

Complaint

118 F.T.C.

IN THE MATTER OF

NORTH AMERICAN PLASTICS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3526. Complaint, Sept. 7, 1994--Decision, Sept. 7, 1994*

This consent order prohibits, among other things, an Illinois corporation and its officer from making unsubstantiated degradability or environmental benefit representations about their plastic bags in the future.

Appearances

For the Commission: *Brinley H. Williams, Phillip Broyles and Christian White.*

For the respondents: *Jeannie Lamar, Peterson & Ross, Chicago, IL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that North American Plastics Corporation, a corporation, and Harold V. Engh, Jr., individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent North American Plastics Corporation is a Delaware corporation with its office and principal place of business at 921 Industrial Drive, Aurora, Illinois.

Respondent Harold V. Engh, Jr., is an officer of said corporation. In his capacity as an officer, he formulates, directs and controls the acts and practices of said corporation, and his business address is the same as that of the corporation.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed plastic trash bags to the public under such trade names as "EnviroGard."

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

PAR. 4. Respondents have disseminated or caused to be disseminated advertisements and promotional materials for EnviroGard bags, including, but not necessarily limited to, the package label attached hereto as Exhibit A and the promotional materials attached hereto as Exhibits B and C.

The package labeling and promotional materials for EnviroGard plastic bags, attached hereto as Exhibits A, B and C, include one or all of the following statements on the package:

- BIODEGRADABLE [Exhibits A, B and C]
- Other degradable-type trash bags don't break down in landfills because they depend on harsh chemical additives that work only in sunlight. [Exhibit A]
- Works when other degradables don't! [Exhibit B]
- Naturally Biodegradable [Exhibit B]
- SAFE & NATURAL: EnviroGard Biodegradable trash bags are formulated with cornstarch. They degrade naturally upon contact with soil micro-organisms. Unlike our so called "Degradable" competition, EnviroGard degrades without sunlight. [Exhibit C]

PAR. 5. Through the statements referred to in paragraph four, and others in package labeling not specifically set forth herein, respondents have represented, directly or by implication, that:

(1) Compared to other plastic bags, EnviroGard bags offer a significant environmental benefit when consumers dispose of them as trash that is buried in a landfill; and

(2) EnviroGard bags will completely break down, decompose and return to nature in a reasonably short period of time after consumers dispose of them as trash that is buried in a landfill.

PAR. 6. Through the statements and representations referred to in paragraphs four and five, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made such representations, respondents possessed and relied upon a reasonable basis for such representations.

PAR. 7. In truth and in fact, at the time respondents made such representations, respondents did not possess and rely upon a reason-

able basis for such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

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

Complaint

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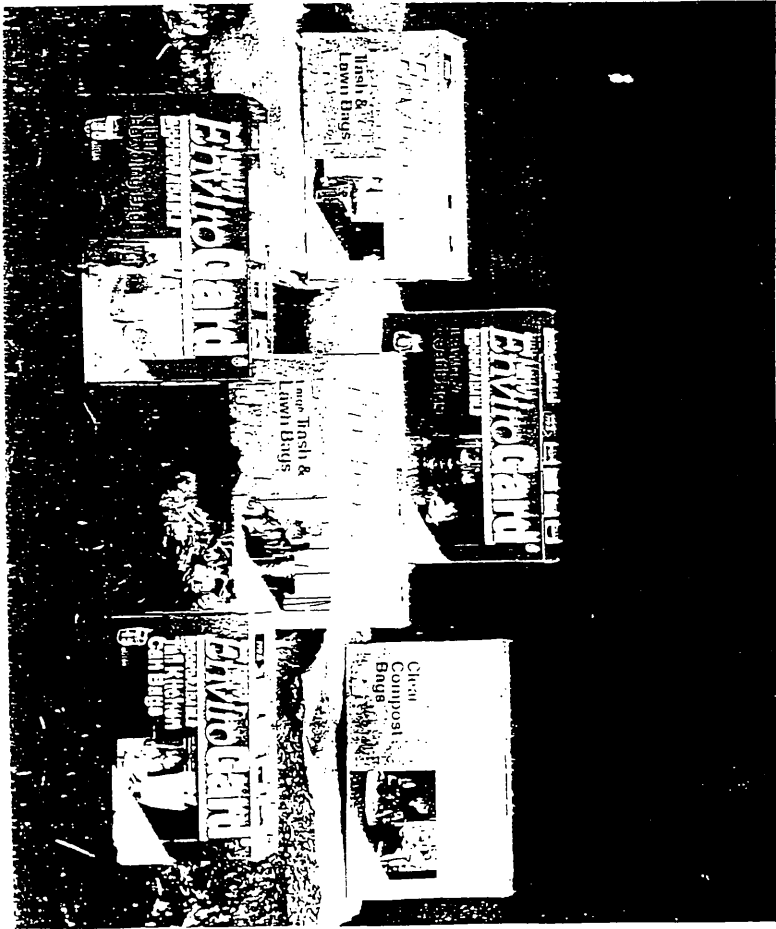
EXHIBIT B

EXHIBIT B

GOOD BUSINESS For You & The Environment

- The EnviroGard™ line of biodegradable trash bags will support products that help the environment (Aldi) they will pay more for them.
- Naturally Biodegradable.
- Requires no sunlight to degrade.
- Formulated with a special blend of polypropylene and polyethylene.
- Available in 13 different colors and sizes.

EnviroGard® **BIODEGRADABLE** Trash Bags



ENVIROGARD™

NATURALLY PROFITABLE!
and good for the environment too.

- **SAFE & NATURAL:** EnviroGard Biodegradable trash bags are formulated with cornstarch. They degrade naturally upon contact with soil micro-organisms. Unlike our so called "Degradable" competition, EnviroGard degrades without sunlight.
- **SUPPORTS RECYCLING:** EnviroGard products and packaging contain recycled materials and are themselves recyclable.
- **USES LESS PLASTIC:** EnviroGard contains cornstarch, so less plastic is used in its manufacture.
- **OUTSTANDING VALUE:** EnviroGard Biodegradable trash bags are profit makers, costing the same or less than several leading brands that are only degradable — **Not BIODEGRADABLE.**

BIODEGRADABLE Trash Bags

Complaint

EXHIBIT C

Stock #	Description	Pack. Case	Pack. Size	Ship Weight
72413	Full Recycled Bags 13 gallon - 24" x 30"	12	24	16.0
72013	Full Recycled Bags 13 gallon - 24" x 30"	1	20	3.7
71530	Black & Green Bags 30 gallon - 30" x 36"	12	15	17.0
74030	Black & Green Bags 30 gallon - 30" x 36"	1	40	3.47
71031	Large Black & Green Bags 33 gallon - 33" x 40"	12	10	17.1
73033	Large Black & Green Bags 33 gallon - 33" x 40"	1	30	3.17
70839	Green & Red Bags 6 Recycled - 33" x 44"	12	8	15.4
72439	Green & Red Bags 6 Recycled - 33" x 44"	1	24	3.11
70833	Compost Bags 33 gallon - 33" x 40"	12	8	16.5
71530	Clean Recycling Bags 30 gallon - 30" x 36"	12	15	17.0

This request has been received in 1 month and has not been available for North American
012440 P.C.T. has been furnished exclusively for North American
Plastics Corp. by Archer Daniels Midland Co.

NORTH AMERICAN PLASTICS CORP.

921 Industrial Drive
Aurora, IL 60506
Phone: 708/896 6200
Outside Illinois: 800/323 5864
Fax: 708/896 5127

DECISION AND ORDER

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

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

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

1. Respondent North American Plastics Corporation is a Delaware corporation with its office and principal place of business at 921 Industrial Drive, Aurora, Illinois.

Respondent Harold V. Engh, Jr., is an officer of said corporation. In his capacity as an officer, he formulates, directs and controls the acts and practices of said corporation, and his business address is the same as that of the corporation.

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

ORDER

DEFINITION

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

“*Plastic bag*” means any plastic grocery sack, or any plastic “disposer” bag, including, but not limited to, trash bags, lawn bags and kitchen bags, that is offered for sale, sold or distributed to the public by respondents, their successors and assigns, under the “North American Plastics” or “EnviroGard” brand name, or any other brand name of respondents, their successors and assigns; and also means any plastic bag sold or distributed to the public by third parties under private labeling agreements with respondents, their successors and assigns.

I.

It is ordered, That respondent North American Plastics Corporation, a corporation, its successors and assigns, and its officers, and Harold V. Engh, Jr., individually and as an officer of said corporation, and respondents’ representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any plastic bag, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by words, depictions or symbols:

(A) That any such plastic bag is “degradable,” “biodegradable,” or “photodegradable,” or

(B) Through the use of “degradable,” “biodegradable,” or “photodegradable,” or any other substantially similar term or expression, that the degradability of any such plastic bag offers any environmental benefit when consumers dispose of them as trash that is buried in a sanitary landfill or incinerated,

unless at the time of making such representation, respondents possess and rely upon a reasonable basis for such representation, consisting of competent and reliable scientific evidence that substantiates such

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

II.

It is further ordered, That respondents North American Plastics Corporation, a corporation, its successors and assigns, and its officers, and Harold V. Engh, Jr., individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any North American Plastics Corporation product, including, but not limited to, any plastic bags and their packaging, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such product offers any environmental benefit, unless at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence that substantiates such representation.

III.

Nothing in this order shall prevent respondents from using any of the terms cited in Part I, or similar terms or expressions, if necessary to comply with any federal rule, regulation, or law governing the use of such terms in advertising or labeling.

IV.

It is further ordered, That, for three (3) years from the date that the representations to which they pertain are last disseminated, respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

(A) All materials relied upon to substantiate any representation covered by this order; and

(B) All tests, reports, studies, surveys or other materials in its possession or control that contradict, qualify or call into question such representation or the basis upon which respondent relied for such representation.

V.

It is further ordered, That respondent North American Plastics Corporation shall distribute a copy of this order within sixty (60) days after service of this order upon it to each of its operating divisions and to each of its officers, agents, representatives or employees engaged in the preparation of labeling and advertising and placement of newspaper, periodical, broadcast and cable advertisements covered by this order.

VI.

It is further ordered, That respondent North American Plastics Corporation shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation, 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.

VII.

It is further ordered, That respondent Harold V. Engh, Jr., shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the service date of this order, he shall promptly notify the Commission of each affiliation with a new business or employment whose activities relate to the manufacture, sale or distribution of plastic products, or of his affiliation with a new business or employment in which his own duties and responsibilities relate to the manufacture, sale or distribution of plastic products. When so required under this paragraph, each such notice shall include the individual respondent's new

business address and a statement of the nature of the business or employment in which respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VIII.

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

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Owen registered her vote in the affirmative for the Complaint and Decision and Order in this matter.

IN THE MATTER OF

MACY'S NORTHEAST, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3527. Complaint, Sept. 13, 1994--Decision, Sept. 13, 1994

This consent order requires, among other things, the New York-based retail department store subsidiaries to comply with the Pre-Sale Availability Rule under the Magnuson-Moss Warranty Act, to deliver a copy of the consent order to retail store managers involved in consumer sales, to inform their retail store managers of their compliance responsibilities, and to develop and implement a program for instructing their sales personnel about the availability and location of manufacturers' warranty information.

Appearances

For the Commission: *Jeffrey Klurfeld, Gerald Wright and Christian White.*

For the respondents: *Carol Hecht Katz*, in-house counsel, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, and Rule 702, 16 CFR Part 702, promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Macy's Northeast, Inc., Macy's South, Inc., Macy's California, Inc., and Bullock's, Inc., corporations ("respondents"), wholly-owned subsidiaries of R. H. Macy & Co., Inc., a Delaware corporation, have violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in

Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Macy's Northeast, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's South, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's California, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

Respondent Bullock's, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

PAR. 3. Respondents are now and have been engaged in the operation of retail department stores in New York, California and various other states. In the operation of their retail stores, respondents are now and have been distributing, advertising, offering for sale and selling, among other items, wearing apparel, consumer electronics, watches, home furnishings, housewares and small appliances, all of which are consumer products. Therefore, respondents are both suppliers and sellers of consumer products.

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

PAR. 5. In the ordinary course and conduct of their aforesaid business, respondents regularly sell or offer for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondents are sellers of consumer products.

PAR. 6. On or after March 12, 1987, respondents, in the ordinary course of their business as sellers of consumer products actually costing more than \$15 and manufactured on or after January 1, 1977, have failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utiliza-

tion of one or both of the following methods required by 16 CFR 702.3(a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;
2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondents' failures to comply with the provisions of 16 CFR 702, as amended, constituted and now constitute violations of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, unfair or deceptive practices under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said 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 no comments having been filed

thereafter by interested parties 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 makes the following jurisdictional findings and enters the following order:

1. Respondent Macy's Northeast, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's South, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's California, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

Respondent Bullock's, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

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

ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

I.

It is ordered, That respondents Macy's Northeast, Inc., Macy's South, Inc., Macy's California, Inc., and Bullock's, Inc., corporations, their successors and assigns, and their officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written

warranty on a consumer product actually costing more than \$15 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

II.

It is further ordered, That respondents shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager and assistant or operations manager engaged in the sale of consumer products on behalf of respondents, a copy of this order to cease and desist.

III.

It is further ordered, That respondents shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers and assistant or operations managers engaged in the sale of consumer products on behalf of respondents as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

IV.

It is further ordered, That respondents shall, for a period of not less than four (4) years from the date of service of this order, instruct all future retail store managers and assistant or operations managers who will be engaged in the sale of consumer products on behalf of respondents, before they assume said responsibilities for respondents, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

V.

It is further ordered, That respondents shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct their sales personnel about the availability and location of warranty information.

VI.

It is further ordered, That respondents shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondents to their retail store managers and assistant and operations managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondents in their retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily available by respondents' retail store outlets for examination by prospective buyers on request.

VII.

It is further ordered, That respondents, for a period of six (6) years from the date of service of this order, shall notify the Commission at least thirty (30) days prior to any 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 that may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondents shall, within ninety (90) days after service of this order on them, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MONTGOMERY WARD & CO., INCORPORATED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3528. Complaint, Sept. 13, 1994--Decision, Sept. 13, 1994

This consent order requires, among other things, the Illinois-based retail department store to comply with the Pre-Sale Availability Rule under the Magnuson-Moss Warranty Act, to deliver a copy of the consent order to retail store managers involved in consumer sales, to inform their retail store managers of their compliance responsibilities, and to develop and implement a program for instructing their sales personnel about the availability and location of manufacturers' warranty information.

Appearances

For the Commission: *Jeffrey Klurfeld, Gerald Wright and Christian White.*

For the respondent: *Philip Delk*, in-house counsel, Chicago, IL.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, and Rule 702, 16 CFR Part 702, promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Montgomery Ward & Co., Incorporated, a corporation ("respondent"), has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Montgomery Ward & Co., Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at One Montgomery Ward Plaza, Chicago, Illinois.

PAR. 3. Respondent is now and has been engaged in the operation of a chain of retail department stores throughout the United States. In the operation of its retail stores, respondent is now and has been distributing, advertising, offering for sale and selling, among other items, wearing apparel, watches, consumer electronics, home furnishings, major and small appliances, power tools, auto parts and accessories, and lawn and garden equipment, all of which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

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

PAR. 5. In the ordinary course and conduct of its aforesaid business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 6. On or after March 12, 1987, respondent, in the ordinary course of its business as a seller of consumer products actually costing more than \$15 and manufactured on or after January 1, 1977, has failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utilization of one or both of the following methods required by 16 CFR 702.3(a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;
2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondent's failure to comply with the provisions of 16 CFR Part 702, as amended, constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

DECISION AND ORDER

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

The respondent, 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 no comments having been filed thereafter by interested parties 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 makes the following jurisdictional findings and enters the following order:

1. Respondent Montgomery Ward & Co., Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at One Montgomery Ward Plaza, Chicago, Illinois.

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

ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

I.

It is ordered, That respondent Montgomery Ward & Co., Incorporated, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written warranty on a consumer product actually costing more than \$15 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

II.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager engaged in the sale of consumer products on behalf of respondent, a copy of this order to cease and desist.

III.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers engaged in the sale of consumer products on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

IV.

It is further ordered, That respondent shall, for a period of not less than four (4) years from the date of service of this order, instruct all future retail store managers who will be engaged in the sale of consumer products on behalf of respondent, before they assume said responsibilities for respondent, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

V.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct its sales personnel about the availability and location of warranty information.

VI.

It is further ordered, That respondent shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondent to its retail store managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondent in its retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily available by respondent's retail store outlets for examination by prospective buyers on request.

VII.

It is further ordered, That respondent, for a period of six (6) years from the date of service of this order, shall notify the Commission at least thirty (30) days prior to any 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 that may affect compliance obligations arising out of the order.

VIII.

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

IN THE MATTER OF

SEARS, ROEBUCK AND CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3529. Complaint, Sept. 13, 1994--Decision, Sept. 13, 1994

This consent order requires, among other things, the Illinois-based retail department store to comply with the Pre-Sale Availability Rule under the Magnuson-Moss Warranty Act, to deliver a copy of the consent order to retail store managers involved in consumer sales, to inform their retail store managers of their compliance responsibilities, and to develop and implement a program for instructing their sales personnel about the availability and location of manufacturers' warranty information.

Appearances

For the Commission: *Jeffrey Klurfeld, Gerald Wright and Christian White.*

For the respondent: *Richard Barnett*, in-house counsel, Hoffman Estates, IL.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, and Rule 702, 16 CFR 702, promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sears, Roebuck and Co., a corporation ("respondent"), has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 3333 Beverly Road, Hoffman Estates, Illinois.

PAR. 3. Respondent is now and has been engaged in the operation of a chain of retail department stores throughout the United States. In the operation of its retail stores, respondent is now and has been distributing, advertising, offering for sale and selling, among other items, wearing apparel, watches, consumer electronics, home furnishings, major and small appliances, power tools, and lawn and garden equipment, all of which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

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

PAR. 5. In the ordinary course and conduct of its aforesaid business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 6. On or after March 12, 1987, respondent, in the ordinary course of its business as a seller of consumer products actually costing more than \$15 and manufactured on or after January 1, 1977, has failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utilization of one or both of the following methods required by 16 CFR 702.3(a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;

2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondent's failure to comply with the provisions of 16 CFR Part 702, as amended, constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to

Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

DECISION AND ORDER

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

The respondent, 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 no comments having been filed thereafter by interested parties 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 makes the following jurisdictional findings and enters the following order:

1. Respondent Sears, Roebuck and Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 3333 Beverly Road, Hoffman Estates, Illinois.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

I.

It is ordered, That respondent Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written warranty on a consumer product actually costing more than \$15 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

II.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager engaged in the sale of consumer products on behalf of respondent, a copy of this order to cease and desist.

III.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers engaged in the sale of consumer products on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

IV.

It is further ordered, That respondent shall, for a period of not less than four (4) years from the date of service of this order, instruct all future retail store managers who will be engaged in the sale of consumer products on behalf of respondent, before they assume said

responsibilities for respondent, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

V.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct its sales personnel about the availability and location of warranty information.

VI.

It is further ordered, That respondent shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondent to its retail store managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondent in its retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily available by respondent's retail store outlets for examination by prospective buyers on request.

VII.

It is further ordered, That respondent, for a period of six (6) years from the date of service of this order, shall notify the Commission at least thirty (30) days prior to any 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 that may affect compliance obligations arising out of the order.

VIII.

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

IN THE MATTER OF

HOME OXYGEN & MEDICAL EQUIPMENT CO., ET AL.

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

Docket C-3530. Complaint, Sept. 14, 1994--Decision, Sept. 14, 1994

This consent order prohibits, among other things, a California supplier of oxygen systems prescribed for home use from acquiring or granting, for ten years, an ownership interest in a firm that sells or leases oxygen systems in the relevant geographic market, if more than 25 percent of the pulmonologists in that market would be affiliated with the firm, and requires the respondents to notify the Commission if they acquire more than one percent of a firm that sells or leases oxygen systems anywhere.

Appearances

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

For the respondents: *David T. Alexander, Jackson, Tufts, Cole & Black, San Francisco, CA.*

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 Home Oxygen & Medical Equipment Co., a limited partnership, Mitchell P. Tarkoff, M.D., Revels M. Cayton, M.D., Robert I. Deutsch, M.D., Leland G. Dobbs, M.D., Fredric N. Herskowitz, M.D., Jerrold A. Kram, M.D., R. Wayne Mall, M.D., Richard A. Nusser, M.D., Joel H. Richert, M.D., John E. Sailer, M.D., Herbert M. Schub, M.D., Jamil S. Sulieman, M.D., and T. Craig Williams, M.D., individually and as partners, trading and doing business as Home Oxygen & Medical Equipment Company, hereinafter sometimes referred to as the respondents, have 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:

DEFINITIONS

PARAGRAPH 1. For the purpose of this complaint, the following definitions shall apply:

A. “*Durable medical equipment*” or “*DME*” means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. “DME” encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

B. “*Oxygen systems*” means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. “Oxygen systems” encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

C. “*Discharge planner*” means any nurse, social worker, respiratory therapist, or other agent of a hospital or health care provider who arranges for the provision of DME or consults with or makes recommendations to patients being discharged from hospitals concerning potential suppliers of DME.

D. “*Hospital*” means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. “Hospital” includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

E. “*Pulmonologist*” means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. “Pulmonologist” does not include medical professionals who specialize in the diagnosis and treatment of pa-

tients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

F. "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

RESPONDENTS

PAR. 2. Respondent Home Oxygen & Medical Equipment Co., (hereinafter "Home Oxygen") is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 2456 Verna Court, San Leandro, California.

Respondent Mitchell P. Tarkoff, M.D., is an individual who has been, and is now, a general partner of Home Oxygen. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of Home Oxygen, including the acts and practices set forth in this complaint. His place of business is located at 350 30th Street, Suite 526, Oakland, California.

Respondent Revels M. Cayton, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 400 29th Street, Suite 419, Oakland, California.

Respondent Robert I. Deutsch, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Alameda, California.

Respondent Leland G. Dobbs, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent Fredric N. Herskowitz, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent Jerrold A. Kram, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent R. Wayne Mall, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2000 Mowry Avenue, Fremont, California.

Respondent Richard A. Nusser, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 365 Hawthorne Avenue, Suite 202, Oakland, California.

Respondent Joel H. Richert, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2557 Mowry Avenue, Suite 12, Fremont, California.

Respondent John E. Sailer, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business was located at 13851 East 14th Street, Suite 302, San Leandro, California.

Respondent Herbert M. Schub, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Alameda, California.

Respondent Jamil S. Sulieman, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 550 South Beretania Street, Honolulu, Hawaii.

Respondent T. Craig Williams, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 13851 East 14th Street, Suite 302, San Leandro, California.

PAR. 3. The relevant product market is the market for the sale, rental, or lease of oxygen systems.

PAR. 4. The relevant geographic market is Alameda County, California, excluding the southeast portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

PAR. 5. Since May 18, 1984, Home Oxygen has been engaged in the purchasing, offering for sale, rental or lease of DME, including oxygen systems and related products, to the public in the relevant geographic market.

PAR. 6. The respondents Mitchell P. Tarkoff, M.D., Revels M. Cayton, M.D., Robert I. Deutsch, M.D., Leland G. Dobbs, M.D., Fredric N. Herskowitz, M.D., Barry R. Horn, M.D., Jerrold A. Kram, M.D., R. Wayne Mall, M.D., Richard A. Nusser, M.D., Joel H. Richert, M.D., John E. Sailer, M.D., Herbert M. Schub, M.D., Jamil S. Sulieman, M.D., and T. Craig Williams, M.D., (collectively the

“pulmonologist respondents”) are now, or have been at times relevant to this complaint, pulmonologists practicing their profession within the relevant geographic market.

PAR. 7. The pulmonologist respondents have held staff positions or have had staff privileges at one or more of the following hospitals located in the relevant geographic market: Alameda Hospital, located in Alameda, California; Highland Hospital, located in Oakland, California; Humana Hospital, located in San Leandro, California; Merritt/ Peralta, located in Oakland, California; Physician’s Community Hospital, located in San Leandro, California; Providence, located in Oakland, California; or Washington Hospital, located in Fremont, California.

JURISDICTION

PAR. 8. The acts and practices of respondents alleged in this complaint are and have been in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act.

THE INDUSTRY

PAR. 9. Patients hospitalized with certain forms of lung, heart, and other disease are unable to obtain sufficient oxygen from their normal breathing. Upon discharge from a hospital, physicians may prescribe oxygen for these patients for home use. Because oxygen is considered a drug under Food and Drug Administration regulations, oxygen for medical use can be provided to patients only pursuant to a physician’s prescription.

PAR. 10. Oxygen systems vary in many respects, including, but not limited to: the type of system, the level and quality of service accompanying the equipment, and price. Patients requiring oxygen systems usually possess incomplete knowledge about oxygen systems or the companies that provide oxygen systems. As a result, patients seldom have a preference for a particular oxygen system supplier and rely on hospitals, discharge planners, health care professionals, and other individuals knowledgeable about DME to make a selection on their behalves.

PAR. 11. In general, patients requiring oxygen systems receive the services of pulmonologists or of hospital respiratory therapy departments under the supervision of pulmonologists. As a result,

pulmonologists have the ability to influence the choice of which oxygen systems supplier services these patients through a variety of means.

ACTS OR PRACTICES

PAR. 12. In 1984, Home Oxygen was formed to engage in the sale, rental or lease of oxygen systems to patients.

PAR. 13. Partnership interests in Home Oxygen were offered primarily to hospitals and pulmonologists.

PAR. 14. A majority of the pulmonologists practicing in the relevant geographic market joined as partners in Home Oxygen. In all, approximately sixty (60) percent of the pulmonologists in the relevant geographic market were investors in Home Oxygen or practiced in groups consisting of one or more of the pulmonologist respondents. Respondents' market position was further enhanced because several of the pulmonologist respondents served as medical directors of respiratory therapy departments at hospitals in the relevant geographic market.

EFFECTS

PAR. 15. Through the aggregation of competitors in the market for the provision of pulmonary services alleged in paragraphs twelve through fourteen, Home Oxygen has achieved a market share of approximately sixty (60) percent in the relevant market.

PAR. 16. As a consequence of the conduct alleged in paragraphs twelve through fourteen, a barrier to entry has been created in the relevant market.

PAR. 17. As a consequence of the conduct alleged in paragraphs twelve through fourteen, free and open competition has been inhibited in the relevant market.

VIOLATIONS

PAR. 18. Home Oxygen has acquired and maintained market power in the relevant market through the acts and practices set out and alleged in paragraphs twelve through fourteen. These alleged acts and practices of the respondents constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the

