

IN THE MATTER OF

GULF & WESTERN INDUSTRIES, INC.

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

Docket 9153. Complaint, March 25, 1981—Decision, April 14, 1983

This consent order requires a New York City corporation engaged in the burial casket industry, among other things, to timely divest to a Commission-approved buyer, Alabama-Indiana Metal Products, Inc., located in Anniston, Alabama. The order also requires the corporation to permit prospective purchasers to inspect the Anniston facility and supply them with information concerning the facility's operation. Further, the corporation is barred from acquiring any stock or interest in any concern engaged in the manufacture or sale of burial caskets or their components, without prior Commission approval for a period of ten years.

Appearances

For the Commission: *Robert W. Doyle, Jr., Michael E. Antalics, Debra A. Simmons and Randall D. Marks.*

For the respondent: *Robert L. Jones*, in-house counsel, New York City and *Charles E. Koob, Simpson, Thacher & Bartlett*, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent, subject to the jurisdiction of the Commission, has acquired the stock or assets, as hereinafter described, of corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint pursuant to Section 11 of the Clayton Act (15 U.S.C. 21), and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

(1) For the purposes of this Complaint, the following definitions shall apply:

(a) A *burial casket* is a container used to display, transport and bury the deceased.

(b) A *burial casket metal knockdown (KD)* is an unassembled metal casket side, end, bottom, top or lid, and bridge, which, when assembled, is referred to as a burial casket shell.

II. GULF & WESTERN INDUSTRIES, INC.

(2) Respondent, Gulf & Western Industries, Inc. ("G&W"), is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 1 Gulf & Western Plaza, New York, New York.

(3) G&W achieved entry into the burial casket industry in 1978 through its acquisition of Simmons Company and its subsidiary, Simmons Casket Company ("Simmons").

(4) Prior to its acquisition by G&W, Simmons Company was a Delaware corporation with its principal place of business located at Jones Bridge Road, Box 49000, Atlanta, Georgia.

(5) In 1979 G&W, ranking 52nd on Fortune magazine's list of the 500 largest industrial corporations, had sales in excess of \$5.2 billion, assets in excess of \$5.1 billion, and net income in excess of \$227 million.

(6) In 1979 G&W was the second largest manufacturer of burial caskets in the United States, with sales of approximately \$57 million, and was also a substantial manufacturer of KDs.

(7) At all times relevant herein, G&W sold or shipped its products and services throughout the United States, was engaged in or affected commerce within the meaning of the Clayton Act, as amended, and was engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

COUNT I

III. NATIONAL CASKET CO.

(8) Prior to its acquisition by G&W, National Casket Co. ("National Casket") was a wholly-owned subsidiary of Walco National Corporation ("Walco"). Walco is a corporation organized and existing under the laws of the State of New York, with its principal place of business located at 743 Fifth Avenue, New York, New York. The principal place of business of National Casket is located at 355 Commonwealth Avenue, Boston, Massachusetts.

(9) Prior to its acquisition by G&W, National Casket was engaged in the manufacture of KDs and in the manufacture and sale of burial

caskets. In 1979 National Casket was the third largest manufacturer of burial caskets with sales of approximately \$25.5 million and was a substantial manufacturer of KDs.

(10) At all times relevant herein, National Casket sold or shipped its products and services throughout the United States, was engaged in or affected commerce within the meaning of the Clayton Act, as amended, and was engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. THE ACQUISITION

(11) On or about April 17, 1980, G&W acquired the burial casket business of Walco for approximately \$12.5 million. Under the terms of the agreement, G&W purchased all of the principal assets of National Casket, including inventory, manufacturing equipment and accounts receivable. The sale also included the transfer of leasehold rights to National Casket's manufacturing facility located in Lancaster, Kentucky and its various warehouses and sales outlets.

V. TRADE AND COMMERCE

(12) For purposes of Count I of this Complaint, the relevant lines of commerce are the following:

(a) The manufacture and sale of burial caskets in the United States ("the burial casket market"); and

(b) The production of KDs in the United States by KD manufacturers, including burial casket manufacturers ("the KD production market").

(13) In 1979 approximately 1.8 million burial caskets were sold to funeral directors in the United States. Total 1979 dollar sales of burial caskets to funeral directors were approximately \$543 million.

(14) Prior to the National Casket acquisition, G&W and National Casket were substantial actual competitors in the burial casket market.

(15) In 1979 G&W was the second largest manufacturer and seller of burial caskets, with a market share of approximately 10%.

(16) In 1979 National Casket was the third largest manufacturer and seller of burial caskets, with a market share of approximately 5%.

(17) Concentration in the burial casket market is high.

(18) There is a trend toward increasing concentration in the burial casket market and the acquisition of National Casket by G&W has increased the level of concentration in the market.

(19) Barriers to entry into the burial casket market are substantial.

(20) Within the KD production market, the value of all KDs produced in 1979 was in excess of approximately \$70 million.

(21) Within the KD production market, G&W and National Casket were substantial actual competitors prior to the acquisition, with approximately 22.4 and 5.6 percent of 1979 KD production, respectively.

(22) Within the KD production market, concentration is high.

(23) Within the KD production market, there is a trend toward increasing concentration and the acquisition of National Casket by G&W has increased the level of concentration.

(24) Barriers to entry into the KD production market are substantial.

VI. EFFECTS OF THE ACQUISITION

(25) The effect of the aforesaid acquisition may be substantially to lessen competition or to tend to create a monopoly in the burial casket market and in the KD production market in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways, among others:

(a) The ability of G&W's competitors to compete in the burial casket market and in the KD production market has been or may be substantially diminished;

(b) Substantial actual and potential competition in the burial casket market and in the KD production market between G&W and National Casket has been or may be eliminated;

(c) G&W's position in the burial casket market and in the KD production market has been or may be further strengthened and entrenched at the expense of G&W's actual and potential competitors;

(d) Barriers to entry into the burial casket market and into the KD production market have been or may be significantly raised; and

(e) The levels of concentration in the burial casket market and in the KD production market have been or may be increased, and the trends toward increased concentration in these markets have been or may be accelerated.

VII. THE VIOLATION CHARGED

(26) The aforesaid acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

VIII. WALLACE METAL PRODUCTS, INC.

(27) Prior to its acquisition by G&W, Wallace Metal Products, Inc. ("Wallace"), a corporation organized under the laws of the State of Indiana, was engaged in the manufacture and sale of KDs. Wallace's principal place of business is South Eighth & O Street, Box 70, Richmond, Indiana.

(28) Prior to its acquisition by G&W, Wallace was engaged in the manufacture and sale of KDs. In 1979 Wallace had KD sales of approximately \$10.1 million.

(29) At all times relevant hereto, Wallace sold or shipped its products throughout the United States and was engaged in or affected commerce within the meaning of the Clayton Act, as amended, and was engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

IX. THE ACQUISITION

(30) On or about October 2, 1979 G&W acquired substantially all of the assets of Wallace, for approximately \$4.0 million, including inventory, machinery and equipment, accounts receivable and real property located at its two KD manufacturing plants in Richmond, Indiana and Anniston, Alabama. G&W assumed certain of Wallace's liabilities amounting to approximately \$5.0 million.

X. TRADE AND COMMERCE

(31) For the purposes of Count II of this Complaint, the relevant line of commerce is the production of KDs in the United States by KD manufacturers, including burial casket manufacturers ("the KD production market").

(32) Within the KD production market, the value of all KDs produced in 1979 was in excess of approximately \$70 million.

(33) Within the KD production market, G&W and Wallace were substantial actual competitors prior to the acquisition, accounting for approximately 9.3 and 13.1 percent of the 1979 KD production market, respectively.

(34) Within the KD production market, concentration is high.

(35) Within the KD production market, there is a trend toward increasing concentration and the acquisition of Wallace by G&W has increased the level of concentration.

(36) Barriers to entry into the KD production market are substantial.

XI. EFFECTS OF THE ACQUISITION

(37) The effect of the aforesaid acquisition may be substantially to lessen competition or to tend to create a monopoly in the KD production market and the finished burial casket market in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways, among others:

(a) The ability of G&W's competitors to compete in the KD production market has been or may be substantially diminished;

(b) Substantial actual and potential competition in the KD production market between G&W and Wallace has been or may be eliminated;

(c) G&W's position in the KD production market and in the burial casket market has been or may be further strengthened and entrenched at the expense of G&W's actual and potential competitors;

(d) Barriers to entry into the KD production market have been or may be significantly raised; and

(e) The level of concentration in the KD production market has been or may be increased, and the trend toward increased concentration in this market has been or may be accelerated.

XII. THE VIOLATION CHARGED

(38) The aforesaid acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; 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 complaint, a statement that the signing of said agreement is for

settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Gulf & Western Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Gulf & Western Plaza, in the City of New York, State of New York.

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

ORDER

I.

It is ordered, That for the purposes of this Order the following definitions shall apply:

1. *G&W* or *Respondent* means Gulf & Western Industries, Inc., a corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal offices at 1 Gulf & Western Plaza, New York, New York, as well as its officers, employees, agents, its parents, divisions, subsidiaries, affiliates¹ successors, assigns, and the officers, employees or agents of G&W's parents, divisions, subsidiaries, affiliates, successors, or assigns.

2. Gulf & Western Casket Corporation, a subsidiary of G&W, is engaged in the burial casket industry through various subsidiaries and divisions.

3. *Anniston* means the Anniston, Alabama facility of Alabama-

¹ For purposes of this Order, the term *affiliates* shall mean any entity over which Gulf & Western Industries, Inc. exercises control. The term *control* shall mean the direction or causing the direction of the management and policies of an entity, in any way.

Indiana Metal Products, Inc., a subsidiary of G&W. Anniston, at the time of divestiture, shall include the assets listed in Appendix A.

4. The term *burial casket* means a container used to display, transport and bury the deceased.

5. The term *KD* means an unassembled metal burial casket side, end, bottom, top or lid, and bridge which when assembled is referred to as a burial casket shell.

6. The term *burial casket shell* means a metal burial casket which has not been finished or trimmed with the requisite cloth interiors, decorative exterior hardware, and other finishings.

7. *Eligible person* means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association, other business or legal entity, or any combination thereof, approved in advance by the Commission.

II.

It is further ordered, That G&W shall divest absolutely and unqualifiedly the Anniston facility to an eligible person within one hundred and eighty (180) days from the date of the issuance of this Order.

III.

It is further ordered, That divestiture under Paragraph II shall be in a manner which preserves the assets and business divested as a viable, ongoing, competitor in the KD market.

IV.

It is further ordered, That, pending the divestiture required by Paragraph II of this Order, G&W will continue to operate Anniston and shall not take any action, other than in the ordinary course of business, without the consent of the Federal Trade Commission, to inhibit the ability of Anniston to operate as a viable competitor in the KD market.

V.

It is further ordered, That G&W provide prospective purchasers with all information concerning the operations of Anniston requested by such purchasers and permit any inspections that may be required.

VI.

It is further ordered, That, for a period of ten (10) years from the date of issuance of this Order, G&W shall not, directly or indirectly, acquire any stock or share capital of, interest in, or assets used in the manufacture of burial caskets or KDs in the United States by any concern, corporate or non-corporate, engaged in the manufacture or sale of burial caskets or KDs in the United States without the prior approval of the Federal Trade Commission.

VII.

It is further ordered, That G&W shall, within sixty (60) days from the date of issuance of this Order, and every sixty (60) days thereafter until the divestiture is completed, submit in writing to the Commission a report setting forth in detail the manner and form in which G&W intends to comply, is complying, and has complied with the terms of this Order and such additional information relating thereto as may from time to time reasonably be required. All such reports shall include a summary of contacts or negotiations with anyone for the specified assets, the identity of all such persons, and copies of all written communications to and from such persons.

VIII.

It is further ordered, That for a period of ten (10) years from the date of issuance of this Order, G&W shall notify the Commission at least thirty (30) days prior to any change in G&W which affects compliance with the obligations arising out of this Order, 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.

APPENDIX A

This Appendix A is annexed to and made a part of this Order in Docket No. 9153. For purposes of this Order, Anniston shall mean: all assets, properties, titles for properties, interests, rights and privileges of whatever nature, tangible and intangible, located at the Anniston facility on the date of this Order, including, but not limited to, all real property, buildings, machinery, equipment, raw materials, inventory, dies and fixtures as described below, presses, as well as all G&W customer lists relating to the sale of KDs, copies of all G&W KD sales invoices describing KD sales processed through Anniston and every other G&W KD facility since January 1, 1982, trade names, trademarks, patents, patent applications, orders for purchase, and all other property owned or operated at the Anniston facility on said date, except that after the date of this Order, G&W may enter into transactions in the ordinary course of business.

On the date of the Order, the assets described above shall include, but shall not be limited to:

One Cincinnati 500-ton Press, serial number 38743
 One Dallas Feeder for use in connection with the Cincinnati 500-ton Press, serial number 38743
 One Rowe Reel for use in connection with the Cincinnati 500-ton Press, serial number 38743
 One Cincinnati 500-ton Press, serial number 39051
 One Verson 1,000-ton Press, serial number 25172
 One Niagara Shear, serial number 61373
 One Tannwitz Saw, serial number 15883
 One Foley Saw Filer, Model 387
 One Rockwell Drill Press
 One Thorbob Bench Grinder
 One Peer Spot Welder, serial number 13435
 One Lincoln Arc Welder, serial number 246886
 One Lincoln Arc Welder, serial number 246794
 One Quincy Air Compressor, serial number 954830-L
 One Catch Hole Punch Press
 One Baron Blakelslee Degreaser
 One Chicago D&K 150-ton Flange Brake, serial number P9687
 One Chicago D&K Power Brake, serial number L17540
 Three Semi-automatic Body Saws
 One Round Corner "A" Punch, serial number 40720
 One Square Corner "A" Punch, serial number 50968
 One Welty-Weigh Uncoiler, serial number UC7792
 One Welty-Weigh Slitter, serial number 67707
 One Welty-Weigh Stacker, serial number SC7703
 One Body Side Panel Punch Unit
 One Ingersoll Rand Air Compressor, serial number 23408
 One steel coil crane system
 One basket and rack system
 One scrap conveyor system
 Five forklifts
 Dies and fixtures sufficient to make the following part numbers, or such other dies and fixtures agreed to by an eligible person:

<u>Tops</u>	<u>Bodies</u>	<u>Bridges</u>
10	140	28 A Steel
20	427	Copper, Bronze
28	499	50 A Steel
50	700 Embossed	Copper, Bronze
70	750	27 A Steel
70 Embossed	427 A	Copper, Bronze
200	427 A Embossed	200 A Steel, Copper
32 A	490 A	# 1 Oversize
35 A	750 A	32 A
37 A	770 A	35 A
37 A Embossed	790 A	37 A
38 A	809 A Steel	38 A
37 A Stainless	Copper, Bronze	10
Steel	990 Steel	20

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<u>Tops</u>	<u>Bodies</u>	<u>Bridges</u>
Full Couch Cap	Copper, Bronze	50
Steel, Copper	427 A Stainless Steel	28
Bronze	110	200
Half Couch Cap	120	70
# 1 Oversize	150	Cap ovals
28-AR	180	
	200	
	700	
	809-AR and bottom filler plates	
<u>Bottom</u>		
Universal		

IN THE MATTER OF
INDIANA FEDERATION OF DENTISTS

Docket 9118. Interlocutory Order, April 28, 1983

ORDER DENYING PETITION FOR RECONSIDERATION

On February 21, 1983, the Commission issued its decision and final order in this matter. On March 11, 1983, respondent filed a petition for reconsideration under Rule 3.55 of the Commission's Rules of Practice. Respondent argues that a regulation promulgated by the Indiana State Board of Dental Examiners on May 8, 1982, "conflicts with the mandates of the Commission's recent Order . . . [and] compels reconsideration of the Commission's rejection of the state action exemption." (Petition at pp. 6-7)

Any petition filed under Rule 3.55 "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." Since respondent made no effort to apprise the Commission of the state regulation before the Commission issued its decision and order, respondent is now hard pressed to argue that the order raises questions upon which it had no earlier opportunity to argue before the Commission. Nevertheless, the Commission has considered respondent's petition on the merits and found it unpersuasive.

The regulation provides in relevant part: "Any person using dental diagnostic materials for the purpose of recommending changes in the treatment plan upon which [reimbursements by a third party] are based is practicing dentistry and must be a dentist. Indiana dentists shall not knowingly submit dental diagnostic materials to any party involved in the Unauthorized Practice of Dentistry." 828 IAC 1-4 (Indiana Register, Vol. 5 Number 5, pp. 992-3, May 1, 1982). Clearly this regulation has no relevance to respondent's state action defense in this case, which concerns conduct engaged in by respondent only up to the time the record was closed in 1979. A regulation promulgated in 1982 cannot, as complaint counsel note, retroactively immunize prior unlawful conduct. Furthermore, even if the regulation had been in effect during the relevant time period, it would not have compelled the concerted action in which respondent engaged. Respondent asserts that the use of the plural word "dentists" in the regulation must mean that Indiana dentists are required to comply *as a group* and, consequently, must conspire together to enforce the regulation among their fellows. This creative analysis exceeds the bounds of reasonableness.