

IN THE MATTER OF
MONIER LIFETILE LLC, 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 9290. Complaint, Sept. 22, 1998--Decision, May 19, 1999

This consent order, among other things, requires the respondents, producers of concrete roofing tile, who have established a joint venture, to divest certain tile manufacturing assets and to provide written notification to the Commission prior to acquiring any stock, share capital or equity in any concern engaged in the manufacturing of concrete roofing tile in Southern California, Arizona, Nevada or Florida.

Participants

For the Commission: *Nicholas Koberstein, Alissa Hecht, Ann Malester, Eric Rohlck, Daniel Ducore, William Baer, Charissa Wellford, William Layher, Charles Pidano, and Randi Boorstein.*

For the respondents: *Tom Smith, Jones, Day, Reavis & Pogue, Washington, D.C. and Randall Allen, Alston & Bird, Atlanta, GA.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Boral Ltd., a corporation subject to the jurisdiction of the Commission, and Redland PLC, a wholly-owned subsidiary of Lafarge S.A., a corporation subject to the jurisdiction of the Commission, acquired shares in and contributed assets to a joint venture limited liability corporation, Monier Lifetile LLC, 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 FTC 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. RESPONDENTS

1. Respondent Monier Lifetile LLC is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at One

Park Place, Suite 900, Irvine, California. Monier Lifetile LLC is owned by Lafarge S.A. and Boral Ltd.

2. Respondent Boral Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of the Country of Australia, with its principal place of business located at 50 Bridge Street, Sydney, NSW, Australia 2000. Boral Ltd., which had total sales of approximately \$3.6 billion in 1996, manufactures a diversified group of construction products. Prior to the formation of Monier Lifetile LLC, Boral Ltd. manufactured and sold concrete roofing tile in the United States through its wholly-owned subsidiary, Boral Lifetile, Inc. Prior to the formation of Monier Lifetile LLC, Boral Lifetile was the second largest producer of concrete roofing tile in the United States.

3. Respondent Lafarge S.A. is a corporation organized, existing, and doing business under and by virtue of the laws of the Country of France, with its office and principal place of business located at 61 Rue des Belles Feuilles, Paris, France. Lafarge S.A., which had total sales of approximately \$7 billion in 1997, produces cement and construction materials. Following the formation of Monier Lifetile LLC, Lafarge S.A. acquired Redland PLC. Prior to the formation of Monier Lifetile LLC, Redland PLC manufactured and sold concrete roofing tile in the United States through its wholly-owned subsidiary, Monier, Inc. Prior to the formation of Monier Lifetile LLC, Monier, Inc. was the largest producer of concrete roofing tile in the United States.

II. THE JOINT VENTURE

4. On or about August 15, 1997, Boral Ltd. and Redland PLC acquired stock in and contributed the assets of their respective United States concrete roofing tile operations to a joint venture limited liability corporation, named Monier Lifetile LLC. Monier Lifetile LLC was formed as a limited liability company under Delaware state law.

III. JURISDICTION

5. Monier Lifetile LLC, Boral Ltd. and Lafarge S.A. are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE RELEVANT MARKETS

6. The relevant line of commerce in which to analyze the effects of the formation of Monier Lifetile LLC is the market for standard-weight concrete roofing tile. Standard-weight concrete roofing tile is used predominately in new home construction.

7. The relevant geographic markets in which to analyze the effects of the formation of Monier Lifetile LLC are the Southwestern United States (consisting of California, Arizona and Nevada) and Florida and/or narrower areas within the Southwestern United States and Florida including, but not limited to: Southern California (all of the state of California south of, and including, Bakersfield); Nevada; Arizona; and Southern Florida (all of the state of Florida south of Lake Okeechobee).

V. STRUCTURE OF THE MARKETS

8. Prior to the formation of Monier Lifetile LLC, Boral Lifetile, Inc. and Monier, Inc. were the two largest producers of concrete roofing tile in the United States. Only one other manufacturer, Pioneer Roofing Tile, Inc., operates in both the Southwestern United States and Florida. In California and Nevada, the only other significant competitor in concrete roofing tile is Burlingame Industries. In Arizona, Monier Lifetile LLC and Pioneer Roofing Tile, Inc. are the only significant competitors in concrete roofing tile. In Florida, the only other significant producer of concrete roofing tile is Entegra Roof Tile Corp.

9. Each of the relevant markets is highly concentrated whether measured by the Herfindahl-Hirschman Index or the two-firm and four-firm concentration ratios. The formation of Monier Lifetile LLC has greatly increased concentration in each of the already concentrated markets.

VI. ENTRY CONDITIONS

10. The threat of entry has not deterred Boral Lifetile, Inc.'s and Monier, Inc.'s attempts to raise prices for concrete roofing tile in the past. The threat of entry has not deterred anticompetitive effects resulting from the formation of Monier Lifetile LLC. It is unlikely the threat of entry will deter additional anticompetitive effects likely to result from the formation of Monier Lifetile LLC.

11. It is unlikely that an entrant would achieve a significant market impact within two years and deter or counteract the anticompetitive effects likely to result from the formation of Monier Lifetile LLC.

12. Because the cost of entering and producing concrete roofing tile is relatively high compared to the potential sales revenues available to an entrant, new entry into the relevant markets is not likely to be profitable. Consequently, entry into the production of concrete roofing tile is not likely to occur in a timely manner to deter or counteract the anticompetitive effects likely to result from the formation of Monier Lifetile LLC.

VII. EFFECTS OF THE ACQUISITION

13. The formation of Monier Lifetile LLC has substantially lessened, or may substantially lessen, competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others, by:

- a. Eliminating Boral Ltd. and Redland PLC as independent competitors with significant capacity in the relevant markets;
- b. Eliminating actual, direct, and substantial competition between Boral Ltd. and Redland PLC, both of which had the ability and incentive to compete on price, in the relevant markets;
- c. Increasing the likelihood of coordinated interaction in the relevant markets;
- d. Increasing the likelihood of unilateral anticompetitive effects in the relevant markets;
- e. Having led, or leading, to a reduction in likely price decreases or an increase in prices in the relevant markets;
- f. Having led, or leading, to a reduction in service in the relevant markets; and/or
- g. Having led, or leading, to a reduction in quality in the relevant markets.

VIII. VIOLATIONS CHARGED

14. The formation of Monier Lifetile LLC described in paragraph four constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations 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 the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Monier Lifetile LLC is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Park Plaza, Suite 900, Irvine, California.

2. Respondent Boral Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Australia, with its office and principal place of business located at 50 Bridge Street, Sydney, NSW 2000, Australia.

3. Respondent Lafarge S.A. is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 61 rue des Belles Feuilles, Paris, France.

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

ORDER

I.

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

A. "*Monier Lifetile*" means Monier Lifetile LLC, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Monier Lifetile, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Boral*" means Boral Ltd., its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Boral, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

D. "*Respondents*" means Monier Lifetile, Boral and Lafarge, individually and collectively.

E. "*CRH*" means CRH PLC, a corporation organized, existing and doing business under and by virtue of the laws of Ireland, with its office and principal place of business located at Belgard Castle, Clondalkin, Dublin 22, Ireland; and its subsidiaries, divisions, groups and affiliates controlled by CRH, including Oldcastle, Inc.

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

G. "*Joint Venture*" means the formation of the limited liability company, Monier Lifetile, on or about August 15, 1997, through the issuance of membership interest and contribution of assets of the respective United States concrete roofing tile operations of Boral and Redland PLC, now a wholly-owned subsidiary of Lafarge.

H. "*Acquirer*" means CRH or the entity/entities to whom respondents divest the Tile Manufacturing Assets To Be Divested.

I. "*Concrete Roofing Tile*" means concrete tile designed primarily to cover the roofs of residential and commercial structures.

J. "*Field Tile*" means Concrete Roofing Tile that is used to cover the face of a roof.

K. "*Field Tile Line*" means a delivered, assembled, installed, and functioning production line that produces Field Tile.

L. "*Trim Tile*" means Concrete Roofing Tile that is used to cover the crest and soffit of a roof.

M. "*Trim Line*" means a delivered, assembled, installed, and functioning production line that has the capacity to produce Trim Tile at a level of at least ten (10) per cent of the overall Field Tile production capacity of the tile manufacturing facility in which the Trim Line is located.

N. "*Divestiture Agreement*" means the Acquisition Agreement between Monier Lifetile and Oldcastle, Inc., dated January 21, 1999, and all exhibits thereof, incorporated by reference into this order and made a part hereof as a Confidential Appendix, regardless of whether the purchase and sale of assets contemplated by such agreement is consummated.

O. "*Tile Manufacturing Assets To Be Divested*" means the following:

1. The Corona tile manufacturing facility, located at 1745 Sampson Avenue, Corona, California, including: two (2) Field Tile Lines and one (1) Trim Line, with a minimum annual production capacity of 600,000 squares of Concrete Roofing Tile; and all assets related to the production of Concrete Roofing Tile at the Corona tile manufacturing facility included in the Divestiture Agreement.

2. The Casa Grande tile manufacturing facility, located at 1742 South Rooftile Road, Casa Grande, Arizona, including: two (2) Field Tile Lines and one (1) Trim Line, with a minimum annual production capacity of 700,000 squares of Concrete Roofing Tile; and all assets related to the production of Concrete Roofing Tile at the Casa Grande tile manufacturing facility included in the Divestiture Agreement.

3. The Ft. Lauderdale tile manufacturing facility, located at 1900 N.W. 21st Avenue, Ft. Lauderdale, Florida, as a functioning facility producing Concrete Roofing Tile, including: one (1) Field Tile Line and one Trim Line, with a minimum annual production capacity of 300,000 squares of Concrete Roofing Tile; and all assets related to the production of Concrete Roofing Tile at the

Ft. Lauderdale tile manufacturing facility included in the Divestiture Agreement.

4. All covenants; undertakings; representations; warranties; guarantees; indemnifications; marketing information; product development information; research materials; technical information; inventions; trade secrets; technology; know-how; intellectual property rights; patents; patent applications; formulas; copyrights; licenses; trademarks; trade names; and rights, expressed or implied, included in the Divestiture Agreement.

P. "*Cost*" means direct cash cost of labor.

Q. "*Non-Public Acquirer Information*" means any information not in the public domain obtained by respondents directly or indirectly from the Acquirer prior to the effective date, or during the term, of the provision of assistance to the Acquirer as required by paragraph II.C. of this order. Non-Public Acquirer Information shall not include information that subsequently falls within the public domain through no violation of this order by respondents.

R. "*Southern California*" means all of the state of California south of, and including, Bakersfield.

II.

It is further ordered, That:

A. Respondents shall divest absolutely and in good faith the Tile Manufacturing Assets To Be Divested to CRH in accordance with the Divestiture Agreement within five (5) days of the date the Commission serves its final decision containing the order herein on respondents' counsel, in disposition of this matter.

B. The purpose of the divestiture of the Tile Manufacturing Assets To Be Divested is to ensure that the Tile Manufacturing Assets To Be Divested are used to produce and sell Concrete Roofing Tile of commercial quality similar to that currently produced by Monier Lifetile and to remedy the lessening of competition resulting from the Joint Venture as alleged in the Commission's complaint.

C. Respondents shall commit to provide at Cost upon reasonable notice and request by the Acquirer, for a period not to exceed six (6) months from the date each divestiture is completed: (a) such assistance, personnel and training as are reasonably necessary to enable the Acquirer to manufacture Concrete Roofing Tile in

substantially the same manner and quality employed or achieved by Monier Lifetile; and (b) such assistance, personnel and training as are reasonably necessary to enable the Acquirer to obtain any necessary governmental approvals to manufacture Concrete Roofing Tile at the current location of the tile manufacturing facility acquired by the Acquirer and to sell Concrete Roofing Tile in each of the counties in which Monier Lifetile currently sells Concrete Roofing Tile in the state where the tile manufacturing facility acquired by the Acquirer is located.

D. Respondents shall not provide, disclose or otherwise make available to any of their employees not involved in providing assistance any Non-Public Acquirer Information, nor shall respondents use any Non-Public Acquirer Information obtained or derived by respondents in their capacity as providers of assistance pursuant to paragraph II.C., except for the sole purpose of providing assistance pursuant to paragraph II.C.

E. Pending divestiture of the Tile Manufacturing Assets To Be Divested, respondents shall take such actions as are necessary to maintain the viability, marketability and competitiveness of the Tile Manufacturing Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Tile Manufacturing Assets To Be Divested except for ordinary wear and tear.

F. Respondents shall comply with the terms of the Divestiture Agreement and such agreement is incorporated by reference into this order and made a part hereof as a Confidential Appendix. Any failure by respondents to comply with the terms of the Divestiture Agreement shall constitute a failure to comply with this order.

G. Respondents shall take all steps necessary to restore the Ft. Lauderdale tile manufacturing facility, located at 1900 N.W. 21st Avenue, Ft. Lauderdale, Florida, as a functioning facility, capable of producing at least 300,000 squares annually of Concrete Roofing Tile of commercial quality similar to that currently produced by Monier Lifetile, and respondents shall complete all restoration work, including addition of the Trim Line, by April 30, 1999, or within two (2) months of the date respondents signed the agreement containing consent order in this matter, whichever is later.

III.

It is further ordered, That:

A. If respondents fail to divest absolutely and in good faith all of the Tile Manufacturing Assets To Be Divested pursuant to paragraph II.A. of this order, the Commission may appoint a trustee to divest the Tile Manufacturing 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 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 Monier Lifetile has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Monier Lifetile 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 accomplish the divestitures described in paragraph III.A. of the order.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures 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 divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan for the divestitures required by this order or believes that the divestitures required by this order can be achieved within a reasonable time, then 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 the period for the divestitures only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Tile Manufacturing Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the 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 divestitures. Any delays in any divestiture caused by respondents shall extend the time for that divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made in a manner consistent with the terms of this order; provided, however, if the trustee receives bona fide offers for a Tile Manufacturing Facility 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; provided further, however, that respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

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, and at reasonable fees, 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 divestitures 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 accomplishing the divestitures required by paragraph III.A. of this order.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims or expenses result from misfeasance, gross negligence, 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 this paragraph.

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 reasonably necessary or appropriate to accomplish the divestitures required by this order.

11. The trustee may divest such additional ancillary assets related to the Tile Manufacturing Assets To Be Divested and effect such ancillary arrangements as are necessary to satisfy the requirements or purposes of this order.

12. The trustee shall have no obligation or authority to operate or maintain the Tile Manufacturing Assets To Be Divested.

13. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures required by this order.

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II. and III. of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the requirements of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II. and III. of the order. Respondents shall include in their compliance reports copies of all written communications to and from any Acquirer, all internal documents (except privileged documents), and all reports and recommendations, concerning the divestitures.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, joint ventures, or otherwise:

A. Acquire any stock, share capital, equity, partnership, membership or other interest in, any concern, corporate or non-corporate, engaged in, at the time of such acquisition or within the year preceding such acquisition, the manufacture of Concrete Roofing Tile in Southern California, Arizona, Nevada or Florida; or

B. Acquire any assets used at the time of such acquisition or within the year preceding such acquisition in the manufacture of Concrete Roofing Tile in Southern California, Arizona, Nevada or Florida.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification. The Notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction.

Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VI.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, sale resulting in the emergence of successor corporations, or the creation or dissolution of subsidiaries or any other change in the corporations or Joint Venture 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, respondents shall permit any duly authorized representative of the Commission:

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

B. Upon five (5) days' notice to respondents and without restraint or interference from respondents, to interview officers, directors or employees of respondents, who may have counsel present, regarding such matters.

[CONFIDENTIAL APPENDIX REDACTED]

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Interlocutory Order

IN THE MATTER OF
R.J. REYNOLDS TOBACCO COMPANY

Docket 9285. Interlocutory Order, May 26, 1999

ORDER WITH RESPECT TO PROTECTIVE ORDER

On March 29, 1999, the R.J. Reynolds Tobacco Company ("Reynolds") filed a motion requesting that the Commission either clarify or modify the Protective Order Governing Confidential Material (dated July 18, 1997), which was entered in Docket No. 9285. Reynolds filed the motion in an effort to establish a right to retain confidential materials it obtained in discovery from Dr. John Pierce ("Pierce") and from the Robert Wood Johnson Foundation ("Foundation"), and to retain work product created by Reynolds' experts incorporating information contained in those materials. Pierce and the Foundation opposed the motion and asked that the Commission impose sanctions against Reynolds.

For the reasons set forth below, we deny Reynolds' request and order that it comply in full with Paragraph 14 of the Protective Order within 15 days of the issuance of this Order.¹ We also deny the Pierce and Foundation requests for sanctions.

I. BACKGROUND

On May 28, 1997, the Commission voted to issue an administrative complaint alleging that Reynolds' Joe Camel advertising campaign violated Section 5 of the FTC Act, 15 U.S.C. 45. During the discovery phase of the administrative proceeding, complaint counsel and counsel for Reynolds jointly moved that the administrative law judge enter a Protective Order Governing Confidential Material ("Protective Order"). The purpose of this order was to control the use and disposition of confidential materials submitted during the course of the proceeding. The Protective Order defined "confidential material" to include, *inter alia*, "documents

¹ Reynolds directed its motion to Administrative Law Judge ("ALJ") James P. Timony, who presided over the adjudicative proceeding in Docket No. 9285. However, because that proceeding has been concluded, *see infra*, the Commission resolves this motion. *See, e.g., General Motors Corp.*, 103 FTC 105 (1984).