

IN THE MATTER OF
MAHLE GMBH, 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-3746. Complaint, June 4, 1997--Decision, June 4, 1997

This consent order requires Mahle, among other things, to divest, within 10 days, Metal Leve's U.S. piston business, which includes plants in Orangeburg and Sumter, South Carolina, and a research and development center in Ann Arbor, Michigan, as well as technology outside the United States which supports the business of manufacturing and selling pistons in the United States.

Appearances

For the Commission: *Howard Morse, Morris Bloom and William Baer.*

For the respondents: *Michael Sohn, Arnold & Porter, Washington, D.C. and Jay Herbst, Driggers, Schultz, Herbst & Patterson, Troy, MI.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mahle GmbH, the parent company of Mahle, Inc., has acquired more than 50 percent of the voting securities of Metal Leve, S.A., the parent company of Metal Leve, Inc., in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and in violation of 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 as follows:

I. THE RESPONDENTS

Mahle GmbH and Mahle, Inc.

1. Respondent Mahle GmbH is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Pragstrasse 26-46,

D-70376 Stuttgart, Germany. Mahle GmbH has had annual worldwide sales of approximately \$1.7 billion.

2. Respondent Mahle, Inc., a majority-owned subsidiary of Mahle GmbH, is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1 Mahle Drive, Morristown, Tennessee. Mahle, Inc. has had annual U.S. sales of approximately \$135 million.

3. Mahle GmbH, which operates in the United States through Mahle, Inc., manufactures and sells pistons for internal combustion engines and is a leading producer of articulated pistons and large bore two-piece pistons. Mahle, Inc. produces pistons in the United States at plants located in Tennessee.

4. At all times relevant herein, Mahle GmbH and Mahle, Inc. (collectively, "Mahle") have been, and are now, corporations as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, Mahle GmbH and Mahle, Inc. have been, and are now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

Metal Leve, S.A. and Metal Leve, Inc.

5. Respondent Metal Leve, S.A. is a corporation organized, existing and doing business under and by virtue of the laws of Brazil, with its office and principal place of business located at Rua Brasilio Luz 535, Sao Paulo SP 04746-901, Brazil. Metal Leve, S.A. has had annual worldwide sales of approximately \$315 million.

6. Respondent Metal Leve, Inc., a wholly-owned subsidiary of Metal Leve, S.A., is a corporation organized, existing and doing business under and by virtue of the laws of Michigan, with its office and principal place of business located at 560 Avis Drive, Ann Arbor, Michigan. Metal Leve, Inc. has had annual U.S. sales of more than \$60 million.

7. Metal Leve, S.A., which operates in the United States through Metal Leve, Inc., manufactures and sells pistons, pins, bearings, bushings, and thrust washers for internal combustion engines and is a leading producer of articulated pistons and large bore two-piece pistons. Metal Leve, Inc. produces pistons in the United States at two plants in South Carolina, and conducts research and development at a facility in Michigan.

8. At all times relevant herein, Metal Leve, S.A. and Metal Leve, Inc. (collectively, "Metal Leve") have been, and are now, corporations as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, Mahle GmbH and Mahle, Inc. have been, and are now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

II. THE ACQUISITION

9. On or about June 26, 1996, Mahle GmbH acquired more than 50 percent of the voting securities of Metal Leve, S.A. (the "Acquisition"), for approximately \$40 million.

III. THE RELEVANT MARKETS

10. Research, development, design, production and sale of articulated pistons constitute one relevant line of commerce within which to analyze the effect of the Acquisition on competition. A piston is an engine component that fits snugly into the hollow of an engine cylinder and moves back and forth under pressure generated by combustion within the cylinder. In a reciprocating engine, pistons are connected to piston rods which turn the crankshaft to generate the power that makes the engine turn. Each engine cylinder contains a separate piston. Articulated pistons are two-piece pistons with a crown made of steel and a skirt made of aluminum, in which the crown and skirt are able to articulate; that is, to move independently of each other. The crown and skirt are joined together by means of a piston pin. Articulated pistons of up to 150 millimeter in diameter are used in engine applications, such as Class 8 diesel truck engines, which require pistons that can withstand high temperatures and pressures to maintain engine performance while meeting increasingly stringent government emissions requirements. There are no economic substitutes for these articulated pistons.

11. Research, development, design, production and sale of large bore two-piece pistons constitute another relevant line of commerce within which to analyze the effect of the Acquisition on competition. Large bore two-piece pistons are pistons with a crown made of steel and a skirt made of aluminum in bore sizes ranging from 150 to 300 millimeters and higher. The crown and skirt of a large bore two-piece piston may be separate pieces joined together by the piston pin, as in

an articulated piston, or may be permanently joined together, as in a composite piston. Large bore two-piece pistons are used in high output diesel and natural gas engines, such as new generation locomotive engines and stationary power generators as well as engines for various marine and industrial applications. There are no economic substitutes for large bore two-piece pistons.

12. The United States is one relevant geographic area within which to analyze the likely effect of the Acquisition on competition in articulated pistons. Several factors limit the competitive significance of foreign-made articulated pistons in the United States. Articulated pistons are designed specifically for the U.S. market to meet technical requirements largely attributable to pollution control regulations. In addition, relatively high manufacturing costs in Europe make articulated pistons manufactured overseas uncompetitive in the United States. Moreover, engine manufacturers' use of just-in-time inventory management practices creates a preference for articulated piston suppliers located in the United States. As a result, articulated pistons consumed in the United States are manufactured in the United States, with the exception of a small quantity of specialized articulated pistons manufactured by Mahle outside the United States.

13. The relevant geographic area within which to analyze the likely effect of the Acquisition on competition in the large bore two-piece pistons may be worldwide. There are significant imports of large bore two-piece pistons into the United States from Europe. Factors that limit the competitive significance of imported articulated pistons in the United States do not have a significant impact on large bore two-piece pistons imports, in part because large bore two-piece pistons are used in engines that are produced in smaller quantities.

IV. CONCENTRATION

14. Prior to the acquisition, Mahle had more than a 50 percent share and Metal Leve had nearly a 45 percent share of United States sales of articulated pistons, producing a combined market share of more than 95 percent. The United States articulated piston market is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The Acquisition increased the HHI by more than 4,500 points to nearly 9,500 points. The only other firm currently selling articulated pistons in the market is a weak competitor that has been losing business to Mahle and Metal Leve.

15. The market for two-piece large bore pistons is also highly concentrated. There are currently only four producers of two-piece large bore pistons in the world. Mahle and one other firm dominate the worldwide large bore two-piece piston market, while Metal Leve has made sales and is aggressively bidding in the market.

V. ENTRY CONDITIONS

16. Entry into the articulated piston or large bore two-piece piston markets would not be timely, likely, or sufficient to deter or offset the adverse effects of the Acquisition on competition, because an entrant would have to develop manufacturing expertise, satisfy time-consuming customer qualification procedures, and acquire manufacturing equipment at a significant sunk cost. Engine manufacturers tend to be risk averse in choosing piston suppliers, because the cost of a piston tends to be small relative to the costs associated with poor piston performance or piston failure.

VI. EFFECT OF THE PROPOSED MERGER ON COMPETITION

17. The Acquisition will substantially lessen competition or tend to create a monopoly in the United States articulated piston market, because, among other things:

- a. It increases concentration substantially in a highly concentrated market;
- b. It eliminates actual, direct, substantial, and potentially increased competition between Mahle and Metal Leve;
- c. It creates a monopoly or near monopoly;
- d. It eliminates competition between the two closest substitutes among differentiated products in the articulated piston market;
- e. It facilitates the unilateral exercise of market power by the merged firm;
- f. It will likely result in increased prices for articulated pistons; and
- g. It will likely result in reduced innovation as a result of delayed or reduced product development.

18. The Acquisition will substantially lessen competition or tend to create a monopoly in the United States large bore two-piece piston market, because, among other things:

- a. It increases concentration substantially in a highly concentrated market;
- b. It eliminates actual, direct, substantial, and potentially increased competition between Mahle and Metal Leve;
- c. It eliminates a maverick competitor which has introduced increased competition in the market;
- d. It facilitates coordinated interaction among sellers of large bore two-piece pistons in the United States;
- e. It will likely result in increased prices for large bore two-piece pistons and
- f. It may allow the merged firm to reduce innovation by delaying or reducing product development.

VII. VIOLATIONS CHARGED

19. The Acquisition by Mahle GmbH of more than 50 percent of the voting securities of Metal Leve, S.A., described in paragraph nine, violates 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.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Mahle GmbH, the parent corporation of Mahle, Inc., of more than 50 percent of the voting securities of Metal Leve, S.A., the parent corporation of Metal Leve, Inc., and 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 a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; 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 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 a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered a comment filed thereafter, and having modified paragraph II.A in one respect, 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 Mahle GmbH is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Pragstrasse 26-46, D-70376 Stuttgart, Germany.

2. Respondent Mahle, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1 Mahle Drive, Morristown, Tennessee.

3. Respondent Metal Leve, S.A. is a corporation organized, existing and doing business under and by virtue of the laws of Brazil, with its office and principal place of business located at Rua Brasilio Luz 535, Sao Paulo, SP 04746-901, Brazil.

4. Respondent Metal Leve, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Michigan, with its office and principal place of business located at 560 Avis Drive, Ann Arbor, Michigan.

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

B. "*Respondents*" means Mahle GmbH, Mahle, Inc., Metal Leve, S.A., and Metal Leve, Inc., their directors, officers, employees, agents

and representatives, predecessors, successors and assigns; their subsidiaries, divisions, and groups and affiliates controlled by Mahle GmbH, Mahle, Inc., Metal Leve, S.A., and Metal Leve, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Mahle GmbH*" means Mahle GmbH, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Mahle GmbH, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

D. "*Mahle, Inc.*" means Mahle, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Mahle, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

E. "*Metal Leve, S.A.*" means Metal Leve, S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Metal Leve, S.A., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

F. "*Metal Leve, Inc.*" means Metal Leve, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Metal Leve, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

G. "*Articulated piston*" means any two-piece piston consisting of a separate crown and skirt, as well as each individual piece of an articulated piston, including, but not limited to, forgings, castings, and finished pistons.

H. "*Other diesel piston*" means any type of diesel piston, other than an articulated piston, including, but not limited to, forgings, castings and finished pistons.

I. "*Other piston*" means any other diesel piston or other type of piston, other than an articulated piston, including, but not limited to, castings and finished pistons.

J. "*Metal Leve, Inc. Business*" means:

1. All assets, properties, business and goodwill, tangible and intangible, of Metal Leve, Inc., including, but not limited to:

a. The manufacturing facilities located at Orangeburg and Sumter, South Carolina,

b. The research and development facility and corporate offices located at Ann Arbor, Michigan; and

2. All assets, properties, business and goodwill, tangible and intangible, of Metal Leve, S.A. worldwide relating to: (i) the research, development, manufacture, or sale of articulated pistons or other pistons manufactured in the United States, (ii) the research, development, manufacture, or sale of articulated pistons anywhere in the world, and (iii) the research, development, manufacture or sale of other diesel pistons sold in the United States; including, without limitation, the following:

a. All machinery, fixtures, equipment, tools and other tangible personal property, but excluding machinery, fixtures, and equipment located outside the United States related to the manufacture of other diesel pistons sold in the United States;

b. All rights, titles and interests in and to owned or leased real property together with appurtenances, licenses and permits, but excluding real property located outside the United States related to the manufacture of other diesel pistons sold in the United States or to the manufacture of articulated pistons sold in Brazil;

c. All inventory;

d. All customer lists, distribution agreements, vendor lists, catalogs, sales promotion literature, and advertising materials;

e. All research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to, manufacturing know-how), specifications, designs, drawings, processes, quality control data, and formulas, as well as licenses thereto, relating to the manufacture or sale of articulated pistons;

f. All Metal Leve, S.A. research and development projects for Metal Leve, Inc., including, but not limited to, all research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to, manufacturing know-how), specifications, designs, drawings, processes, quality control data, and formulas, as well as licenses

thereto, relating to all such research and development projects, including, but not limited to, the following: (i) lightweight articulated ppt, (ii) oxidation resistant steels, (iii) iron aluminide, (iv) steel material evolution, (v) thermal barrier steel crown coatings, open versus closed articulated gallery, (vi) analytical software development, (vii) rapid solidification aluminum alloy, and (viii) bowl rim life prediction.

g. Rights that are equal to the rights held by Metal Leve, S.A. to all research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to manufacturing know-how), specifications, designs, drawings, processes, quality control data, and formulas, as well as licenses thereto, relating to the manufacture or sale of other diesel pistons sold in the United States or other pistons manufactured in the United States;

h. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

i. All rights under warranties and guarantees, express or implied;

j. All books, records, and files; and

k. All items of prepaid expense.

Provided, that this definition of the Metal Leve, Inc. Business does not include research and development conducted after the divestiture required by this order.

K. "*Metal Leve, S.A. Piston Business*" means all assets, properties, business and goodwill, tangible and intangible, relating to the manufacture or sale of articulated pistons and other pistons by Metal Leve, S.A. or Metal Leve, Inc. anywhere in the world, including, without limitation, the following:

1. The Metal Leve, Inc. Business, plus all Metal Leve S.A. assets anywhere in the world relating to research, development, manufacture or sale of articulated pistons or other pistons, including, but not limited to:

a. The manufacturing facilities located at Santo Amaro and Limeira in Brazil,

b. The research and development facility located at Santo Amaro in Brazil;

2. All trademarks;

3. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

4. Inventory and storage capacity;

5. All customer lists, distribution agreements, vendor lists, catalogs, sales promotion literature, and advertising materials;

6. Exclusive rights to all research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to manufacturing know-how), specifications, designs, drawings, processes, quality control data, and formulas relating to the manufacture of articulated pistons or other pistons by Metal Leve;

7. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

9. All rights under warranties and guarantees, express or implied;

10. All books, records, and files; and

11. All items of prepaid expense.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, no later than ten (10) days after the date on which this order becomes final, the Metal Leve, Inc. Business as a fully viable and competitive ongoing business. Provided, however, that Metal Leve S.A. may retain a non-exclusive licence from the acquirer of the Metal Leve, Inc. Business to intellectual property for the sole purpose of producing for Volvo Brazil and Volvo Sweden service part number

P-2067 in Brazil, and may retain the right to supply Volvo Brazil and Volvo Sweden service part number P-2067.

B. Respondents shall divest the Metal Leve, Inc. Business only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Metal Leve, Inc. Business is to ensure the continuation of the Metal Leve, Inc. Business as an ongoing, viable, and competitive operation engaged in the same business of researching, developing, manufacturing, and selling articulated pistons and other pistons, in which the Metal Leve, Inc. Business is engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. A condition of approval by the Commission of the divestiture shall be the submission by the acquirer to the Commission of an acceptable five-year business plan for the Metal Leve, Inc. Business demonstrating that the acquirer will establish the Metal Leve, Inc. Business as a viable and competitive business free of all continuing relationships with respondents in the research, development, manufacture or sale of articulated pistons and other pistons, except as set forth in paragraph II.D, below.

D. On reasonable notice to Metal Leve, S.A. from an approved acquirer, Metal Leve, S.A. shall provide technical assistance and know-how to the acquirer with respect to the Metal Leve, Inc. Business. Such technical assistance shall include, without limitation, consultation with knowledgeable employees of Metal Leve, S.A. and training at the manufacturing facilities of Metal Leve, S.A. Metal Leve, S.A. may charge the reasonable costs incurred in providing such technical assistance, including reimbursement (commensurate with the salary and benefits of Metal Leve, S.A. personnel involved) for the time plus expenses of Metal Leve, S.A. personnel providing the technical assistance. Metal Leve, S.A. shall continue to provide such technical assistance until the acquirer of the Metal Leve, Inc. Business is satisfied that it is capable of producing, and of developing for production, commercially saleable articulated pistons and other pistons utilizing the assets of the Metal Leve, Inc. Business; provided, however, Metal Leve, S.A. shall not be required to continue providing such technical assistance and training for more than two (2) years after the date on which the divestiture required by this order is made.

E. Pending divestiture of the Metal Leve, Inc. Business, respondents shall take such actions as are reasonably necessary to maintain the viability, competitiveness, and marketability of the Metal Leve, Inc. Business and the Metal Leve, S.A. Piston Business and to prevent the destruction, removal, wasting, deterioration, or impairment of the Metal Leve, Inc. Business and the Metal Leve, S.A. Piston Business.

F. Respondents shall comply with all terms of the Agreement to Hold Separate signed by the respondents and accepted by the Commission on August 30, 1996, which is attached to this order and made a part hereof, and which shall continue in effect until such time as respondents have accomplished the divestiture required by this order.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Metal Leve, Inc. Business within ten (10) days of the date this order becomes final, then the Commission may appoint a trustee to divest the Metal Leve, Inc. Business. The trustee shall have all rights and powers necessary to permit the trustee to effect the divestiture of the Metal Leve, Inc. Business and to add to the Metal Leve, Inc. Business all or any part of the Metal Leve, S.A. Piston Business in order to assure the viability, competitiveness, and marketability of the Metal Leve, Inc. Business so as to expeditiously accomplish the remedial purposes of this order. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), 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 (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute, for any failure by any of the 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, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has 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 respondents of the identity of any proposed trustee, respondents 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 Metal Leve, Inc. Business and shall have the power to add to the Metal Leve, Inc. Business all or any part of the Metal Leve, S.A. Piston Business in order to accomplish the divestiture required by this order.

3. Within ten (10) days after appointment of the trustee, respondents 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 of the Metal Leve, Inc. Business, to add to the Metal Leve, Inc. Business all or any part of the Metal Leve, S.A. Piston Business, and to divest such additional ancillary assets of Metal Leve S.A. and effect such additional arrangements, in order to assure the viability, competitiveness, and marketability of the Metal Leve, Inc. Business so as to expeditiously accomplish the remedial purposes of this order.

4. The trustee shall have twelve (12) months to accomplish the divestiture required by this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) 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 for no more than two (2) additional terms of six (6) months each.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Metal Leve, Inc. Business or the Metal Leve, S.A. Piston Business, or to any other

relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by the respondent shall extend the time for divestiture under this paragraph III in an amount equal to the delay, as determined by the Commission (or, in the case of 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 that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner, and to the acquirer or acquirers, as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission approves more than one such acquiring entity, then the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

7. 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 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 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 (based on sales price) contingent on the trustee's accomplishing the divestiture required by this order.

8. Respondents 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, recklessness, willful or wanton acts, or bad faith by the trustee.

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 Metal Leve, Inc. Business or the Metal Leve, S.A. Piston Business.

12. The trustee shall report in writing to respondents and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without prior notification to the Commission, directly or indirectly:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in the sale of articulated pistons or other pistons in the United States within the year preceding such acquisition; provided, however, an acquisition of securities will be exempt from the requirements of this paragraph if, after such acquisition of securities, respondents will hold cumulatively no more than two (2) percent of the outstanding shares of any class of securities of such person; or

B. Enter into any agreement or other arrangement to transfer direct or indirect ownership, management, or control of any assets used for or previously used for (and still suitable for use for) the manufacture or sale of articulated pistons or other pistons in the United States; provided, however, prior notice shall not be necessary for: the acquisition of assets in the ordinary course of business or the acquisition of assets valued at less than \$100,000 from the same person within any twelve (12) month period; or for transfers to or from manufacturers of diesel engines.

The prior notifications required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that: no filing fee will be required for any such notification; notification shall be filed with the Secretary of the Commission and a copy shall be delivered to the Bureau of Competition; notification need not be made to the United States Department of Justice; and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to the consummation of any such transaction (hereinafter referred to as the "initial phase of the waiting period"). If, within the initial phase of the waiting period, the Commission or its staff makes a written request for additional information and documentary material, respondents shall not consummate the transaction until at least twenty (20) days after complying with such request for additional information and documentary material. Early termination of the waiting periods in this paragraph may, where appropriate, be granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, and prior notification shall not be required by this paragraph for acquisitions by respondents Mahle GmbH or Mahle, Inc. of Metal Leve, S.A. stock or assets.

V.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondents intend to comply, are complying, and have complied with paragraphs II and III of this order. Respondents 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 that have contacted

respondents or that have been contacted by respondents. Respondents 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.

VI.

It is further ordered, That one (1) year 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 such other times as the Commission may require, respondents 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.

VII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in Mahle GmbH, Mahle, Inc., Metal Leve, S.A., or Metal Leve, Inc. that may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and respondents shall permit any 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 matters contained in this order; and

B. Upon five (5) days' notice to respondents, and without restraint or interference, to interview officers, employees, or agents of respondents.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among Mahle GmbH, a German corporation and an entity included within its "ultimate parent entity" as that term is defined in 16 CFR 801.1(a)(3), MABEG, e.V., with its principal office and place of business at Pragstrasse 26-46, D-70376 Stuttgart, Germany; Mahle Inc., a corporation organized and existing under the laws of Delaware and a wholly-owned subsidiary of Mahle GmbH, with its principal office and place of business at 1 Mahle Drive, Morristown, Tennessee, (collectively referred to as "Mahle"); Metal Leve, S.A., a Brazilian corporation with its principal office and place of business at Rua Brasilo Luz 535, Sao Paulo, SP 04746-901, Brazil; Metal Leve, Inc., a corporation and an indirect wholly-owned subsidiary of Metal Leve S.A. organized and existing under the laws of Michigan, with its principal office and place of business at 560 Avis Drive, Ann Arbor, Michigan (collectively referred to as "Metal Leve"); and the Federal Trade Commission (the "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.* (collectively, the "Parties").

Whereas, on June 11, 1996, Mahle entered into a Purchase Agreement to acquire 50.1% of the voting shares of Metal Leve S.A. (hereinafter the "Acquisition"); and

Whereas, this Acquisition was subject to the prior notification requirements of the Hart Scott Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a ("HSR Act"); and

Whereas, on or before June 26, 1996, Mahle consummated the Acquisition without MABEG, e.V. or Mahle filing notification with the Commission or the Department of Justice pursuant to the HSR Act, and without observing the waiting periods required by that Act; and

Whereas, on July 22, 1996, Mahle, on behalf of MABEG, e.V. and Metal Leve submitted filings pursuant to the HSR Act; and

Whereas, Mahle and Metal Leve produce pistons for sale in the United States; and

Whereas, the Commission is now investigating the Acquisition to determine if it violates Section 7 of the Clayton Act, 15 U.S.C. 18;

Section 5 of the FTC Act, 15 U.S.C. 45; or any other statute enforced by the Commission; and

Whereas, the Commission is concerned that if an understanding is not reached, further changes in the operation and organization of Metal Leve by Mahle or its nominees during the period prior to the final resolution of the Commission's investigation of the Acquisition, may preclude an effective remedy; and

Whereas, the Commission is concerned that it is necessary to preserve the Commission's ability to seek an effective remedy and the Commission's right to seek to restore Metal Leve as a viable competitor; and

Whereas, the purpose of this Agreement is to:

(i) Preserve Mahle's and Metal Leve's piston businesses and other businesses as viable independent businesses pending the Commission's investigation, and

(ii) Prevent any anticompetitive effects resulting from the Acquisition; and

Whereas, Mahle and Metal Leve entering into this Agreement shall in no way be construed as an admission by Mahle or Metal Leve that the Acquisition is in violation of Section 7 of the Clayton Act or Section 5 of the FTC Act; and

Whereas, Mahle and Metal Leve understand that this Agreement shall in no way limit civil penalties of up to \$10,000 per day under Section 7A(g)(1) of the Clayton Act for failing to file notifications and for continuing to hold stock in violation of the HSR Act; and

Whereas, Mahle and Metal Leve understand that no act or transaction contemplated by this 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 Agreement; and

Whereas, the Commission has not yet determined whether the Acquisition will be challenged under any statute it enforces.

Now, therefore, Mahle and Metal Leve agree, in consideration of the Commission's agreement that the Commission will not seek further relief from Mahle or Metal Leve under Section 7A(g)(2) of the Clayton Act, 15 U.S.C. 18(A)(g)(2), except that the Commission may exercise any and all rights to enforce this Agreement, and, in the event that the Parties do not comply with the terms of this Agreement, to seek further relief, as follows:

1. Mahle and Metal Leve agree to execute and be bound by this Agreement.

2. Mahle and Metal Leve agree that from the date they sign this Agreement until the earliest of the dates listed in subparagraphs 2.a - 2.b, they will comply with the provisions of paragraph 3 of this Agreement:

a. The expiration of all waiting periods under the HSR Act with respect to the Acquisition;

b. Such time as specified in any Consent Agreement accepted by the Commission in resolution of antitrust concerns raised by the Acquisition.

3. Mahle will hold Metal Leve separate and apart on the following terms and conditions:

a. Metal Leve shall be held separate and apart and shall be operated independently of Mahle (meaning here and hereinafter, Mahle excluding Metal Leve) except to the extent that Mahle must exercise direction and control over Metal Leve to assure compliance with this Agreement;

b. Mahle shall place its Metal Leve shares in trust pending the outcome of the Commission's investigation, and shall not vote those shares or in any other manner exercise control over Metal Leve;

c. Mahle shall not exercise direction or control over, or influence directly or indirectly, Metal Leve or any of its operations or businesses, and Metal Leve shall not receive direction from Mahle;

d. Mahle and Metal Leve shall maintain the viability and marketability of Metal Leve as a separate entity and shall not reorganize its operations in any way that would reduce the value or competitiveness of Metal Leve or Metal Leve Inc.'s business;

e. Mahle shall not permit any director, officer, employee, consultant or agent of Mahle, or any person affiliated with or associated with Mahle, to also be a director, officer, or employee of Metal Leve;

f. No Mahle employees, consultants, or agents shall consult with, advise on, or participate in any manner in the planning or conduct of Metal Leve operations;

g. Except as required by law, and except to the extent necessary information is exchanged among outside counsel in defending investigations or litigation, Metal Leve shall not give and Mahle shall

not receive or have access to, or use of, any of Metal Leve's confidential information and Mahle shall not give and Metal Leve shall not receive or have access to, or use of, any of Mahle's confidential information, except as such information would be available to Mahle or Metal Leve in the normal course of business if the Acquisition had not taken place ("confidential information," as used herein, means competitively sensitive or proprietary information and includes but is not limited to financial information, customer lists, price lists, prices, engineering, manufacturing, and marketing methods, patents, technologies, processes, research and development or other trade secrets);

h. Mahle shall not change the composition of the Board of Directors or any officers of Metal Leve; and

i. Metal Leve shall not pay to Mahle, nor shall Mahle accept from Metal Leve any dividends.

4. Should the Commission or the United States institute any action under this Agreement, the FTC Act, or the Clayton Act, arising from this Acquisition, Mahle and Metal Leve waive any objection based on lack of personal jurisdiction. Mahle and Metal Leve appoint the attorneys identified below to accept service of process in any such action.

5. Should the Commission seek in a proceeding to compel Mahle to divest itself of Metal Leve or to compel Mahle to divest any assets or businesses of Metal Leve, or seek any other injunctive or equitable relief, neither Mahle nor Metal Leve shall raise any objection based upon this Agreement; and should the United States seek civil penalties under the HSR Act, neither Mahle nor Metal Leve shall raise any objection based on this Agreement. Mahle and Metal Leve also waive the right 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 Mahle and Metal Leve made to their principal offices, Mahle and Metal Leve shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Mahle or Metal Leve 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 Mahle or Metal Leve relating to compliance with this Agreement;

b. Upon five (5) days' notice to Mahle and Metal Leve, and without restraint or interference from them, to interview their officers or employees, who may have counsel present, regarding any such matters.

7. For the purpose of determining or securing compliance with this Agreement:

a. Metal Leve shall provide the Commission with reports every 30 days following the signing of this Agreement by Metal Leve which describe each change in organization, production, investment, sales, or research and development conducted by Metal Leve or its U.S. subsidiary;

i. Since June 11, 1996 and

ii. Since the date of the last report filed under this subparagraph;
and

b. Mahle shall provide the Commission with reports every 30 days following the signing of this Agreement which describe its compliance with this Agreement.

8. The Parties agree to publicize this Agreement by taking the following actions:

a. The Commission making public this Agreement after acceptance by the Commission;

b. Mahle and Metal Leve promptly providing copies of this Agreement to all of Mahle and Metal Leve's officers and directors;
and

c. Mahle and Metal Leve promptly providing notice of this Agreement to all Mahle and Metal Leve employees in the United States and to all U.S. pistons customers.

9. This Agreement shall be effective and binding immediately upon signing by Mahle and Metal Leve, but is subject to acceptance of the Commission.

Complaint

123 F.T.C.

IN THE MATTER OF

AMERIFIT, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3747. Complaint, June 16, 1997--Decision, June 16, 1997*

This consent order requires, among other things, the Connecticut-based marketer of diet supplements to pay \$100,000 for disgorgement, and prohibits the use of the name "Fat Burners" unless it is part of the trade name, "Fat Burners Diet, Exercise and Supplement System," and that the material containing the name includes the specified disclosure statements clearly and prominently. The consent order also requires the respondent to possess scientific substantiation for any claim that a food, drug or dietary supplement will cause weight loss or reduce body fat.

Appearances

For the Commission: *Jeffrey Feinstein.*

For the respondent: *Nancy Buc and Phillip Katz, Buc & Bearsdley, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that AmeriFIT, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent AmeriFIT, Inc., is a Delaware corporation with its principal office or place of business at 166 Highland Park Drive, Bloomfield, Connecticut.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold and distributed products to the public, including "Fat Burners," "Fast Burners," "Improved Formula Fat Burners," and "Extra Strength Fat Burners" (collectively, "the Fat Burners products"). These products are "foods" and/or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for the products referred to