

IN THE MATTER OF

WARNER COMMUNICATIONS INC., ET AL.

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

Docket 9174. Complaint, March 19, 1984—Decision, Sept. 8, 1986

This consent order requires, among other things, a New York City record company to obtain prior FTC approval before acquiring any interest in major record companies and to notify the FTC about distribution agreements planned with those companies.

Appearances

For the Commission: *Robert W. Doyle, Jr. and Richard Malatt.*

For the respondents: *Stuart Robinowitz and Martin Flumenbaum, Paul, Weiss, Rifkind, Wharton & Garrison, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents, Warner Communications Inc., Warner Bros. Records, Inc., (collectively "Warner"), Chappell & Co., Inc., and PolyGram Records, Inc. (collectively "PolyGram"), subject to the jurisdiction of the Commission, have agreed to a merger of each firm's prerecorded music businesses that, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITION

1. For the purposes of this complaint, *prerecorded music* refers to music sold to consumers in the form of records (singles, LPs, and compact discs) and tapes (cassettes, 8-track cartridges, and reel-to-reel tapes).

II. WARNER COMMUNICATIONS INC. AND
WARNER BROS. RECORDS, INC.

2. Respondent Warner Communications Inc. is a Delaware corporation with its principal place of business in New York, New York. Warner Communications Inc. is a worldwide entertainment firm with interests in prerecorded music, pay television, motion pictures, consumer electronics and publishing. In 1982 it had revenues of about \$4 billion and a profit of \$257.8 million.

3. Warner Communications Inc. is the owner of all the outstanding shares of Warner Bros. Records, Inc.

4. Warner Bros. Records, Inc. is a Delaware corporation with its principal place of business in New York, New York. It is a wholly owned subsidiary of Warner Communications Inc., and one of several Warner Communications' domestic companies involved in the prerecorded music business.

III. CHAPPELL & CO. AND POLYGRAM RECORDS, INC.

5. Chappell & Co. and PolyGram Records, Inc. are part of a collection of domestic and foreign corporations known as the "PolyGram Group," which is a joint venture of the N.V. Philips Gloeilampenfabrieken ("Philips") of the Netherlands and Siemens, AG of West Germany. Both Chappell & Co. and PolyGram Records, Inc. are corporations organized and existing under the laws of the State of Delaware with their corporate headquarters located in New York, New York.

6. PolyGram Records, Inc. is currently the PolyGram Group's principal organization for its U.S. prerecorded music operations. The PolyGram Group had worldwide prerecorded music sales in 1982 of about \$1 billion, with gross sales exceeding \$150 million in the United States.

IV. JURISDICTION

7. At all times relevant herein, each of the companies named in this complaint has been engaged in activities that are in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE PROPOSED MERGER

8. Warner and PolyGram have agreed to merge their prerecorded music businesses in the U.S. and in the rest of the world. In the United States, Warner will transfer its prerecorded music assets to respondent Warner Bros. Records, Inc. PolyGram will transfer its prerecord-

ed music business to respondent Chappell & Co. These two corporations will then merge, and the surviving corporation, Warner-PolyGram, Inc., will then issue new stock: 80 class A shares to Warner; 13 class B shares to PolyGram's shareholder, PolyGram B.V. and 7 class B shares to PolyGram's shareholder, PolyGram GmbH. Warner will also receive 65 shares (representing \$65 million principal amount) of Non-Voting 9 percent preferred shares.

9. Warner and PolyGram's parent, Philips, also plan to merge their prerecorded music businesses in the rest of the world.

VI. TRADE OF COMMERCE

10. The relevant product market in which to assess the competitive effects of the merger is the market for prerecorded music.

11. The relevant geographic market in which to assess the competitive effects of the merger is the United States.

12. The relevant market is moderately concentrated.

13. Barriers to entry into the distribution of the relevant product are substantial.

14. Both Warner and PolyGram are substantial competitors in the relevant product and geographic markets.

VII. EFFECTS OF THE MERGER

15. The effect of the proposed merger, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), inasmuch as it will, among other things, result in all of the following:

(a) Eliminate substantial actual competition between Warner and PolyGram in the relevant market;

(b) Eliminate substantial potential competition between Warner and PolyGram;

(c) Eliminate substantial actual and potential competition between the other companies engaged in the distribution of the relevant product; and

(d) Significantly increase the level of industry concentration in the relevant market.

VIII. VIOLATIONS CHARGED

16. The proposed merger constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and, if consummated, Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents Warner Communications Inc. and Warner Bros. Records, Inc. with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter 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 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondents Warner Communications Inc. and Warner Bros. Records, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of Delaware, with offices and principal places of business located at 75 Rockefeller Plaza, in the City of New York, State of New York.

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

ORDER

Definitions

Warner, as used herein, means Warner Communications Inc., Warner Bros. Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns, and the officers, directors, employees, or agents of their parents, divisions, subsidiaries, successors and assigns.

PolyGram, as used herein, means Chappell & Co., Inc., PolyGram

Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns and the officers, directors, employees or agents of their parents, divisions, subsidiaries, successors and assigns.

Major record company, as used herein, means the following record companies that are vertically integrated into the creation and national distribution of prerecorded music: Warner, PolyGram, CBS Inc., Capitol Records Inc., RCA Corporation and MCA Corporation.

Distribution Agreement, as used herein, means a contractual arrangement whereby one major record company undertakes to distribute nationally prerecorded music for another major record company, as defined herein, to prerecorded music retailers, one-stops, rack jobbers or other subdistributors for resale. *Distribution Agreement* shall not include an arrangement by which a major record company licenses particular tracks of an artist's music to another record company for the purpose of making so-called *compilation albums*.

Effective date, as used herein, means the date on which the agreement containing consent order between respondents and counsel for the Commission was executed.

I.

It is ordered, That Warner terminate immediately all agreements that provide for or contemplate the merger of, or a joint venture between, its prerecorded music operations and those of PolyGram in the United States, including but not limited to the Letter of Intent dated July 26, 1983, and Agreement of Merger and Plan of Reorganization dated December 29, 1983; and return or destroy all documents, if any, regarding confidential information provided to Warner by PolyGram in connection with merger or joint venture negotiations or agreements.

II.

It is further ordered, That for a period of five (5) years from the effective date hereof, Warner cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, any interest in, or any stock, share capital or assets of any major record company; *provided, however*, that nothing in this order shall prohibit a director of Warner from acquiring, for investment purposes only, an interest of not more than one (1) percent of the stock, share capital or equity of any such concern.

III.

It is further ordered, That for a period of five (5) years from the effective date hereof, Warner shall not, without providing written advance notification to the Federal Trade Commission, enter into a distribution agreement with a major record company, as defined herein. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"). Warner shall provide the Notification to the Federal Trade Commission at least fifteen (15) days prior to entering into the distribution agreement (hereinafter referred to as the "first waiting period"). The Notification shall be given by Warner and not by any party whose records Warner seeks to distribute. At the time of the filing of the Notification, Warner shall provide to the Commission supplemental information, either in Warner's possession or reasonably available to Warner. Such supplemental information shall include a copy of the proposed agreement; the names of the principal representatives of Warner and the firm whose records are to be distributed who negotiated the proposed distribution agreement; any management or strategic plans discussing the proposed distribution agreement; and documents discussing market shares and competitive conditions in the prerecorded music industry. If within the first waiting period of fifteen (15) days, the Federal Trade Commission makes a written request for additional information, Warner shall comply with said request within an additional period of fifteen (15) days or sooner. Warner shall not enter into the proposed distribution agreement for fifteen (15) days after the submission of the additional information.

IV.

It is further ordered, To the extent that it will affect Warner's compliance obligations arising out of this order, Warner shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or any other changes in the record operations of the corporation.

V.

It is further ordered, That Warner shall, within sixty (60) days after service upon it of this order, and annually thereafter for five years,

file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

Chairman Oliver and Commissioner Strenio did not participate.

IN THE MATTER OF

POLYGRAM RECORDS, INC., ET AL.

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

Docket 9174. Complaint, March 19, 1984—Decision, Sept. 8, 1986*

This consent order requires, among other things, a New York City record company to obtain prior FTC approval before acquiring any interest in major record companies and to notify the FTC about distribution agreements planned with those companies.

Appearances

For the Commission: *Robert W. Doyle, Jr. and Richard Malatt.*

For the respondents: *James E. Akers, Sullivan & Cromwell, New York City.*

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents, Chappell & Co. Inc., formerly an affiliated company under common ownership now merged with PolyGram Records, Inc., and PolyGram Records, Inc., with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent, PolyGram Records, Inc., its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter 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

* Complaint previously published at 108 F.T.C. 105

further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent, PolyGram Records, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with offices and principal places of business located in the City of New York, State of New York. Respondent Chappell & Co. Inc. was merged with PolyGram Records, Inc. in January of 1984.

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

Warner, as used herein, means Warner Communications Inc., Warner Bros. Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns, and the officers, directors, employees, or agents of their parents, divisions, subsidiaries, successors and assigns.

PolyGram, as used herein, means Chappell & Co., Inc., PolyGram Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns and the officers, directors, employees or agents of their parents, divisions, subsidiaries, successors and assigns.

Major record company, as used herein, means the following record companies that are vertically integrated into the creation and national distribution of prerecorded music: Warner, PolyGram, CBS Inc., and RCA Corporation.

Distribution Agreement, as used herein, means a contractual arrangement whereby one major record company undertakes to distribute nationally prerecorded music for another major record company, as defined herein, to prerecorded music retailers, one-stops, rack jobbers or other subdistributors for resale.

Prerecorded music means recorded audio-only performances sold in the form of records (singles, LPs and compact discs) and tapes (cassettes, 8-track cartridges and reel-to-reel tapes).

Effective date, as used herein, means the date on which the agreement containing consent order between respondent and counsel for the Commission was executed.

I.

It is ordered, That PolyGram terminate immediately all agreements that provide for or contemplate the merger of, or a joint venture between, its prerecorded music operations and those of Warner in the United States, including but not limited to the Letter of Intent dated July 26, 1983, and Agreement of Merger and Plan of Reorganization dated December 29, 1983; and return or destroy all documents, if any, regarding confidential information provided to PolyGram by Warner in connection with merger or joint venture negotiations or agreements.

II.

It is further ordered, That for a period of five (5) years from the effective date hereof, PolyGram cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, any interest in, or any stock, share capital or assets of the United States operations of any other major record company.

III.

It is further ordered, That for a period of five (5) years from the effective date hereof, PolyGram shall not, without providing written advance notification to the Federal Trade Commission, enter into a United States distribution agreement with any other major record company, as defined herein. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"). PolyGram shall provide the Notification to the Federal Trade Commission at least fifteen (15) days prior to entering into the distribution agreement (hereinafter referred to as the "first waiting period"). At the time of the filing of the Notification, PolyGram shall provide to the Commission supplemental information, either in PolyGram's possession or reasonably available to PolyGram. Such supplemental information shall include a copy of the proposed agreement; the names of the principal representatives of PolyGram and the principal representatives of the firm whose records are to be distributed (or that intends to distribute PolyGram's records) who negotiated the proposed distribution agreement; any management or strategic plans discussing the proposed distribution agreement; and documents discussing market shares and competitive conditions in the prerecorded music industry. If within the first waiting period of fifteen (15) days, the Federal Trade Commis-

sion makes a written request for additional information, PolyGram shall comply with said request within an additional period of fifteen (15) days or sooner. PolyGram shall not enter into the proposed distribution agreement for fifteen (15) days after the submission of the additional information.

IV.

It is further ordered, To the extent that it will affect PolyGram's compliance obligations arising out of this order, PolyGram shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or any other changes in the record operations of the corporation.

V.

It is further ordered, That PolyGram shall, within sixty (60) days after service upon it of this order, and annually thereafter for five years, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

Chairman Oliver and Commissioner Strenio did not participate.

Complaint 108 F.T.C.

IN THE MATTER OF

THE NORTH CAROLINA ORTHOPAEDIC ASSOCIATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-3200. Complaint, Sept. 19, 1986—Decision, Sept. 19, 1986.*

This consent order, among other things, prohibits The North Carolina Orthopaedic Assoc. from placing unreasonable restrictions against podiatrists seeking access to hospital facilities or surgical privileges and inducing hospitals or medical staffs to deny such privileges to qualified podiatrists.

Appearances

For the Commission: *Douglas B. Brown and Charles Peterson.*

For the respondent: *George L. Little, Jr. and F. Joseph Treacy, Pe-tree, Stockton, Robinson, Vaughn, Glaze & Maready, Winston-Salem, N.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the North Carolina Orthopaedic Association, a non-profit 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 as follows:

PARAGRAPH 1. Respondent, the North Carolina Orthopaedic Association, is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina.

PAR. 2. Respondent is a professional association organized in substantial part to represent the interests of orthopedic surgeons who practice in North Carolina and the profession of orthopedics in North Carolina. Respondent has approximately 225 members. Many of respondent's activities are of a scientific and educational nature. A significant portion of respondent's activities furthers its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 3. Most members of the North Carolina Orthopaedic Association provide medical care for a fee. Most, if not all, of respondent's members have been and are now in competition among themselves and with other health care providers in the State of North Carolina.

PAR. 4. In the course of their treatment of patients, North Carolina orthopedic surgeons:

- (a) receive and treat patients from other states;
- (b) receive substantial sums of money from the federal government and from private insurers for rendering medical services, which money flows across state lines; and
- (c) prescribe medicines and medical devices that are shipped in interstate commerce.

PAR. 5. There are approximately 100 podiatrists in North Carolina. Most of them are engaged in the business of providing podiatric services for a fee. Podiatrists in North Carolina are licensed to provide diagnostic, medical and surgical services limited to the foot. Podiatrists compete with orthopedic surgeons in the delivery of some health care services.

PAR. 6. In the course of their treatment of patients, North Carolina podiatrists:

- (a) receive and treat patients from other states;
- (b) receive substantial sums of money from the federal government and from private insurers for rendering medical services, which money flows across state lines; and
- (c) prescribe medicines and medical devices that are shipped in interstate commerce.

PAR. 7. Graduates of podiatry schools and residency programs in podiatry decide where to practice based on a number of factors. One important factor for many podiatrists is their ability to obtain access to hospital facilities that allow them to perform surgery within the scope of their state licenses and in accordance with their training and experience.

PAR. 8. The acts or practices described herein are in interstate commerce or affect the interstate activities of respondent's members, third parties who pay for orthopedic services, hospitals, podiatrists, or others, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 9. Respondent has agreed, combined, or conspired with some of its members and with others to engage in conduct that unreasonably restrains the practice of podiatry. In particular, they have agreed, combined, or conspired to take action to exclude or unreasonably discriminate against podiatrists who seek, within the scope of their professional licenses as described in Paragraph Five, surgical privi-

leges or access to or use of hospital facilities. As part of or in furtherance of the agreement, combination, or conspiracy regarding podiatry, respondent passed two resolutions opposing the hospital practice of podiatry, its members were enjoined to review or change hospital bylaws accordingly, and some of respondent's members have participated in such review or change of hospital bylaws.

PAR. 10. The purposes or effects and the tendency and capacity of the agreement, combination, or conspiracy and the acts and practices described in Paragraph Nine of this complaint are and have been to unreasonably restrain competition and to deny to the public the benefits of competition in the following ways, among others:

(a) Competition based on price, quality and service in the delivery of professional health services has been lessened;

(b) The ability of patients and prospective patients to select a licensed practitioner of their choice has been hindered;

(c) The ability of podiatrists to compete with medical doctors has been restricted; and

(d) Podiatrists have been discouraged from practicing in North Carolina because of the difficulty of obtaining hospital privileges.

PAR. 11. The aforesaid agreement, combination, or conspiracy and the acts and practices of respondent constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such agreement, combination, or conspiracy and the acts and practices of respondent are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act 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 filed thereafter by an interested person 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 North Carolina Orthopaedic Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina.
2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, for the purpose of this order, *respondent* means the North Carolina Orthopaedic Association, a non-profit corporation, its Executive Committee, officers, representatives, agents, employees, successors, and assigns.

II.

It is ordered, That respondent shall cease and desist from, directly or indirectly or through any corporate or other device, in or in connection with respondent's activities as a professional non-profit association in or affecting commerce, the following:

A. Entering into, continuing, maintaining, adhering to, acquiescing in, or aiding and abetting any agreement, combination or conspiracy to unreasonably exclude, unreasonably discriminate against, or place unreasonable restrictions on any podiatrist seeking or having surgical privileges at any hospital or access to or use of any hospital facilities, when such privileges, access or use is permitted under North Carolina law;

B. Inducing or seeking to induce any hospital, hospital medical staff, physician, or other person or entity to obstruct or deny surgical privileges at any hospital or access to or use of any hospital facilities

by the podiatric profession or any licensed podiatrist through any representation that is false or deceptive within the meaning of the Federal Trade Commission Act.

Provided, That nothing in subpart II(B) shall prohibit respondent from making or publishing a representation for which respondent possesses a reasonable basis regarding the training, education, practice, or other qualifications of podiatrists or any individual podiatrist.

Provided further, That nothing in this order shall prohibit respondent from exercising rights guaranteed by the First Amendment to the United States Constitution to petition any federal, state, or local government, executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal, state, or local administrative or judicial proceeding.

III.

It is further ordered, That, within sixty (60) days after the date of service of this order, respondent shall:

A. Mail or otherwise furnish a copy of this order, accompanied by the cover letter attached as Appendix I, to each person who on the date of service of this order is a member of respondent and to each person who on the date of service of this order is an executive employee of respondent;

B. Mail or personally deliver a copy of this order, accompanied by the cover letter attached as Appendix I, to the President of the North Carolina Medical Society;

C. Withdraw any policy, standard, or position regarding podiatry, if any, that is inconsistent with the terms of Part II of this order.

IV.

It is further ordered, That respondent shall:

A. File a written report with the Commission within ninety (90) days following the date of service of this order, and annually on the anniversary of the date of service of this order for a period of five (5) years, and at such other times as the Commission or Commission staff may by written notice to respondent require, setting forth in detail the manner and form in which it has complied with this order;

B. For five (5) years after the date of service of this order, maintain and make available to the Commission staff, for inspection and copying upon reasonable notice, any documents regarding podiatric clini-

cal privileges or access to hospital facilities, podiatric training or education, or the appropriate scope of practice by podiatrists; and

C. For five (5) years after the date of service of this order, provide each new member and each new executive employee of the respondent, or any other employee whose responsibilities include disseminating respondent's views, with a copy of this order at the time he or she is accepted into membership or employment.

V.

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

APPENDIX I

Dear [Sir or Madam]:

As you may know, on _____ the Federal Trade Commission issued a Consent Order settling charges that the North Carolina Orthopaedic Association (NCOA) has been involved in activities that restricted the lawful practice of podiatry and restrained competition between medical doctors and podiatrists. This order was entered as part of a compromise settlement in order to save NCOA the expense of defending a costly litigation and without any admission whatsoever of any wrongdoing on the part of NCOA. NCOA has not admitted that it has violated the law, nor admitted that it has done the acts alleged in the Complaint except those relating solely to jurisdiction.

Under the terms of the Order issued by the Commission, among other things, NCOA is prohibited from entering into or maintaining any agreement or conspiracy to unreasonably exclude or discriminate against any podiatrist seeking or having surgical privileges at any hospital or access to or use of any hospital facilities, when such privileges, access or use is permitted under North Carolina law.

The Order also prohibits NCOA from inducing any hospital, hospital medical staff, physician, or other person or entity to obstruct or deny surgical privileges at any hospital or access to or use of any hospital facilities by the podiatric profession or any licensed podiatrist through any representation for which NCOA does not have a reasonable basis.

The Order, however, does not prohibit NCOA or its members from exercising their First Amendment rights to petition any legislative or executive body concerning any rules, legislation, or procedures, or participating in any administrative or judicial proceeding. The Order does not prevent any individual from engaging in unilateral conduct, in an individual capacity and not as an officer, agent or representative of NCOA.

Decision and Order. 108 F.T.C.

Pursuant to the Order issued by the Federal Trade Commission, we are withdrawing all of our policies and statements relating to podiatry, if any, that are not consistent with the Order.

Your attention to these matters will be appreciated. Thank you for your cooperation.

Sincerely,

President
The North Carolina Orthopaedic Association

IN THE MATTER OF

PITTSBURGH PENN OIL COMPANY, ET AL.

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

Docket 9203. Complaint, Jan. 16, 1986—Decision, Sept. 29, 1986

This consent order requires, among other things, a Creighton, Pa. automotive fluids company to cease falsely representing that its automotive oils, transmission fluids and antifreeze meet standardized industry ratings and standards established by Ford and General Motors.

Appearances

For the Commission: *James K. Leonard, Nathan P. Owen and Tamra S. Kempf.*

For the respondents: *Stephen J. Laidhold, Lampl, Sable, Makoroff & Libenson, Pittsburgh, Pa.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pittsburgh Penn Oil Company, a corporation, and Fred Danovitz, individually and as an officer of said corporation ("respondents"), have violated Section 5 of the Federal Trade Commission Act and, it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondent Pittsburgh Penn Oil Company is a Pennsylvania corporation with its principal office and place of business located at Box 296, Route 28, Freeport Road, Creighton, PA.

(b) Respondent Fred Danovitz is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporate respondent.

(c) Respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents are, and have been, engaged in the production and sale of substantial quantities of engine oil, automatic transmission fluid, antifreeze-coolant and other automotive and petroleum products. Respondents package their products under the brand names of the corporate respondent, including Prize Penn, Sure-Matic and

Sure Permanent, and under the brand names of independent merchandisers.

PAR. 3. In the course and conduct of their business, respondents cause their products to be sent to purchasers in various States of the United States. Respondents prepare promotional and labeling materials for their products and disseminate these materials in various States of the United States. Respondents maintain, and at all times relevant herein have maintained, 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 their business, and in order to induce the sale of their engine oils, respondents have made statements in their promotional literature and on their containers of engine oil. Typical of these statements are the following:

1. SAE 10W-40
2. Exceeds requirements for A.P.I. service classifications—SC, SD, SF

PAR. 5. Through the use of these and other similar statements, respondents have represented, directly or by implication, that respondents' engine oils have met the standards established by the Society of Automotive Engineers ("SAE") and the American Petroleum Institute ("API") for the stated SAE viscosity and API service classification, respectively.

PAR. 6. In truth and in fact, in numerous instances, respondents' engine oils have not met the standards established by the SAE and the API for the stated SAE viscosity and API service classification, respectively. Therefore, the representation set forth in Paragraph Five has been, and is, false and misleading.

PAR. 7. In the course and conduct of their business, and in order to induce the sale of their engine oils, respondents have made statements on their containers of engine oil not labeled with any API service classification. Typical of these statements are the following:

1. High grade lubricant for modern high-speed motors
2. Longer engine life for the new long-life engines

PAR. 8. Through the use of these and other similar statements, respondents have represented, directly or by implication, that respondents' engine oils were suitable for use in engines manufactured in model years 1980 to the present.

PAR. 9. In truth and in fact, in numerous instances, respondents' engine oils have not been suitable for use in engines manufactured in model years 1980 to the present. Therefore, the representation set forth in Paragraph Eight has been, and is, false and misleading.

PAR. 10. In the course and conduct of their business, and in order to induce the sale of their automatic transmission fluids, respondents have made statements on their containers of automatic transmission fluid. Typical of these statements are the following:

1. "DEXRON® II" or "a substitute for DEXRON® II"
2. "Type F"
3. "Ford Approved"

PAR. 11. Through the use of these and other similar statements, respondents have respectively represented, directly or by implication, that respondents' automatic transmission fluids have met the standards established by General Motors Corporation for DEXRON® II transmission fluids, have met the standards established by Ford Motor Company for Type F automatic transmission fluids, and have been approved by Ford Motor Company.

PAR. 12. In truth and in fact, in numerous instances, respondents' automatic transmission fluids have not met the standards established by General Motors Corporation for DEXRON® II automatic transmission fluids, have not met the standards established by Ford Motor Company for Type F automatic transmission fluids, and have not been approved by Ford Motor Company. Therefore, the representations set forth in Paragraph Eleven have been, and are, false and misleading.

PAR. 13. In the course and conduct of their business, and in order to induce the sale of their antifreeze-coolants, respondents have made statements on their containers of antifreeze-coolant. Typical of these statements is a "protection chart" stating that respondents' antifreeze-coolant has afforded given levels of protection against freezing in engine cooling systems, including protection against freezing down to -34 degrees F. when respondents' antifreeze-coolant has been mixed with an equal amount of water.

PAR. 14. Through the use of this chart and other similar statements, respondents have represented, directly or by implication, that respondents' antifreeze-coolant has afforded the stated levels of protection against freezing in engine cooling systems, including protection down to -34 degrees F. when mixed with an equal amount of water.

PAR. 15. In truth and in fact, in numerous instances, respondents' antifreeze-coolant has not afforded the stated levels of protection against freezing in engine cooling systems, including protection down to -34 degrees F. when mixed with an equal amount of water. Therefore, the representation set forth in Paragraph Fourteen has been, and is, false and misleading.

PAR. 16. Through the use of the statements described in Paragraphs Four, Seven, Ten and Thirteen and the use of other similar statements, respondents have represented, directly or by implication, that

at the times of making the representations set forth in Paragraphs Five, Eight, Eleven and Fourteen, respectively, respondents possessed and relied upon a reasonable basis for making those representations.

PAR. 17. In truth and in fact, at such times respondents did not possess and rely upon a reasonable basis for making such representations. Therefore, the representation set forth in Paragraph Sixteen was, and is, false and misleading.

PAR. 18. Respondents' dissemination of the aforesaid material representations and the placement in the hands of others of means and instrumentalities by and through which others may have used the aforesaid representations have had, and now have, the likelihood to mislead consumers and to induce such consumers to purchase and use respondents' engine oils, automatic transmission fluids and anti-freeze-coolants.

PAR. 19. The acts or practices of respondents as alleged in this complaint constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the 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 Secretary of the Commission having withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter 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 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Pittsburgh Penn Oil Company is a Pennsylvania

corporation with its principal office and place of business located at Box 296, Route 28, Freeport Road, Creighton, PA.

Respondent Fred Danovitz is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporate respondent.

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

ORDER

I.

It is ordered, That respondents Pittsburgh Penn Oil Company, a corporation, its successors and assigns, and its officers, and Fred Danovitz, individually and as an officer of the corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the production, labeling, advertising, offering for sale, sale or distribution of any engine oil, automatic transmission fluid or anti-freeze-coolant in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication (*e.g.*, by making a product claim such as "high grade lubricant for modern high-speed motors" or "longer engine life for the new long-life engines"), that any engine oil has any American Petroleum Institute (API) service classification;

B. Representing, directly or by implication, that any engine oil has any Society of Automotive Engineers (SAE) viscosity;

C. Representing, directly or by implication, that any automatic transmission fluid has been approved by or meets any specification set by General Motors Corporation, Ford Motor Company or any other company;

D. Representing, directly or by implication, that any antifreeze-coolant affords a stated level of protection against freezing in engine cooling systems; or

E. Representing, directly or by implication, that any engine oil, automatic transmission fluid or antifreeze-coolant possesses any other performance or quality characteristic or has been tested or approved;

unless such representation is true and unless, at the time of making such representation, respondents, their successors or assigns possess and rely upon competent and reliable evidence which substantiates the representation.

II.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the production, labeling, advertising, offering for sale, sale or distribution of any automotive or petroleum product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, that any such product possesses any performance or quality characteristic or has been tested or approved.

III.

It is further ordered, That respondents, their successors and assigns shall draw a representative sample from each production batch or run, and from each filling run, of engine oil, automatic transmission fluid and antifreeze-coolant, shall document the method or methods used to draw such samples, and shall for at least one year retain and upon reasonable notice make available to the Commission for inspection and testing a properly marked portion of each such sample and that for a period of three (3) years after the date of service of this order respondents, their successors and assigns shall, at the option of the Commission, cause to be tested (as described below) by a competent and independent laboratory approved by the Commission, at the expense of respondents, their successors or assigns, up to seventy-five (75) samples of engine oil, automatic transmission fluid and/or antifreeze-coolant, the samples being either such retained samples or samples sold by respondents, their successors or assigns, and shall submit to the Commission copies of the results of such tests within twenty (20) days after the Commission has identified the retained sample(s) to be tested or has tendered the sold sample(s) to be tested, as the case may be; *provided, however,* that the twenty (20)-day period shall be extended by the length of any delay during the period beyond the control of respondents, their successors or assigns:

A. Engine oil samples tested pursuant to this Part shall be subjected to the then current version of the following American Society for

Testing and Materials (ASTM) tests and other tests or any succeeding tests that have the same force and effect:

1. Kinematic viscosity at 100 degrees C. (ASTM D445);
2. Low-temperature viscosity (multi-temperature version of ASTM D2602, described in Appendix A of SAE J300 APR 84) (test required only for multigrade oils);
3. Borderline pumping temperature (ASTM D3829) (test required only for multigrade oils);
4. Nitrogen (ASTM D3228 or chemiluminescence);
5. Sulfated ash (ASTM D874);
6. Total Base Number (ASTM D2896); and
7. Elemental analysis showing parts per million of barium, calcium, magnesium, phosphorus, sodium, and zinc (emission spectrometry or other generally accepted method).

B. Automatic transmission fluid samples tested pursuant to this Part shall be subjected to the then current version of the following tests or any succeeding tests that have the same force and effect:

1. Kinematic viscosity at 100 degrees C. (ASTM D445);
2. Flash point (ASTM D92);
3. Brookfield viscosity at -40 degrees C. (ASTM D2983);
4. Nitrogen (ASTM D3228 or chemiluminescence); and
5. Elemental analysis showing parts per million of boron, calcium, phosphorus, sulfur, and zinc (emission spectrometry or other generally accepted method).

C. Antifreeze-coolant samples tested pursuant to this Part shall be subjected to the then current version of the following tests or any succeeding tests that have the same force and effect:

1. Specific gravity (ASTM D1122);
2. Freezing point, 50% by volume in distilled water (ASTM D1177);
3. Boiling point, 50% by volume in distilled water (ASTM D1120);
4. pH, 50% by volume in distilled water (ASTM D1287);
5. Reserve alkalinity (ASTM D1121);
6. Water, % by weight (ASTM D1123); and
7. Elemental analysis showing parts per million of boron, phosphorus, silicon, and sodium (emission spectrometry or other generally accepted method).

IV.

It is further ordered, That respondents, their successors and assigns shall clearly and indelibly mark each container or the outside of each case of engine oil, automatic transmission fluid and antifreeze-coolant

with information identifying the relevant production batch(es) or run(s), production date(s) and filling date(s); *provided*, that containers so marked shall be marked on the day of filling, and cases so marked shall be marked on the day of packing.

V.

It is further ordered, That respondents, their successors and assigns shall retain records which substantiate any representation covered by this order for three (3) years after the last date on which the representation was made and upon reasonable notice shall make such records available to the Commission for inspection and copying; *provided*, that for engine oils, automatic transmission fluids and antifreeze-coolants produced or packaged by respondents, their successors or assigns, such records shall include blend formulas and specifications; formulas and specifications supplied to respondents, their successors or assigns by additive companies; documents describing the physical and chemical characteristics of additives purchased by respondents, their successors or assigns; pertinent licensing agreements; records describing purchases and inventories of base stocks and additives of respondents, their successors or assigns; records showing for each production batch or run the production date, the tank(s) used, the quantity of each ingredient used, the date of transfer to another tank(s), the tank(s) so used, the quantity transferred to each tank, and the results of quality control tests run; records showing for each filling run the filling date, the tank(s) used, the quantity drawn from each tank, the size and number of containers filled, the results of quality control tests run, and, if known at the time of the filling run, the shipping destination and intended customer; and records indicating the dates on which each tank used in production or filling is emptied.

VI.

It is further ordered, That respondents, their successors and assigns shall retain records of their sales of engine oil, automatic transmission fluid and antifreeze-coolant for three (3) years after each such sale which identify the name and address of each purchaser and the quantity of each of these products sold to each purchaser, shall retain for three (3) years from the date of their first possession all documents, including letters from consumers, customers and industry members and responses thereto, which constitute or relate to a complaint about or an unfavorable assessment of any engine oil, automatic transmission fluid or antifreeze-coolant sold by respondents, their

successors or assigns and upon reasonable notice shall make such records and documents available to the Commission for inspection and copying; *provided*, that, this Part VI shall apply only to such sales and first possessions occurring within five (5) years of the date of service of this order.

VII.

It is further ordered, That respondent Pittsburgh Penn Oil Company, its successors and assigns shall forthwith distribute a copy of this order to each of its subsidiaries and divisions and to all present and future agents, representatives and employees having responsibilities for advertising, production, packaging, quality control or corporate policy with respect to the subject matter of this order, shall secure from each such person a signed and dated statement acknowledging receipt of the order and shall maintain such statement for three (3) years after the end of such person's employment by respondent, its successors or assigns.

VIII.

It is further ordered, That respondent Fred Danovitz shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment and that, for a period of ten (10) years from the date of service of this order, respondent Fred Danovitz shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the production, labeling, advertising, offering for sale, sale or distribution of any automotive, petroleum or chemical product and of his affiliation with any new business or employment in which his own duties or responsibilities involve the production, labeling, advertising, offering for sale, sale or distribution of any automotive, petroleum or chemical product, with each such notice to include his new business address and a statement of the nature of the business or employment in which he is newly engaged, as well as a description of his duties and responsibilities in connection with the business or employment.

IX.

It is further ordered, That respondent Pittsburgh Penn Oil Company, its successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change to itself, such as dissolution, assignment or sale resulting in the emergence of a successor

corporation, the creation or dissolution of subsidiaries or any other change which may affect compliance obligations arising out of this order.

X.

It is further ordered, That respondents, their successors and assigns shall, within sixty (60) days after the date of service of this order, file a written report with the Commission setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2929. Consent Order, Sept. 26, 1978—Modifying Order, Oct. 3, 1986

The Federal Trade Commission has modified a 1978 consent order with respondents by setting aside the portions of the order pertaining to the exclusive dealing prohibitions. The Commission concluded that respondents do not have the market power to exclude competitors.

ORDER REOPENING AND SETTING ASIDE PORTIONS OF ORDER
ISSUED SEPTEMBER 26, 1978

On May 6, 1986, respondents Interco Incorporated ("Interco"), Londontown Corporation ("Londontown") and Queen Casuals, Inc. ("Queen Casuals") filed a "Request As Supplemented To Reopen And Set Aside Part Of Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice. Londontown and Queen Casuals are wholly owned subsidiaries of Interco. The Request asked the Commission to reopen the consent order issued on September 26, 1978, ("the order") and set aside paragraphs (1) and (2) of Part II of the order. [92 F.T.C. 404]

Paragraphs (1) and (2) of Part II of the order are applicable only to respondents' footwear products. Paragraph (1) of Part II forbids respondents from enforcing any agreement, understanding or arrangement which prevents resellers or prospective resellers from selling the footwear products of competitors or from independently determining the volume of footwear to be purchased from competitors. Paragraph (2) of Part II prohibits respondents from requiring or inducing resellers to cancel orders for or not purchase footwear products supplied by competitors.

After reviewing respondents' Request, the Commission has concluded that the public interest warrants reopening and setting aside the mentioned paragraphs of the order as requested by respondents. The action we take today is consistent with our previous determinations in *Brown Shoe Company, Inc.*, Docket No. 7606, July 16, 1984 [104 F.T.C. 266], and in *International Shoe Company*, Docket No. 6835, January 30, 1985 [105 F.T.C. 191]. In both of those matters the Commission set aside perpetual exclusive dealing orders in the footwear industry. The same considerations which prompted our actions in

these earlier matters are applicable to the present request. Respondents have demonstrated that they do not have market power in the domestic footwear industry either at the manufacturing or retailing levels. Given the present characteristics of the shoe industry and that respondents do not have market power by which they may exclude competitors, paragraphs (1) and (2) of Part II of the order now serve no procompetitive purpose and may impede respondents' efforts to achieve efficient distribution of their footwear products through lawful practices available to their competitors.

Accordingly, *it is ordered* that this matter be and it hereby is reopened and that paragraphs (1) and (2) of Part II of the Commission's Decision and Order issued on September 26, 1978, shall be of no further force and effect.

IN THE MATTER OF

MAX FACTOR & CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SEC 2(d) OF THE CLAYTON ACT

Docket C-3201. Complaint, Oct. 15, 1986—Decision, Oct. 15, 1986

This consent order requires, among other things, a Stamford, Conn. cosmetics company to make promotional allowances available on proportionally equal terms to all of its customers, and in particular, to make alternatives, such as handbills or other in-store promotional activities, available to customers for whom its basic promotional plans are not usable or economically feasible. Respondent is required to notify all its customers that the promotional payments and alternatives are available.

Appearances

For the Commission: *Paul R. Roark.*

For the respondents: *Steven C. McCracken, Gibson, Dunn & Crutcher, Newport Beach, Calif.*

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 Max Factor & Co. has violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13(d)), 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 Max Factor & Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 Gatehouse Road, Stamford, Connecticut.

PAR. 2. Respondent is now and for many years has been engaged in the manufacture, sale, and distribution of cosmetic products.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, having

sold and shipped its cosmetic products or caused them to be transported from its previous principal place of business in California and its current principal place of business in Connecticut to customers located in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of credits or sums of money, hereinafter referred to as "promotional allowances," either directly or indirectly by way of discounts, allowances, rebates, or deductions, as compensation or in consideration for promotional services or facilities, including advertising in various media such as newspapers, furnished by customers in connection with the sale or offering for sale of respondent's cosmetic products.

PAR. 5. In granting promotional allowances, respondent discriminated against particular customers in that respondent did not make such promotional allowances functionally available, on proportionally equal terms, to all customers competing in the sale and distribution of respondent's cosmetic products. Respondent failed to offer alternative terms and conditions to customers for whom respondent's basic promotional allowances were not usable and suitable.

PAR. 6. The acts and practices of respondent set forth in Paragraphs 4 and 5 above violate Section 5 of the Federal Trade Commission Act, as amended, and Section 2(d) of the Clayton Act, as amended. The acts and practices of respondent, as herein alleged, may recur in the absence of the relief herein contemplated.

Chairman Oliver and Commissioner Strenio dissented.

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 Los Angeles 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 Clayton Act; and

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

