

IN THE MATTER OF
AMERICAN STAIR-GLIDE CORPORATION, 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-3331. Complaint, May 17, 1991—Decision, May 17, 1991

This consent order requires, among other things, American Stair-Glide to grant a non-exclusive perpetual license to Cheney's technology involved in the production of curved stairway lifts, straight stairway lifts, and vertical wheelchair lifts, and a perpetual exclusive license to sell such products under the Cheney name and certain trade names, to a Commission-approved licensee, pursuant to a Commission-approved licensing agreement.

Appearances

For the Commission: *M. Howard Morse* and *Steven A. Newborn*.

For the respondents: *Michael Cooper, Bryan, Cave, McPheeters & McRoberts*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents American Stair-Glide Corporation and Access Industries, Inc., both subject to the jurisdiction of the Federal Trade Commission, have acquired respondent The Cheney Company, Inc., also subject to the jurisdiction of the Federal Trade 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 ("FTC 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:

I. RESPONDENTS

1. Respondent American Stair-Glide Corporation is a corporation organized, existing and doing business under and by virtue of the laws

of the State of Missouri with its principal executive offices located at 4001 East 138th Street, Grandview, Missouri.

2. Respondent Access Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri with its principal executive offices located at 4650 College Boulevard, Suite 300, P.O. Box 7933, Overland Park, Kansas.

3. Respondent The Cheney Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its principal executive offices located at 2445 S. Calhoun Road, New Berlin, Wisconsin.

II. JURISDICTION

5. Respondents at all times herein have been and now are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business or practices are in or affecting commerce as "commerce" is defined in section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

6. On or about November 21, 1990, American Stair-Glide, acting through Access Industries, acquired all of Cheney's outstanding stock.

IV. THE RELEVANT MARKETS

7. The relevant product markets in which to analyze the acquisition of Cheney are the manufacture and sale of: (1) curved stairway lifts, (2) straight stairway lifts, and (3) vertical wheelchair lifts.

8. The relevant geographic market is the United States for all products.

V. THE MARKET STRUCTURE

9. The United States market for curved stairway lifts is marked by extremely high concentration as measured by the Herfindahl-Hirschmann Index ("HHI") or by the four-firm and eight-firm concentration ratios. American Stair-Glide and Cheney are the only competitors in this market.

10. The United States markets for straight stairway lifts and vertical wheelchair lifts are highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or by the four-firm and eight-firm concentration ratios. American Stair-Glide and Cheney are the market leaders with dominant shares of these markets.

11. In all three relevant markets, American Stair-Glide and Cheney are the two largest competitors and compete substantially and directly on price, service and product innovation.

VI. BARRIERS TO ENTRY

12. Entry into each of the relevant markets is difficult and time consuming because of the need to design and develop products, develop distribution, and build a reputation.

VII. EFFECTS

13. The effect of the acquisition may be to substantially lessen competition in the relevant markets described above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, by, among other things:

- a. Eliminating actual competition in the relevant markets;
- b. Establishing a dominant firm in the relevant markets;
- c. Diminishing future product innovation;
- d. Increasing barriers to new entry; and
- e. Enhancing the likelihood of collusion or interdependent coordination between or among the firms in the relevant markets.

VIII. VIOLATIONS CHARGED

14. The acquisition as set forth in paragraph 6 herein violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

Commissioner Azcuenaga dissenting.

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 Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act; and

The respondents, their attorneys, 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 a 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 Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Stair-Glide Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the state of Missouri, with its principal executive offices located at 4001 East 138th Street, Grandview, Missouri.

2. Respondent Access Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Missouri with its principal executive offices located at 4650 College Boulevard, Suite 300, P.O. Box 7933, Overland Park, Kansas.

3. Respondent The Cheney Company, Inc., is a corporation organized, existing and doing business under and by virtue of the law of the state of Wisconsin with its principal executive offices located at 2445 S. Calhoun Road, New Berlin, Wisconsin.

4. 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

I.

As used in this order, the following definitions shall apply:

A. "*Stair-Glide*" means American Stair-Glide Corporation, a Missouri corporation, and its directors, officers, employees, agents and

representatives, its predecessors, successors, subsidiaries, divisions, groups, and any other corporations, partnerships, joint ventures, companies and affiliates that Stair-Glide controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Access*" means Access Industries, Inc., a Missouri corporation, and its directors, officers, employees, agents and representatives, its predecessors, successors, subsidiaries, divisions, groups, and any other corporations, partnerships, joint ventures, companies and affiliates that Access controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*Cheney*" means the Cheney Company, Inc., a Wisconsin corporation, and its directors, officers, employees, agents and representatives, its predecessors, successors, subsidiaries, divisions, groups, and any other corporations, partnerships, joint ventures, companies and affiliates that Cheney controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

D. "*Respondents*" means Stair-Glide, Access, and Cheney.

E. "*Cheney Name*" shall mean the use of the name "Cheney" in conjunction with the Trade Names, as defined herein, and does not include use of the corporate name.

F. "*Commission*" means the Federal Trade Commission;

G. "*Stairway lift*" means any device that carries a person seated on a chair from one level to another on an incline up or down a stairway, and includes devices meeting Section 2002 of the ASME/ANSI (American Society of Mechanical Engineers/American National Standards Institute) A17.1 Code.

H. "*Straight stairway lift*" means any stairway lift designed for straight stairways.

I. "*Curved stairway lift*" means any stairway lift designed for stairways with landings, bends, or curves, and spiral stairways.

J. "*Vertical wheelchair lift*" means any device that carries a person in a wheelchair or standing, on a platform, vertically from one level to another, and includes devices meeting Section 2000 of the ASME/ANSI (American Society of Mechanical Engineers/American National Standards Institute) A17.1 Code.

K. "*Stairway Lift Technology and Know-how*" means all of Cheney's drawings, blueprints, patents, specifications, tests and other

documentation, and all information contained therein or available to Cheney personnel relating to the design, and the production methods, processes and systems used by Cheney in the production, of curved stairway lifts and straight stairway lifts.

L. "*Stairway Lift Trade Names*" means all trademarks, registered names and trade names used by Cheney in the sale of curved stairway lifts and straight stairway lifts, including Liberty LX, Liberty LT, Liberty II, Liberty I, and Liberty Special.

M. "*Vertical Wheelchair Lift Technology and Know-how*" means all of Cheney's drawings, blueprints, patents, specifications, tests and other documentation, and all information contained therein or available to Cheney personnel relating to the design, and the production methods, processes and systems used by Cheney in the production, of vertical wheelchair lifts.

N. "*Vertical Wheelchair Lift Trade Names*" means all trademarks, registered names and trade names used by Cheney in the sale of vertical wheelchair lifts, including Handi-Lift, Handi Home Lift and Handi-enclosure.

O. "*Technology and Know-how*" means Stairway Lift Technology and Know-how and Vertical Wheelchair Lift Technology and Know-how.

P. "*Trade Names*" means Stairway Lift Trade Names and Vertical Wheelchair Lift Trade Names.

II.

It is ordered:

A. Within twelve (12) months after the date this order becomes final, respondents shall grant to a licensee a perpetual non-exclusive license of the Technology and Know-how, and a perpetual exclusive license to sell curved stairway lifts, straight stairway lifts, and vertical wheelchair lifts in the United States under the Trade Names and under the Cheney Name, for a fixed sum without a royalty based on future sales. Respondents shall grant the license only to a licensee that receives the prior approval of the Commission and only pursuant to a licensing agreement that receives the prior approval of the Commission. The purpose of the licensing shall be to remedy the lessening of competition alleged in the Commission's complaint.

B. Respondents shall make available to the licensee such Cheney personnel, assistance and training at its facility in New Berlin,

Wisconsin as the licensee might reasonably need to transfer the Technology and Know-how and shall continue providing such personnel, assistance and training at no additional cost for a period of time sufficient to satisfy the licensee's management that its personnel are appropriately trained in the Technology and Know-how. However, Cheney shall not be required to continue providing such personnel, assistance and training for more than six (6) months after the execution of the license agreement.

C. Respondents shall provide the licensee with lists of Cheney's suppliers of components and of its distributors of curved stairway lifts, straight stairway lifts, and vertical wheelchair lifts.

D. For a period of five (5) years, respondents shall not enter into any sales or distribution agreement with any distributor exceeding one (1) year in duration for the sale of curved stairway lifts, straight stairway lifts, or vertical wheelchair lifts; shall not enter any exclusive agreement with any distributor limiting directly or indirectly the distributor's ability to sell curved stairway lifts, straight stairway lifts, or vertical wheelchair lifts of any other manufacturer; and shall not seek to prevent any distributor from selling curved stairway lifts, straight stairway lifts, or vertical wheelchair lifts of any other manufacturer by conditioning the sale of respondents' products or the provision of any services on any distributor not selling curved stairway lifts, straight stairway lifts, or vertical wheelchair lifts of any other manufacturer.

E. Notwithstanding the foregoing, respondents may submit for approval, and the Commission may in its sole discretion approve, separate licensees and licensing agreements (1) for the Stairway Lift Technology and Know-how and the Stairway Lift Trade Names, and (2) for the Vertical Wheelchair Lift Technology and Know-how and Vertical Wheelchair Lift trade names. In the event the respondents submit for approval separate licensees and licensing agreements, the Commission may in its sole discretion approve one licensing agreement which does not include the right to sell under the Cheney Name.

F. Except as provided in paragraph IV., and except during any transition period under a license agreement approved by the Commission, respondents shall not use the Cheney Name in connection with any product sold in the United States. *Provided however*, that respondents shall not be required to change the corporate name of Cheney or to authorize the use of the Cheney Name for any purpose other than in connection with the sale of curved stairway lifts, straight stairway lifts, and vertical wheelchair lifts in the United States.

III.

It is further ordered, That:

A. If respondents have not licensed the Technology and Know-how, the Trade Names, and the Cheney Name, absolutely and in good faith and with the Commission's approval, as provided in paragraph II, within twelve (12) months of the date this order becomes final, respondents shall consent to the appointment by the Commission of a trustee to license the Technology and Know-how, the Trade Names, and the Cheney Name, and to provide to the licensee lists of Cheney's suppliers of components and of Cheney's distributors of curved stairway lifts, straight stairway lifts and vertical wheelchair lifts. *Provided, however,* if the Commission has not approved or disapproved a proposed license agreement within 120 days of the date the application for approval of such license agreement has been put on the public record, the running of the twelve (12) month period shall be tolled until the Commission approves or disapproves the license agreement. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1), of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, authorities, duties and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld.

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to license the Technology and Know-how, the Trade Names, and the Cheney Name, and to provide to such licensee lists of Cheney's suppliers of components and of Cheney's distributors of curved stairway lifts, straight stairway lifts and vertical wheelchair lifts, as provided in paragraph II.

3. The trustee shall have eighteen (18) months from the date of appointment to license the Technology and Know-how, the Trade Names, and the Cheney Name. If, however, at the end of the eighteen-month period the trustee has submitted a plan of licensing or believes that licensing can be accomplished within a reasonable time, the period within which the trustee may license the Technology and Know-how, the Trade Names, and the Cheney Name may be extended by the Commission. *Provided, however,* the Commission may only extend this period two (2) times.

4. The trustee shall have full and complete access to the personnel, books, records and facilities of Cheney related to the Technology and Know-how, the Trade Names, and the Cheney Name, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Respondents shall take no action to interfere with or impede the trustee's efforts to license. Any delays in licensing caused by respondents shall extend the time for executing a license agreement under this paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

5. Subject to the respondents' absolute and unconditional obligation to license at no minimum price and the purpose of licensing as stated in paragraph II.A. of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the Technology and Know-how, the Trade Names, and the Cheney Name. The license shall be made in the manner set out in paragraph II, *provided, however,* if the trustee receives bona fide offers from more than one prospective licensee, and if the Commission determines to approve more than one such licensee, the trustee shall grant a license to the licensee or licensees selected by respondents from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the license and all expenses incurred. After approval by the Commis-

sion and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's licensing the Technology and Know-how, the Trade Names, and the Cheney Name.

7. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

8. Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the license required by this order.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

10. The Commission and, in the case of a court-appointed trustee, the court may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the license required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Technology and Know-how, the Trade Names, and the Cheney Name.

12. The trustee shall report in writing to respondents and to the Commission every sixty (60) days concerning the trustee's efforts to license.

IV.

It is further ordered, That pending the license agreement for the Technology and Know-how, Trade Names, and the Cheney Name:

A. Respondents shall maintain, preserve and promote all of the Technology and Know-how, Trade Names, and the Cheney Name so that such Technology and Know-how, Trade Names, and the Cheney Name can be licensed effectively and viably in accordance with the requirements of this order. Respondents shall take such action as is

necessary to maintain the viability, competitiveness, and marketability of the Technology and Know-how, Trade Names and the Cheney Name.

B. Respondents shall refrain from taking any actions that may cause any material adverse change in the Technology and Know-how, Trade Names, and the Cheney Name.

V.

It is further ordered, That respondents shall remain in compliance with the license agreement entered pursuant to paragraph II of this order until the date at which all of the obligations under the license cease, and shall not, without the prior approval of the Commission, make or agree to any modifications, directly or indirectly, of any of the terms of such license agreement approved by the Commission, or make or agree to any other agreements with the licensee relating to curved stairway lifts, straight stairway lifts or vertical wheelchair lifts.

VI.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, respondents shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise any assets, any interest in, or the stock or share capital of any entity that owns or operates assets, engaged in the production, distribution or sale in or to the United States of any curved stairway lift, straight stairway lift, or vertical wheelchair lift.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondents have fully complied with the provisions of paragraph II and III of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which respondents intend to comply, are complying, or have complied with those provisions. Respondents shall include in their compliance reports,

among other things reasonably required from time to time, a full description of substantive contacts or negotiations for the license specified in paragraph II of this order, including the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and reports and recommendations concerning the licensing.

B. One year from the date this order becomes final and annually for nine years thereafter, respondents shall file with the Commission a verified written report of their compliance with this order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents made to Stair-Glide's principal office, respondents shall permit duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matter contained in this order: and

B. Upon five days notice to respondents and without restraint or interference from respondents, to interview officers or employees of respondents, who may have counsel present, regarding such matters.

IX.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall notify the Commission at least thirty (30) days prior to any proposed change in any respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation, dissolution or sale of subsidiaries or any other change that may affect compliance obligations arising out of the order.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I disagree with the majority of the Commission that a remedy is

warranted in this case. I see no basis for finding reason to believe that the acquisition is unlawful, unless we rely solely on market share and concentration data in the alleged product markets. The likelihood of anticompetitive effect is doubtful because of the absence of any barriers or impediments to entry. Even assuming the likelihood of anticompetitive effect, the licensing required by the order provides an inadequate remedy.

The products can be designed and assembled well within the two-year benchmark against which we usually assess entry conditions. The additional alleged impediments to entry, the need to develop distribution and build a reputation, are nothing more than inertia. Consumers—here, the distributors that resell and install the products—will continue to deal with a supplier that has an established record for quality and service, unless someone offers them a better deal. Nothing prevents an aspirant from offering a quality product at a competitive price, either through existing distributors or through, for example, durable medical equipment dealers.

Even if we assumed that the need to build a reputation for quality and service is sufficient to delay entry for more than two years, the consent order offers little prospect for relief. The industry members that commented on the proposed order agree that the required licensing is not adequate to remedy the alleged harm, because a firm without such a reputation cannot acquire it simply by using the name “Cheney.” Instead, any licensee under the consent order will have to develop its own reputation for quality and reliability.

The order is unlikely to provide relief from any potential anticompetitive effects stemming from the impediments to entry alleged in the complaint. At the same time, the order imposes substantial compliance costs on the respondents, the Commission and, ultimately, the public. I dissent.

IN THE MATTER OF
TK-7 CORPORATION, ET AL.

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

Docket 9224. Complaint, Feb. 7, 1989—Decision, May 17, 1991

This consent order prohibits, among other things, a corporation, that manufactures and distributes fuel additive products, and its officer, Moshe Tal, from making any representations concerning the efficacy of any fuel or engine additives, unless they possess competent and reliable scientific evidence that substantiates the representation.

Appearances

For the Commission: *William L. Haynes* and *Lydia B. Parnes*.

For the respondents: *Moshe Tal, President*, Oklahoma City, OK.
John A. Claro, Claro & Johnston, Oklahoma City, OK.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents TK-7 Corporation (TK-7) and Moshe Tal, individually and as an officer of said corporation, hereinafter referred to as 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 as follows:

PARAGRAPH 1. Respondent TK-7 Corporation is a Nevada corporation with its office and principal place of business located at 1300 N.E. 4th ST., Oklahoma City, OK.

PAR. 2. Respondent Moshe Tal is the President of TK-7. His business address is the same as that of the corporate respondent. At all times relevant to this complaint, he has formulated, directed and controlled the business acts and practices of respondent TK-7.

PAR. 3. Respondents are now and for some time in the past have been engaged in the promotion, manufacture, distribution, marketing,