produced under proprietary arrangements with chemical companies.<sup>37</sup>

24. CCP manufacture also requires the support of an especially rigorous level of quality control and testing, as well as an extensive and continuous research effort. These requirements of CCP, which are unique in the paper industry, demand that specially trained manufacturing, technical, and research personnel be employed.<sup>38</sup>

25. The extraordinary demands of CCP manufacture would be wasted if expensive CCP capability were used for a less demanding product

<sup>33</sup> P.C. Smith 891-92, 980-81, Kershaw 1220-21, 1227-28, 1308-09; CX's 7B, 10F-"O", 17H-I, 29V, Z-16, 32M, V, Z-7, 33J, Z-11-Z-14, 34J, 41C, "O", 48D, P, 87W, 91Q-S, 100N-P, 173C, 184Z-42-Z-47, 188A-"O", 209A-W, 210, 212B-C, 220B.

<sup>34</sup> CX 82H. See also CX's 2M-N, 47C.

<sup>35</sup> CX 36A.

<sup>36</sup> Langlais 1130-31; CX's 12Z-9-Z-12, 13V-Z-8, 262Z-31-Z-40; RX's 293L, 314G. At the heart of CCP technology is the creation of—

... discrete capsules for isolating the color forming components from the color developers until pressure or impact breaks the capsules, releasing the dyes and allowing them to react and to form an image.

The capsules range in size from roughly 3 microns to 15 microns, depending upon the specific [CCP] system. (A micron is equal to 0.000001 meters or approximately 0.0004 inches.) By way of comparison, a single capsule would be one hundred times smaller than the period at the end of this sentence.

(CX 262Z-27)

<sup>37</sup> P.C. Smith 870-71, 878, 880-81; CX's 10F-K, 13V-Z-6, 100H, 254Z-8-Z-11, 257P-Q, 274E-F(¶¶20-22,25); RX's 262A-N.

<sup>38</sup> Elliott 2907; CX's 10F-K, V-W, 27J, 65, 68N, 100M, 101F, 126G, 274Z-35(¶53); RX's 262L-N. Appleton's research staff consists of over 80 technicians (CX's 126J-K) and its research facilities represent "a major investment in proprietary equipment for carbonless paper." CX 126L. See also CX 2V. Appleton has had as many as 50 CCP research projects underway at the same time. CX's 126"O"-P. The technical requirements of CCP go beyond the factory and laboratory. Technical service representatives are trained to work with forms manufacturers on the intricacies of CCP printing. P.C. Smith 896-97; CX's 2"O", 3M, 10V-W, 31Z-1.

such as OTC.<sup>39</sup> Thus there is no reliable evidence that CCP equipment is used for OTC manufacture.<sup>40</sup> [20]

26. CCP paper is sold in rolls to printers of multi-part business forms who use CCP to make either stock (standard) or custom (individualized) forms, and either unit sets (forms designed to be filled out individually as they are torn from a glued stub) or continuous forms (containing perforations enabling many forms to be filled out sequentially; for example, as the paper is fed continuously through a computer or specialized printer).<sup>41</sup>

27. The main other channel of CCP distribution is through sheet sales which flow from CCP manufacturer to paper merchants who resell to commercial printers (so-called "quick printers") or to company in-plant printing facilities for use in making up unit sets.<sup>42</sup>

28. The sheets produced by CCP manufacturers, which represent about 30% of all CCP production, and is higher-priced than CCP rolls, are non-substitutable products. The customers for CCP sheets—the aforementioned "quick printers" and in-plant printing operations—are for all practical purposes [21] precluded from turning to OTC even if the price of CCP were to be raised substantially in relation to OTC.<sup>43</sup>

29. The multi-part forms printers who purchase CCP in rolls (in contrast to sheet sales to merchants for resale to "quick printers") can use either OTC or CCP to make forms suitable for most applications.<sup>44</sup> This functional overlap, however, has not eliminated the price differential which has existed between CCP and the combined ingredients (mainly bond paper and tissue) used by the forms manufacturers themselves to make OTC.<sup>45</sup> [22]

30. The premium paid for CCP over OTC persists because forms printers place a high value on neatness and cleanliness, considerations which carry forward into the forms market itself where CCP

<sup>39</sup> CX 35Z-12. See also P.C. Smith 888.

<sup>40</sup> See P.C. Smith 874-76, 880; CX 254Z-9. There is no evidence that OTC equipment has been successfully converted to CCP production. See P.C. Smith 871, Langlais 1132-34, Kershaw 1225-26, Hangen 2087-88.

<sup>41</sup> McMullen 304-06, Roth 1659-60, Pohly 4594-95; CX's 138D-F, 262H-J. Large rolls are also sold to converters for the manufacture of teletype rolls and other smaller rolls. CX 38W.

<sup>42</sup> CX 38W. There are presently over 100,000 in-plant printers. P.C. Smith 1002.

<sup>43</sup> McMullen 320-21, Reeves 681, 825-26, P.C. Smith 898-99, 985-86, Kershaw 1204, 1223, 1231, Roth 1668-70, Clappitt 4207-08, Pohly 4602, 4606, Anderson 5013; CX's 16Z-59, 22, 29Z-9, 31Z-7, 33Z-7, 210A-Z-16, 492M. In order to use OTC, the sheet printer would have to cut the carbon paper into the size appropriate for the order, interleave the carbon with the form paper, glue the form together, and perforate the glued form for later removal of the carbon. This process has been rejected since it is labor-intensive, time-consuming, and requires special equipment. McMullen 300-01, 320; CX's 66M, 213C.

<sup>44</sup> Hummell 3945, Shade 4062, Clappitt 4159, Mustari 4399. In some applications, however, CCP has taken over to the virtual exclusion of OTC. For example, unattended printers, such as those used in automated tellers and teletype machines, have been designed to use only CCP. CCP is the dominant multi-part material used in minicomputers. CCP is the preferred material in restaurants, hotels, and hospitals where cleanliness is a consideration. CCP is also preferred in businesses in which security is a major consideration. McMullen 312-20, W. Smith 440-47, 558-59, Roth 1665-66, Hangen 1964-65, Ramey 3883, Hummell 3942-44; CX's 18"O", 20B. The record, however, does not reveal what percentage of total CCP production is represented by these applications.

<sup>45</sup> McMullen 341-42, W. Smith 465, Reeves 675; CX's 381-J, 41L, 70, 79A-Z-11. In 1982, the difference between CCP costs and OTC costs to the forms printer was between 20% to 30%. W. Smith 464-65, Reeves 675.

forms are traditionally priced higher and independently of OTC forms. In a word, the forms printers and their customers (the forms users) are willing to pay a higher price for CCP in order to avoid the smudging and inconvenience associated with either carbonized tissues or bond paper with a carbon backing.<sup>46</sup>

31. The ability of CCP manufacturers to maintain this premium and yet switch a significant number of customers from the more widely-used OTC does not turn on small changes in the price of either of the two products. H.F. Rance, the father of WT's CCP business and a seasoned follower of trends in the U.S. market and elsewhere,<sup>47</sup> observed: [23]

In my experience the amount of the price differential has little effect upon the penetration rate provided it is between 15% and 50%. In other words, a price differential of about 30%, balanced against the quality benefits of CCCP and allowing for the other subordinate constraining factors, determines the penetration rate at a figure of 1% per annum, and this penetration rate is not significantly reduced even if the price differential is doubled; nor is it significantly increased even if the price differential is halved.<sup>48</sup>

32. Further contributing to the lack of price sensitivity between OTC and CCP, is the fact that once a decision to use a CCP form has been made, customers of the forms manufacturers rarely switch back to OTC on the basis of changes in the price spread between the two products.<sup>49</sup> [24]

33. Given the leverage which they have over sheet users who realistically cannot turn to a substitute, and the perception of CCP customers generally (*i.e.*, forms printers and forms users) that CCP is the technologically superior product which legitimately commands a substantial premium, in the day-to-day operations of CCP manufacturers, pricing decisions are not made on the basis of OTC prices, and the prices of the two products do not move in tandem.<sup>50</sup>

<sup>46</sup> McMullen 312-13, 327, 355-56, W. Smith 465-66, Reeves 644, 675-77, 819-21, Kershaw 1222, Eichner 4275-76; CX's 12H,Z-22, Z-28, 66M.

<sup>47</sup> Rance's career was described as follows by one of respondents' attorneys:

Dr. Rance served WT for over forty years, some twenty of them as a director. At the time of his retirement, on January 31, 1975, he was in charge of all of WT's strategic planning and research functions. During his tenure at the company, he had acquired technical expertise in carbonless paper and had conducted all of WT's license negotiations with the NCR corporation. Accordingly, when he retired, at a time of considerable uncertainty in WT's relationship with NCR, WT took steps to ensure that Dr. Rance's knowledge and experience would remain at its disposal (affidavit of Paul S. Shrank attached to Respondents' Opposition to In Camera Examination of Certain Documents, 8/31/81). See also Best 2378-79.

The steps taken by WT to retain Dr. Rance's knowledge included a series of consultancy agreements and use of his services as a behind-the-scenes expert in this litigation.

<sup>48</sup> CX 12Z-25. See also Horowitz 1353-56, 1516-20, 1522-23, 1599.

<sup>49</sup> McMullen 331-32, 335, 337-38, 354-55, W. Smith 468, 644, Reeves 821-22, Kershaw 1230, Roth 1770-71, Clampitt 4209, Mustari 4485, Anderson 5038. Thus, even in times of recession, users do not switch from CCP to OTC on any significant scale. CX 12Z-25.

<sup>50</sup> W. Smith 466-67, Reeves 827, P.C. Smith 891-92, 905, 994, Kershaw 1220-21, 1227-29, 1231, Ramey 3879-80; CX's 11A,"O", 12Z-25, 41F-G, 43A, 44C, 91Z-20, 217A-C. Similarly, there is no relationship between the price charged by printers for CCP forms and the price charged for OTC forms. McMullen 356, W. Smith 466, Reeves

34. No weight can be given to the econometric analysis of Appleton's own elasticity, the CCP industry's elasticity, and the cross-elasticity between CCP and OTC, which was prepared for litigation by respondents' retained expert, Dr. William J. [25] Baumol. Baumol's entire exercise, as summarized in RX 562, is grounded on the assumption that CCP buyers make decisions about whether to switch to other suppliers of CCP, or to switch between CCP and OTC, in a period ranging from four to six months after a price change is announced. Baumol, who had no expertise in the CCP industry ("I am not qualified to report what the industry does")<sup>51</sup> admitted that he knew of no evidentiary support for his "lag" hypothesis and he conceded that his study was useless if his assumption was in error.<sup>52</sup> As it happens, the only support for this "lag" assumption is Baumol's own bootstrap argument that without it his studies produce "statistical nonsense."<sup>53</sup> But no Appleton or B.A.T official (or any other CCP executive) testified about the existence of a four to six month "lag" in actual practice. Moreover, in a pre-litigation report on the feasibility of a study of Appleton's own elasticities in which a similar four month lag was [26] applied,<sup>54</sup> Appleton executives were warned of the bias and limitations inherent in the econometric approach to elasticities.<sup>55</sup> This earlier research (whose reliability was no more firmly established on the record than Baumol's study) reached the conclusion that Appleton's own elasticity was 1.1 which would indicate that Appleton could raise prices with little risk to itself.<sup>56</sup> In contrast, Baumol's construct produced a cross-elasticity coefficient of 4.19 and an Appleton own elasticity of 16.11. These results, which even came as a surprise to Baumol ("I can literally say that I have never for any firm found an elasticity higher than this, even for individual gasoline stations"),<sup>57</sup> suggest that the underlying data lends itself too easily to adversarial gerrymandering. This is corroborated by the fact that using Baumol's own

819-20, Eichner 4275. The fact that several witnesses testified that "if" or "when" CCP and OTC were priced at the same level, even more users would switch to CCP (Reeves 748, Roth 1691, Kershaw 1297-98, Hummell 3945-46) tells us little about the pricing discretion enjoyed by CCP manufacturers who, in fact, have historically priced their product above and independently of OTC while achieving a growth rate which far exceeds the growth of OTC. CX's 28G-H, 29'O', Z-6, 31'O', Z-4, 32Q, 33E, Z-6, 38Z-32, 58N, 191M-P, 209Q. For the period 1972 to 1979, the average annual growth for CCP was 17% while forms bond grew at 9%, and carbonizing tissue grew at a rate of 4%. CX 60J.

<sup>51</sup> Baumol 6291. See also Baumol 6404, 6409-12.

<sup>52</sup> Baumol 6157-58, 6292-93, 6340, 6345-46.

<sup>53</sup> Baumol 6342. The record suggests at least two other reasons why the study would produce "statistical nonsense" besides the insertion or removal of arbitrary "lags." The proxies used by Baumol for both CCP and OTC are questionable (see Baumol 6165-66, 6176-77, 6190, 6192-93) and there is strong evidence of a multicollinearity problem traceable to the identity of Mead and Appleton prices and the clear record proof that customers in fact do not switch CCP suppliers on the basis of price (see Tr. 6042, agreement of respondents' counsel, and Baumol 6039-42, 6046-47, 6202-03, 6206-09).

<sup>54</sup> CX's 372A-M.

<sup>55</sup> CX 372G.

<sup>56</sup> Baumol 6367. See also CX's 417, 454A-E for another Appleton pre-litigation estimate of own elasticity which ranged from 1.32 to 2.65.

<sup>57</sup> Baumol 5999.

annual regressions, complaint counsel's econometrician produced exhibits showing a cross-elasticity coefficient of  $-.01$ .<sup>58</sup> Moreover, by applying various monthly "lags"—0, 1, 2, 3 months— [27] which are as plausible on the basis of this record as Baumol's four to six month lag, the same data used by Baumol produces own elasticity and cross-elasticity coefficients which are not statistically different from zero.<sup>59</sup> In sum, because the validity of Baumol's econometric study was not established on the record, and because his testimony was largely based on the study, I have not relied on any of the opinions expressed by this witness.

#### *Relevant Geographic Market*

35. The relevant geographic market in which to evaluate B.A.T's acquisition of Appleton is the United States as a whole.<sup>60</sup>

#### *Concentration In The U.S. CCP Market*

36. The first U.S. company to challenge NCR as a CCP producer was 3M Corp. which entered the market in 1962 with a self-contained form of CCP sold under the brand name "Action 100." "Action 100" has achieved limited acceptance.<sup>61</sup> Beginning in 1966, 3M entered into the manufacture of standard, transfer-type CCP, first with the use of contract coaters and then through the purchase in 1971 of a coating plant in Nekossa, [28] Wis., which had formerly done contract coating for NCR.<sup>62</sup> 3M, which is not integrated into paper making, lost money from its entry in 1962 until 1974.<sup>63</sup> Since then, its profits have averaged about 6% before taxes.<sup>64</sup> CCP is an infinitesimal segment of 3M's overall business,<sup>65</sup> and it is not aggressively promoted by 3M.<sup>66</sup>

37. The next entrant into the U.S. CCP market was Nashua, a firm generally engaged in paper coating and converting. Nashua embarked on CCP development in 1965 with a clay-based CCF system which it began selling five years later with limited commercial success.<sup>67</sup> Subsequently, it converted to a resin-based CF sheet.<sup>68</sup> Nashua is not integrated into paper making and presently most of its CF is

<sup>58</sup> CX's 432, 450. See also CX 433 for a measure of the cross-elasticity of OTC and CCP using Baumol's data. It shows a range of values between .44 to 1.14.

<sup>59</sup> Baumol 6318-19, 6331-34, 6337-38.

<sup>60</sup> CX 274F(¶ 29).

<sup>61</sup> Ramey 3792-93, 3798.

<sup>62</sup> Ramey 3794-95.

<sup>63</sup> RX 609.

<sup>64</sup> RX 609. 3M turned a profit by concentrating on sheet sales during a 1974 shortage. To this day, 3M has made no profit on roll sales. Ramey 3824-25, 3832.

<sup>65</sup> Ramey 3889.

<sup>66</sup> Reeves 711-12, Roth 1675.

<sup>67</sup> Langlais 1117, 1135, 1193, Kershaw 1202.

<sup>68</sup> Langlais 1128; RX 223. The conversion was made over a two-year period, but could have been accomplished more quickly if the project had been assigned a higher priority. Langlais 1129.

coated by James River Company.<sup>69</sup> Nashua makes the other components of its CCP product in its [29] Merrimack, New Hampshire, facility.<sup>70</sup> Nashua cannot match either Appleton or Mead in the quality of finished product or the efficiency of its production.<sup>71</sup> Nashua's commitment to CCP has been half-hearted at best.<sup>72</sup> During most of the period 1976-1982, Nashua's CCP business has shown deep losses.<sup>73</sup>

38. Mead, an integrated paper company with internal access to trees, pulp, and paper, began its production of CCP as a contract coater for NCR in 1954.<sup>74</sup> In 1971, Mead was given a license by NCR to manufacture CCP for its own account. Mead paid royalties to NCR for the use of NCR's patents and technology from 1971 through 1978.<sup>75</sup> Mead has also licensed patented technology from Fuji, a Japanese CCP producer.<sup>76</sup> Mead's CCP operation is successful and highly profitable.<sup>77</sup>

39. Champion International, a large paper company, entered the U.S. CCP market in 1969 with its own technology. Although [30] it is fully integrated into paper manufacturing and has substantial financial and marketing resources, Champion was unable to overcome the technical problems of CCP production.<sup>78</sup> Throughout its existence as a CCP producer, Champion was plagued by quality problems, and because its product was not commercially accepted, Champion left the CCP market in 1976.<sup>79</sup>

40. Boise Cascade, another large integrated paper company, obtained a license from Nashua in 1975 to produce and sell CCP west of the Mississippi.<sup>80</sup> Under Nashua's unpatented, proprietary technology, Boise began manufacturing CCP in 1978 but a west coast paper strike interrupted production soon after it began. The strike was followed by a series of quality problems and Boise did not resume production until 1980. Boise only produces CCP rolls for sale to the west coast multi-part forms printers.<sup>81</sup>

41. In addition to the CCP manufacturers described above who manufacture for resale, Moore Business Forms, a Canadian firm which is by far the largest producer of business forms in the world, has integrated backward into CCP production. Moore, [31] which has

<sup>69</sup> Kershaw 1213; RX 304Z-7.

<sup>70</sup> Kershaw 1213.

<sup>71</sup> W. Smith 469, Reeves 711; CX's 12Y.

<sup>72</sup> Kershaw 1251-52.

<sup>73</sup> RX 756B.

<sup>74</sup> P.C. Smith 940-44, Hangen 1813.

<sup>75</sup> P.C. Smith 1089-90.

<sup>76</sup> P.C. Smith 1089-90.

<sup>77</sup> P.C. Smith 1082-87.

<sup>78</sup> Ramey 3876.

<sup>79</sup> CX's 57C, 66X, 255Z-44.

<sup>80</sup> Hangen 1902; CX 66Y; RX's 512A-V, 565B.

<sup>81</sup> Reeves 710; CX 29Z-11, 254Z-29; RX's 121Z-1, 134.

