

Modifying Order

111 F.T.C.

IN THE MATTER OF

MIDCON CORPORATION, ET AL.

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

*Docket 9198. Consent Order, Feb. 6, 1986—Modifying Order, Aug. 31, 1988*

This order reopens the proceeding and modifies the Commission's consent order issued on Feb. 6, 1986 [107 F.T.C. 48], by removing a requirement that the company divest its interests in the Acadian Gas Pipeline System.

ORDER MODIFYING ORDER  
ISSUED FEBRUARY 6, 1986

On July 8, 1988, MidCon Corporation ("MidCon") filed a Request To Reopen Proceeding and Modify 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, 16 CFR 2.51, asking that the Commission reopen and modify the consent order in Docket No. 9198 ("order"). The order requires MidCon, among other things, to divest its interest in five natural gas pipelines ("Schedule A Properties") in the area between Baton Rouge and New Orleans, Louisiana ("Baton Rouge-New Orleans Corridor" or "Corridor").

In its request, MidCon asks that the Commission reopen the order and set aside the requirement that MidCon divest the Schedule A Properties. MidCon asserts that the sale of the common stock of United Gas Pipeline Company ("United") and UER Marketing Company ("UER Marketing") to LaSalle Energy Corporation ("LaSalle") on June 30, 1987, together with Commission adoption of two additional order provisions that MidCon proposes relating to agreements between MidCon and LaSalle, will accomplish the remedial purposes of the order in Docket No. 9198. MidCon submits that "these circumstances [*i.e.*, the sale to LaSalle and the proposed order provisions] constitute changed conditions of fact sufficient to warrant reopening this proceeding to modify the order" to set aside the divestiture requirement. MidCon also claims that the sale to LaSalle, together with the order modifications proposed by MidCon, satisfy the public interest [2] concerns that led the Commission to issue the order

in this matter and that "it would be inequitable" in the circumstances to require MidCon to divest the Schedule A Properties.

#### BACKGROUND

On February 6, 1986, the Commission issued the order in this matter, requiring MidCon to divest the Schedule A Properties within one year from the date the order became final. The purpose of the divestiture was to remedy the lessening of competition and increase in concentration in the transportation and sale of natural gas in the Baton Rouge-New Orleans Corridor that the Commission believed would result from MidCon's acquisition of United Energy Resources, Inc. ("UER"), as alleged in Count Two of the Commission's complaint. The order became final on February 26, 1986. MidCon has not divested the Schedule A Properties.<sup>1</sup>

On June 30, 1987, MidCon's subsidiary, UER, sold the common stock of United and UER Marketing to LaSalle, a newly formed corporation. In partial payment of the purchase price, UER accepted a promissory note from LaSalle. The note provides that MidCon will acquire an equity interest in LaSalle in the event that LaSalle fails to meet its payment obligations. In addition to its note indebtedness to MidCon, LaSalle assumed substantial potential liabilities arising from the contract obligations of United.

MidCon and LaSalle also entered into a Master Agreement on Transportation ("Transportation Agreement"), in which MidCon guaranteed certain revenues to LaSalle for a period of years and LaSalle agreed to transport gas for MidCon on the United pipeline system. To ensure that LaSalle would not grant more favorable terms to other shippers than to MidCon, MidCon and LaSalle agreed to a "most-favored-nation" provision that prevents LaSalle from [3] charging a higher price to MidCon than to other shippers for reasonably comparable shipments.

On July 23, 1987, MidCon filed a request to reopen the proceeding and modify the order to set aside the requirement that MidCon divest the Schedule A Properties. The Commission denied the request on

<sup>1</sup> On February 25, 1987, MidCon requested an extension of time to accomplish divestiture under the order. On April 28, 1987, MidCon supplemented its request for an extension of time, disclosing the proposed sale of the United assets to LaSalle and asserting that the proposed sale would accomplish the remedial purposes of the order. The Commission denied the request for an extension, noting that the appropriate procedure for proposing a divestiture different from that required by an order is by a request to reopen and modify the order so that the Commission may consider whether the alternative divestiture is sufficient to accomplish the remedial purposes of the order and thereby obviate the need for the remedy provided in the order. Letter to Priscilla Mims, Esq., MidCon Corporation (June 26, 1987) (unpublished).

December 11, 1987. The Commission stated that the substantial and continuing financial and contractual commitments between MidCon and LaSalle would reduce the parties' incentives and ability to compete in the Corridor, that MidCon had failed to establish that LaSalle would be an independent, viable competitor in the Corridor and that MidCon had failed to establish that the sale of United to LaSalle would achieve the remedial purposes of the order. *See* Letter to Priscilla Mims, Esq., MidCon Corporation (December 11, 1987) ("MidCon Letter") (unpublished).

In its request filed on July 8, 1988, MidCon again asks that the Commission reopen and modify the order to set aside the requirement that MidCon divest the Schedule A Properties. As in its earlier request, MidCon asserts that the sale of United to LaSalle eliminates the horizontal overlap between United and the Schedule A Properties in the relevant market. In addition, MidCon asks that the Commission modify the order to require MidCon to divest absolutely within nine months from the date of acquisition, subject to the prior approval of the Commission, any LaSalle stock that MidCon may acquire pursuant to the terms of the promissory note. MidCon also asks that the Commission modify the order to prohibit MidCon from invoking the "most-favored-nation" clause of the Transportation Agreement in the Corridor. Finally, MidCon has supplied information that it claims attests to the financial viability of LaSalle. MidCon asserts that under these circumstances the sale of United to LaSalle restores United as a viable competitor in the Corridor and accomplishes the remedial purposes of the order.

#### STANDARDS FOR REOPENING A FINAL ORDER

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the petitioner "makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside in whole or in part." A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *See Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) (unpublished). The burden is on the petitioner to make the satisfactory showing of changed conditions required by the

statute. This burden is not a light one, in view of the public [4] interest in repose and the finality of Commission orders. See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification.

Section 5(b) also provides that the Commission may modify an order when the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. In such a case, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. Once such a need has been shown, the Commission will weigh the reasons favoring the modification requested against any reasons not to make the modification. See *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 (unpublished); see also *Chevron Corp.*, Docket No. C-3147, 105 FTC 228 (1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for the order). The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.

#### THE PUBLIC INTEREST WARRANTS MODIFICATION OF THE ORDER

The Commission has determined that it is in the public interest to reopen and modify the order to set aside the requirement that MidCon divest the Schedule A Properties.<sup>2</sup> The sale of United to LaSalle, together with the additional order provisions proposed by MidCon to address the Commission's concerns that MidCon and LaSalle would not compete aggressively in the Corridor and that LaSalle would not be an independent, viable competitor in the Corridor, appear to be sufficient to remedy the lessening of competition and increase in concentration alleged in count two of the complaint. Divestiture of the Schedule A Properties as required by the order would result in MidCon's exit from the relevant market, which is no longer necessary in light of MidCon's proposed additions to the order and the additional information regarding LaSalle's viability. [5]

The Commission was concerned that MidCon could acquire an

<sup>2</sup> MidCon has not made a satisfactory showing of changed conditions of fact that require reopening of the order. Because of the continuing connections between MidCon and LaSalle and the issues relating to LaSalle's viability, the sale of United does not achieve the remedy ordered by the Commission. See MidCon Letter at 3-5.

interest in United as a result of MidCon's retained security interest under the promissory note. Such an interest would be inconsistent with the remedial purpose of the order to eliminate the horizontal overlap and to reestablish the assets divested by MidCon as an independent competitive entity. A new order provision proposed by MidCon would require MidCon to divest, within nine months from the date of acquisition and subject to the prior approval of the Commission, any stock of LaSalle that it may acquire by operation of the promissory note or any other security interest. The proposed provision would prevent the possibility that MidCon could control or influence LaSalle in the event that MidCon obtains LaSalle stock pursuant to the security interest.

The Commission was concerned that LaSalle's incentives to compete aggressively with MidCon for transportation of natural gas might be deterred by the requirement of the Transportation Agreement that LaSalle transport natural gas for MidCon on the same terms that LaSalle offers to any third parties. A new order provision proposed by MidCon would preclude MidCon's use of the "most-favored-nation" clause of the Transportation Agreement in the Corridor and thereby reduce the potential deterrent effect of the Transportation Agreement on competition. As modified, the Transportation Agreement would no longer provide a disincentive for LaSalle to compete aggressively with MidCon in the Corridor.<sup>3</sup>

The Commission also was concerned that the financial viability of LaSalle had not been demonstrated by MidCon, particularly in view of LaSalle's assumption of United's substantial potential liabilities and LaSalle's undertaking considerable debt obligations to finance the acquisition of United, including the promissory note to MidCon. MidCon has submitted financial statements of LaSalle, showing that LaSalle has operated United successfully during the past year. LaSalle has had positive operating revenue and has been able to meet its debt obligations following the acquisition of the United assets. In addition, the changes in the Transportation Agreement that eliminate possible disincentives for LaSalle to compete in the [6] Corridor may enhance LaSalle's ability to compete and, therefore, its viability.

#### CONCLUSION

For the reasons described above, the Commission has determined to

<sup>3</sup> In addition, MidCon and LaSalle have amended the Transportation Agreement to limit the operation of the "most-favored-nation" clause outside the Corridor. MidCon has represented that the amendment, section 7.8 of the Transportation Agreement, becomes effective if the order is modified as requested by MidCon. In granting MidCon's request to modify the order, the Commission has relied on this representation by MidCon.

reopen and modify the order to set aside the requirement that MidCon divest the Schedule A Properties. Therefore, the order will be modified to set aside the requirement that MidCon divest the Schedule A Properties and to incorporate the other changes set forth below.<sup>4</sup> [7]

Accordingly, *it is ordered*, that this matter be reopened and that the Commission's order in Docket No. 9198, issued on February 6, 1986, be modified, as of the date of service of this order, as follows:

1. The terms "Lasalle stock" shall be substituted in every case for the term "Schedule A Properties" or "Properties" in paragraphs III through VII.

2. The term "9-month" shall be substituted in every case for the term "12-month" in paragraphs III through VII.

3. Paragraph I shall be modified by replacing paragraph I.(c) with the following:

(c) "*MidCon*" means MidCon Corp., its parent, subsidiaries, divisions, groups and affiliates controlled by MidCon and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

4. Paragraph I shall be modified to add the following:

(g) "*LaSalle*" means LaSalle Energy Corp., its subsidiaries, divisions, groups and affiliates controlled by MidCon and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

5. Paragraph I shall be modified to add the following:

(h) "*Transportation Agreement*" means the Master Agreement on Transportation executed between MidCon and LaSalle on June 30, 1987. [8]

6. Paragraph II shall be modified by replacing paragraph II.(A) with the following:

(A) In the event MidCon, as a result of the operation of any promissory note, mortgage, bona fide lien, deed or trust or other form of security interest, executed in connection with the sale of United Gas Pipeline Company and UER Marketing Company to

<sup>4</sup> Occidental Petroleum Corporation acquired MidCon on April 1, 1986. Occidental has agreed to be bound as MidCon's parent by the terms of the order in Docket No. 9198. Letter from Samuel Wolfson, Esq., Assistant General Counsel, Occidental Petroleum Corp., to Elliot Feinberg, Assistant Director, Bureau of Competition, Federal Trade Commission (July 5, 1988).

LaSalle, acquires, directly or indirectly, any LaSalle stock, MidCon shall, within ten (10) days, notify the Commission in writing and shall divest the acquired stock, absolutely and in good faith, in accordance with paragraphs II through VII of this order within nine (9) months of the acquisition.

7. Paragraph II shall be modified by replacing paragraph II.(B) with the following:

(B) Divestiture of the LaSalle stock shall be made only to an acquirer or acquirers and only in a manner that receives the prior approval of the Federal Trade Commission. The purpose of the divestiture of the LaSalle stock is to ensure the continuation of the assets, interests and pipelines as ongoing, viable enterprises engaged in the same business in which they are presently employed and to remedy the lessening of competition resulting from the Acquisition as alleged in count two of the Commission's complaint.

8. A new paragraph VIII shall be added:

*It is further ordered,* That MidCon cease and desist from taking any action to implement or otherwise enforce Section 3.5 (regarding rates for comparable natural gas transportation services) of the Transportation Agreement with respect to the shipment or transportation of any natural gas by LaSalle to any delivery point within the New Orleans—Baton Rouge Corridor.

**[9]**

9. Paragraph III shall be modified by replacing paragraph III.(C) with the following:

(C) MidCon through its ownership of LaSalle stock shall not take any action to impair the viability of LaSalle's business.

10. Paragraph IV shall be modified by replacing paragraph IV with the following:

*It is further ordered,* That, within sixty (60) days after giving the Commission notice required by paragraph II of this order and every sixty (60) days thereafter until MidCon has fully complied with the provisions of paragraphs II and III of this order, MidCon shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to

comply, is complying or has complied with those provisions. MidCon shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of properties specified in paragraphs II of this order, including the identity of all parties contacted. MidCon also shall include in its compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture. [10]

11. Paragraph V shall be modified to include the following sentence at the end of the first paragraph:

The provisions of this paragraph shall not apply to the acquisition by MidCon of any LaSalle stock through the operation of any promissory note, mortgage, bona fide lien, deed or trust or other form of security interest executed in connection with the sale of United Gas Pipeline Company and UER Marketing Company to LaSalle.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

In September 1985 the Commission issued the complaint in this matter, challenging MidCon's acquisition of the United Gas Pipeline Company ("United").<sup>1</sup> Count II of the complaint alleged that the acquisition might substantially lessen competition in the transmission of natural gas in the area between Baton Rouge and New Orleans (the "Corridor"). In February 1986 the Commission settled count II by accepting a consent order which permitted MidCon to retain the United pipeline assets in the Corridor, but required MidCon to divest other natural gas pipeline interests in the same market (the "Acadian Partnership" interests).<sup>2</sup>

In June 1987 Midcon sold United to LaSalle Energy Corporation. As a result, MidCon and United are once again competitors in the Corridor. MidCon subsequently filed a petition to modify the consent order to permit it to retain its Acadian Partnership interests. The Commission denied the petition in December of last year. I dissented from that decision because, in my view, MidCon's sale of United

<sup>1</sup> *MidCon Corp.*, 107 FTC 48 (1986) (consent order). The complaint actually addressed the acquisition of United Energy Resources ("UER"), but the acquisition of United—the pipeline subsidiary of UER—was the gravamen of count II of the complaint. *Id.* at 52-54.

<sup>2</sup> *Id.* at 56. Count I of the complaint is currently in administrative litigation.

effectively eliminated any competitive problems that its earlier acquisition of United might have created.

The Commission staff and MidCon have now been able to negotiate additional modifications that have led a majority of the Commission to agree to delete the divestiture requirement. Although I do not believe that those additional modifications are necessary, I support the Commission decision to relieve MidCon of any additional divestiture obligations.

IN THE MATTER OF  
NATIONAL TEA COMPANY

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

*Docket 9126. Order, July 23, 1980—Set Aside Order, Sept. 23, 1988*

The Federal Trade Commission has set aside a 1980 order with National Tea Co. (96 F.T.C. 42) so that the company is no longer required to get the Commission's approval before acquiring grocery stores in certain geographic areas. Since the company exited the Minneapolis/St. Paul area in 1983, the Commission determined that public interest considerations warranted setting the order aside.

ORDER REOPENING AND SETTING ASIDE  
ORDER ISSUED ON JULY 23, 1980

On May 27, 1988, National Tea Company ("National") filed a "Petition To Reopen And Set Aside Consent Order" ("Petition"), 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, 16 CFR 2.51 (1986). The Petition asked the Commission to reopen the proceeding in Docket No. 9126 and set aside the consent order issued by the Commission on July 23, 1980 ("the order"). National's Petition was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules. No comments were received.

The complaint in this case was issued under Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and alleged anticompetitive effects arising from National's acquisition of Applebaums' Food Markets, Inc., in February 1979. 96 FTC 42 (1980). According to the complaint, the relevant line of commerce in which to assess the acquisition was sales by retail grocery stores; the relevant geographic market was the Metropolitan Minneapolis/St. Paul, Minnesota area ("Twin Cities"). The order, which was issued by the Commission on July 23, 1980, prohibits National, for a ten year period ending on July 28, 1990, from acquiring without the prior approval of the Commission, five or more retail grocery stores in seven designated states, or within 500 miles of any National warehouse, or 300 miles of any National retail grocery store. 96 FTC at 49.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be altered, modified or set aside, in whole or in part, if the respondent makes a satisfactory showing that changed conditions of law or fact require the order to be modified or set aside. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

Section 5(b) also provides that the Commission may modify an order when the Commission determines that the public interest so requires. Therefore, the Commission has invited respondents to show in petitions to reopen how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2.

After reviewing National's Petition, the Commission has concluded that it is in the public interest to reopen the proceeding and set aside the order in Docket No. 9126. Although National remains in the retail grocery store business, it has been out of the Twin Cities market for five years. National has shown that the prior approval requirements of the order impose substantial compliance costs on National and put it at a disadvantage with respect to its competitors who are not under similar restraints. These costs were foreseeable at the time National agreed to the order and would not provide a sufficient basis to justify termination of the order if it were serving a procompetitive purpose. However, in light of National's exit from the Twin Cities market, any need for the order in the Twin Cities market that was the focus of the Commission's complaint is outweighed by the costs of the prior approval provision.

The Commission has also concluded that it is in the public interest to

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## Set Aside Order

set aside the prior approval requirements of the order with respect to any other geographic areas designated in the order. The allegations of the complaint relate primarily to the Twin Cities market and with the setting aside of the primary relief, the ancillary relief should also be set aside.

Accordingly, *it is ordered*, that this matter be, and it hereby is reopened and that the Commission's order issued on July 23, 1980, shall be set aside as of the effective date of this order.

Complaint

111 F.T.C.

IN THE MATTER OF  
BATESVILLE CASKET COMPANY, INC.

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

*Docket C-3240. Complaint, Oct. 4, 1988—Decision, Oct. 4, 1988*

This consent order prohibits, among other things, a Batesville, Ind. casket company from making future misrepresentations and unsubstantiated claims concerning casket durability and also prohibits false claims that the Commission or any other government agency endorses its products, warranty, or programs.

*Appearances*

For the Commission: *Rachel Miller.*

For the respondent: *Calvin J. Collier, Hughes, Hubbard & Reed,*  
Washington, D.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 Batesville Casket Company, Inc., a corporation, hereinafter 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 Batesville Casket Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana. Its office and principal place of business is located at Highway 46 East, Batesville, Indiana.

PAR. 2. Respondent is now, and for some time past has been, engaged in the manufacture, marketing, sale and distribution of funeral caskets.

PAR. 3. In the course and conduct of its business, respondent causes and has caused its caskets to be sold and distributed in the various states of the United States and the District of Columbia. Respondent therefore maintains and has maintained a substantial course of

business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertising, product brochures and other sales literature concerning its caskets to distributors and retailers for display and for distribution to consumers prior to or at the time of sale.

PAR. 5. Typical and illustrative of statements contained in said advertisements and promotional materials, but not necessarily all-inclusive thereof, are the statements set forth below:

"Batesville's Steel Monoseal is a protective casket, designed to completely resist the entrance of all outside elements."

"Every Batesville Monoseal Casket carries a fully insured warranty that the casket has successfully passed the vacuum test before shipment and will remain completely resistant to the entrance of air and water for a period of 50 years. If not, Batesville, will replace it at no cost upon notification."

"The Monoseal has been a source of comfort and consolation to families for more than 40 years. To make sure the trust families have shown in us is always deserved, Batesville builds into each one the qualities necessary for lasting protection.

"In addition to testing of components during manufacture, every Batesville protective casket is vacuum tested as a complete unit at the factory before shipment. Each casket must hold a perfect seal in this vacuum test or it does not leave the factory. These precautions are why Batesville is able to supply a full warranty on their caskets against the entrance of air or water. This warranty covers a period of 20 years on the Monogard caskets, and a period of 50 years on the Monoseal."

"Every protective casket manufactured by Batesville is subjected to a scientific performance test. This test, designed to simulate actual burial conditions, involves creating a partial vacuum on the inside of the casket to check if air comes into the casket from any spot."

"Batesville Casket Company provides a full warranty on both its Monoseal and Monogard caskets. These caskets are warranted to have successfully passed the vacuum test before leaving the factory and to be completely resistant to the entrance of air and water. The warranty period is 20 years on the Monogard and 50 years on the Monoseal. The warranty specifies that should the product be found not to perform as designed within that stated period, that upon notice of this fact Batesville will, within 10 days, replace the casket with one of similar quality."

PAR. 6. Furthermore, in the course and conduct of its business, respondent has offered, disseminated and caused to be disseminated, written warranties against the entry of air or water into its caskets for specified periods of time after interment. These warranties provide, typically but not all-inclusively:

"That upon notice to it, Batesville will within ten days replace this casket with one

of similar quality if, at any time within 50 years after the date of interment, it has failed in any way to resist the entrance of air, water, or any element found in the soil in which it is interred, provided it was properly sealed and not damaged after leaving Batesville factory, and an opportunity is afforded for examination of the casket by Batesville representatives and/or impartial experts designated by them." ("Monoseal" caskets.)

"That upon notice to it, Batesville will within ten days replace this casket with one of similar quality if, at any time within 20 years after the date of interment, it has failed in any way to resist the entrance of air, water, or any element found in the soil in which it is interred, provided it was properly sealed and not damaged after leaving Batesville factory, and an opportunity is afforded for examination of the casket by Batesville representatives and/or impartial experts designated by them." ("Monogard" caskets.)

PAR. 7. Through the use of the advertisements, promotional materials and warranties referred to in paragraphs four through six above, and others not specifically set forth in this complaint, respondent has represented, directly or by implication, that:

Respondent's "Monoseal" caskets are designed, and in the ordinary course of events can reasonably be expected, to completely resist the entrance of air, water, or any other gravesite substance for a period of fifty (50) years after interment, when sealed according to directions and interred normally anywhere in the United States, and in the absence of damage between shipment from the factory and interment.

Respondent's "Monogard" caskets are designed, and in the ordinary course of events can reasonably be expected, to completely resist the entrance of air, water, or any other gravesite substance for a period of twenty (20) years after interment, when sealed according to directions and interred normally anywhere in the United States, and in the absence of damage between shipment from the factory and interment.

PAR. 8. In truth and in fact, contrary to the above representations:

(a) Respondent's "Monoseal" caskets cannot reasonably be expected, in the ordinary course of events, to completely resist the entrance of air, water, or any other gravesite substance, for a period of fifty (50) years after interment, when sealed according to directions and interred normally anywhere in the United States, and in the absence of damage between shipment from the factory and interment; rather, when directly interred, they can reasonably be expected to perform as described only for a substantially shorter period than fifty years in the majority of soil conditions normally encountered in the United States; and

(b) Respondent's "Monogard" caskets cannot reasonably be expected, in the ordinary course of events, to completely resist the entrance of air, water, or any other gravesite substance for a period of twenty (20) years after interment, when sealed according to directions and interred normally anywhere in the United States, and in the absence of damage between shipment from the factory and interment; rather, when directly interred, they can reasonably be expected to perform as described only for a substantially shorter period than twenty years in the majority of soil conditions normally encountered in the United States.

Therefore, the representations described in paragraph seven above are false and misleading.

PAR. 9. In making the representations described in paragraph seven above, respondent has represented, directly or by implication, that at the times of making those representations respondent possessed and relied upon a reasonable basis for those representations.

PAR. 10. In truth and in fact, at such times respondent did not possess and rely upon a reasonable basis for those representations, because, *inter alia*, respondent either did not conduct appropriate tests or did not properly interpret tests by generally accepted procedures in light of varying, reasonably anticipated conditions of use. Therefore, the representation described in paragraph nine above was and is false and misleading.

PAR. 11. Furthermore, in the course and conduct of its business, respondent has disseminated and caused the dissemination of product brochures containing the following statements:

"Thus, to satisfy the concern of the FTC . . . we now offer a totally new 'progressive' approach to casket warranties. . . . our exclusive Cathodic Protection feature, a benefit found only on Batesville caskets. . . . Throughout the development of this warranty program with the FTC, Cathodic Protection was verified as the single most-important factor in casket durability."

PAR. 12. Through the use of the statements referred to in paragraph eleven above, respondent has represented, directly or by implication, that:

The Federal Trade Commission has endorsed or approved respondent's new "progressive" warranty program.

The Federal Trade Commission has endorsed or approved cathodic protection as the most important factor in casket durability.

The Federal Trade Commission has endorsed or approved respondent's exclusive design for cathodic protection.

PAR. 13. In truth and in fact, contrary to the above representations:

The Federal Trade Commission has not endorsed or approved respondent's new "progressive" warranty program.

The Federal Trade Commission has not endorsed or approved cathodic protection as the most important factor in casket durability.

The Federal Trade Commission has not endorsed or approved respondent's exclusive design for cathodic protection.

Therefore, the representations described in paragraph twelve above were and are false and misleading.

PAR. 14. The acts and practices of respondent as herein alleged are all to the prejudice and injury of the public, and constitute unfair and deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

#### DECISION AND ORDER

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the

comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Batesville Casket Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana. Its office and principal place of business is located at Highway 46 East, Batesville, Indiana.

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

The following definitions shall apply to this order:

1. A "casket" is a rigid container which is designed for the encasement of human remains and which is usually constructed of wood, metal, or like material, and ornamented and lined with fabric.

2. "Funeral goods" are the goods which are sold or offered for sale directly to the public for use in connection with funeral services.

3. A "funeral provider" is any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.

4. "Funeral services" are any services which may be used to care for and prepare deceased human bodies for burial, cremation or other final disposition; and arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.

#### PART I

*It is ordered,* That respondent Batesville Casket Company, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the marketing, offering for sale, sale or distribution of any casket in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication, the durability or expected life of any casket, including but not limited to any

misrepresentation of the period of time after interment, whether stated as a specific number of years or generally, during which any casket is designed, or in the ordinary course of events can reasonably be expected, to prevent the entrance of air, water, or other gravesite substance; and

B. Making any representation, directly or by implication, about the durability or expected life of any casket, unless at the time of making the representation respondent possesses and relies upon a reasonable basis for such representation. For purposes of this order, a reasonable basis shall consist of competent and reliable scientific evidence which substantiates such representation. To the extent that such evidence consists of technical, engineering or other professional tests, experiments, analyses, research, studies, surveys, or expert opinions, such evidence shall be "competent and reliable" for purposes of this paragraph only if those tests, experiments, analyses, research, studies, surveys, or opinions are conducted and evaluated in an objective manner by persons qualified to do so, using only procedures that are generally accepted in the profession or science as yielding accurate and reliable results, and making only inferences and extrapolations that are generally accepted in the profession or science as reasonable and reliable.

C. Misrepresenting, directly or by implication, that the Federal Trade Commission or any other government agency has endorsed or approved any product or product characteristic, or any warranty or service program.

For purposes of this order, any representation for which the applicable conditions of interment are not specifically disclosed will be construed as a representation of casket performance in the majority of interment conditions found in the United States.

Also for purposes of this order, whenever a written warranty offering a remedy for any casket failure for a specified period of time is issued, or the duration of such a warranty is advertised, this shall be construed as a representation that the casket is designed, and in the ordinary course of events can reasonably be expected, to perform without that failure for that specified time period, *unless*, that warranty or advertising clearly and prominently discloses that the above representation is not made. (An example of such a disclosure would be: "Batesville makes no claim that its caskets will ordinarily remain protective for the entire warranty period. However, if this casket does not, we will . . .") Nothing in this order requires that such

a disclosure be made when issuing or advertising a written warranty if each representation made according to this paragraph is substantiated, and is not misrepresented, in compliance with this part of this order.

## PART II

*It is further ordered,* That respondent and its successors and assigns shall maintain for three years after the date of the last dissemination of the representation, and upon request shall make available to the Federal Trade Commission for inspection and copying:

1. Copies of all materials relied upon for each representation covered by this order;
2. Copies of all materials relating to any test, experiment, analysis, research, study, survey, or expert opinion in the possession of the respondent that may contradict, qualify, or call into question any representation covered by this order.

## PART III

*It is further ordered,* That respondent shall forthwith distribute a copy of Attachment A to this order to each funeral provider and each casket showroom that purchased a casket from respondent during calendar year 1987, to each funeral provider and each casket showroom that received any marketing material from respondent during calendar year 1987, and to each journal, newspaper, magazine or other media outlet with which respondent has placed any advertisement concerning any casket during calendar year 1987, except that respondent need not send a copy of Attachment A to anyone to whom, prior to the date of service of this order, respondent has sent a copy of Attachment B together with a brochure incorporating the following language:

The Federal Trade Commission staff has informed Batesville of its belief that Batesville's pre-1988 warranties to replace caskets may have been understood to mean that the caskets would have remained protective throughout the warranty period under typical conditions of interment. Because of this concern, Batesville's New Progressive Warranty establishes warranty periods that more closely relate to the expected periods during which its caskets can be expected to remain protective.

## PART IV

*It is further ordered,* That respondent shall forthwith distribute a copy of this order, together with Attachment A to this order, to each of its operating divisions, and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertisements or other sales materials.

## PART V

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

## PART VI

*It is further ordered,* That 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 the order.

## ATTACHMENT A

NOTICE ABOUT BATESVILLE'S PROTECTIVE CLAIMS

The Federal Trade Commission has indicated that it has reason to believe that Batesville's warranty language could be understood to mean that most Batesville caskets will remain protective throughout the warranty period under typical conditions of interment.

Batesville's pre-1988 warranties should not have been understood to make any claims about normal or ordinary casket durability. Pursuant to an agreement with the Federal Trade Commission, Batesville wishes to remind Funeral Directors that those warranties constituted no more than a promise to replace any of its metal caskets which are found to have failed to completely resist the entrance of air, water or any outside element during the stated warranty period.

Batesville has revised its product warranties so that, unless otherwise stated on the warranty, the replacement periods shall more closely relate to the average or typical period during which the products can be expected to remain protective under varying interment conditions.

HOW THIS AFFECTS FUNERAL DIRECTORS

Although Funeral Directors are not covered by this agreement, Funeral Directors are prohibited from making any untrue protective claims for caskets, under the Commission's Funeral Rule.

Signed:

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Batesville Casket Company, Inc.

## ATTACHMENT B

Batesville Casket Company  
Batesville, Indiana

Dear

Within the past few months we provided to you materials explaining our new warranty program. At the request of the Federal Trade Commission staff, we are replacing those materials with the enclosed materials, to remove any implication that the FTC has approved Batesville's products or warranty program. The FTC, of course, does not approve the products or programs of any company. We would appreciate your substituting the new materials for the old ones.

Please understand that the new warranties themselves remain in effect, and will be honored.

Sincerely,

Batesville Casket Company

Enclosures

Complaint

111 F.T.C.

IN THE MATTER OF

## SIOUX FALLS OBSTETRICIANS, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3241. Complaint, Oct. 11, 1988—Decision, Oct. 11, 1988*

This consent order prohibits, among other things, certain physicians practicing in the Sioux Falls, S.D. area from continuing to act in combination to interfere with the operation of the University of South Dakota School of Medicine, obstetrical/gynecological (OB/GYN) program, and from further restricting competition for the provision of OB/GYN care in the Sioux Falls area.

*Appearances*

For the Commission: *Paul J. Nolan.*

For the respondents: *Charles D. Gullikson, Devenport, Evans, Hurwitz & Smith, Sioux Falls, S.D., Karen L. Crew, Sioux Falls, S.D., Merle A. Johnson, Woods, Fuller, Shultz & Smith, Sioux Falls, S.D. and Thomas J. Welk, Boyce, Murphy, McDonnell & Greenfield, Sioux Falls, S.D.*

## 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 respondents have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

## PARAGRAPH 1.

(a) The address of respondents James P. Ingvolstad, M.D.; Russell T. Orr, M.D.; C. Roger Stoltz, M.D.; and Patricia S. Wirtz, M.D. is Central Plains Clinic, 2727 South Kiwanis Avenue, Sioux Falls, South Dakota.

(b) The address of respondents Milton G. Mutch, Jr., M.D., Thomas L. Looby, M.D. and Dean L. Madison, M.D., is Obstetrics and

Gynecology, Ltd., 1201 South Euclid Avenue, Suite 204, Sioux Falls, South Dakota.

(c) The address of respondent Samir Z. Abu-Ghazaleh, M.D., is 1301 South Ninth Street, Sioux Falls, South Dakota.

(d) The address of respondent Buck J. Williams, M.D., is Women's Medical Services, P.C., 1200 South Euclid Avenue, Suite 310, Sioux Falls, South Dakota.

(e) The address of respondent Gilbert L. English, M.D., is McGreevy Clinic, 1200 South Seventh Avenue, Sioux Falls, South Dakota.

(f) The address of Si G. Lee, M.D., is 2710 South Spring Street, Sioux Falls, South Dakota.

PAR. 2. Respondents along with Dr. Lee M. Mabee, Jr., are physicians licensed by the State of South Dakota who specialize in the practice of obstetrics and gynecology, and who practice medicine in Sioux Falls, South Dakota (hereinafter "Sioux Falls").

PAR. 3. Fees and other payments for respondents' medical services are paid, at times, by patients or third-party payors that are located in states other than South Dakota. Respondents purchase and use drugs, supplies and equipment manufactured outside of South Dakota, and treat patients who are residents of the states of North Dakota, Nebraska, Montana, Minnesota, Wyoming and Iowa. Respondents also recruit obstetricians/gynecologists who reside outside of South Dakota to practice in their offices or clinics. As a result, respondents' general business practices, and the conduct described below, affect the interstate purchase of medical supplies and products, the treatment of patients from out of state, the interstate billing of patients, and the interstate recruitment of physicians who practice or teach obstetrics and gynecology or subspecialties of those disciplines. Respondents' general business practices, and the acts and practices described below, 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. 4. Except to the extent that competition has been restrained as alleged herein, each of the respondents has been and is now in actual or potential competition with at least some of the other respondents, both in the provision of obstetrical/gynecological ("OB/GYN") care and in the provision of OB/GYN instruction in Sioux Falls.

PAR. 5. The University of South Dakota School of Medicine is the only medical school in South Dakota; its main campus is located in Sioux Falls. In addition to its program of medical education that leads to the M.D. degree, the Medical School offers several residency

training programs, which provide education in medical specialties. The Medical School utilizes both full-time and part-time faculty members in its medical education programs, and uses its part-time faculty, called "clinical" faculty, to perform a much greater share of teaching duties than do most medical schools. Using clinical instructors gives students exposure to physicians with extensive practical experience, and makes some or all of the clinical faculty's patients available to the students for instructional purposes; it also reduces the Medical School's operating budget, as it is usually far more costly to hire full-time instructors than to hire clinical instructors to provide the equivalent amount of instruction.

PAR. 6. The physicians on the Medical School's clinical faculty have as their principal occupation the private practice of medicine in their respective communities. Most members of the Medical School's full-time faculty also treat some private patients by participating in the University of South Dakota Medical Service Plan ("MSP"), a multi-disciplinary group practice that is controlled by the Medical School. Through the MSP, full-time faculty members treat both indigent and paying patients, with the Medical School and the physician who treats a paying patient sharing any fees received by the MSP. Although they treated private patients, prior to 1984 the vast majority of the physicians on the full-time faculty did not compete in any significant way with clinical faculty members or other private practitioners for paying patients. Instead, they practiced in a manner that was "complementary" to local private practitioners, generally confining their treatment of paying patients to specialties or subspecialties not served by the local, private medical community. The full-time faculty members generally did not, and still do not, attempt to attract patients directly, but instead primarily receive their paying patients through referrals from physicians in private practice.

PAR. 7. The Medical School has operated an OB/GYN residency program since 1956. The program is headquartered in Yankton, South Dakota, a city with a population of 19,000, located eighty-two miles south of Sioux Falls. Originally, the Yankton campus was the program's only year-round location, with residents doing short rotations at Sioux Falls and other sites to receive specialized training. In the early 1980's, however, in response to evolving accreditation standards requiring additional subspecialty training, the Medical School gradually increased the length of rotations at its Sioux Falls campus. because Sioux Falls is the only location in the state with the

facilities, personnel and patients needed to give residents sufficient OB/GYN subspecialty experience. Expanding the residency program in Sioux Falls raised the prospect of increasing the supply of OB/GYN specialists in Sioux Falls, because residents sometimes find it desirable to establish their practices in the community where they receive their residency training.

PAR. 8. Because of the expansion of the residency program in Sioux Falls, the Medical School needed to increase its OB/GYN faculty there. In July 1984, to prepare for longer rotations by residents in the 1984-1985 school year, the Medical School hired James R. Thomas, Ph.D., M.D., a perinatologist, to serve on its OB/GYN full-time faculty in Sioux Falls. Perinatology is an OB/GYN subspecialty that focuses on maternal fetal medicine and high risk pregnancies. Then, to accommodate the further expansion of the Sioux Falls residency program to a year-round schedule in the 1985-1986 school year, the Medical School added another full-time OB/GYN instructor, Robert W. Wilson, M.D., and increased the clinical faculty teaching OB/GYN residents in Sioux Falls from two to eight members: respondents Ingvolstad, Lee, Looby, Madison, Mutch, Orr, Stoltz, and Wirtz. In 1985 and 1986, respondents, along with Dr. Lee M. Mabee, Jr., and two physicians who were employed by one of the respondents and Dr. Mabee, were the only private practice obstetricians/gynecologists in Sioux Falls, and were therefore the only physicians available to serve as clinical OB/GYN faculty members.

PAR. 9. The Medical School hired Dr. Thomas both to teach medical students and to start a perinatal center in Sioux Falls, which the Medical School hoped would eventually have a staff of three or four perinatologists. His recruitment was a first step in the Medical School's plan to recruit for its full-time faculty physicians trained in three OB/GYN subspecialty fields that the Medical School believes are inadequately served by South Dakota's private practitioners: perinatology, gynecologic oncology, and reproductive endocrinology. These subspecialists would not only teach and do research, but would also spend a substantial portion of their time caring for patients in treatment centers located in the two major Sioux Falls hospitals.

PAR. 10. Dr. Thomas was the first practicing perinatologist in Sioux Falls. Prior to the arrival of Dr. Thomas in Sioux Falls, women in South Dakota who were experiencing a high-risk pregnancy were referred out of state, or were treated locally by obstetricians, including a number of the respondents, who are not perinatologists.

PAR. 11. Unlike other members of the full-time faculty, Dr. Thomas began to advertise and directly solicit patients shortly after he joined the faculty, indicating his availability to provide general OB/GYN services as well as perinatal services. Specifically, in October 1984, Dr. Thomas placed an advertisement in the local daily newspaper, which ran weekly for ten weeks and which stated that he was an "Obstetrician, Gynecologist and Perinatologist," and offered the "new special service" of perinatology. Dr. Thomas also placed a large personal yellow pages advertisement, which appeared in the edition that was distributed in April 1985, and contained similar information under a banner reading "Comprehensive Women's Health Care."

PAR. 12. From the autumn of 1984 through the spring of 1985, several respondents along with Dr. Mabee complained to Medical School officials, in at least two meetings and through telephone calls, direct conversations and written communications, about Dr. Thomas' seeking to treat private patients. They wanted Dr. Thomas to stop competing with private practitioners and to limit his practice to the full-time faculty's traditional "complementary" role, as described above in paragraph six. In addition, after his yellow pages advertisement appeared, some or all respondents stopped or decreased their referring of paying patients to Dr. Thomas, treating high-risk pregnancies themselves, or sending such patients to perinatologists in other states.

PAR. 13. In August 1985 the Medical School continued its plan to recruit subspecialists it considered to be needed in South Dakota, by placing in The Journal of Obstetrics/Gynecology a recruitment advertisement for additional perinatologists. The Medical School's recruitment of such full-time OB/GYN faculty members in Sioux Falls posed and continues to pose a competitive threat to respondents because (a) subspecialists on the full-time faculty may treat paying patients with complex problems that the respondent subspecialists, Dr. Abu-Ghazaleh, a gynecologic oncologist, and Dr. Lee, a reproductive endocrinologist, would otherwise treat; (b) subspecialists on the full-time faculty may also treat paying patients, with or without complex problems, that respondents who do not have formal subspecialty training would otherwise treat; and (c) recruitment by the Medical School may make it more difficult or less profitable for respondents to expand their medical practices by recruiting OB/GYN subspecialists.

PAR. 14. In personal conversations and medical staff meetings,

some respondents along with Dr. Mabee complained to the Medical School about the recruitment advertisement and demanded that the Medical School do no recruiting for its full-time OB/GYN faculty without consulting with its clinical OB/GYN faculty. In addition, respondents along with Dr. Mabee met several times to discuss and draft a written presentation to the Medical School. On September 24, 1985, the eleven respondents along with Dr. Mabee sent a letter signed by each of them (the "resignation letter") to officials of the Medical School and of the two major Sioux Falls hospitals, withdrawing their support from the Medical School's OB/GYN residency program because of the actions of the Medical School and its faculty described in paragraphs nine, ten, eleven and thirteen. The letter stated that local "private sector physicians" were capable of providing all high risk pregnancy care needed in the Sioux Falls region and that the Medical School was seeking to hire additional perinatologists for a perinatal center to be located at Sioux Valley Hospital, despite implied promises that the Medical School would not actively enter into the "private sector of health care." The letter also said it was "incongruous" that Sioux Valley Hospital would "subsidize" the Medical School's Obstetrical Department through purported rent, staffing and marketing subsidies, and a referral system for high risk obstetrical patients that would give preferential treatment to the Medical School's perinatologists. Respondents subsequently told the Medical School that they would stop participating in the residency program as of June 30, 1986. The letter indicated, however, that those respondents currently teaching undergraduate medical students would continue to do so.

PAR. 15. The resignation letter constituted an explicit attempt by respondents and Dr. Mabee to use their power as the only physicians available to serve on the clinical OB/GYN faculty in Sioux Falls to force the Medical School to limit the medical practice of Dr. Thomas and any additional full-time OB/GYN faculty members residing in Sioux Falls. Thereafter, respondents along with Dr. Mabee agreed to negotiate only collectively as to the terms upon which they would teach in the residency program. At a December 10, 1985, meeting with the Medical School at which nine of the respondents were present, respondents' spokesman stated that they feared a loss of income if the Medical School hired more full-time OB/GYN faculty members, including subspecialists, or allowed Dr. Thomas to continue actively building a private practice. Therefore, they demanded as a

condition to the agreement of any of them to teach in the residency program (a) that Dr. Thomas and the Medical School not advertise; (b) that full-time faculty members treat only those paying patients referred to them by Sioux Falls private practitioners; (c) that the Medical School either stop all recruitment of full-time OB/GYN faculty members and all plans to establish OB/GYN subspecialty centers, or establish a board, controlled by the respondents, that would have veto power over OB/GYN recruiting decisions; and (d) that Dr. Thomas, the dean and the OB/GYN residency director be fired.

PAR. 16. Early in 1986, in response to respondents' and Dr. Mabee's demands and threats, the Medical School dean instructed full-time OB/GYN faculty not to place individual advertisements in the newspapers or the yellow pages, and, for a while, not to see private patients outside their subspecialty areas. Nevertheless, respondents along with Dr. Mabee continued to make the demands listed in paragraph fifteen and also took joint actions aimed at closing down the year-round OB/GYN residency program in Sioux Falls. These actions included attempts to induce the two Sioux Falls hospitals, which had been paying stipends to four OB/GYN residents, to stop such payments after June 30, 1986. Due to respondents' and Dr. Mabee's efforts, only one resident received funding in Sioux Falls for the 1986-1987 school year. Some or all respondents also sought to prevent the Medical School's hiring of full-time OB/GYN faculty members needed to continue the residency program in Sioux Falls. For example, they successfully deterred two applicants from accepting positions on the full-time faculty by telling them, in interviews arranged by the Medical School, that they would receive no referrals if they joined the full-time faculty, and by indicating generally that the applicants would face an antagonistic local medical community.

PAR. 17. On June 30, 1986, the respondents who were on the clinical faculty stopped teaching in the residency program.

PAR. 18. Respondents' and Dr. Mabee's actions have significantly hindered the operation of the Medical School's OB/GYN residency program. Because there were no other obstetricians/gynecologists in Sioux Falls to teach as clinical faculty members, and because the Medical School was unable to hire full-time faculty members before the start of the 1986-1987 school term, the Medical School was forced to assume considerable added expenses and to find alternative locations for its OB/GYN residents, sending them to Indian Health

Service facilities in western South Dakota and Alaska. The geographic dispersion of the residents, the loss of experienced faculty members, the inadequacy of subspecialty experience in locations other than Sioux Falls and the lack of funding all threaten the program's accreditation status. The program has recently been placed on probation for four years by the Accreditation Council for Graduate Medical Education because of these deficiencies. The Medical School has decided not to accept any new residents for the 1987-1988 school year, indicating that the program may be phased out over the next three years. The uncertainty over the future of the residency program makes it more difficult to attract high quality residents and faculty and has caused three of the six remaining OB/GYN residents to transfer to programs at other medical schools. If the OB/GYN residency program is forced to close, South Dakota would also lose an important source of new OB/GYN specialists, and many members of the OB/GYN full-time faculty may also leave the state.

PAR. 19. The acts and practices described in paragraphs twelve through seventeen were undertaken as part of a combination or conspiracy by and among the respondents along with Dr. Mabee to eliminate or limit competition in the provision of OB/GYN care through the use of coercive practices, including threats to boycott and actual boycotts. The combination or conspiracy was directed at restricting competition in Sioux Falls from (1) members of the Medical School's full-time faculty, (2) any clinic or medical center established by the Medical School or the local hospitals, and (3) graduating residents of the Medical School's OB/GYN residency program.

PAR. 20. The purposes, effects, tendency, or capacity of the combination or conspiracy alleged in paragraph nineteen and the acts and practices alleged in paragraph twelve through seventeen are or have been to restrict competition for the provision of OB/GYN care and for the provision of OB/GYN instruction among obstetricians/gynecologists in the Sioux Falls area, and thereby to deprive consumers of the benefits of competition, in the following ways, among others:

A. With respect to the provision of OB/GYN care,

(a) members of the Medical School's full-time faculty have been restrained from competing for patients and from receiving referrals of patients from respondents;

(b) the Medical School has been restrained (i) from competing

