

Complaint

119 F.T.C.

IN THE MATTER OF

B.A.T INDUSTRIES P.L.C., 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 9271. Complaint, Nov. 28, 1994--Decision, April 19, 1995

This consent order permits, among other things, B.A.T Industries and Brown & Williamson Tobacco Corporation to consummate the acquisition of American Tobacco Company, but requires them to divest, within twelve months, six American Tobacco discount cigarette brands and to divest to the purchaser of these brands three American Tobacco full-revenue brands, as well as the American Tobacco manufacturing facility in Reidsville, N.C. If the required divestitures are not completed on time, the consent order permits the Commission to appoint a trustee to complete the transactions. In addition, the consent order requires the respondents, for ten years, to obtain Commission approval before acquiring any interest in a cigarette manufacturer or any assets used to manufacture or distribute cigarettes in the United States.

Appearances

For the Commission: *Joseph Krauss, Howard Morse and William Baer.*

For the respondents: *Ronald S. Rolfe, Cravath, Swaine & Moore, New York, N.Y. Daniel J. O'Neill, Chadbourne & Parker, New York, N.Y. and Mark Crane, Hopkins & Sutter, Chicago, IL.*

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 ("Commission"), having reason to believe that respondent B.A.T Industries p.l.c., a corporation subject to the jurisdiction of the Federal Trade Commission, has agreed to acquire the American Tobacco Company, a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof

would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. RESPONDENTS

1. Respondent B.A.T Industries p.l.c. ("BAT") is a public limited company incorporated under the laws of England, with its headquarters and principal place of business located at Windsor House, 50 Victoria Street, London, England, SW1H 0NL. It is the second largest cigarette manufacturer in the world. BAT indirectly owns all of the common stock of Brown & Williamson Tobacco Corporation.

2. Respondent Brown & Williamson Tobacco Corporation ("B&W") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at 1500 Brown & Williamson Tower, P.O. Box 35090, Louisville, Kentucky. B&W is the third largest cigarette manufacturer in the United States.

3. Respondent American Brands, Inc. ("American Brands") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut with its headquarters and principal place of business located at 1700 East Putnam Avenue, P.O. Box 819, Old Greenwich, Connecticut.

4. Respondent American Tobacco Company ("ATC"), a wholly owned subsidiary of American Brands, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at Six Stamford Forum, P.O. Box 1038, Stamford, Connecticut. ATC is the fifth largest cigarette manufacturer in the United States.

II. JURISDICTION

5. Employees and agents of BAT negotiated with employees and agents of American Brands, and entered into an agreement, in New York, New York, to acquire the stock of ATC. BAT, B&W, American Brands and ATC are, and at all times relevant herein have been, 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 businesses are in or affect commerce as "commerce" is

defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

6. On or about April 26, 1994, BAT and American Brands entered into a stock purchase agreement whereby BAT agreed to purchase all of the outstanding common stock of ATC for \$1 billion ("Acquisition"). BAT also agreed to assume all existing product liability claims against ATC.

IV. THE RELEVANT MARKETS

7. The relevant product market or line of commerce within which to assess the competitive effects of the proposed Acquisition is the manufacture and sale of cigarettes for U.S. consumption and any narrower market contained therein.

8. The relevant geographic market within which to assess the competitive effects of the proposed Acquisition is the United States.

V. MARKET STRUCTURE

9. The United States cigarette market is already highly concentrated, whether measured by the Herfindahl-Hirschmann Index or two-firm and four-firm concentration ratios. B&W and ATC are, respectively, the third and fifth largest manufacturers of cigarettes in a market that consists of only six meaningful firms.

10. The United States cigarette market will become substantially more concentrated if the proposed Acquisition is consummated.

VI. ENTRY CONDITIONS

11. Entry into the United States cigarette market is difficult and therefore unlikely to undermine an anticompetitive price increase.

VII. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be substantially to lessen competition in the manufacture and sale of cigarettes in the United States 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) Eliminating ATC as a substantial independent, disruptive and competitive force in the market;

(b) Substantially increasing concentration, and further heightening barriers to entry, thereby increasing the likelihood of successful anticompetitive coordinated interaction, nonrivalrous behavior, and actual or tacit collusion among firms; and

(c) Eliminating substantial actual head-to-head competition between B&W and ATC in the manufacture and sale of cigarettes in the United States.

VIII. VIOLATIONS CHARGED

13. The Acquisition agreement described in paragraph six constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

14. The Acquisition described in paragraph six, 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.

Commissioner Varney not participating.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, B.A.T Industries, p.l.c. and Brown & Williamson Tobacco Corporation, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission, for the purposes only of that agreement and any proceedings arising out of, or to enforce that agreement, this order and the Preservation Agreement attached as Appendix I, by those respondents 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 those 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 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, 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 B.A.T Industries p.l.c. (BAT) is a public limited company incorporated under the laws of England, with its headquarters and principal place of business located at Windsor House, 50 Victoria Street, London, England, SW1H 0NL.

2. Respondent Brown & Williamson Tobacco Corporation (B&W) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at 1500 Brown & Williamson Tower, P.O. Box 35090, Louisville, Kentucky.

3. 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.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*BAT*" means B.A.T Industries p.l.c., its subsidiaries, divisions, and groups, including Brown & Williamson Tobacco

Corporation, its subsidiaries, divisions, and groups, and affiliates controlled by Brown & Williamson Tobacco Corporation ("B&W"), their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. "*American Brands*" means American Brands, Inc., its subsidiaries, divisions and groups, including The American Tobacco Company ("ATC"), their successors and assigns, and their directors, officers, employees, agents, and representatives.

C. "*Commission*" means the Federal Trade Commission.

D. "*Acquisition*" means the acquisition of ATC from American Brands by BAT.

E. The "*Reidsville Assets*" means all real property, fixtures and equipment at ATC's location at North Scales Street, Reidsville, NC, including but not limited to, the following:

1. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;
2. Inventory and storage capacity;
3. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

Provided however that the Reidsville Assets shall not include:

98.50/30 - (MISTY 100's) (3) Modules; Maker/Protos, Packer/Focke
350

120/32 - (MISTY 120's) (2) Modules; Maker/Protos, Packer/Focke
350

120/32 - (CARLTON 120's) (1) Module; Maker/Protos, Packer/Focke
350

Plus supporting equipment dedicated to the above identified brand styles including, but not limited to, plug makers, wrappers if separate, case packers, and routine maintenance parts and specific size parts.

F. "*ATC Value Brands*" means the following brands of cigarettes in the U.S.: Montclair, Riviera, Malibu, Bull Durham, Crowns, and Special Tens.

G. "*ATC Full Revenue Brands*" means the following brands of cigarettes in the U.S.: Tareyton, Silva Thins and Tall.

H. "*ATC Brands*" means the ATC Value Brands together with the ATC Full Revenue Brands.

I. "*B&W Brand*" means the following brand of cigarette in the U.S.: Belair.

J. The term "*Assets*" means the following tangible and intangible assets exclusively relating to the manufacture, distribution and sale of those of the ATC Value Brands, the ATC Full Revenue Brands (excluding any Reidsville Assets) or the B&W Brand actually being divested (collectively the "*Brands*") including, to the extent they exist, but not limited to:

1. The Brand profit and loss statements, Brand contribution statements, and Brand advertising, promotional and marketing spend records for each Brand since January 1, 1990;

2. All trademarks, trade dress, trade secrets, technical information, intellectual property, patents, technology, know-how, tobacco content formulae, designs, specifications, drawings, processes and quality control data exclusively related to any of the Brands;

3. A bill of materials for each of the Brands, consisting of full manufacturing standards and procedures, quality control specifications, specifications for raw materials and components, including lists of authorized sources for materials and components;

4. All dedicated molds and equipment currently in use for each of the Brands;

5. A list of all direct customers who have bought the Brands from ATC or B&W at any time from January 1, 1990, including names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by Brand, to each customer;

6. All current and projected advertising, promotional and marketing information, materials and programs specifically dedicated to the sale and distribution of each of the Brands;

7. All inventories of finished goods, packaging and raw materials uniquely relating to each of the Brands;

8. All names of manufacturers and suppliers under contract with ATC or B&W who produce for, or supply to, ATC or B&W in connection with the manufacture or sale of each of the Brands;

9. A copy of all product testing required by any regulatory authority specific to the Brands from January 1, 1990, including but not limited to tar and nicotine content testing as required by the FTC and all regulatory registrations and correspondence; and

10. All price lists for each of the Brands from January 1, 1990.

II.

It is further ordered, That:

A. BAT and B&W shall divest absolutely and in good faith, within 12 months of the date this order becomes final, the ATC Value Brands Assets. BAT and B&W shall also divest to the proposed acquirer of the ATC Value Brands Assets, the Reidsville Assets and the ATC Full Revenue Brands Assets. BAT and B&W shall also divest:

1. Such additional ancillary assets, formerly of ATC, and effect such arrangements in respect thereof, as are necessary to assure the marketability and the viability of the Reidsville Assets for the manufacture of cigarettes in the United States for sale and consumption in the United States; and

2. Such additional ancillary physical assets and legal rights, formerly of ATC, as are exclusive to those ATC Brands being divested and are necessary to assure the marketability and the viability of those ATC Brands;

Provided however, if the divestiture of only the ATC Value Brands Assets is approved by the Commission pursuant to paragraph II.B., and the divestiture does not include the Reidsville Assets and/or the ATC Full Revenue Brands Assets, the obligations of BAT and B&W to divest under this order shall be satisfied upon the divestiture of the ATC Value Brands Assets.

B. BAT and B&W shall divest hereunder only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture provided herein is to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint and, therefore, if the Reidsville Assets are divested, they shall be used only for the production of cigarettes in the U.S. principally for sale and consumption in the U.S.

C. Pending divestiture as provided in this paragraph II, BAT and B&W shall:

1. Take such actions as are necessary to maintain the viability and marketability of the Reidsville Assets by preventing the destruction, removal, wasting, deterioration, sale, transfer, encumbrance or impairment of any of the Reidsville Assets except for ordinary wear and tear, and

2. Take such actions as are necessary to maintain the viability and marketability of the ATC Brands Assets by preventing the destruction, sale, transfer, encumbrance or impairment of any of the ATC Brands Assets.

D. BAT and B&W shall comply with all terms of the Preservation Agreement, attached to this order and made a part hereof as Appendix I. The Preservation Agreement shall continue in effect until the date this order becomes final.

III.

It is further ordered, That:

A. If BAT and B&W have not divested, absolutely and in good faith and with the Commission's prior approval, as provided in paragraph II.A., the Commission may appoint a trustee to divest the ATC Value Brands Assets, the B&W Brand Assets and the Reidsville Assets. Upon divestiture under this paragraph III, the Reidsville Assets shall be used for the production of cigarettes in the U.S. principally for sale and consumption in the U.S. Provided, however, that if the Commission has not approved or disapproved a proposed divestiture within 120 days of the date the application for such divestiture has been placed on the public record, the running of the divestiture period shall be tolled until the Commission approves or disapproves the divestiture. In the event that 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, BAT and B&W 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 BAT and B&W 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, BAT and B&W shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of BAT and B&W, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If BAT and B&W have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to BAT and B&W of the identity of any proposed trustee, BAT and B&W shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets.

3. Within twenty (20) days after appointment of the trustee, BAT and B&W shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III B. 3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets or to any other relevant information, as the trustee may request, and shall take all reasonable steps to ensure that the confidentiality is maintained of matters and documents so designated by either of the

respondents. BAT and B&W shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. BAT and B&W shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by BAT and B&W shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract (which may include provision for the contract manufacture of cigarettes) that is submitted to the Commission, subject to BAT's and B&W's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II.B. of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by BAT and B&W from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of BAT and B&W, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of BAT and B&W, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission 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 the BAT and B&W, 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 divesting the Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets.

8. BAT and B&W shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses

incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee. BAT and B&W shall be responsible for the defense of any and all claims against the trustee under this subsection and the trustee shall do and omit nothing which may prejudice such defense.

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 or, 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 divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets.

12. The trustee shall report in writing to BAT and B&W and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

13. The trustee shall note, in his or her recommendation to the Commission, whether the proposed acquirer, or any other entity controlling or commonly controlled by the proposed acquirer, has, directly or indirectly, in any jurisdiction in the world and at any time within the last five years, had goods that it manufactured or supplied seized, impounded or destroyed by any authority pursuant to a claim of infringement of any intellectual property or other right over or in respect to those goods.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, BAT and B&W shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged at the time of such acquisition, or within the two years preceding such acquisition, in the

manufacture in the United States of cigarettes for consumption in the United States, or

B. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture, distribution, or sale in the United States of cigarettes.

Provided, however, that this paragraph IV shall not apply to transactions entered into in the ordinary course of business.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until BAT and B&W have fully complied with the provisions of paragraphs II and III of this order, BAT and B&W shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III of this order. BAT and B&W shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. BAT and B&W shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, BAT and B&W shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraph IV of this order.

VI.

It is further ordered, That BAT and B&W shall notify the Commission at least thirty (30) days prior to any proposed change in the corporations, such as dissolution, assignment, sale resulting in the

emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporations, that in each case may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, BAT and B&W shall permit any duly authorized representative of the Commission:

A. Upon written notice to counsel, 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 BAT and B&W relating to any matters contained in this order; and

B. Upon five days' written notice to counsel and without restraint or interference from BAT and B&W, to interview officers, directors, or employees of BAT and B&W, who may have counsel present.

Commissioner Varney not participating.

APPENDIX I

PRESERVATION AGREEMENT

This Preservation Agreement is by and between B.A.T Industries p.l.c., a public limited company incorporated under the laws of England, with its headquarters and principal place of business located at Windsor House, 50 Victoria Street, London, England, SW1H 0NL ("BAT"), Brown & Williamson Tobacco Corporation, a corporation incorporated under the laws of the State of Delaware with its headquarters and principal place of business located at 1500 Brown & Williamson Tower, P.O. Box 35090, Louisville, Kentucky ("B&W"), and the Federal Trade Commission, an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

PREMISES FOR AGREEMENT

Whereas, BAT, pursuant to an agreement dated April 26, 1994, agreed to purchase substantially all of the outstanding stock of the American Tobacco Company ("ATC"), a wholly owned subsidiary of American Brands, Inc.; and

Whereas, the Commission has reason to believe that the agreement would violate Section 5 of the Federal Trade Commission Act, and that, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, statutes enforced by the Commission, and the Commission has issued its administrative complaint challenging the agreement; and

Whereas, if the parties accept the agreement containing consent order ("consent agreement"), the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently withdraw such acceptance pursuant to the provisions of Section 3.25(f) of the Commission's Rules; and

Whereas, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Reidsville Assets and the ATC Brands Assets during the period prior to final acceptance of the order by the Commission (after the 60-day comment period), any divestiture resulting from any proceeding challenging the legality of the acquisition might not be possible, or might produce a less than effective remedy; and

Whereas, the Commission is concerned that if the acquisition is consummated, it will be necessary to preserve the continued viability and marketability of the Reidsville Assets and the ATC Brands Assets., as defined in the consent agreement; and

Whereas, the purpose of this Preservation Agreement and of the consent agreement is to preserve the Reidsville Assets and the ATC Brands Assets until the date this order becomes final, in order to remedy any anticompetitive effects of the acquisition; and

Whereas, BAT's and B&W's entering into this Preservation Agreement shall in no way be construed as an admission by BAT and B&W that the acquisition is anticompetitive or illegal; and

Whereas, BAT and B&W understand that no act or transaction contemplated by this Preservation Agreement shall be deemed immune or exempt from the provisions of the antitrust laws, or the Federal Trade Commission Act by reason of anything contained in this Preservation Agreement;

Now, therefore, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent agreement, it will not seek further relief from the parties with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this Preservation Agreement, and the consent agreement to which this Preservation Agreement, is annexed and made a part thereof, and the final order in this proceeding, and, in the event the required divestiture is not accomplished, to appoint a trustee to seek the divestiture of the Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets as provided in the consent agreement, the parties agree as follows:

TERMS OF AGREEMENT

1. BAT and B&W agree to execute, and upon its issuance, to be bound by the consent agreement.

2. BAT will be free to close the acquisition with American Brands immediately after the Commission's approval of the consent agreement for placement on the public record for comment.

3. BAT and B&W agree that from the date this Preservation Agreement is signed by BAT and B&W until the earliest of the dates listed in subparagraphs 3.a and 3.b they will comply with the provisions of this Preservation Agreement:

a. Three business days after the Commission withdraws its acceptance of the consent agreement pursuant to the provisions of Section 3.25(f) of the Commission's Rules; or

b. The day the order becomes final.

4. From the time BAT and B&W sign this Preservation Agreement until the date the order becomes final, BAT and B&W shall:

a. Take such actions as are necessary to maintain the viability and marketability of the Reidsville Assets by preventing the destruction, removal, wasting, deterioration, sale, transfer, encumbrance or impairment of any of the Reidsville Assets except for ordinary wear and tear, and

b. Take such actions as are necessary to maintain the viability and marketability of the ATC Brands Assets by preventing the

destruction, sale, transfer, encumbrance or impairment of any of the ATC Brands Assets.

5. BAT and B&W also waive all rights to contest the validity of this agreement.

6. For the purpose of determining or securing compliance with this agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to counsel for BAT or B&W, BAT or B&W shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of BAT or B&W, 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 BAT or B&W relating to compliance with this agreement; and

b. Upon five (5) days' notice to BAT or B&W and without restraint or interference from them, to interview officers or employees of BAT or B&W, who may have counsel present, regarding any such matters.

7. This agreement shall not be binding on the Commission until approved by the Commission.

IN THE MATTER OF

BOSTON SCIENTIFIC CORPORATION

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-3573. Complaint, April 28, 1995--Decision, April 28, 1995

This consent order permits, among other things, Boston Scientific Corporation, a Massachusetts-based manufacturer and marketer of catheters, to proceed with the proposed acquisitions of Cardiovascular Imaging Systems, Inc., and SCIMED Life Systems, Inc., but requires the respondent to grant a non-exclusive license to a specified package of patents and technology related to the manufacture, production and sale of intravascular ultrasound (IVUS) imaging catheters to the Hewlett-Packard Company or another Commission-approved licensee. In addition, the consent order requires the respondent to obtain Commission approval, for ten years, before acquiring an interest greater than one percent in a company engaged in researching, developing or manufacturing IVUS catheters for sale in the United States.

Appearances

For the Commission: *Howard Morse* and *Robert S. Tovsky*.

For the respondent: *Bruce Montgomery, Arnold & Porter*,
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Boston Scientific Corporation (Boston Scientific) has entered into agreements with Cardiovascular Imaging Systems, Inc. (CVIS), and with SCIMED Life Systems, Inc. (SCIMED), whereby Boston Scientific will acquire all of the outstanding shares of both CVIS and SCIMED, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisitions, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and having reason to believe that Boston Scientific has entered into such agreements in restraint of trade in violation of