

IN THE MATTER OF

AMERICAN CYANAMID COMPANY

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

Docket C-3739. Complaint, May 12, 1997--Decision, May 12, 1997

This consent order prohibits, among other things, a New Jersey-based distributor of agricultural herbicides and insecticides from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for their products, and from agreeing with its dealers to control or maintain resale prices. The consent order requires the respondent, for three years, to post clearly and conspicuously a statement, on any price list, advertising or catalogue that contains a suggested resale price, that dealers remain free to determine on their own the prices at which they sell the company's products. In addition, the respondent must mail a letter containing this statement to all current dealers, distributors, officers, management employees and sales representatives.

Appearances

For the Commission: *Michael Antalics and Sarah O. Allen.*

For the respondent: *Daniel K. Mayers, Wilmer, Cutler & Pickering, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Cyanamid Company, a corporation (hereinafter "Am Cy" or "respondent"), has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent American Cyanamid Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business at One Campus Drive, Parsippany, New Jersey. Respondent is a wholly-owned subsidiary of American Home Products Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Five Giralda Farms, Madison, New Jersey.

PAR. 2. Respondent is now, and for some time has been, engaged in the offering for sale, sale, and distribution of crop protection chemicals, such as herbicides and insecticides used in commercial agriculture, to over 2500 retail dealers located throughout the United States. In 1995, Am Cy sold at retail more than \$1 billion of its crop protection chemicals.

PAR. 3. In 1995, Am Cy was the market share leader in three domestic crop protection chemical markets: soybean broadleaf herbicides, soybean grass herbicides, and corn soil insecticides. In addition, Am Cy had the second-largest share of the domestic cotton grass herbicide market.

PAR. 4. Respondent's acts and practices, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. For approximately five years beginning in 1989, Am Cy operated two rebate programs for its retail dealers. From 1989-1992, the plan was called the "Cash Reward on Performance" ("C.R.O.P.") program, and was renamed the "Award for Performance Excellence" ("A.P.E.X.") program in late 1992 through August 1995. Pursuant to the written agreements respondent entered into with its dealers under these programs, Am Cy offered to pay the dealers substantial rebates on each sale if the dealers sold Am Cy's crop protection chemicals at or above specified minimum resale prices. The specified minimum resale prices were equal to the wholesale prices paid by the dealers for the crop protection chemical products. Under the terms of the agreements, a dealer was not entitled to, and did not receive, any rebate on sales made below the specified minimum price; therefore, sales below Am Cy's specified minimum resale prices were made at a loss to the dealer. The dealers overwhelmingly accepted Am Cy's offer by selling at or above the specified minimum prices.

PAR. 6. Am Cy also included certain nonprice performance criteria in its C.R.O.P. and A.P.E.X. programs that could increase the amount of the rebate, but compliance with those performance criteria was neither necessary nor, by itself, sufficient to obtain rebates. For example, if the dealer did not meet any of Am Cy's performance criteria, but sold the product at or above the specified minimum resale price, the dealer nonetheless received a rebate on that sale. On the other hand, if the dealer met all of the performance criteria, but sold the product below Am Cy's specified minimum resale price, the dealer received no rebate on that sale.

PAR. 7. The purpose, effects, tendency, or capacity of the acts and practices described in paragraphs five and six are and have been to restrain trade unreasonably and hinder competition in the provision of crop protection chemicals in the United States.

PAR. 8. The aforesaid acts and practices of the respondent were and are to the prejudice and injury of the public. These acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts and practices may recur in the absence of the relief requested.

Commissioner Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent 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 the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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, now in further conformity with the procedure described 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 Cyanamid Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business at One Campus Drive, Parsippany, New Jersey. Respondent is a wholly-owned subsidiary of American Home Products Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Five Giralda Farms, Madison, New Jersey.

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

ORDER

I.

For purposes of this order, the following definitions shall apply:

(A) "*Respondent*" or "*Am Cy*" means American Cyanamid Company, its directors, officers, employees, agents and representatives, predecessors, successors (including American Home Products Corporation) and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by American Cyanamid Company, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

(B) "*Commission*" means the Federal Trade Commission.

(C) "*Product*" or "*Products*" means any crop protection chemicals, such as herbicides and insecticides used in commercial agriculture, that are manufactured, offered for sale, sold, or distributed by Am Cy to retail dealers or consumers located in the United States of America.

(D) "*Dealer*" means any person, corporation or entity not owned by Am Cy that in the course of its business purchases from Am Cy or a distributor and sells any Product in or into the United States of America.

(E) "*Resale price*" means any price, price floor, minimum price, maximum discount, price range, or any mark-up formula or margin of profit used by any dealer for pricing any Product. "Resale price" includes, but is not limited to, any established or customary resale price.

II.

It is ordered, That Am Cy, directly or indirectly, or through any corporate or other device, in connection with the manufacturing, offering for sale, sale, or distribution of any Product in or into the United States of America in or affecting "commerce," as defined by the Federal Trade Commission Act, forthwith cease and desist from:

(A) Conditioning the payment of any rebate or other incentive to any dealer, in whole or in part, directly or indirectly, on the resale price at which the dealer offers for sale or sells any Product; and

(B) Otherwise agreeing with any dealer to control or maintain the resale price at which the dealer may offer for sale or sell any Product.

III.

It is further ordered, That, for a period of three (3) years from the date on which this order becomes final, Am Cy shall clearly and conspicuously state the following on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any Product to any dealer:

ALTHOUGH AMERICAN CYANAMID MAY SUGGEST RESALE PRICES FOR PRODUCTS, DEALERS ARE FREE TO DETERMINE ON THEIR OWN THE PRICES AT WHICH THEY WILL SELL AMERICAN CYANAMID PRODUCTS.

IV.

It is further ordered, That respondent shall:

(A) Within thirty (30) days after the date on which this order becomes final, mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to all of its officers, management employees, dealers, distributors, and agents or representatives having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America;

(B) For a period of three (3) years after the date on which this order becomes final, mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to each person who becomes an officer, management employee, or agent or representative having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America, within thirty

(30) days of the commencement of such person's employment or affiliation with Am Cy; and

(C) For a period of three (3) years after the date on which this order becomes final, require each of its officers, management employees, and agents or representatives having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America, to sign and submit to Am Cy within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject American Cyanamid Company to penalties for violation of the order.

V.

It is further ordered, That respondent shall:

(A) Within sixty (60) days after the date on which this order becomes final, and annually thereafter for three (3) years on the anniversary of the date this order becomes final, and at such other times as the Commission shall request, file with the Commission a verified written report setting forth in detail the manner and form in which Am Cy has complied and is complying with this order;

(B) For a period of three (3) years after the order becomes final, maintain and make available to Commission staff for inspection and copying, upon reasonable notice, all records of communications with dealers, distributors, and agents or representatives having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America relating to any aspect of retail pricing in the United States of America, and records pertaining to any action taken in connection with any activity covered by paragraphs II, III, IV, and V of this order; and

(C) Notify the Commission at least thirty (30) days prior to any proposed changes in Am Cy such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

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Decision and Order

VI.

It is further ordered, That this order shall terminate on May 12, 2017.

Commissioner Starek dissenting.

EXHIBIT A

[AMERICAN CYANAMID LETTERHEAD]

Dear Dealer:

The Federal Trade Commission has conducted an investigation into American Cyanamid's sales policies, and in particular, American Cyanamid's C.R.O.P. and A.P.E.X. rebate programs, which were in effect from mid-1989 through August 1995. To expeditiously resolve the investigation and to avoid disruption to the conduct of its business, American Cyanamid has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission prohibiting certain practices relating to resale prices. A copy of the order is enclosed. This letter and the accompanying order are being sent to all of our dealers, distributors, sales personnel and representatives.

The order spells out our obligations in greater detail, but we want you to know and understand that you can sell our products at any price you choose. While we may send materials to you which contain suggested retail prices, you remain free to sell those products at any price you choose.

We look forward to continuing to do business with you in the future.

Sincerely yours,

President

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONERS JANET D. STEIGER AND CHRISTINE A. VARNEY

The Commission today enters a consent order with American Cyanamid prohibiting it from engaging in conduct designed to prevent its dealers from making discounted sales below the minimum price that American Cyanamid specified. American Cyanamid entered into written agreements with its dealers that provided dealers with "rebates" each time they sold their product at or above a certain resale price (the floor transfer price). For dealers who sold at the specified price, this rebate constituted their entire profit margin. The Commission believes that this conduct amounted to an illegal resale price maintenance agreement.

Commissioner Starek, in his dissent, criticizes this enforcement action for a number of reasons. As explained below, we disagree with Commissioner Starek's reasoning.

First, the dissenting statement appears to conclude that a situation where a manufacturer and a dealer enter into an express agreement that the manufacturer will pay the dealer to adhere to the manufacturer's specified resale price, is not an "agreement on resale prices" but rather some form of voluntary behavior. Judge Posner responded to similar arguments in *Khan v. State Oil*.¹

In *Khan*, the court declared a maximum resale price arrangement *per se* illegal where the manufacturer permitted dealers to charge above a maximum price, but required them in such case to provide any resulting profit above the maximum price to the manufacturer. The "voluntary" nature of the arrangement did not detract from the finding that there was an agreement. Judge Posner noted that the arrangement was indistinguishable from an agreement not to exceed the maximum price, because the dealer was sanctioned for violating the agreement by having to remit any resulting profit to the manufacturer. In responding to *State Oil*'s argument that there was no price fixing agreement, Judge Posner observed: "The purely formal character of the distinction that it urges can be seen by imagining that the contract had forbidden *Khan* to exceed the suggested resale price and had provided that if he violated the prohibition the sanction would be for him to remit any resulting profit to *State Oil*."²

¹ 93 F.3d 1358 (7th Cir.), *cert. granted*, ___ S. Ct. ___ (1996).

² *Id.*, at 1361. See also *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (in finding a violation based on economic coercion, Judge Posner noted, "It is as if Vermont Castings had told Isaksen that it would reduce its wholesale price to him if he raised his retail price, and Isaksen had accepted the offer by raising his price.").

We agree with Judge Posner. In this case, the sanction was loss of the rebate for sales made below the floor transfer price. If an agreement to forego one's entire profit margin if one departs from the specified price does not constitute a price maintenance agreement, then nothing remains of the *per se* rule.

Second, the dissent seems to suggest that this case is one where agreement is being inferred from unilateral conduct. We cannot concur. American Cyanamid entered into written agreements which offered financial incentives for adherence to a minimum price schedule. Courts, both before and after Sharp,³ have held such arrangements unlawful where adherence to a suggested price was the *quid pro quo* for the financial inducements. Judge Posner's decision in Khan is consistent with this approach.⁴

Third, the dissenting statement, relying in large part on recent economic literature, argues that American Cyanamid's program should not be condemned without proof of a supplier cartel, dealer cartel, or market power.⁵ That view is inconsistent with the Supreme Court's view that resale price maintenance continues to be illegal *per se* and we reject the idea that the Supreme Court can be overruled by scholarly contributions to economic journals.

Finally, we cannot agree with the suggestion that this enforcement action somehow creates uncertainty about the Commission's treatment of pass through rebates or cooperative advertising programs. As the analysis to aid public comment explains, pass through programs have always been permitted, as long as the dealer is free to discount to an even greater extent than the pass through amount. Similarly, both the courts and the Commission have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer's right: (1) to discount below the advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement. Unlike those programs, American Cyanamid's rebate program controlled the actual prices charged and was structured to prevent dealers from pricing below the floor transfer price.

³ *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

⁴ 93 F.3d at 1362.

⁵ Although we do not fully detail our disagreement with the description of the facts in the dissent, we believe that a full trial would have shown that an overwhelming portion of sales were made at or above the minimum resale price. Moreover, a dealer's advisory council voted to advise American Cyanamid to retain the program in order to protect its margins.

Attachment to Statement of Chairman Pitofsky,
Commissioner Steiger, and Commissioner Varney

ANALYSIS TO AID PUBLIC COMMENT ON
THE PROPOSED CONSENT ORDER

The Federal Trade Commission ("the Commission") has accepted an agreement to a proposed consent order from American Home Products Corporation ("AHP"), through its wholly-owned subsidiary, American Cyanamid Company ("American Cyanamid"), located in Parsippany, New Jersey. The agreement would settle charges by the Commission that American Cyanamid violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted competition in the domestic markets for crop protection chemicals, which are herbicides and insecticides widely used in commercial agriculture.

The proposed consent order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to invite public comment concerning the consent order and any other aspect of American Cyanamid's alleged anticompetitive conduct relating to its C.R.O.P. and A.P.E.X. rebate programs. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

The Complaint

The complaint prepared for issuance by the Commission along with the proposed order alleges that American Cyanamid has engaged in acts and practices that have unreasonably restrained competition in the sale and distribution of crop protection chemicals in the United States. In 1995, the Commission's proposed complaint alleges, American Cyanamid sold at retail more than \$1 billion of its crop protection chemicals and was the market share leader in three domestic crop protection chemical markets: soybean broadleaf herbicides, soybean grass herbicides, and corn soil insecticides, as well as being the second-largest domestic producer of cotton grass herbicides.

According to the complaint, American Cyanamid operated two cash rebate programs for its retail dealers for approximately five years. From 1989-1992, the plan was called the "Cash Reward on Performance" ("C.R.O.P.") program, and was renamed the "Award for Performance Excellence" ("A.P.E.X.") program in late 1992 through August 1995. The complaint states that American Cyanamid entered into written agreements with its dealers under these programs, pursuant to which American Cyanamid offered to pay its dealers substantial rebates on each sale of its crop protection chemicals that was made at or above specified minimum resale prices. According to the complaint, the dealers overwhelmingly accepted American Cyanamid's rebate offer by selling at or above the specified minimum resale prices.

The complaint further alleges that the wholesale prices in the agreements were set at a level equal to the specified minimum resale prices, and because a dealer received no rebate on sales below the specified prices, those sales were made at a loss to the dealer.

The complaint further states that although American Cyanamid included certain non-price performance criteria in its rebate programs that could increase the amount of the rebate, a dealer's compliance with these performance criteria was neither necessary nor, by itself, sufficient to obtain rebates. As examples, the complaint alleges that if a dealer met all of American Cyanamid's performance criteria, but sold the product for less than American Cyanamid's specified minimum resale price, that dealer received no rebate on the sale. On the other hand, if the dealer met none of the performance criteria, but sold the product at or above American Cyanamid's specified minimum resale price, the dealer nonetheless received a rebate on that sale.

American Cyanamid's conditioning of financial payments on dealers' charging a specified minimum price amounted to the *quid pro quo* of an agreement on resale prices. In cases where this issue has arisen, both before and after the Supreme Court examined the *per se* rule against resale price maintenance in *Monsanto* and *Sharp*,¹ courts have treated such agreements as *per se* illegal. See *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 39, 40 (5th Cir.), *cert denied*, 409 U.S. 1077 (1972) (stating that ". . . adherence to a suggested price schedule was the *quid pro quo* for Lehrman's receiving Gulf's TCAs [temporary competitive allowances]" and "there is no comparable justification for

¹ *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

conditioning wholesale price support upon adherence to a schedule of minimum retail prices." (emphasis in original)); *Butera v. Sun Oil Co., Inc.*, 496 F.2d 434, 437 (1st Cir. 1974). By offering financial inducements in return for selling at specified minimum prices, a manufacturer seeks the "acquiescence or agreement" of its dealers in a resale price-fixing scheme. *Monsanto*, 465 U.S. at 764 n. 9. The dealer, in turn, accepts the manufacturer's offer by selling at or above the specified minimum prices. *See Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (Posner, J.) (an "obvious" resale price-fixing agreement is found" . . . if [the manufacturer] had told [the dealer] that it would reduce its wholesale price to him if he raised his retail price, and [the dealer] had accepted the offer by raising his price."). *See also Khan v. State Oil Co.*, 93 F.3d 1358, 1360-61 (7th Cir. 1996) (Posner, J.), *petition for cert. pending* (No. 96-871) (agreement on price found where dealership agreement on its face allowed dealer to charge any resale price it wished, but distributor tied financial consequences to dealers' not charging the resale prices it suggested). As a result, incentives to reduce price below the specified level were substantially affected by American Cyanamid's rebate scheme.

The rebate programs challenged in this case are unlike situations where manufacturers are permitted to condition a discount or other incentive on that discount being "passed through" to consumers, which prevents a dealer from simply "pocketing" the discount. In these types of cases, the dealer is free to sell at even lower prices than the amount of the direct "pass through" of the discount or other incentive. Discounts cannot be conditioned, therefore, on the dealers' adherence to specified minimum prices. *See AAA Liquors, Inc. v. Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203, 1206 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983) (Seagram's requirement of passing through its discount "[did] not prohibit the wholesaler from making greater reductions in price than the discount provides."). *See also Acquaire v. Canada Dry Bottling Co.*, 24 F.3d 401, 409-10 (2d Cir. 1994); *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 845-47 (8th Cir. 1983) (because dealers could discount more than Mack's sales assistance, the court found that "the purpose of Mack's discount program [was] not to force adherence to any particular price scheme of Mack's.").

The Proposed Consent Order

Part I of the proposed order covers definitions. These definitions make clear that the consent order applies to the directors, officers, employees, agents and representatives of American Cyanamid. The order also defines the terms product, dealer and resale price.

Part II of the order contains two major operative provisions: Part II(A) deals with the specific conduct at issue in this case. It prohibits American Cyanamid from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for its products. Part II(B) prevents American Cyanamid from otherwise agreeing with its dealers generally to control or maintain resale prices.

Neither of these provisions should be construed to prohibit lawful cooperative advertising programs or "pass through" discount programs that are not otherwise part of an unlawful resale price maintenance scheme. The Commission has previously determined that order provisions prohibiting agreements on resale prices do not restrict a company's ability to implement otherwise lawful cooperative advertising and "pass through" rebate plans because such programs do not, in themselves, constitute agreements on resale prices. *See, e.g., In Re Magnavox Co.*, 113 FTC 255, 263, 269-70 (1990).

Part III of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall include a statement, posted clearly and conspicuously, on any price list, advertising, catalogue or other promotional material where it has suggested a resale price for any product to any dealer. The required statement explains that while American Cyanamid may suggest resale prices for its products, dealers remain free to determine on their own the prices at which they will sell American Cyanamid's products.

Part IV of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall mail the letter attached to the order as Exhibit A and a copy of this order to all of its current dealers, distributors, officers, management employees, and agents or representatives with sales or policy responsibilities for American Cyanamid's products. American Cyanamid also must mail the letter and order to any new dealer, distributor or employee in the above positions within thirty (30) days after the commencement of that person's affiliation or employment with American Cyanamid. All of the above dealers, distributors and employees must sign and return a statement to American Cyanamid

within thirty (30) days of receipt that acknowledges they have read the order and that they understand that non-compliance with the order may subject American Cyanamid to penalties for violation of the order.

Part V of the order requires that American Cyanamid file with the Commission an annual verified written report giving the details of the manner and form in which American Cyanamid is complying and has complied with the order. In addition, Part V of the order also requires American Cyanamid to maintain and make available to the Commission upon reasonable notice all records of communications with dealers, distributors, and agents or representatives relating to resale prices in the United States, as well as records of any action taken in connection with activities covered by the rest of the order. Finally, American Cyanamid must inform the Commission at least thirty (30) days before any proposed changes in the corporation, such as dissolution or sale.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to issue the consent order, but decline to join the separate statement of Chairman Pitofsky and Commissioners Steiger and Varney. The consent agreement, which includes the consent order and the complaint on which it is based, constitutes the decisional document of the Commission. My substantive views on this matter are contained entirely within the four corners of the decisional document. If the majority wants to revise or expand its decision, the proper course is to revise the decisional document. *See* Dissenting Statement of Commissioner Mary L. Azcuenaga in *Dell Computer Corp.* at 21-23 (Docket No. 3658, May 20, 1996).

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue a consent order against American Cyanamid Company ("AmCy"), a producer of agricultural chemicals. The complaint claims that certain aspects of AmCy's compensation arrangement with its dealers constitute *per se* illegal resale price maintenance ("RPM"), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. I do not agree that AmCy's dealer rebate policies constitute the functional and legal equivalent of RPM agreements. Consequently, I conclude that the decision to challenge AmCy's distribution policies would expand substantially the range of activities

condemned by the Commission as illegal *per se*. This policy is ill-advised and runs contrary to twenty years of case law in which the scope of vertical arrangements subject to *per se* condemnation has been steadily narrowed. This case is an especially poor vehicle for expanding the scope of the *per se* rule, for it would be difficult to find conduct that better exemplifies the economic deficiencies of that standard.

Condemning certain conduct as illegal *per se* normally is rationalized by the belief that the conduct in question is so frequently pernicious that one cannot justify the cost of attempting to identify the few instances in which it is not. Whether RPM warrants characterization as *per se* illegal conduct has increasingly been called into question by antitrust scholars,¹ indeed, it would be difficult to find an antitrust economist who would defend this enforcement standard.² RPM remains illegal *per se*, however, and, consistent with this standard, I have voted to support enforcement actions against RPM agreements when I have been convinced that (1) the conduct in question plainly constituted an illegal agreement on price (as construed by contemporary case law), and (2) the relief was appropriately tailored to deter future illegal conduct.

Notwithstanding the continued *per se* treatment of RPM -- and my willingness to support RPM cases in the limited circumstances identified above -- I cannot ignore the persistent accumulation of economic evidence demonstrating the potentially procompetitive (or, at worst, economically neutral) nature of RPM agreements. At minimum, this evidence counsels against expanding the boundaries

¹ There is a substantial body of economic literature demonstrating that RPM frequently can be socially beneficial. See, e.g. Michael L. Katz, "Vertical Contractual Relations," in Richard Schmalensee and Robert D. Willig, 1 *Handbook of Industrial Organization* 655 (1989). The existing empirical literature fails to find evidence supporting an anticompetitive characterization of RPM. See, e.g., Pauline M. Ippolito & Thomas R. Overstreet, Jr., "Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works," 39 *J.L. & Econ.* 285 (1996) (evidence convincingly rejects anticompetitive theories and suggests instead that RPM increased sales of Corning's products); Pauline M. Ippolito, "Resale Price Maintenance: Empirical Evidence from Litigation," 34 *J.L. & Econ.* 263 (1991) (empirical evidence cannot support a collusive explanation for the use of RPM).

² I also emphasize that in none of the RPM actions brought by the Commission during my tenure could one have plausibly characterized the condemned conduct as having an anticompetitive effect (indeed, in several instances, procompetitive rationales for the restrictions were plainly evident). In only one instance, *Nintendo of America Inc.*, 114 *FTC* 702 (1991), could one have plausibly ascribed market power to the manufacturer that was party to the agreement. Without manufacturer market power, RPM agreements between a single manufacturer and its dealers cannot harm consumers. Of course, it cannot be overemphasized that market power is only a necessary, but not a sufficient, condition for vertical restraints to reduce consumer welfare; by itself, market power does not establish that the conduct is anticompetitive. Even when a manufacturer possesses substantial market power, all of the procompetitive rationales for vertical restraints remain potentially valid.

of *per se* illegal conduct to envelop activities that (at best) only weakly satisfy the legal criteria for finding the existence of an "agreement" and, more important, appear to be procompetitive in both purpose and effect. Under these evaluative criteria, the present matter is a poor candidate for an enforcement action.

The Supreme Court set forth the legal standard for finding an illegal RPM "agreement" in *Monsanto Co. v. Spray-Rite Service Corporation*.³

The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Monsanto, 465 U.S. at 768. The court stated further that the "concept of 'a meeting of the minds' or 'a common scheme' . . . includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id.* at 764 n. 9 (emphasis added).

While it is true that AmCy entered into contracts with its distributors providing for compensation for sales at or above the wholesale purchase price, it is clear that there was no "meeting of the minds" or "common scheme," and thus no illegal agreement, to maintain resale prices. At no time did AmCy tell its distributors that they must sell agricultural chemicals at specific prices or risk losing supplies; AmCy did not attempt to coerce or intimidate its distributors into selling at specific price levels; distributors did not communicate an agreement to sell at specific prices; no distributors were ever terminated for selling at prices below the wholesale price; and distributors remained free (as explicitly provided by contract) to resell products at any price of their choosing. That distributors sometimes sold at prices below the wholesale level without loss of supply or termination is testament to the unilateral nature of the distributors' pricing decisions and to the absence of any agreement to

³ 465 U.S. 752 (1984).

maintain resale prices.⁴ In this instance, all of the hallmarks of a *per se* illegal RPM agreement are lacking.

Evidence that dealers did in fact resell AmCy products at or above the wholesale purchase price does not relieve the Commission of its obligation to demonstrate the existence of an illegal agreement. As made clear by *Colgate*,⁵ a unilateral, self-motivated decision by a distributor to accept a manufacturer's pricing policies, and thus sell products at a suggested retail price, does not constitute an illegal RPM agreement. In *Monsanto*, the Supreme Court stated: "Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." 465 U.S. at 761. As *Monsanto* and *Colgate* make clear, something more than mere acquiescence by a distributor in a manufacturer's pricing policies is necessary to convert a unilateral decision by a distributor into an agreement to maintain resale prices.

I am therefore puzzled why the majority is so quick to infer the existence of a *per se* illegal RPM agreement from evidence that many distributors found it in their self-interest unilaterally to sell at or above the wholesale price and thereby receive rebates from AmCy. To infer the existence of a *per se* illegal RPM agreement in this context, when AmCy never announced minimum resale prices nor sought a commitment from distributors to sell at or above certain price levels, violates the fundamental principle of RPM law announced in *Colgate*. How can the majority find a *per se* illegal agreement here -- under arguably weaker factual circumstances than existed in *Colgate* -- and believe that it still seeks to enforce the rule announced in *Colgate*, and reiterated in *Monsanto*, that mere acquiescence by a distributor in the pricing policies of a manufacturer

⁴ Evidence suggests that distributors in fact sold specific products covered by the AmCy program at retail prices both above and below the wholesale transfer price. Wide variation in distributor resale prices runs contrary to usual evidence of a minimum resale price fixing agreement. As Chairman Pitofsky has stated: "The one point that emerges clearly in any debate concerning the *per se* rule is that minimum vertical price agreements lead to higher, and usually uniform, resale prices." Robert Pitofsky, "In Defense of Discounters: The No-Frills Case for a *Per Se* Rule Against Vertical Price Fixing," 71 Geo. L.J. 1487, 1488 (1983). The Commission's complaint does not allege, nor does it provide supporting evidence, that the rebate program resulted in higher retail prices for AmCy's products. Moreover, the wide dispersion in resale prices demonstrates the absence of the type of uniformity believed to be an indicator of a minimum resale price agreement. This dispersion in retail prices suggests that distributors were engaging in loss-leader programs out of a desire to increase future sales of AmCy products. In addition to encouraging distributors to provide valuable pre-sale services, AmCy's rebate program may have encouraged distributors to engage in loss-leader programs as a means of persuading customers to switch to AmCy products.

⁵ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

is insufficient as a matter of law to warrant inference of the existence of a *per se* illegal RPM agreement?⁶

The majority's finding that AmCy entered into illegal RPM agreements with its distributors is nothing less than a retreat from the principles of vertical restraints analysis laid down by the Supreme Court in *Colgate*, *Monsanto*, *Sylvania*,⁷ and *Sharp*.⁸ In cases involving allegations of concerted price fixing, "the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an interference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded." *Monsanto*, 465 U.S. at 763. I concluded that the standard set forth by Supreme Court for the finding of a price-fixing agreement has not been met. That the majority is willing to infer the existence of an agreement in this instance on the basis of such ambiguous evidence, and to rely primarily on pre-*Sharp* case law and post-*Sharp* dicta and one case not on point⁹ to justify its conclusion, represents an effort to

⁶ Although the majority's reply emphasizes "written agreements" pursuant to which dealers were offered compensation for sales at prices above the wholesale transfer price (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of American Cyanamid, at 2), the complaint in this case indicates that the Commission is willing -- despite the clear warnings of *Colgate* and *Monsanto* to the contrary -- to infer the existence of *per se* illegal RPM "agreements" solely from the dealers' unilateral response to AmCy's "offer." Complaint, at ¶ 6 ("The dealers overwhelmingly accepted AmCy's offer by selling at or above the specified minimum prices.").

⁷ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

⁸ *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

⁹ The majority relies heavily on Judge Posner's opinion in *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 941 (1997). Besides the obvious difference that *Khan* deals with maximum rather than minimum RPM, the facts of *Khan* are fundamentally different. The contract between State Oil (the supplier) and *Khan* (the dealer) provided that State Oil would announce a suggested retail price for gasoline and sell it to *Khan* for 3.25 cents per gallon less. The contract further required *Khan* to rebate to State Oil any profit received for sales above the suggested retail price. As Judge Posner noted, the contract eliminated any incentive for *Khan* to charge above the suggested retail price. Since absolute compliance was thus guaranteed under the facts of *Khan*, it is not surprising that a dealer challenged the program. AmCy, on the other hand, never announced suggested retail prices to its dealers, never established an explicit mark-up, and never required dealers to seek permission before lowering their price. The fact that AmCy's dealers frequently lowered retail prices below the wholesale purchase price indicates that AmCy did not implement its rebate program in order to eliminate dealers' incentives to reduce prices (e.g., to develop new customers, to increase business with existing customers, or to encourage switching by customers from other manufacturers' agricultural products to AmCy's products). The majority's reliance on *Khan* is therefore of doubtful relevance to this case, particularly in light of the Supreme Court's recent decision to review *Khan* and the Commission's decision to join with the Antitrust Division of the Justice Department in the filing of an amicus brief in that Court that seeks to overrule the precedent on which *Khan* relies, *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and bring an end to the *per se* rule against maximum RPM. See Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Reversal, *State Oil v. Khan*, No. 96-871 (April 1997).

circumvent the law of RPM (and of vertical restraints in general) laid down by the Supreme Court over the last twenty years.¹⁰

The majority's decision to issue a consent order here also cannot be supported on economic grounds. The *per se* treatment of RPM usually is justified by the assertion that such agreements almost invariably are used to support collusion, either among manufacturers or among distributors.¹¹ RPM could support manufacturer collusion for two reasons.¹² First, RPM may make it easier to detect cheating on a cartel agreement, because resale prices (presumably) are easier to observe than wholesale prices, and successful monitoring of prices is necessary for any successful collusive price agreement to work.¹³ Second, RPM may reduce the incentive to cheat on a cartel because a manufacturer cutting its wholesale price will not increase sales by very much if the corresponding resale price cannot fall.¹⁴ If RPM is being used to facilitate manufacturer collusion, we would expect to see other manufacturers adopting similar price restrictions; collectively, these manufacturers would have to account for sufficient total output to give them power over price.¹⁵

As far as I can tell, the "manufacturer cartel" theory is not relevant to the present case. The Commission's complaint does not allege, let alone provide supporting evidence, that AmCy attempted to collude with other agricultural chemical makers, such as DuPont, Monsanto, Ciba-Geigy, or BASF. There is also no evidence that these other firms used RPM, as is required for the theory to work. But even

¹⁰ Today's action by the Commission has by no means established a clearer and more certain legal rule for RPM cases than exists under the rule of Colgate and other Supreme Court decisions. Whereas a supplier before today's order might know with certainty that mere voluntary adherence by a distributor to a unilaterally announced resale price policy does not constitute illegal RPM, this same supplier must now worry that the Commission may henceforth use such voluntary adherence as evidence of a *per se* illegal agreement to maintain resale prices. Moreover, as a result of today's decision, the business community may be left wondering how the Commission can -- and whether it will -- maintain the functional distinction it currently draws between, on the one hand, rebate-pass-through provisions and cooperative advertising programs -- programs that the Commission generally does not consider to be *per se* illegal -- and, on the other hand, other types of rebate programs that similarly impose restrictive conditions on the buyer.

¹¹ Of course, much of the empirical literature on the actual uses of RPM (*see* note 1, *supra*) casts serious doubt upon the validity of this proposition.

¹² *See* Lester G. Telser, "Why Should Manufacturers Want Fair Trade?," 3 J.L. & Econ. 86 (1960).

¹³ *See* George J. Stigler, "A Theory of Oligopoly," in *The Organization of Industry* 39, 43 (1968) ("In general the policing of a price agreement involves an audit of the transactions prices.").

¹⁴ This argument is subject to the obvious limitation that a manufacturer wishing to cheat on the collusive arrangement would have little incentive to enforce the RPM agreement.

¹⁵ Of course, all of the standard factors used to analyze market power and the ability to implement and maintain collusive pricing (*e.g.*, ease of entry, heterogeneity of the products, and so forth) would also be relevant to judging the likelihood of successful supplier collusion.

putting aside the absence of such evidence, it is difficult to imagine an arrangement less suited to cartel stability than that which existed between AmCy and its distributors. Specifically, under the terms of AmCy's C.R.O.P.[™] and A.P.E.X.[™] programs, a dealer's compensation was tied explicitly to the share of chemical sales accounted for by AmCy's products. Given that a crucial element of cartel enforcement is the discovery of some means by which each member can commit credibly to maintaining -- but not increasing -- its market share,¹⁶ how could a program that explicitly rewards market share expansion plausibly be characterized as a cartel enforcement tool?

Furthermore, the available evidence suggests that the C.R.O.P.[™] and A.P.E.X.[™] programs were extraordinarily successful in expanding AmCy's sales and market share, which grew substantially while the program was in use. Certainly, other factors (*e.g.*, the successful introduction of several new product lines) may have accounted for a portion of this increase,¹⁷ nevertheless, it is difficult (if not impossible) to reconcile the behavior of AmCy's output -- or of total market output -- during this period with any coherent theory of competitive harm involving collusion with other chemical makers.

In the alternative, *per se* treatment sometimes is predicated on the characterization of RPM as an aid to dealer collusion. Under such a scenario, a group of dealers pressures the supplier to adopt RPM to achieve and maintain a collusive resale price arrangement among the dealers. When RPM is used for this purpose, we would expect to see coordinated pressure on the manufacturer to adopt RPM from a group of dealers with sufficient market power to credibly threaten the manufacturer. Moreover, to be effective, the dealer cartel must enter into similar arrangements with enough manufacturers to be able to affect market price; otherwise, the collusive retail price of price-maintained products would be undermined by competition from products not subject to RPM agreements. Under such conditions, we would expect the manufacturer to be a reluctant participant in the scheme, though it would enforce the RPM agreement if the dealer threats were credible. Finally, it is unlikely that the colluding dealers would carry competing products not subject to RPM agreements, as

¹⁶ As Stigler (*supra* note 13, at 42) noted, "[f]ixing market shares is probably the most efficient of all methods of combating secret price reductions."

¹⁷ The likelihood of successfully maintaining collusion in the face of product innovation (as was occurring in this instance) is, of course, quite small. Collusion is more likely to be successful, the greater the degree of similarity (*e.g.*, in terms of cost, demand, and product characteristics) among the parties to the agreement.

that would be equivalent to cheating on the collusively-determined resale margin.

This second anticompetitive theory fits the facts of this case no better than the first. The Commission's complaint does not allege that AmCy is the victim of a dealer cartel. As I already have noted, it does not appear that other manufacturers had similar arrangements with the members of any putative "dealer cartel," or that this "cartel" eschewed the products of rival manufacturers.¹⁸ Had AmCy been the victim of a cartel, its attitude toward the Commission and numerous state investigations should have been one of grateful acquiescence, because the enforcement agencies would be rescuing it from the clutches of its rapacious dealers. In fact, of course, AmCy unilaterally terminated the challenged provisions of the C.R.O.P.[™] and A.P.E.X.[™] programs several years ago. So much for "dealer coercion."¹⁹

Given that neither of the two traditional anticompetitive theories can be reconciled with the terms of the AmCy program, could the Commission's action be justified on some other basis? The Commission might attempt to seek refuge in some unilateral theory of market power, under which a manufacturer with substantial pre-existing market power is hypothesized to use vertical restraints because, for some reason, it cannot extract the full value of its market power simply by raising its wholesale price. The economics literature certainly acknowledges such possibilities, but these theories provide a fragile basis for antitrust enforcement.²⁰ As such models show, vertical restraints often can improve consumer welfare even when adapted by firms with substantial market power,²¹ the models fail, however, to provide empirical criteria by which enforcers can

¹⁸ This is unsurprising, because over 2500 dealers participated in the C.R.O.P.[™] and A.P.E.X.[™] programs. It is fanciful to believe that a cartel could have been formed from among such a large number of dealers. If such a cartel exists, one might reasonably ask why the dealers that belong to it are not also named in the Commission's complaint.

¹⁹ In its reply, the majority appears to suggest that the existence of a dealer cartel can be inferred from the allegation that "a dealer's advisory council voted to advise American Cyanamid to retain the program in order to protect its margins." Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of American Cyanamid, at note 5. Even if an advisory council furnished this advice to AmCy, communications of this nature between dealers and manufacturers do not establish that the dealers acted collusively. Moreover, the fact that dealers may have communicated this advice says nothing about the competitive effects of AmCy's rebate program. One would expect dealers to provide this same "advice" if AmCy's program were designed to prevent discounters from free-riding on the pre-sale services provided by other dealers.

²⁰ See, e.g., Remarks of Commissioner Roscoe B. Starek, III, "Reinventing Antitrust Enforcement? Antitrust at the FTC in 1995 and Beyond," before a conference on "A New Age of Antitrust Enforcement: Antitrust in 1995" (Marina del Rey, California, Feb. 24, 1995).

²¹ As I noted earlier (*supra* note 2), market power is a necessary, but not a sufficient, condition for vertical restraints to reduce consumer welfare.

distinguish anticompetitive from procompetitive effects.²² Thus, the practical utility of these theories is questionable even for conduct judged under the rule of reason; their inability to justify a policy of *per se* illegality appears self-evident.

On several grounds, therefore, issuance of the complaint and consent order in this matter represents a poor policy choice by the Commission. From a legal perspective, AmCy's conduct does not constitute an illegal agreement to maintain resale prices; from an economic perspective, the evidence points to the conclusion that AmCy's conduct was procompetitive; and from a policy perspective, the Commission's decision hardly delineates a clearer distinction (and in fact seriously blurs the line) between conduct likely to be subject to *per se* condemnation and conduct that is not. Instead of reaching for ways to expand the application of the *per se* rule to conduct that is plainly procompetitive, enforcers should reserve their heavy hand for conduct that falls within standards for *per se* illegality clearly enunciated by the Supreme Court.

²² As Katz (*supra* note 1, at 713-14) notes, "[much of the literature on vertical restraints has been conducted with the express aim of deriving policy conclusions. But in many, if not most, instances there is no widespread agreement on whether a particular vertical practice is socially beneficial or harmful. This unhappy state of affairs is due, in part, to the fact that all of the practices can be beneficial in some instances and harmful in others, and it may be extremely difficult to distinguish between the two cases."

IN THE MATTER OF

AMERICAN HOME PRODUCTS 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-3740. Complaint, May 16, 1997--Decision, May 16, 1997

This consent order requires, among other things, American Home Products Corporation ("AHP"), a New Jersey-based manufacturer of animal vaccines, to divest Solvay's U.S. and Canada rights to three types of vaccines to the Schering-Plough Corporation; to assist Schering-Plough in obtaining U.S. Department of Agriculture ("USDA") certifications; and to manufacture and supply the three vaccines to Schering-Plough for 24 to 36 months or until Schering-Plough obtains USDA approvals. The consent order also prohibits AHP from suing Schering-Plough for patent infringements relating to the vaccines.

Appearances

For the Commission: *Casey Triggs, Ann Malester and William Baer.*

For the respondent: *Michael Sohn, Arnold & Porter, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, American Home Products Corporation ("AHP"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the animal health business of Solvay S.A. ("Solvay"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and 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. DEFINITIONS

1. "*Canine Lyme Vaccines*" means all vaccines used to create and maintain antitoxin levels in dogs to prevent lyme disease.

2. "*Canine Corona Virus Vaccines*" means all combination vaccines used to create and maintain antitoxin levels in dogs to