

IN THE MATTER OF
GUINNESS PLC, 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-3801. Complaint, April 17, 1998--Decision, April 17, 1998

This consent order requires, among other things, Guinness and Grand Met, producers and sellers of Dewar's Scotch, Bombay Original gin, and Bombay Sapphire gin brands, to divest, within six months of this order, certain assets to Commission approved buyers.

Appearances

For the Commission: *Joseph Brownman, Phillip Broyles and William Baer.*

For the respondents: *Ron Rolfe, Cravath, Swaine & Moore, New York, N.Y. and Bill Norfolk, Sullivan & Cromwell, New York, N.Y.*

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 Guinness plc ("Guinness") and Grand Metropolitan plc ("Grand Met") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. 18, and Guinness and Grand Met, having also merged into a successor corporation known as Diageo plc ("Diageo"), 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. RESPONDENT GUINNESS PLC

1. Respondent Guinness was, until on or about December 17, 1997, a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 39 Portman Square, London, England W1H 0EE.

2. Among other things, respondent Guinness, through United Distillers, a wholly-owned subsidiary corporation, produced and sold Scotch from distilleries located in Scotland and gin from distilleries located in England.

3. Respondent Guinness had total sales, for all products, of about \$8 billion in 1996. Respondent Guinness' United States sales of all products totaled about \$645 million in 1996.

4. Respondent Guinness was, and at all times relevant herein has been, engaged in the sale and distribution of distilled spirits, including "premium Scotch" and "premium gin," in the United States. Respondent Guinness' premium Scotch brands in the United States were Johnnie Walker Red and Dewar's White Label. Respondent Guinness' premium gin brands in the United States were Tanqueray gin and Tanqueray Malacca gin.

5. Respondent Guinness was, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

II. RESPONDENT GRAND MET

6. Respondent Grand Met was, until on or about December 17, 1997, a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

7. Among other things, respondent Grand Met, through International Distillers and Vintners, a wholly-owned subsidiary corporation, produced and sold Scotch from distilleries located in Scotland and gin from distilleries located in England.

8. Respondent Grand Met had total sales, for all products, of about \$14 billion in 1996. Respondent Grand Met's United States sales of all products totaled about \$8 billion in 1996.

9. Respondent Grand Met was, and at all times relevant herein has been, engaged in the sale and distribution of distilled spirits, including "premium Scotch" and "premium gin," in the United States. Respondent Grand Met's premium Scotch brands in the United States included J&B Rare, J&B Select, and The Famous Grouse. Respondent Grand Met's premium gin brands in the United States were Bombay Original and Bombay Sapphire.

10. Respondent Grand Met was, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

II. RESPONDENT DIAGEO

11. Respondent Diageo is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

12. Respondent Diageo is the successor corporation to respondents Guinness and Grand Met.

13. Respondent Diageo is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

III. THE MERGER

14. On or about May 11, 1997, respondents Guinness and Grand Met executed an agreement to merge their two companies. The value of the merger, measured by the aggregate market capitalization, was approximately \$36 billion.

15. On or about December 17, 1997, respondents Guinness and Grand Met merged their two corporations, creating respondent Diageo.

IV. TRADE AND COMMERCE

A. *Relevant Product Markets*

16. Relevant product markets in which it is appropriate to assess the effects of the proposed merger include (a) premium Scotch and (b) premium gin. Product markets broader than premium Scotch and premium gin may also exist. Total United States sales for premium Scotch are about 3.2 million 9-liter case equivalents, which represents over \$600 million in retail sales. Total United States sales of all premium gin is about 2.2 million 9-liter case equivalents, which represents over \$400 million in retail sales.

17. Premium Scotch is blended Scotch whisky that is made and bottled in Scotland, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of the Johnnie Walker Red, Dewar's White Label, and J&B Rare brands.

18. Premium gin is gin that is made and bottled in England, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of Tanqueray, Bombay Original, and Bombay Sapphire brands.

B. Relevant Geographic Markets

19. The relevant geographic market in which it is appropriate to assess the effects of the proposed merger is the United States.

C. Conditions of Entry

20. Entry into the relevant markets would not be timely, likely, or sufficient to prevent anticompetitive effects.

V. MARKET STRUCTURE

21. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschmann Index (or "HHI") or by two-firm and four-firm concentration ratios. The proposed merger, if consummated, will substantially increase that concentration.

22. In the premium Scotch product market, respondent Guinness was the largest competitor in the United States with about a 68% share and respondent Grand Met was the second largest, with about a 24% share. Together, they would control approximately 92% of all United States premium Scotch sales. The proposed merger would increase the HHI by over 3000 points and produce an industry concentration of over 8000 points.

23. In the premium gin market, respondent Guinness was the largest competitor in the United States with about a 58% share and respondent Grand Met was the third largest, with about a 15% share. Together, they would control approximately 73% of all United States premium gin sales. The proposed merger would increase the HHI by over 1700 points and produce an industry concentration of over 6000 points.

VI. EFFECTS OF THE MERGER

24. The merger may substantially lessen competition in the relevant markets in the following ways, among others:

(a) By eliminating direct competition between Guinness and Grand Met;

(b) By increasing the likelihood that respondents will unilaterally exercise market power; and

(c) By increasing the likelihood of, or facilitating, collusion or coordinated interaction; each of which increases the likelihood that the prices of premium Scotch and premium gin will increase.

VII. VIOLATIONS CHARGED

25. The agreement entered into between respondents Guinness and Grand Met for their merger constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Further, the already consummated merger of Guinness and Grand Met is a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed merger between Guinness plc ("Guinness") and Grand Metropolitan plc ("Grand Met"), and Guinness and Grand Met, having merged into a successor corporation known as Diageo plc ("Diageo"), all sometimes referred to herein as "respondents," and respondents having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act;

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents, for purposes of this proceeding, 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 the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment received, 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 Guinness plc was a corporation organized, existing, and doing business under and by virtue of the laws of the

United Kingdom with its office and principal place of business located at 39 Portman Square, London, England W1H 0EE.

2. Respondent Grand Metropolitan plc was a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

3. Respondent Diageo plc is a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and over 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. "*Guinness*" means Guinness plc, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Guinness plc, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. "*Grand Met*" means Grand Metropolitan plc, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Grand Metropolitan plc, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

C. "*Respondents*" means Guinness and Grand Met, individually and collectively, and their successor, Diageo.

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

E. "*Dewar's*" means "Dewar's," "Dewar's White Label," and any other brand of Scotch whisky that uses the name "Dewar's" in connection with Scotch whisky.

F. "*Bombay*" means "Bombay," "Sapphire," "Bombay Original," "Bombay Sapphire" and any other brand that uses the name "Bombay" in connection with gin.

G. "*Assets To Be Divested*" means:

1. All assets, properties, business and goodwill, tangible and intangible, owned or controlled by Guinness, anywhere in the world,

used in the manufacture, distribution, marketing, and sale of Scotch whisky under any trade name or trademark that incorporates the term Dewar's, including, without limitation (except that distilleries, distilling capacity, storage capacity, inventory, and cooperage services, are limited as specified in subparagraphs (i) - (k) below), the following:

- a. The trade name or trademark "Dewar's" and all trademarks, trade dress, trade names, and logos associated with the sale of any "Dewar's" Scotch whisky;
- b. The Dewar's profit and loss statements, Dewar's contribution statements and Dewar's advertising, promotional, and marketing spend records;
- c. All Dewar's customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, blend specifications, formulas;
- d. All names of manufacturers and suppliers under contract with respondents who produce for, or supply to, respondents in connection with the manufacture or sale of Dewar's;
- e. Copies of all product testing required by any regulatory authority relating to Dewar's;
- f. All price lists for Dewar's;
- g. Molds currently in use for bottling Dewar's in its various sizes sufficient to produce 3 million 9-liter cases of Dewar's per year;
- h. All inventories of finished case goods and packaging relating to Dewar's;
- i. Sufficient distilling capacity to produce 3 million 9-liter cases of Dewar's per year, including the distillery located in Aberfeldy, Scotland;
- j. Sufficient inventory of aged, distilled malt and grain whisky and storage capacity to produce 3 million 9-liter cases of Dewar's White Label per year for seven (7) years, provided, however, that the acquirer may utilize such stocks solely for the purpose of producing Dewar's or for trading for other stocks to be used in producing Dewar's.
- k. Sufficient cooperage services to produce 3 million 9-liter cases of Dewar's per year;
- l. To the extent transferable or assignable, all rights, titles, and interests in and to the contracts relating to Dewar's entered into in the ordinary course of business with customers (together with associated bid and performance bonds), other Scotch distillers, suppliers, sales

representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees;

m. All rights under warranties and guarantees, express or implied, relating to Dewar's;

n. All books, records, and files, relating to Dewar's; and

2. All assets, properties, business and goodwill, tangible and intangible, owned or controlled by Grand Met, anywhere in the world, used in the manufacture, distribution, marketing, and sale of gin under any trade name or trademark that incorporates the term "Bombay," including, without limitation, the following:

a. The trade name or trademark "Bombay" and all trademarks, trade dress, trade names, and logos associated with the sale of any "Bombay" gin;

b. The Bombay profit and loss statements, Bombay contribution statements and Bombay advertising, promotional and marketing spend records;

c. All Bombay customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, blend specifications, formulas;

d. All names of manufacturers and suppliers under contract with respondents who produce for, or supply to, respondents in connection with the manufacture or sale of Bombay;

e. Copies of all product testing required by any regulatory authority relating to Bombay;

f. All price lists for Bombay;

g. Molds currently in use for bottling Bombay in its various sizes sufficient to produce 800,000 9-liter cases of Bombay per year;

h. All inventories of finished case goods and packaging relating to Bombay;

i. To the extent transferable or assignable, all rights, titles, and interests in and to the contracts relating to Bombay entered into in the ordinary course of business, including but not limited to the contract between Grand Met and Greenalls Group plc as relating to Bombay, with customers (together with associated bid and performance bonds), other distillers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

j. All rights under warranties and guarantees, express or implied, relating to Bombay; and

k. All books, records, and files, relating to Bombay.

H. "Merger" means the proposed merger of Grand Met and Guinness pursuant to the merger agreement dated May 11, 1997, leading to the creation of Diageo.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, within six (6) months from the date the agreement containing consent order is signed by respondents, all of the Assets To Be Divested; with the assets described in paragraphs I.G.1 going to a single acquirer and the assets described in paragraphs I.G.2 also going to a single acquirer (who may be the same acquirer as the acquirer of the assets described in paragraph I.G.1),

1. Provided, however, that if the Commission, in its sole discretion, determines that the acquirer of any of the Assets To Be Divested does not require any or all of the distillery capacity, cooperage services, or inventory of or storage capacity for aged, distilled malt and grain whiskies referred to in paragraphs I.G.1(i) - (k) in order to fulfill the purposes of this order (including as a result of other arrangements made by the acquirer such as supply agreements with respondents or others as approved by the Commission), then respondents shall not be required to divest such assets,

2. Provided further, that to the extent that the Assets To Be Divested include ownership interests in distilled spirits distributors, respondents shall not be required by virtue of anything contained in this order to divest such ownership interests,

3. Provided further, that to the extent that any document or other material included within the Assets To Be Divested contains information concerning a brand other than Dewar's or Bombay, such other information need not be provided, and

4. Provided further, that if any document or other material included within the Assets To Be Divested is required to be retained by respondents by requirements of law, or for tax purposes or for defending products liability lawsuits, respondents may retain a copy of such material for use only for such purposes.

B. Respondents shall make best efforts to ensure the continued and uninterrupted supply of Bombay to the acquirer by its existing supplier, Greenalls Group plc ("Greenalls"), under the terms of the existing contract between Greenalls and Grand Met. In the event Greenalls does not agree to supply the acquirer under terms acceptable to the acquirer, to ensure the acquirer an uninterrupted supply of Bombay at supply levels consistent with the terms of the contract with Greenalls, at the request of the acquirer, respondents shall produce and bottle Bombay in England for the acquirer using the same production methods, type of equipment, and recipe as those used by Greenalls for the production of Bombay, through September 30, 2001, or such shorter or longer time period as respondents and the acquirer may mutually agree. Respondents shall charge the acquirer, for a period of twelve (12) months from the date of the divestiture, no more than the prices for Bombay charged by Greenalls as of the date the agreement containing consent order is signed. Thereafter, through September 30, 2001, respondents may charge the acquirer prices in accordance with the terms in the existing contract between Grand Met and Greenalls.

C. The purposes of the order are to remedy the lessening of competition resulting from the merger as alleged in the Commission's complaint, and to ensure the continued use of the Assets To Be Divested in the same businesses in which the Assets To Be Divested are engaged at the time of the merger.

D. Respondents shall divest the Assets To Be Divested 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.

E. Pending divestiture of the Assets To Be Divested, respondents shall take such actions as are necessary to maintain the viability and marketability of the Assets To Be Divested and the ability to compete at the same levels of sales, profitability, and market share as prior to the merger, subject to prevailing market conditions, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Assets To Be Divested, except for ordinary wear and tear.

F. Respondents shall comply with all terms of the Asset Maintenance Agreement, attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as respondents have divested all the Assets To Be Divested as 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 Assets to be Divested within six (6) months of the date respondents sign the agreement containing consent order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that 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 available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by 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 respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to 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 Assets To Be Divested.

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 required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph

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

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested 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 respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate expeditiously 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 expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in Section II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity 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 the 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 the respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a

commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

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, 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 Assets To Be Divested.

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

IV.

It is further ordered, That respondents shall, for a period of one year from the date of the divestiture pursuant to this order, or for such shorter period as the acquirer shall determine, make available, at no cost to the acquirer, such technical assistance and know-how as the acquirer shall require to enable the acquirer to produce Dewar's Scotch or Bombay gin according to current production processes and formulas.

V.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of Sections II, III, and IV of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Sections II, III, and IV 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 Sections II, III, and IV of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. 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 respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the respondents such as dissolution, assignment, sale resulting in the emergence of a successor entity, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request to counsel, respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect any facility and 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 days' notice to counsel for respondents and without restraint or interference from respondents, to interview officers, directors, or employees of respondents, who may have counsel present.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement is by and among Guinness plc ("Guinness"), a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 39 Portman Square, London, England W1H 0EE, Grand Metropolitan plc ("Grand Met"), a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG, the successor of Guinness and Grand Met,

Diageo, and the Federal Trade Commission, an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

PREMISES FOR AGREEMENT

Whereas, Guinness and Grand Met, pursuant to an agreement dated May 11, 1997, agreed to merge; and

Whereas, the Commission is now investigating the proposed merger to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, the Commission has reason to believe that the agreement would violate Section 5 of the Federal Trade Commission Act, and that the merger contemplated by the agreement, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, statutes enforced by the Commission; and

Whereas, if the parties accept the attached Agreement Containing Consent Order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the purpose of this agreement and of the consent order is to preserve the Assets To Be Divested pending the divestiture to the acquirer approved by the Commission under the terms of the order, in order to remedy any anticompetitive effects of the merger; and

Whereas, Guinness's and Grand Met's entering into this agreement shall in no way be construed as an admission by Guinness or Grand Met that the proposed merger is illegal; and

Whereas, 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;

Now, therefore, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will terminate Guinness' obligation to give twenty (20) days' notice to the Commission's staff prior to consummating the merger with Grand Met, the parties agree as follows:

TERMS OF AGREEMENT

1. Guinness and Grand Met agree to execute, and upon acceptance by the Commission of the Agreement Containing Consent

Order for public comment agree to be bound by, the attached Consent Order.

2. Unless the Commission brings an action to seek to enjoin the proposed merger pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed merger, Guinness and Grand Met will be free to close the merger after 11:59 p.m. on the date the Commission accepts the Consent Order for public comment.

3. Guinness and Grand Met agree that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 3.a - 3.b they will comply with the provisions of this Agreement:

a. Three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. On the day the divestitures set out in the Consent Order have been completed.

4. From the time Guinness and Grand Met sign this Agreement until the divestitures set out in the Consent Order have been completed, Guinness, Grand Met, and Diageo shall take such actions as are necessary to maintain the viability and marketability of the Assets To Be Divested and the ability to compete at the same levels of sales, profitability, and market share as prior to the merger, subject to prevailing market conditions, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Assets To Be Divested except for ordinary wear and tear.

5. Should the Federal Trade Commission seek in any proceeding to compel Guinness, Grand Met, or Diageo to divest themselves of the Assets To Be Divested or to seek any other injunctive or equitable relief, Guinness, Grand Met, and Diageo shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the merger. Guinness, Grand Met, and Diageo also waive all rights to contest the validity of this Agreement.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to counsel for Guinness, Grand Met, and Diageo, the aforesaid Guinness, Grand Met, and Diageo

shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Guinness or Grand Met or Diageo, in the presence of counsel, to inspect any facility and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Guinness or Grand Met or Diageo relating to compliance with this Agreement; and

b. Upon five (5) days' notice to counsel for Guinness or Grand Met or Diageo and without restraint or interference from them, to interview officers or employees of Guinness, Grand Met, and Diageo, who may have counsel present, regarding any such matters.

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

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Today, the Commission accepts a consent order settling allegations that the merger of Guinness PLC and Grand Metropolitan PLC would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The complaint alleges as antitrust product markets: (1) "premium Scotch," which is defined as "blended Scotch whisky that is made and bottled in Scotland, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of the Johnnie Walker Red, Dewar's White Label, and J&B Rare brands," and (2) "premium gin," which is defined as "gin that is made and bottled in England, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of Tanqueray, Bombay Original, and Bombay Sapphire brands." I cannot support the complaint as written.

Although at first glance the markets may seem overly creative, if not gerrymandered, the complaint merits our careful attention. For reasons that are not apparent, the proposed product markets exclude brands not marketed throughout the United States, if there are any, that compete head to head with the national brands. By definition, the "premium gin" product market also excludes domestically bottled gin brands, if any, that are sold at prices comparable to Tanqueray and Bombay. I see no reason for these seemingly arbitrary exclusions.

More importantly, the price limitations in the product markets do not seem justifiable. As recognized in Commission precedent, competition occurs along a continuum of prices. In *Heublein, Inc.*, 96 FTC 385 (1980), for example, the Commission dismissed the complaint based on findings in an "all wine" market and the table, dessert and sparkling wine submarkets. As then Commissioner Pitofsky stated in the *Heublein* opinion, although the competitive offerings of the wine industry were not altogether homogeneous, "those diverse products nevertheless may 'appropriately be designated as a market' for antitrust analysis." 96 FTC at 576 quoting *Coca Cola Bottling Co. of New York, Inc.*, 93 FTC 110 (1979).

Despite my disagreement with the allegations in the complaint, I find reason to believe that the merger of Guinness PLC and Grand Metropolitan PLC would violate the law on the basis of a broader market and that an order to remedy the lessening of competition in the broader market would be appropriate. The divestiture of the Dewar's Scotch and Bombay gin brands will have some remedial effect in the broader market, and for that reason, I have voted to accept the order.

IN THE MATTER OF

S.C. JOHNSON & SON, INC.

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-3802. Complaint, April 20, 1998--Decision, April 20, 1998

This consent order requires, among other things, S.C. Johnson & Son, Inc., a Wisconsin-based manufacturer and seller of household cleaning products, to divest certain assets relating to stain and soil remover products and glass cleaner products it would gain in the acquisition of DowBrands.

Appearances

For the Commission: *Steven Bernstein, Yolanda Gruendel, Ann Malester and William Baer.*

For the respondent: *Mark Kovner, Kirkland & Ellis, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, S.C. Johnson & Son, Inc. ("S.C. Johnson"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire certain assets of the home care and home food management businesses of DowBrands Inc., DowBrands L.P. and DowBrands Canada Inc. (hereinafter collectively "DowBrands"), entities 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. "*Soil and stain remover products*" means products that are designed to pretreat soiled and stained clothing prior to washing in order to aid in the cleaning of the soiled or stained area of the clothing.

2. "*Glass cleaner products*" means products that are designed primarily to clean glass and mirrors, but which may also be used to clean other surfaces.