

IN THE MATTER OF

DIAMOND SHAMROCK CORPORATION

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-2493. Consent Order, Mar. 18, 1974—Set Aside Order, Apr. 30, 1990

The Federal Trade Commission has set aside a 1974 consent order as it applies to Occidental, a successor to a part of Diamond Shamrock Corporation, (83 FTC 1389), thus removing the order's prohibition of reciprocal dealing with customers and suppliers and certain related conduct. Occidental argued, among other things, that the restrictions in the order constrained its ability to compete, and that reopening and vacating the order would be in the public interest.

ORDER REOPENING AND SETTING ASIDE ORDER

Occidental Chemical Corporation ("Occidental"), a successor to a part of the business of Diamond Shamrock Corporation ("DSC"),¹ has filed a "Request of Occidental Chemical Corporation To Reopen and Vacate a Consent 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. In the Request, Occidental asks the Commission to reopen the proceeding in Docket No. C-2493 and set aside the consent order issued by the Commission on March 18, 1974, "insofar as it applies to Occidental." Request at 1. In support of its Request, Occidental states that the relief it seeks is required by changed conditions and the public interest. Request at 3. Occidental's request was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules of Practice. No comments were received. For the reasons stated below, the Request is granted.

I.

The Commission issued its complaint and order in this matter on March 18, 1974. The complaint alleged that DSC had engaged in reciprocal dealing by "systematically utiliz[ing] its actual or potential purchases to obtain or increase sales of its products, services or raw

¹ The order applies to DSC and its "subsidiaries, successors, and assigns." 83 FTC at 1392. Occidental is a successor by acquisition. Request at 1.

materials to certain companies." 83 FTC at 1390. The complaint further alleged that DSC's conduct had the effect, among other things, of foreclosing actual or potential suppliers of DSC, foreclosing DSC's competitors from selling to DSC's suppliers or giving DSC an unfair competitive advantage over its competitors. *Id.* at 1391.

The order prohibits DSC from engaging in reciprocal dealing with its suppliers and customers and from engaging in certain conduct that was thought to foster reciprocal dealing. Although some of the order's provisions expired in 1984, DSC still is prohibited from, among other things, discussions with another company "to ascertain, develop, facilitate, or further any relationship between purchases and sales of the nature prohibited by [the] order." 83 FTC at 1398. DSC also is prohibited from making purchasing data available to its sales personnel and from making sales data available to its purchasing personnel. *Id.* at 1394.

II.

The order in *Occidental Petroleum Corp.*, Docket C-2492, 83 FTC 1394 (1974), like the *Diamond Shamrock* order, prohibited Occidental from engaging in reciprocal dealing and contained various fencing-in provisions to prevent opportunities for reciprocal dealing. In 1982, Occidental asked the Commission to reopen the order in *Occidental Petroleum Corp.* and set it aside, limit its duration to ten years or "bring it in line with current case law and enforcement attitudes." Request at 20. Occidental asserted that modification was warranted by changed conditions of law, fact and the public interest. Occidental argued, among other things, that similar orders entered against its competitors had expired, that the Commission and the Department of Justice were unlikely to challenge reciprocal dealing arrangements and that the order impeded Occidental's ability to compete. Request at 11.

On March 9, 1983, the Commission set aside the fencing-in provisions of the *Occidental* order and ordered that the remaining provisions of the order should expire ten years from the date of their original entry based on public interest considerations. *Occidental Petroleum Corp.*, Docket C-2492, 101 FTC 373 (1983) (Reopening and Vacating in Part and Modifying in Part Order Issued March 18, 1974). The Commission concluded that the fencing-in provisions of the *Occidental* order, with the passage of time, prohibited innocuous and

possibly procompetitive conduct, resulting in competitive harm that outweighed any continuing need for them. The Commission concluded that the same public interest considerations warranted setting aside the remaining order provisions at the end of the specified ten-year period. *Id.* at 373-74.

The Commission consistent with its decision to modify and set aside the *Occidental* order, set aside two additional orders that prohibited the respondents from engaging in reciprocal dealing. In *The Southland Corp.*, Docket 8915, 102 FTC 1337 (1983), the Commission set aside the fencing-in provisions of a 1974 order "at this time" and ordered that the remaining provisions be set aside ten years from the date of their original entry.² The Commission set aside a 1973 order prohibiting reciprocal dealing in *Georgia-Pacific Corp.*, Docket C-2402, 103 FTC 203 (1984).³

III.

In its Request, Occidental asserts that changed conditions and the public interest require the Commission to set aside the *Diamond Shamrock* order, which now applies to Occidental as a result of Occidental's acquisition of part of DSC's business. Request at 3. Occidental argues that the order prohibits conduct that the Commission described as "innocuous and often procompetitive" in its decisions to set aside the reciprocal dealing orders against Occidental, Southland and Georgia-Pacific. Request at 2. Occidental also argues that because the public policy considerations that "motivated [the Commission's decision to modify and set aside the *Occidental* order] have not changed," it would be "illogical and manifestly unfair" to subject Occidental, by reason of its acquisition of a part of DSC's business, to the same order provisions that the Commission decided should not apply to Occidental. Request at 4. Finally, Occidental asserts that it is "injured by the continued applicability of the *Diamond Shamrock* order to it, especially when similar consent orders applicable to several of its competitors have been permitted to expire." Request at 2 and 5 n.4.

² The original *Southland* order was issued January 24, 1974. See 83 FTC 1282.

³ The order in *Georgia-Pacific*, 82 FTC 1428 (1973), which had been in effect for more than ten years when the Commission issued the 1984 order, was set aside in its entirety.

IV.

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 respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. 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 it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket 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, although changed circumstances would not require reopening, 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. 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 C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), 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.*, Docket C-2916, 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. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, by means other than conclusory statements, why an order should be modified. If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.

V.

A reciprocal dealing arrangement exists when two parties deal with each other as both a buyer and seller, one party offering to buy the other party's goods conditioned on the second party buying goods from the first party.⁴ The elements of proof required to show that reciprocal dealing violates the antitrust laws are equivalent to the elements required to provide an unlawful tying arrangement, in which, similarly to reciprocal dealing, a party's willingness to enter one transaction is conditioned on the other party's willingness to enter into a different one too.⁵ Unilateral conduct, such as buying from a present customer in order to give that customer an incentive to keep buying from it, or to maintain "goodwill," does not violate the law,⁶ nor does two parties maintaining a consensual relationship to purchase each other's products.⁷ Continued order restraints against unilateral and consensual reciprocal dealing are legally unsupportable. Coercive reciprocal dealing may violate the law, if there is an actual agreement between the parties to make reciprocal purchases, if one party has substantial market power that tends to coerce the reciprocal transaction,⁸ and if the reciprocal dealing arrangement forecloses a substantial amount of commerce.⁹

Occidental demonstrates that orders against reciprocal dealing, of all forms, by its competitors have now expired. *See Georgia-Pacific Corp.*, Docket C-2402, 103 FTC 203 (1984); *United States v. PPG Industries, Inc.*, 1970 Trade Cas. (CCH) ¶ 73,373 (W.D. Pa. 1970).

Occidental demonstrates that it has lost caustic soda business as a result of not having the ability to enter into reciprocal dealing arrangements. Public Record at 49-53. This showing supports Occidental's assertions that the restrictions in the Order constrain its

⁴ *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1216 (9th Cir. 1982); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 424 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979); *E.T. Barwick Industries, Inc. v. Walter E. Heller & Co.*, 692 F. Supp. 1331, 1337 (N.D. Ga. 1987); *Skepton v. County of Bucks, Pennsylvania*, 613 F. Supp. 1013, 1018 (E.D. Pa. 1985).

⁵ *E.T. Barwick Industries, Inc.*, 692 F. Supp. at 1337; *Skepton*, 613 F. Supp. at 1018, citing *Betaseed, Inc.*, 681 F.2d at 1216-17; *Spartan Grain and Mill Co.*, 581 F.2d at 425.

⁶ *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 537 (7th Cir. 1986). *See Davis v. First National Bank of Westville*, 868 F.2d 206, 208 (7th Cir. 1989).

⁷ *Great Escape, Inc.*, 791 F.2d at 537; *see Davis*, 868 F.2d at 208.

⁸ *Great Escape, Inc.*, 791 F.2d at 537; *E.T. Barwick, Inc.*, 692 F. Supp. at 1331; *Skepton*, 613 F. Supp. at 1018. *See Davis*, 868 F.2d at 208; *Bruce v. First Federal Savings and Loan Association of Conroe, Inc.*, 837 F.2d 712, 718 (5th Cir. 1988).

⁹ *Bruce*, 837 F.2d at 718, citing *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 13-16 (1984).

ability to compete, and that reopening and vacating the order would thus tend to serve the public interest.

VI.

In modifying and setting aside the *Occidental* order, the Commission said that the conduct prohibited by the order is "innocuous and may, in certain circumstances, be procompetitive." 101 FTC at 373-74. The Commission believes that there is no sound reason to deny Occidental now relief equivalent to what the Commission already granted it in 1983.

Occidental has shown an affirmative need to reopen and modify the order, and this need is not outweighed by any reasons to continue the order. Accordingly, the Request to reopen and set aside the order, insofar as it applies to Occidental, is granted.

Accordingly, *it is ordered*, that the proceeding in Docket C-2493 be, and it hereby is, reopened and that the order, insofar as it applies to Occidental, be, and it hereby is, set aside.

Commissioner Azcuenaga and Commissioner Strenio dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

A majority of the Commission today grants the petition of Occidental Chemical Corporation to reopen and set aside the order in *Diamond Shamrock Corporation*, Docket C-2493, insofar as it applies to Occidental.¹ The majority takes this action although Occidental failed to demonstrate changed conditions of fact or law that require reopening or public interest considerations that warrant reopening.² I cannot agree.

I.

The majority relies on the public interest to set aside the order in *Diamond Shamrock*. Reopening an order may be warranted in the public interest when the respondent shows as a threshold matter some affirmative need to modify the order, usually a competitive disadvan-

¹ Occidental filed the petition as a successor under the order by its 1986 acquisition of Diamond Shamrock Chemical Corporation.

² Although Occidental alleges "changed conditions" generally, Petition at 3, it does not specifically identify any changed conditions of fact.

tage resulting from the order.³ Occidental has not made the requisite threshold showing. Instead, Occidental's public interest arguments are vague and conclusory.

Occidental asserts that similar consent orders once applicable to several of its competitors have been set aside or permitted to expire. Petition at 2 & 5. Even if true, this assertion does not create an inference that Occidental is competitively disadvantaged. The mere fact that other firms are not precluded by order from engaging in certain conduct does not mean that the conduct is necessary to compete effectively or that Occidental is competitively disadvantaged by its inability to engage in that conduct. Occidental makes no claim or showing that it is unable to compete effectively by reason of the order.⁴

Affidavits from Occidental personnel are similarly uninformative. The affiants claim "instances" in the three and a half years since Occidental acquired Diamond Shamrock Chemical Corporation that Occidental has not completed transactions because it could not discuss reciprocal dealing. Not even one of these "instances" is identified, and no other specific information such as the identity of the potential customer or the volume of business is provided.

One would expect that Occidental could identify any competitive disadvantage it suffers with some degree of particularity.⁵ Certainly that is a minimum we have required in other cases, and I see nothing here to justify a departure from our usual standards. In the absence of a showing of competitive harm, we cannot evaluate whether the order unnecessarily hinders competition, nor can we assess the appropriateness of the requested order revision to remedy the identified harm. This is law enforcement in a vacuum.

Occidental in its Petition and the majority in its order rely primarily and almost exclusively on the fact that the Commission set aside a similar order in *Occidental Petroleum Corp.*, Docket C-2492, 101

³ Once such a showing is made, the Commission will consider the reasons for and against modification and whether the particular modification requested is appropriate to remedy the identified harm. See Order Reopening and Setting Aside Order, Docket C-2493, at 4 ("Order").

⁴ Occidental's allegation that other orders banning reciprocal dealing have expired, Petition at 5 n.4, does not identify either a change in law or a change in fact. The orders cited by Occidental had a definite term when they were issued, and almost all of them were issued before the Commission issued the order in *Diamond Shamrock*.

⁵ Despite this vagueness, the majority concludes that the affidavits show that Occidental "has lost caustic soda business as a result of not having the ability to enter into reciprocal dealing arrangements." Order Reopening and Setting Aside Order ("Order") at 5. Occidental claimed only that several sales were not made to unidentified customers when it could not discuss reciprocity. Even assuming the truth of the claim, at most it shows a transaction cost. Occidental neither claims nor shows that it lost business overall as a result of the *Diamond Shamrock* order.

FTC 373 (1983). According to *Occidental*, the 1983 decision of the Commission to set aside the *Occidental* order is the “most significant factor” in favor of setting aside the *Diamond Shamrock* order, Petition at 3, and it is “obviously controlling here.” Petition at 4. Apparently acquiescing, the majority states that “there is no sound reason to deny *Occidental* now relief equivalent to what the Commission already granted it in 1983.” Order at 6.

Occidental’s argument is tantamount to saying that a decision to set aside one order requires setting aside all orders imposed for similar violations of law, regardless of the industry involved, differences in the competitive positions of different respondents or any other factual difference. This would be an astonishing development.⁶ It ignores the reality that every law enforcement order is and must be based on its particular facts. Similarly, each petition to reopen and modify an order must be decided on its own merits. The Commission did not in 1983 decide that *Occidental* should never be subject to an order prohibiting reciprocal dealing, *see* Petition at 4; Order at 6, the Commission did not in 1983 decide that all reciprocal dealing orders should be set aside and most assuredly the Commission did not in 1983 decide that *Occidental* should be treated differently from any other potential successor to the terms of the *Diamond Shamrock* order. Instead, the Commission in 1983 considered a different petition in the context of a different order and found that modification of that order, *Occidental Petroleum Corp.*, Docket C-2492, was in the public interest.⁷ Whatever competitive injury *Occidental* may have shown then, clearly the requisite showing has not been made here.

Nor is the 1983 decision in *Occidental* “controlling” by virtue of *stare decisis* or *res judicata*. *Stare decisis* requires that we follow established legal principles—here, the standards for reopening and modification under Section 5(b) of the Federal Trade Commission Act. *Res judicata* does not make the 1983 decision “controlling,” because the order at issue here is based on a cause of action different from that in *Occidental*, and *Occidental*, by virtue of its 1986 acquisition of Diamond Shamrock Chemical Corporation, is different from *Occidental* as it was constituted in 1983.

⁶ By this reasoning, for example, if a firm subject to a divestiture order under Section 7 of the Clayton Act persuades the Commission to relieve it of its divestiture obligation, then all other Section 7 divestiture requirements similarly should be lifted.

⁷ The order modifications in *Georgia-Pacific Corp.*, Docket C-2402, 103 FTC 203 (1984), and *The Southland Corporation*, Docket 8915, 102 FTC 1337 (1983), both reciprocal dealing orders, also were based on the public interest. In neither case did the Commission rely “expressly on its decision in *Occidental*,” as *Occidental* erroneously claims. Petition at 6. Instead, in both cases, the Commission cited the public interest and said that the result “is consistent” with the decision in *Occidental*.

II.

A change in law sufficient to require reopening is a change in statutory or decisional law that has the effect of bringing the provisions of the order in conflict with existing law, so that to continue the order would work an injustice. *Louisiana-Pacific Corp.*, Docket C-2956, slip op. at 20 (Nov. 15, 1989). Occidental fails to meet this standard, but the majority appears to conclude that the law has changed sufficiently that some provisions of the order are "legally unsupportable."

In its summary petition, Occidental alleges generally and without citation to authority that the law applicable to reciprocal dealing has changed and that it is "widely accepted" that most forms of reciprocal dealing are "entirely innocuous." According to Occidental, "even in its most extreme form—so-called 'coercive reciprocity'—the practice is not so anticompetitive in effect or lacking in redeeming virtues to justify applying a strict *per se* rule." Petition at 5.⁸ These allegations fall far short of identifying a change in law sufficient to require reopening under Section 5(b). Occidental does not otherwise embellish its bare assertion on the state of the law.

The cases the majority cites quite simply do not demonstrate that the law has changed. See Order at 4-5. Two of those cases, *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203 (9th Cir. 1982), and *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978), were cited in Occidental's 1982 petition in support of its argument that the law had changed.⁹ After considering these and other cases Occidental cited, the Commission in 1983 specifically found that Occidental had failed to demonstrate a change in law.¹⁰

Nor do the cited cases provide any support for the proposition that the law of reciprocity has changed since 1983. This is hardly surprising, because if any such authority existed, Occidental presumably would have included those citations in its petition. The court in *Skepton v. County of Bucks, Pennsylvania*, 613 F. Supp. 1013 (E.D. Pa. 1985) (cited in the Order at 4 n.4), cited *FTC v. Consolidated*

⁸ Occidental also alleges that the Commission and the Antitrust Division "have discontinued efforts to enjoin reciprocal practices." Petition at 5. It is not clear whether Occidental proffers this as a change in law or a change in fact. Neither, however, can be inferred from government inaction with respect to a particular restraint of trade, which reflects the exercise of prosecutorial discretion or, perhaps, a dearth of violations.

⁹ Request To Reopen and Vacate or Modify Consent Order in *Occidental Petroleum Corp.*, Docket C-2492 (Nov. 8, 1982), at 27, a copy of which was attached to the 1989 petition to reopen the *Diamond Shamrock* order "for the convenience of the Commission." Petition at 4 n.3.

¹⁰ Occidental obviously could not incorporate by reference the change of law arguments in its 1982 petition, because the Commission already has rejected them.

Foods Corp., 380 U.S. 592 (1965), *Betaseed* and *Spartan Grain* for its discussion of reciprocity, and the court in *E.T. Barwick Industries, Inc. v. Walter E. Heller & Co.*, 692 F. Supp. 1331 (N.D. Ga. 1987) (cited in the Order at 4 n.4), relied, *inter alia*, on *Skepton*. A more recent case cited by the majority, *Great Escape, Inc. v. Union City Body Company, Inc.*, 791 F.2d 532 (7th Cir. 1986) (cited in the Order at 5 n.6), applied the same legal principles that were applied in *Betaseed* and *Spartan Grain*.¹¹

Neither Occidental nor the majority suggests that reciprocal dealing is never unlawful. Indeed, both concede that so-called coercive reciprocal dealing may be unlawful. Order at 5; Petition at 5. The majority does conclude, however, that “[c]ontinued order restraints against unilateral and consensual reciprocal dealing are legally unsupportable.”¹² Order at 5.

I agree with the implication of the majority’s statement that unilateral reciprocity is not, indeed, never was unlawful. This does not mean that provisions in the *Diamond Shamrock* order barring unilateral reciprocity were or are “legally unsupportable.” At best, a finding that the order is too broad in its present context might support modifying the order to eliminate fencing-in provisions that may, with the passage of time, have served their purpose and may now needlessly impede competition. But neither Occidental nor the majority individually examines the so-called “legally insupportable” provisions in this light.¹³

I am not prepared to say, as does the majority, that consensual reciprocity can never be unlawful.¹⁴ A consensual reciprocity agreement, like any contract, combination or conspiracy, may constitute an unreasonable restraint of trade under Section 1 of the Sherman Act, although, presumably, only the government or a foreclosed competitor would have standing to raise the issue. See *Industria Siciliana Asfalti, S.p.A. v. Exxon Research & Engineering Co.*, 1977-1 Trade Cas. (CCH) ¶61,256, at 70,778-80 (S.D.N.Y. 1977); *Spartan Grain*,

¹¹ Two cases cited by the majority, *Davis v. First National Bank*, 868 F.2d 206 (7th Cir. 1989), and *Bruce v. First Federal Savings & Loan*, 837 F.2d 712 (5th Cir. 1988), arose under the Bank Holding Company Act, which prohibits reciprocal dealing but under standards different from those applied in Sherman Act cases, and the courts in both cases expressly stated that Sherman Act standards did not apply.

¹² Like all final orders, the order in *Diamond Shamrock* is of course presumptively valid, absent mistake or fraud, see *Louisiana-Pacific Corp.*, Docket C-2956, slip op. at 9 (Nov. 15, 1989), yet this statement suggests that the majority is willing to second guess what the Commission did in 1974.

¹³ If the order appears too broad, the appropriate procedure, because Occidental has not requested modification and therefore has not attempted to limit the appropriate scope of modification, is to deny the petition and issue an order to show cause under Section 3.72 of the Commission’s Rules of Practice.

¹⁴ Indeed, this is a unique and interesting departure from the rest of our enforcement agenda.

581 F.2d at 425 n.5; see also *Heublein, Inc.*, 96 FTC 385, 596-97 (1980). The foreclosure and entry-detering effects of reciprocity could be the same whether the reciprocal agreement is consensual or coercive. See V Areeda & Turner, *Antitrust Law* ¶ 1129h, at 176-77 (1980).

III.

The standards under Section 5(b) of the Federal Trade Commission Act for reopening an order are stringent, and the petitioner carries a heavy burden of proof in light of the public interest in repose and the finality of orders. See *United States v. Swift & Co.*, 286 U.S. 106 (1932); *United States v. Swift & Co.*, 276 U.S. 311 (1928); *United States v. Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961). These interests are threatened if the Commission reopens and modifies orders absent a satisfactory showing of changed conditions or public interest considerations that eliminate the need for the order or make continued application of the order inequitable or harmful to competition. Insubstantial or frivolous petitions may be encouraged, wasting our resources. Decisions based on inadequate showings may tend to be arbitrary, resulting in inequitable treatment and lessening respect for the Commission's enforcement efforts. We can avoid these dangers by adhering to the standards for reopening set forth in Section 5(b) of the Federal Trade Commission Act.

No right of appeal obtains for today's decision, and it will be little remarked beyond a specialized segment of the bar. Nevertheless, this kind of decisionmaking diminishes the agency. I dissent.

IN THE MATTER OF

FITNESS QUEST, INC., ET AL.

Docket 9236. Interlocutory Order, April 30, 1990

ORDER AMENDING COMPLAINT

Upon consideration of the parties' Joint Motion to Amend Complaint, dated April 27, 1990, and pursuant to Section 3.15(a)(1) of the Commission's Rules of Practice in Adjudicative Proceedings, the complaint is hereby amended as set forth below:

1. The caption of the case is amended to read:

In the Matter of
Consumer Direct, Inc.,
The Gut Buster Corporation, and
Fitness Quest, Inc.,
corporations, and
Richard A. Suarez and
LuAnn Suarez,
individually and as officers of said
corporations.

2. The preamble of the complaint is amended to read:

The Federal Trade Commission, having reason to believe that Consumer Direct, Inc., The Gut Buster Corporation, and Fitness Quest, Inc., corporations, Richard A. Suarez, individually and as an officer of said corporations, and LuAnn Suarez, individually and as an officer of The Gut Buster Corporation and Fitness Quest, Inc., 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:

3. Paragraph one of the complaint is amended to read:

PARAGRAPH 1. Respondent Consumer Direct, Inc. is an Ohio corporation, with its office and principal place of business located at 1375 Raff Road, S.W., Canton, Ohio.

Respondent The Gut Buster Corporation is an Ohio corporation, with its office and principal place of business located at 1400 Raff Road, S.W., Canton, Ohio.

Respondent Fitness Quest, Inc. is an Ohio corporation, with its office and principal place of business located at 1400 Raff Road, S.W., Canton, Ohio.

Respondent Richard A. Suarez is an officer and director of each of the corporate respondents named herein. Respondent LuAnn Suarez is an officer of The Gut Buster Corporation and an officer and director of Fitness Quest, Inc. They formulate, direct and control the acts and practices of said corporate respondents. LuAnn Suarez's address is the same as that of respondent Fitness Quest, Inc. Richard Suarez's address is the same as that of respondent Consumer Direct, Inc.

The aforementioned respondents cooperated and acted together in carrying out the acts and practices hereinafter set forth.

So ordered.

IN THE MATTER OF
RHONE-POULENC S.A., ET AL.

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

Docket C-3287. Complaint, May 1, 1990—Decision, May 1, 1990

This consent order requires, among other things, a U.S. subsidiary of the French corporation, for a period of five years, to grant licenses to duplicate and sell, on a royalty free basis, the dairy cultures products of Marschall Dairy Products to any entity except Chris Hansen Laboratories and Dairyland Food Laboratories. In addition, respondents are prohibited, for a period of ten years, from acquiring any interest, with certain exceptions, in any company that manufactures or sells dairy cultures in the U.S., without prior Commission approval.

Appearances

For the Commission: *Robert Doyle* and *Steven Newborn*.

For the respondents: *Paul W. Bartel, Davis, Polk & Wardwell*,
New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondents, Rhone-Poulenc S.A. and Rhone-Poulenc Inc. (collectively "Rhone-Poulenc"), corporations subject to the jurisdiction of the Commission, have entered into an agreement that violates Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); that through this agreement Rhone-Poulenc has agreed to acquire the Marschall Dairy Products ("Marschall") division of Miles Inc. and that such acquisition of Marschall, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding in respect thereof would be in the public interest, the Commission hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows: