Proposed merger of a major producer of rosin and a producer of hydrocarbon resins. (File No. 733 7002).

Opinion Letter

February 12, 1973

Dear Mr. Sachs:

This is in response to your request for an advisory opinion regarding the proposed acquisition of Picco by Hercules.

Although the information * submitted to the Commission is not wholly adequate for the Commission to render an advisory opinion, the Commission wishes to inform you that it is of the present view that an investigation would not be warranted if the acquisition were consummated.

You are cautioned, however, that the Commission may initiate an investigation in the future if it has reason to believe that substantial adverse competitive effects attributable to the acquisition have resulted, or that they probably will result.

By direction of the Commission.

Fourth Supplemental Letter Relative to Request

October 31, 1972

Attention Joseph P. Dufresne, Esquire
Attorney, Office of General Counsel

Re: Request for advisory opinion—Acquisition by Hercules Incorporated of Pennsylvania Industrial Chemical Corporation (Picco)

Gentlemen:

Here is the information which Joseph P. Dufresne, Esquire, in a letter dated September 26, 1972, requested Herbert B. Sachs, Esquire, to have Hercules submit.

Previously, we completed the "Acquiring Company Special Report" (Form OMB No. 56–R0026 which we furnished to Mr. Sachs, who has delivered it to the Federal Trade Commission.

We believe the information is clear, but if it isn't we shall be glad to explain it or answer any question that you may have.

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*The material not classified as confidential is available for inspection and copying at the Division of Legal and Public Records, 6th and Pennsylvania Avenue, Washington, D.C.

As discussed at a conference with Staff Members Charles Koch, Esquire, and Norman Smith, Economist, and Herbert B. Sachs, Esquire, Ralph Thompson, Vice President of Picco, and George Gregory and Gerard P. Kavanaugh, Esquire, of Hercules, on October 10, 1972, we have prepared a statement as an introduction to the answers which appear below.

INTRODUCTION

In consideration of the supplementary questions posed by the Federal Trade Commission relative to the acquisition of PICCO by Hercules, a common understanding of the definitions of several terms is essential to a proper interpretation of the answers to the questions. In particular, the terms "resins", "polymer", "hydrocarbon", and "rosin" must be defined.

Historically, a "resin" has been defined as an amorphous organic solid or semisolid of relatively low molecular weight, usually of natural origin, usually somewhat lusterous and often transparent or translucent. These natural resins can be of plant origin or animal origin. Examples of the former are "rosin" (from the pine tree), copal (from various tropical trees), dammar (from trees in Malaya), etc. A common example of a resin of animal origin is shellac, a substance secreted by the lac insect. In recent years, man-made or "synthetic" resins have been produced from a variety of raw materials. Resins are relatively low in molecular weight, usually in the 400–3000 range, melt to syrupy liquids, are brittle and low in strength, and are soluble in a variety of solvents.

"Polymers" are relatively high molecular weight substances (50,000 to several million in molecular weight) which contain repeating units, like the links in a chain. Each link is one molecule of the "monomer", or starting material from which the polymer is produced by chemical reaction. Hence, polymers like polyethylene are made from ethylene as the monomer, polystyrene from styrene, etc. Since resins may also contain repeating units, the molecular weight distinction is more basic.

In marked contrast to resins, most polymers soften upon heating to give a molten immobile mass rather than a liquid, are generally insoluble in solvents, and are tough with high strength, rather than brittle and weak like the resins.

Polymers are used as the source of strength in fabricated products like plastic bottles, plastic film, boxes, luggage, tubes, pipes, toys, textile fibers, etc. Resins are used to modify, or to impart special properties to, the polymers used in paints and protective coatings, adhesives, chewing gum, inks, etc.

Despite the rather clearcut distinctions between resins and polymers in their fundamental properties and behavior, some industrial vocabulary does confuse the issue. In the plastics industry, where polymers are molded or extruded or otherwise fabricated to finished products, the polymer molding powder or flake, prior to fabrication, is usually termed a "resin". Another confusing use of the term "resin" is in describing the common phenol-formaldehyde "resins" which are really pre-polymers or lower molecular weight polymers. Upon heating, these phenol-formaldehyde "resins" are converted irreversibly to high melting or infusible solids.

Thus, the term "resins" must be defined and differentiated from "polymer". In answering the FTC questions, we are defining "resins" to mean natural or synthetic substances, either weak brittle solids or liquid products, in the molecular weight range 400–3000, which are used to modify polymers to obtain specific properties. Generally speaking, resins and polymers do not perform the same functions, hence are not fully substitutable for each other.

The term "hydrocarbon" classically is defined as a substance containing only the elements carbon and hydrogen. A "hydrocarbon resin", therefore, is a resin which contains only carbon and hydrogen and no other elements. (Traces of contaminants or catalyst residues do not influence this nomenclature.)

* * * * * * *

We believe the definitions given above to be accurate and consistent with accepted terminology in the field of organic chemistry. Specific reference is made to:

a) *The Condensed Chemical Dictionary*, 6 Edition, Reinhold Publishing Company, 1961.

b) *Organic Chemistry*, Fieser & Fieser, D. C. Heath & Co., 1944 and subsequent editions.

c) "Rosin and Rosin Derivatives", *Encyclopedia of Chemical Technology*, Vol. 17, p. 475, 1968. Written by H. I. Enos and G. C. Harris of Hercules and G. W. Hedrick, U. S. Department of Agriculture. See Attachment 1.

PICCO is a producer of hydrocarbon resins by the above definitions. To the best of our knowledge only a few of PICCO's products are produced from components containing significant amounts of other elements, such as oxygen. PICCO's raw materials are essentially hydrocarbons of petroleum or coal tar origin. Although these raw materials may contain components in which other elements occur, the presence of these components is normally incidental to the production of the desired final product. In addition, we believe that PICCO also purchases pure hydrocarbons, like styrene, alpha-methylstyrene and vinyl toluene, which may be produced synthetically, rather than isolated from petroleum or coal tar sources.

Hercules is a major producer of rosin as a basic raw material. Rosin is an example of a natural resin which can be isolated from the living pine tree (gum rosin), from pine stumps (wood rosin), or from crude tall oil (tall oil rosin), a by-product of paper production. The chief chemical constituents of rosin, regardless of source, are abietic acid and its common isomers (Figure I), all of which are monobasic acids. As a result of the presence of the reactive acid group, as well as the double bond system present in many of the isomers, rosin can be chemically modified in many ways. By this means, Hercules produces a line of resins termed "modified rosins", obtained by various reactions involving the double bond system present in the resin acid molecules. By catalytic dehydrogenation, Resin 731 is produced. By dimerization, Poly-pale, Resin 861 and Dymerex are produced. By hydrogenation, Staybelite and Foral are produced. By reaction with maleic anhydride or fumaric acid, in the classical Diels Alder reaction, Hercules produces still other resins which are tri-carboxylic acids, rather than monocarboxylic acids, like abietic acid and its isomers.

The modified rosins can be further chemically converted to metal resinates by reaction with metallic oxides to yield the Pexate resins, or by esterification with alcohols to yield ester resins. These products, produced by the chemical conversion of the modified rosins, are termed "synthetic resins" in Hercules and industry nomenclature. (See Figure II).

The term "resins/rosins", used by the Federal Trade Commission, we interpret to mean the modified rosins and synthetic resins produced by the chemical conversion of rosin as the basic raw material. Since rosin is itself not a hydrocarbon, neither the modified rosins nor the synthetic resins produced by Hercules are hydrocarbon resins as defined.

Although Hercules does produce hydrocarbon polymers, such as polyethylene and polypropylene, Hercules does not now produce a hydrocarbon resin on a commercial scale. A limited number of hydrocarbon resins are under development, for reasons to be given later.

During the period October 1961–1970, Hercules produced for sale mixed alpha, beta-pinene resins which would conform to the above classical definition of a hydrocarbon resin. Due to the small scale of this operation, having an annual production of 2–3MM lbs., unit costs were high and the project was judged to be unprofitable. Production was discontinued in 1970. Since that time, any occasional sale of these polyterpene resins by Hercules has been merely the disposal of old inventories. These resins were reported in previously submitted Federal Trade Commission Acquiring Company Special Report Form OMB No. 56–R0026 in the answer to Question 6(a) under Product Code 2861198—Other Derivatives of Softwood Distillation. They are not included in this report since they do not meet the definition of resins/rosins as used herein.

HERCULES' UTILIZATION OF ROSIN

To satisfy its requirements for rosin as a basic raw material, Hercules produces both wood rosin and tall oil rosin and, in addition, purchases annually quantities of gum rosin, wood rosin and tall oil rosin. Of the total rosin of all types available to Hercules in 1971, 42% was converted to resins/rosins for domestic markets. About 7.8% was sold as such, mostly to Hercules' foreign affiliates for production of resins/rosins, with PICCO purchasing only 0.007% of the total Hercules rosin. The remaining 50% of Hercules' rosin moved to the paper industry as paper size, to miscellaneous industrial uses, and, in the form of Resin 731, to the rubber industry as an emulsifier for use in the production of synthetic rubber.

The costs of the resins/rosins virtually preclude their use in paper size and in most miscellaneous industrial applications. Only the special properties of Resin 731, primarily its stability under polymerization conditions, render it suitable on a cost/performance basis for the production of synthetic rubber.

The "resins/rosins" are sold to diverse markets including adhesives, printing inks, coatings, floor covering, food products and chewing gum, floor polishes, plastic materials, distributor sales and other miscellaneous uses.

Although in certain of these applications the Hercules resins/rosins are competitive with certain hydrocarbon resins, the area of this competition

is relatively restricted technically, by virtue of the greater polarity and reactivity of the rosin-based resins. Hydrocarbon resins are notably nonpolar and unreactive as compared to the greater polarity and reactivity resulting from the carboxyl and ester groups present in the rosin-based resins. Hercules' resins/rosins compete with comparable products produced by many other manufacturers who have access to rosin as a raw material (see Question 8. (a)).

PICCO resins compete with those of other producers who rely primarily upon the hydrocarbon raw materials available from petroleum, coal tar and other similar feed streams. We believe PICCO's chief competitors in hydrocarbon resins to be Neville, Velsicol, Reichhold, Goodyear, Amoco, Schenectady and Eastman and potentially Arco, Enjay, Monsanto, Dow and Union Carbide. Foreign competitors who are currently marketing or could market hydrocarbon resins in the U.S. are Mitsui, Arakawa, Toho, Nippon Petrochemical, ICI, Repalsa, Cledca, CdF Chimie, Faime, and VfT-Rutgers. For a more complete list of names and addresses of companies mentioned, see Attachment 2.

To the best of Hercules' knowledge, instances of direct competition between Hercules resin/rosins and PICCO hydrocarbon resins are infrequent and insignificant.

HERCULES' MARKETING OF RESINS/ROSINS

In the production and sale of the resins/rosins to the Hercules markets mentioned above, areas of application have emerged in which resins/rosins appear superior to hydrocarbon resins and vice versa. As Hercules has learned more about these markets and their growth potential, it has become apparent that a resin which would combine the best features of both the resins/rosins and the hydrocarbon resins would satisfy industry needs for which no existing resins is entirely suitable. As a result of many years of experimentation with the resins/rosins, Hercules has acquired certain unique technology, much of which would be applicable to the upgrading of relatively low-cost, hydrocarbon resins. We believe that this synergistic combination of resins/rosins and hydrocarbon resin technologies is capable of producing new products which would compete both with hydrocarbon resins and with other resins based upon rosin. Such new products could provide customers in many industries with equivalent performance at lower cost, or superior performance at no increase in cost. With a broad raw material base in rosin, Hercules is in a strong position to increase competition in many marketing areas, provided that Hercules can obtain technology in the production of hydrocarbon resins. The only technology possessed by Hercules in the production of hydrocarbon resins other than acquired from Mitsui (see below), is strictly limited to that required for the production of the polyterpene resins, mentioned previously, which were discontinued because of the small scale and consequent poor economics of the operation. This Hercules technology is, generally speaking, not adaptable to the production of a broad spectrum of hydrocarbon resins.

In an effort to acquire the necessary technology for the production of hydrocarbon resins, Hercules has explored several avenues. An agreement with Mitsui Petrochemical Industries, Ltd., dated January 1, 1971, granted to Hercules, for a monetary consideration, an option to use certain limited

Mitsui technology in the production of two types of petroleum-based hydrocarbon resins. Hercules has exercised this option, for the European Continent only, by commencing construction of a plant at Middelburg, The Netherlands, for the production of these two resins. The option to Mitsui technology for the continental United States must be exercised prior to January 1, 1976, by construction of a plant in the U.S. If Hercules does not commence such construction prior to that date, it will lose all rights to the Mitsui technology for the United States. Because of the limited scope of the Mitsui technology (it pertains to only two hydrocarbon resins), Hercules at the present time has no definite plans to exercise the option for the U.S. (See Question 5 (d) (1) below.)

The acquisition of broader hydrocarbon resin technology for the United States would be of much greater potential value to Hercules. PICCO is a broad base producer of hydrocarbon resins in the U.S., having been engaged in this business since the early 1930's. PICCO's proprietary technology, generated internally, is judged to be of much greater value to Hercules and to the American market than the relatively limited technology available from Mitsui. The acquisition of PICCO by Hercules would present the opportunity for a synergistic combination of two technologies to produce new products which would compete both with other hydrocarbon resins and other resins/rosins, thus increasing competition in several marketing areas.

The numbered paragraphs which follow correspond to the numbered paragraphs in the FTC letter dated September 26, 1972, to Herbert B. Sachs, Esquire, Baskin, Boreman, Sachs, Gondelman & Craig.

1. The state and date of incorporation and a complete description of the business and geographic area of operations of Hercules.

Hercules Incorporated was incorporated in Delaware on October 18, 1912. Its principal activity is the manufacture and sale of a widely diversified line of chemicals, allied products and modular structures. See Exhibit 1 for a complete description.

2. A description of each class of stock of Hercules, the total number of shares of each class authorized and outstanding on December 1, 1971. A list of all owners of record on December 1, 1971, who owned 1% or more of each such class of stock.

i) For a description of each class of capital stock of Hercules, see Exhibit 2(i).

ii) The total number of shares of each class authorized and outstanding as of December 1, 1971:

Class	*Authorized*	*Outstanding*
Common	25,000,000	20,192,857
Cumulative Convertible Class A	93,401	32,840
Convertible Preferred	1,000,000	None.

iii) Rather than submit a list of owners of record on December 1, 1971, who own 1% or more of each class of stock, the Company is furnishing a list of stockholders owning 20,000 shares or more as of February 11, 1972. This list covers only the holders of the Common Stock of the Company. None of the authorized Convertible Preferred has been issued. All of the outstand-

ing Cumulative Convertible Class A Stock has been redeemed or converted as of March 15, 1972, and none of it is currently outstanding.

3. The names and address of all officers and directors of Hercules, and the location of all the firms' offices, plants and distribution terminals.

i) For the names and address of all officers and directors of Hercules, see Exhibit 3(i).

ii) For the location of all the firms' offices and plants, see Exhibit 3(ii).

iii) For the location of 348 distribution terminals, see Exhibit 3(iii). These terminals include 13 Bulk Storage Locations, 113 Toxaphene (Insecticide) Storage Tank Locations, 81 Public Warehouses, 132 Explosive Magazine Locations and 9 Smokeless Powder Dealers.

4. Copies of contracts, options and agreements relating to the acquisition. Please include letters of intent, correspondence, internal memoranda, summaries, minutes of meetings, reports, surveys, analyses, studies, or writings by or for Hercules, referring in any way to the purchase of assets or stock, commitment to buy stock, or the purchase of stock voting rights from Picco.

See Exhibits 4.

Prior to the September 22, 1972, conference with members of the Staff of the Federal Trade Commission, Herbert B. Sachs, Esquire, Baskin, Boreman, Sachs, Gondelman & Craig, Counsel for Picco, Mr. Robert Ostermayer, Jr., President of Picco, and Gerard P. Kavanaugh, Esquire, Assistant General Counsel of Hercules Incorporated, no contracts, options or agreements relating to the acquisition of Picco by Hercules had been entered into. At the conference the representatives of Picco and Hercules were advised in accordance with the FTC practice that an announcement of the request for an advisory opinion as described in the caption of this letter would be made public during the week of September 24. In view of this, Picco and Hercules entered into a letter of intent on September 22, 1972. Risk analysis studies of the Picco acquisition dated July 17, 1972, and a memorandum dated July 26, 1972, describing the factors affecting the outcome of the Picco risk analysis prepared by Hercules can be made available in STRICT CONFIDENCE.

5. Original or photocopies of:

(a) All annual, quarterly and other reports made by Hercules and its affiliates to its stockholders since January 1, 1969.

See Exhibits 5(a).

(b) All prospectuses, solicitations or proxy statements, and statements listing securities filed by Hercules, or its affiliates with any state corporation and/or stock exchange since January 1, 1969.

See Exhibits 5(b).

(c) All reports and prospectuses submitted by Hercules and its affiliates to the Securities and Exchange Commission since January 1, 1969.

In response to this question are the following reports and prospectuses:

(1) Hercules Incorporated Stock Option Plan Definitive Prospectuses dated May 5, 1969—May 8, 1970—June 11, 1971, and June 5, 1972. The Prospectus given each option holder is the same for the 1956, 1962 and 1967 Stock Option Plan so we have furnished only one copy for all Plans for each year.

(2) Hercules Incorporated Employe Savings Plan Definitive Prospectuses dated April 30, 1969—May 1, 1970—May 27, 1971—May 15, 1972, and October 12, 1972.

(3) The Prospectuses included in two S–16 Registrations. One Prospectus is dated October 25, 1971; the other July 18, 1972.

(4) The following Form 8–K Current Reports for:

(a) March,	1969	(i) August,	1971
(b) August,	1969	(j) November,	1971
(c) March,	1970	(k) January,	1972
(d) May,	1970	(l) March,	1972
(e) July,	1970	(m) April,	1972
(f) September,	1970	(n) July,	1972
(g) March,	1971	(o) September,	1972
(h) July,	1971		

(5) Form 9–K Semi-Annual Reports for the six months ended June 30, 1969, and for the six months ended June 30, 1970.

(6) The following Form 10–Q Quarterly Reports for the quarters ended:

(a) March 31, 1971
(b) June 30, 1971
(c) September 30, 1971
(d) March 31, 1972
(e) June 30, 1972

(7) Form 10–K Annual Report of Hercules Incorporated to the Securities and Exchange Commission for the years 1968, 1969, 1970 and 1971. We have not included the Exhibits in 10–K Filings which are:

Report for 1971—

(1) Excerpts of Minutes relating to changes in the membership of the Board of Directors of Hercules.

(2) Computation of Earnings per share of Common Stock.

Report for 1970—

(1) Excerpts of Minutes relating to changes in the membership of the Board of Directors of Hercules.

(2) Computation of Earnings per share of Common Stock.

(3) Hercules Pension Plan Booklet, approved December 30, 1970.

(4) Composite Certificate of Incorporation of Hercules Incorporated.

(5) By-Laws of Hercules Incorporated as Revised and Amended dated March 19, 1968.

(6) Specimen of Hercules Incorporated Voting Common Stock Certificate.

(7) Specimen of Hercules Incorporated $1.65 Cumulative Class A Stock Certificate.

Report for 1969—

(1) Excerpts of Minutes relating to changes in the membership of the Board of Directors of Hercules.

(2) Copy of Hercules Incentive Compensation Plan which was incorporated by reference to the February 10, 1969 Proxy Statement. (This Plan never became operative and has been abandoned.)

Report for 1968—

(1) Excerpts of Minutes relating to changes in the membership of the Board of Directors of Hercules.

(2) Copy of Bonus Plan incorporated by reference to Exhibit in 8–K Report filed for October, 1968.

(8) Form 11–K Annual Report of the Hercules Employe Savings Plan to the Securities and Exchange Commission for the years 1968, 1969, 1970 and 1971.

(d) All documents, including correspondence, internal memoranda, summaries, minutes of meetings, press releases, reports, surveys, analyses, studies, announcements and writings of any sort, including printed or typewritten matter, made by, made for, or in the possession of Hercules, or any subsidiary, affiliate or stockholder, or any agent acting on behalf of any of them, referring in any way to:

(1) entry or expansion by Hercules into new product lines or new marketing areas—at any time during the past five years, or in the future;

In the related area of resins/rosins, Hercules has entered into three new product lines in the past 5 years. The three products, Resin 1977, Permalyn XA resins and the Terpalyn XC resins are shown in Exhibit 5(d)(1). The sources of research information are listed under the column headed "Source of Information" and can be made available in STRICT CONFIDENCE. Resin 1977 is manufactured for internal consumption only for polyolefin film manufacture. The current sales brochures for the Permalyn XA and Terpalyn XC resins are included as part of Exhibit 5(d)(1).

In addition to the specific new product lines/marketing areas shown in Exhibit 5(d)(1), Hercules and Mitsui Petrochemical Industries, Ltd. have entered into an agreement, having an effective date of January 1, 1971, under which Hercules acquired an option to certain Mitsui know-how in the production of two types of hydrocarbon resins. The agreement is marked Exhibit 5(d)(1).

In addition, Hercules has studied the economics of entering the hydrocarbon resin business by construction of its own plant, utilizing Mitsui know-how. A risk analysis of this proposal is contained in a letter from D. A. Palmer to R. G. Fajans, dated July 14, 1972. This document can be made available in STRICT CONFIDENCE.

A letter, Gregory to Leahy, May 2, 1972, qualitively describes the potential synergism obtainable through a combination of resin/rosin and hydrocarbon resin technologies. This document can be made available in STRICT CONFIDENCE.

(2) Hercules' market share, rank, or position with reference to the sale and distribution of the resins/rosins, or components thereof or products derived therefrom, which are a part of its product line, during the past five years, or in the future;

The information required to anwer this question is unavailable to Hercules. We are aware of the indentities of our competitors in the production of resins/rosins, but have no means of determining Hercules' "market share, rank or position". The resins/rosins from all producers move into a broad spectrum of marketing areas. No single supplier, to the best of our knowledge,

occupies a dominant position in all of these individual markets, some suppliers being more active in certain markets than others. Hercules has never had access to information which would permit it to determine Hercules' position in each of the diverse markets served by resins/rosins.

(3) general studies, surveys, and analyses of the resins/rosins industry within the geographic marketing area of Hercules during the past five years, or in the future;

To the best of our knowledge, no general studies or surveys of the "resins/rosins industry" exist because such an "industry" cannot be defined, since these products move to many diverse industries.

(4) the most recent brochures and catalogs describing and illustrating all products manufactured or distributed by Hercules.

See Exhibit 5(d)(4) which contains the most recent brochures and data sheets describing Hercules resins/rosins.

(e) Reports regarding resins/rosins, or components thereof or products derived therefrom, filed in connection with the 1967 Census of Manufacturers, or in lieu thereof, the quantity and dollar value of shipments of each S.I.C., 7-digit product code item so reported for the year 1967.

See Exhibit 5(e).

The data reported in this Exhibit were extracted from the Annual Survey of Manufacturers Report (Form MA–100) submitted to the U.S. Department of Commerce, Bureau of Census. The seven digit Standard Industrial Classification Product Code is reported on products where the code was shown on the forms provided by the Census Bureau. There were cases where the seven digit code was not shown and we reported under the six digit code furnished in the Bureau of Census Instruction Manual (MA–100–R1).

(f) Industry statistical data regarding production, shipments, and sales of resins/rosins, or components thereof or products derived therefrom, contained in reports prepared and submitted to, or received by Hercules from industry sources.

There is no trade association or group which publishes industry statistical data regarding the production, shipment and sale of resins/rosins. Again, trade associations do exist for some of the markets using these products. However, no statistical data are available which would pertain to all of these industries. (See comments under 5(d)(2) and 5(d)(3) above).

6. Provide the following information:

(a) Identify each Hercules' plant manufacturing resins/rosins, or components thereof or products derived therefrom, showing:

(1) the yearly capacity of each in barrels, tons, or other appropriate term for each of the years 1969, 1970 and 1971;

See Exhibit 6(a)(1).

Hercules' plant capacities for the manufacture of resins/rosins for the years 1969, 1970, and 1971 are given in the three tables in Exhibit 6(a)(1). Hercules, at present, has the capacity to make about 280 million pounds of wood rosin from the extraction of pine stumps and about 150 million pounds of tall oil rosin via recovery from crude tall oil. These rosins are interchangeable to some degree.

A portion of the total rosin production is used to make the resins/rosins of current interest. The various classes of derivatives are shown, along with the Hercules manufacturing capability for each, by plant, in Exhibit 6(a)(1).

Certain resins/rosins are made from others in the group. A given quantity of rosin may pass through as many as four distinct product identities before being offered for sale. For this reason, the total net capacity shown for each plant is not necessarily the sum of the capacities of the various production units, but is the total capacity of that plant to produce all resin/rosin products.

In some cases, significant yield losses are incurred, the quantity of a specific resin/rosin produced being much less than the rosin consumed. In other cases, as in reaction with alcohols, the combining weight of the alcohol may offset yield losses, so that more resin/rosin is produced than rosin consumed. Specific information concerning this is proprietary and can be made available under STRICT CONFIDENCE.

(2) total shipments of resins/rosins, or components thereof or products derived therefrom, by quantity and value of shipment, for each of the years 1969, 1970 and 1971. (Include any transshipped through distribution terminals.)

See Exhibit 6(a)(2).

Exhibit 6(a)(2) shows total shipment of resins/rosins *to customers.* which are substantiated by invoices, for each of the years 1969, 1970, and 1971. The totals include shipments to both *domestic* and *foreign* customers, since they are based upon a computer print-out of shipments by plant of origin. Separation of these shipments by plants of *origin* and by *destination* would be extremely laborious.

The invoiced values are based upon the gross price to the customer, therefore do not show any freight charges paid or allowed by Hercules.

The sales price applied is the average net sales price to all customers for the year and product involved.

Transshipped products through distribution terminals are not shown in Exhibit 6(a)(2) since this would duplicate shipments from producing plant sites. Sales to distributors are shown in Exhibit 10(a). For a complete list of the 348 distribution terminals see Exhibit 3(iii).

The shipment of each resin/rosin product by quantity and by plant is considered proprietary information and can be made available in STRICT CONFIDENCE.

(b) Identify and locate each terminal and/or other type of storage capacity for each of the years 1969, 1970 and 1971.

It is not practical to identify and locate each terminal and/or other type of storage capacity for each of the years 1969, 1970 and 1971 with respect to resins/rosins.

7. Describe the classes of customers to which Hercules sells and/or distributes each of its resins/rosins, or components thereof or products derived therefrom, indicating the method and means used to sell, advertise and promote the sale of such products to each class of customers.

Hercules sells resins/rosins to the following classes of customers:

	S.I.C. Code/Codes
1. Adhesives	2891, 3842
2. Coatings	2641, 2851, 3479
3. Distributors	5000
4. Floor Coverings	3996, 3292
5. Floor Polishes	2842
6. Food and Kindred Products	2073, 2086
7. Printing Inks	2893
8. Plastic Materials	2821
9. Other	

The "other" class of customers covers various manufacturers such as fragrances, hair care, plasticizers, solding fluxes, rubber compounding, lens grinding and leather impregnating.

All resins/rosins are marketed directly by Hercules to the classes of customers listed above utilizing Technical Representatives. A limited amount of advertising in trade journals is used to help promote the sale of these products.

8. (a) List Hercules' competitors in the sale or distribution of resins/rosins, or components thereof or products derived therefrom. The products covered in responding to Question 5(e) should be used in determining whether competition exists.

See Exhibit 8(a).

Hercules' competitors in the sale of resins/rosins falls into two categories: (a) those who produce rosin and modify it chemically to resins/rosins; (b) those who purchase rosins or modified rosins for further chemical processing to resins/rosins. The S.I.C. product codes (see 5(e)) are too broad in scope to permit a definitive answer to this question. The companies in Exhibit 8(a) are, to the best of our knowledge, Hercules' major competition in the sale of resins/rosins.

(b) List Hercules' shipments of each of the resins/rosins, or components thereof or products derived therefrom, which it produces (a) to Picco (b) to all customers for each of the years 1969, 1970 and 1971. (Include any resins/rosins, or components thereof or products derived therefrom, transshipped through distribution terminals.)

See Exhibit 8(b)(a) and Exhibit 8(b)(b).

9. (a) Identify each product Hercules purchases from Picco. As to each, provide the total dollar value of such purchases for each of the years 1969, 1970 and 1971.

Hercules' purchases from PICCO for the years 1969, 1970 and 1971 were as follows:

Year	*Piccotex 120*	*Picco 6000 Resins*
1969	$ 59,260.56	None
1970	244,659.70	None
1971	388,779.00	$1,346.10

(b) Identify all other suppliers of each such product. As to each, provide the total dollar value of Hercules' purchases from each such supplier for each of the years 1969, 1970 and 1971.

PICCO has a composition of matter patent on the Piccotex resins. We are not aware that they are available from any other supplier.

Resins comparable to the Picco 6000 Resins are available from other suppliers in the U.S. and abroad. We believe that in the United States, Neville, Velsicol, Reichhold and perhaps Schenectady and Amoco produce resins more or less comparable in properties to the Picco 6000 series. Abroad Mitsui Petrochemical Industries, Ltd. produces a series of resins termed Petrosin G which are also comparable to the Picco 6000 Resins.

Prior to calendar year 1970, Hercules purchased no resin comparable to the Picco 6000 Resins from any supplier. In 1970 and 1971, Hercules purchased from Mitsui quantities of Petrosin G having values of $3,663.14 and $3,127.46, respectively. During 1971, Hercules decided that the Picco 6000 Resins are more representative of the type of resin which Hercules would contemplate using than the Petrosin G resins from Mitsui. The feedstocks used by PICCO in producing the Picco 6000 Resins were thought to include those which Hercules has found to be most acceptable for its use. Consequently, due to Hercules' small requirement for interim supplies of resins of this type, it was not judged necessary or even advisable to seek alternative sources of supply at this time.

10. For each class of customer described in answering Question 7, (a) state the total dollar value of Hercules' sales to such class during 1970 and 1971; and (b) within each class, identify by name, address and dollar value of purchases, Hercules' twenty largest customers for each of the years 1970 and 1971.

(a) See Exhibit 10(a).

(b) See Exhibit 10(b).

11. Provide copies of any agreement and explain any understandings or condition between Hercules and Picco, or anyone acting on behalf of them, relating to Hercules' purchases of resins from Picco. If such agreement, understanding, or condition is not in writing, describe its terms in detail.

No written agreement exists between Hercules and PICCO relating to Hercules' purchases of PICCO resins. Periodically Hercules orders Piccotex 120 and the Picco 6000 Resins, on a spot basis at list price, using a standard Hercules purchase order form.

Very truly yours,

/s/ Gerard P. Kavanaugh

Assistant General Counsel

Third Supplemental Letter Relative to Request

October 27, 1972

Attention: Joseph P. Dufresne, Esquire

Re: Hercules-Pennsylvania Industrial Chemical Corporation proposed merger

Gentlemen:

Regarding the submittal of Pennsylvania Industrial Chemical Corporation re the above, the writer requests that Exhibit "J" of the transmittal letter be given confidential treatment.

Very truly yours,

/s/ HERBERT B. SACHS

Second Supplemental Letter Relative to Request

October 18, 1972

Attention: Joseph P. Dufresne, Esquire

Re: Request for advisory opinion—Acquisition by Hercules, Inc., of Pennsylvania Industrial Chemical Corporation (Picco)

Dear Mr. Dufresne:

In response to your letter dated September 22, 1972 requesting certain information relative to the above subject matter, please be advised of the following:

1. Picco was incorporated on August 11, 1920 under the name of Pittsburgh Soda Products Company, as evidenced by a Certificate of Incorporation filed in the office of the Department of State of the Commonwealth of Pennsylvania on August 11, 1920. On January 10, 1924 Articles of Amendment were approved and filed in the said office changing the name to Pennsylvania Industrial Chemical Corporation.

The said company is engaged in the business of manufacturing and selling industrial resins employed as a raw material in a wide variety of industries more fully detailed herein.

Picco has manufacturing facilities in the City of Clairton, Pennsylvania, Baton Rouge, Louisiana and Dax, France, a facility owned and operated by a French company known as Derpicco SA, in which it owns a 50% equity.

Details relating to the purchase of supplies from suppliers located outside of the Commonwealth of Pennsylvania, together with their respective names and addresses are described in Exhibit "A" attached hereto. As to the identification of Picco's customers to whom sales are made see Exhibit "O" which contains the names and addresses of its principal customers in the eight market areas within the United States and total approximately 66 accounts. The total number of accounts to which Picco sells products is roughly 1200 companies in number, many of which have more than one receiving point. It would therefore be a burdensome task to provide a list of all of Picco's customers outside the Commonwealth of Pennsylvania.

In the years 1969, 1970 and 1971, 90% of the company's total sales were delivered to points outside of the Commonwealth of Pennsylvania.

2. Picco is authorized to issue 600,000 shares of one class of stock, to-wit, Common, and has in fact issued a total of 284,461 shares thereof, from which Picco has purchased 83,243 shares of Treasury Stock leaving issued and outstanding 201,218 shares. Those individuals who, alone or with members of their family, own in excess of 1% of the issued and outstanding shares of said stock are, together with the number of shares so owned, identified in Exhibit "B" attached hereto.

The writer has no knowledge of any beneficial interest in any of the said shares which is not reflected on the records of the company. Picco maintains its own registry and acts as its own transfer agent.

3. The names and addresses of all officers and directors of Picco, together with a description of the capacity in which they serve, are identified in Exhibit "C" attached hereto. In addition to the locations of its manufacturing facilities described in paragraph 1 hereof, Picco SA, a company formed under the laws of the Canton of Friborg, Switzerland, a wholly owned Picco subsidiary, maintains an office in Friborg, Switzerland. Other than those specifically elsewhere referred to herein, Picco has no distribution terminals.

4. The only writing relating to the proposed acquisition is a letter of intent dated September 22, 1972, a copy of which is marked Exhibit "D" and attached hereto.

5. (a) All of the annual and quarterly financial reports made or published by Picco and its affiliates to shareholders since January 1, 1969 are marked collectively as Exhibit "E" and attached hereto.

(b) All prospectuses, solicitations or proxy statements, together with statements listing securities filed by it or its affiliates with any state corporation and/or stock exchanges, are collectively marked Exhibit "F" and attached hereto.

(c) All reports, statements and prospectuses submitted by Picco and its affiliates to the Securities and Exchange Commission since January, 1969 are collectively marked Exhibit "G" and attached hereto.

(d) (1) Picco has developed and made no new product lines or new marketing areas at any time within the past five (5) years.

(2) and (3) The information requested is contained in an inter-office memorandum dated September 29, 1972 to R. W. Ostermayer, Jr., which is marked Exhibit "H" and attached hereto.

(4) The information requested is contained in Exhibit "I" attached hereto.

(e) The information requested is contained in Exhibit "J" attached hereto.

(f) An exhaustive research discloses that no such statistical data has been published or received by Picco.

6. (a) (1) and (2) The information requested is contained in Exhibit "K" attached hereto.

(b) The information requested is contained in Exhibit "L" attached hereto.

7. (a) The information requested is contained in Exhibit "M" attached hereto.

(b) The information requested is contained in Exhibit "N" attached hereto.

8. See Exhibit "H".

9. Since Picco does not have twenty customer in each class described in the preceding answer, Exhibit "O" attached hereto contains a summary of sales by market area for the years 1970 and 1971. For each market all sales in excess of $50,000 worth of annual sales of product are shown together with the individual accounts. Sales to other accounts and total accounts are also shown in each market area.

10. There is no agreement or understanding between Picco and Hercules, or anyone acting on behalf of either, relating to the purchases by Picco of resins from Hercules. All purchases are made at Hercules' published prices and are all arms-length transactions.

We trust that the foregoing is sufficient for your purposes. However, should any additional information be required or desired, please advise at your earliest convenience and the same will be promptly forthcoming.

Very truly yours,

/s/ HERBERT B. SACHS

First Supplemental Letter Relative to Request

October 9, 1972

Attention: Joseph P. Dufresne,
Attorney, Office of General Counsel

Re: Request for advisory opinion—Acquisition by Hercules Incorporated, of Pennsylvania Industrial Chemical Corporation (Picco)

Gentlemen:

This is a reply in part to the letter dated September 26, 1972, addressed to Herbert B. Sachs, Esquire, Baskin, Boreman, Sachs, Gondelman & Craig, Counsel for Pennsylvania Industrial Chemical Corporation (Picco) concerning the request for an advisory opinion described in the caption.

Accompanying this letter is the Acquiring Company (Hercules Incorporated) Federal Trade Commission Special Report (Form

OMB No. 56–R0026). Where necessary, the data was extracted from the Annual Survey of Manufacturers Reports (Form MA–100) submitted to the United States Department of Commerce Bureau of Census in the form and manner required by that Department. In some instances the information called for was not available, and in others the available information is not in the form in which requested, but in all instances every effort has been made to answer fully the questions set forth in the FTC Acquiring Company Special Report Form.

Some information, because of its proprietary nature, is submitted in confidence with the understanding that it will not be disclosed to third parties without the prior written consent of Hercules Incorporated. This information has been stamped "Confidential" and appears in connection with questions 6 and 7.

Very truly yours,

/s/ Gerard P. Kavanaugh

Assistant General Counsel

Letter of Request

June 26, 1972

Dear Mr. Mezines:

The writer is counsel for Pennsylvania Industrial Chemical Corporation (Picco), a corporation organized and existing under the laws of Pennsylvania. The purpose of this letter is to ascertain the possibility of seeking an advisory opinion, based upon the facts furnished herein, relating to action contemplated by the client in conjunction with Hercules, Inc.

Picco is a corporation whose principal business is the manufacture of industrial resins used as a raw material in a wide variety of industries. In 1971 it did a dollar volume of 3½ million, the highest in its history. It sells its products, primarily synthetic hydrocarbon resins, under a variety of tradenames in both domestic and foreign markets to the rubber, printing, flooring, paint, textiles, plastics, paper, adhesive and coating industries, as well as in other related fields. Its products are manufactured primarily from by products of the petroleum industry, terpene products and petro chemical raw materials, and are used as raw materials by manufacturers in the industries noted above.

Roughly 90% of its sales in 1971 were domestic markets and 10% foreign.

Picco has manufacturing facilities in Clairton, Pennsylvania, Baton Rouge, Louisiana, and in Dax, France, its equity in the latter being a one-half interest as a result of a joint venture with a French company.

Hercules, Inc. and its consolidated subsidiaries serve many of the same industries that Picco serves, by way of example, the paper, construction, plastics, rubber, synthetic fibers, etc., and does a total dollar volume in excess of $800,000,000. Oddly enough the products of Hercules and Picco are not competitive although each buys and sells to the other. Picco sells to Hercules approximately one-half million dollars worth of resins per annum. These resins are consummed by Hercules as raw materials in the formulating of some of its finished products. On the other hand, Picco purchases from Hercules one-quarter million dollars worth of beta pinene (a fractionated part of turpentine) which is used as a base for the manufacture of some of its low molecular weight hydro carbon resins.

Hercules approached Picco to explore the possibility of a joint venture in foreign markets and proposed that the two companies build manufacturing plants in foreign markets to produce those hydro carbon resins which Hercules now purchases from Picco and others. Hercules' primary interest in a joint venture with Picco stems from its lack of technology in compounding the hydro carbon resins which would be manufactured in those foreign markets. While Hercules could secure from others a similar type of technology adequate to achieve its purpose in manufacturing the contemplated resins, the proposed venture with Picco would result in a time saving factor which would enable Hercules to penetrate this market several years sooner than it could if it were forced to secure the technology elsewhere. The most likely source for such technology would be from one of the many Japanese companies that are currently trying to penetrate the domestic hydro carbon resin market. A joint venture with Hercules is unattractive to Picco since the use of such technology by Hercules in domestic markets would, of course, have an adverse impact on Picco's position in such markets. It is because of this factor that Hercules suggested the possibility of a merger, and hence this inquiry.

The following are some of the salient facts I suspect would be

helpful to you to respond, if you are so inclined, with an unofficial opinion.

1. The management of both Hercules and Picco are confident that a consolidation of efforts and technologies in the manufacture and compounding of certain hydro carbon resins would have a beneficial effect upon the economy of the Country insofar as it will broaden research and experimentation which in turn may produce new uses and applications for such products. Historically, in this industry as in others, such is the ultimate result. Certainly it would appear that from an economic point of view the proposed combination would be more desirable than an arrangement for the acquisition of technology for the manufacture of hydro carbon resins between Hercules and one of the Japanese companies, the effect of which would be to provide such foreign companies with an opportunity to penetrate domestic markets. As matters stand presently the Japanese companies, later identified herein, are now attempting to enter into and sell their resins in domestic markets.

2. It is difficult to describe with definity the uses and applications of all of Picco's 151 low molecular weight hydro carbon resins, since new ones are constantly appearing that are generally employed as base ingredients in the manufacturing and compounding of products generally used in the industries cited above, and more particularly in the manufacture of products used in connection with the following industries, viz., glass, paints, cloth, ink, automotive, dry cleaning, chemical milling, hydraulic fluids, rubber, electric installations, furniture, toners, wood laminating, ceramic leather, sealents, cellophane, construction, medical, dental, etc. In describing the total expanse of products made from hydro carbon resins it would be difficult to point to any object with which we have daily contact that does not contain some type or form of a hydro carbon resin.

3. I can identify Picco's "competitors" only by using the term "competitor" in a very limited manner so as to include only those companies that manufacture the same type of low molecular weight hydro carbon resins included in Picco's line. Some of these are Goodyear, Reichhold, Veliscol, Chemfax, Neville Chemical, Amoco, Tenneco, Eastman, Dow, Mattson, Ziegler, Arizona Chemical, Schenectady, Crosby Chemical, DuPont, Pfaudler Permutit, Rohm & Haas, Catalin, Hooker, Schen., P. Hunt, Cyanamid, Stauffer, Carlisle and Monsanto. It should be borne in mind that the above named are direct "competitors" in the context of similarity of product compositionwise, and that there are many others

who manufacture products that compete with those of Picco at both a functional and economic level.

4. In an attempt to provide you with a maximum amount of helpful information in terms of Picco's percentage of some specific markets in the industries identified, construing "market" in the broad and practical sense, I submit the following:

Market	*Picco's Percentage*
Adhesive and Coating	less than 1%
Plastics (film)	1%
Paper	less than 1%
Textiles	less than 1%
Rubber	less than 1%
Printing and Toners	
Inks	2%
Toners	50%
Flooring	
Tile	
Asphalt	82%
Vinyl	2%
Carpeting	less than 1%
Paint	2%

5. It is my understanding that Picco sells approximately three million dollars worth of products manufactured from beta pinene. Approximately one-half of the sales of such products are manufactured from raw materials purchased from Hercules.

6. Within the past ten years there have been a number of new enterants into the commercial manufacture and sale of hydro carbon resins, and for what value it may have in your terms of reference, they are Eastman, Goodyear, Amoco, Arizona Chemical, Tenneco, Ziegler and several other small companies.

7. In addition to those companies named in the preceding paragraph as new enterants into the hydro carbon resin field, there are a number of Japanese companies making strong efforts to penetrate the industry. Some of these are Arakawa (manufacturers of both petroleum and terpene resins); Mitsui Chemical (manufacturers of petroleum resins); Toho Sekiya Yushi (manufacturers of petroleum resins); Nippon Petro Chemical (manufacturers of petroleum resins).

As I have previously stated, the management of both companies are thoroughly convinced that the purposed combination would have an extremely desirable effect upon both present and future

domestic market conditions and, therefore, are hopeful that some favorable reaction will be forthcoming.

If there is any additional information you may wish or require, please advise and I will oblige promptly.

I gratefully acknowledge your courtesy in this matter.

Very truly yours,

/s/ HERBERT B. SACHS

Proposed acquisition of assets of Medi-Hair International, Inc., a franchisor of hair replacement system salons. (Docket No. 8830*)

Opinion Letter

February 13, 1973

Dear Mr. Palombo:

This is in response to the request dated December 1, 1972, of Dura-Hair International, Inc. ("Dura-Hair") that the order to cease and desist in the above-cited matter be modified by entry of a consent order against Dura-Hair as proposed by the request.

Rule 3.72(b)(2) of the Commission's Rules of Practice provides for the filing of a petition to modify a final order only by a person subject to that order. Inasmuch as Dura-Hair is not presently subject to the above-cited order, the request, qua a petition under Rule 3.72(b)(2), is denied. The Commission, however, has determined to treat the request as a request for an advisory opinion under Rule 1.1 of the Commission's Rules.

Based on the documents and information submitted, the following appears relevant to the request: corporate respondent Medi-Hair International, Inc. ("Medi-Hair") is presently in bankruptcy.[1] On August 18, 1972, an order was entered by the Referee in Bankruptcy providing for the sale to Dura-Hair of certain assets from the Estate in Bankruptcy of Medi-Hair. Among the assets Dura-Hair will acquire are United States Patent 3553737, dated January 12, 1971, Patent Application No. 88279, dated November 10, 1970, the business name, accounts receivable and records of Medi-Hair, and all right, title and interest in Medi-Hair's licensing or franchise agreements. These assets are presently held in escrow, and title to them will pass to Dura-Hair upon payment of the purchase price within 180 days of the date of the order, or before February 14, 1973.

The order to cease and desist, issued April 21, 1972, in Docket No. 8830 provides, among other things, that it shall run against not only Medi-Hair and Jack I. Bauman but also their successors and assigns.[2] In view of this, it is the Commission's opinion that

*For case before the Commission, see 80 F.T.C. 627.

[1] No. S-19950-W In Bankruptcy, United States District Court for the Eastern District of California.

[2] The order provides, in pertinent part, as follows:

"IT IS ORDERED that respondents Medi-Hair International, a corporation, and Jack I.

should Dura-Hair acquire the assets of Medi-Hair as contemplated by the above-mentioned order of the Referee in Bankruptcy, Dura-Hair would thereupon be subject to the Docket 8830 order to cease and desist.

However, if and when the acquisition is accomplished, Dura-Hair may, if it wishes, renew its petition requesting that the Commission modify the order. Enforcement of the order will be stayed for 30 days subsequent to the date of any such acquisition to allow you to renew such petition and have it acted upon by the Commission.

By direction of the Commission.

Letter of Request

December 1, 1972

Gentlemen:

Dura-Hair International, Inc., a California corporation ("Dura-Hair") has tentatively agreed to purchase a patent and certain other assets from the Trustee of the Estate in Bankruptcy of Medi-Hair International, Inc. ("Medi-Hair"). Those assets are presently held in escrow and it is expected that title will pass to Dura-Hair on or before February 14, 1973.

There is not now, nor has there ever been, any affiliation or other connection between Dura-Hair and Medi-Hair.

During the course of negotiating for the purchase of the Medi-Hair assets with the Trustee, Dura-Hair became aware of the Consent Order entered into by the Federal Trade Commission, Medi-Hair and Jack I. Bauman on October 5, 1971. That Order sets down very stringent terms with respect to the advertising and sales practices in which Medi-Hair and its licensees were engaged. The Consent Order also provides in part as follows:

IT IS FURTHER ORDERED that in the event that the corporate respondent (Medi-Hair) merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation or to any other person, said respondent shall require such successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this Order; provided that if said respondent wishes to present to the Commission any reasons why said Order should not apply in its present form to said successor or transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

Bauman, individually, and as an officer and director of said corporation * * * (hereinafter sometimes referred to as 'respondents') and respondents' * * * successors and assigns * * * do forthwith cease and desist from * * * ."

Because Dura-Hair expects to acquire "a substantial part" of the assets of Medi-Hair, it will consider itself bound by the Consent Order when title to those assets passes. However, Dura-Hair earnestly believes that certain terms of the Consent Order should be modified insofar as they would apply to the conduct of business by Dura-Hair. The reasons for Dura-Hair's application for modification of the Consent Order, insofar as it would apply to Dura-Hair, are set forth fully in the enclosed Motion* of Dura-Hair International, Inc. for Modification of Consent Order. The basic reasons for the Motion are (1) Dura-Hair was in no way responsible for, or connected with, the practices which resulted in the issuance of the Commission's complaint against Medi-Hair and Jack I. Bauman, (2) compliance with certain terms of the Order would be extremely damaging and burdensome to Dura-Hair, (3) Dura-Hair's business practices are, and have always been, dramatically different from those apparently practiced by Medi-Hair, and (4) if the Order is not modified, Dura-Hair will, in effect, be punished for acts and practices by Medi-Hair over which it had no control or responsibility.

Because there is a period of only about two months before Dura-Hair expects to take title to the Medi-Hair assets, we urgently request that the Commission consider this matter at the earliest possible time. Dura-Hair would, of course, be pleased to submit any additional information that the Commission might find helpful.

In order to facilitate the Commission's review of this matter, we are sending a copy of this letter and the enclosed Motion directly to Messrs. Paul R. Peterson and Gerald E. Wright, the Attorneys in the San Francisco Regional office, who handled the proceeding against Medi-Hair and Mr. Bauman.

Sincerely,
/s/Don J. Belcher

*Not reproduced herein, but available for inspection and copying at the Division of Legal & Public Records, Room 130, Federal Trade Commission Bldg., Washington, D.C.

Proposed acquisition by a grocery wholesaler of the assets and business of Clover Farm Stores Corporation. (Docket No. 6444*)

Opinion Letter

March 23, 1973

Dear Mr. Houston:

This is in reference to your letter of June 19, 1972 wherein you request, on behalf of Fox Grocery Company, an advisory opinion from the Commission with respect to the proposed acquisition by Fox Grocery Company of the assets and business of Clover Farm Stores Corporation. Your letter requests assurances from the Commission that the proposed acquisition, in and of itself, will not be in violation of the 2(c) order in the above-captioned matter and that Fox Grocery Company will not be bound by the profit and dividend limitations contained in the compliance report filed by Clover Farm Stores Corporation in May of 1956.

The Commission has considered your submission of June 19, 1972 and based solely upon the information and representations set forth therein, has determined that the proposed acquisition, in and of itself, will not be in violation of the 2(c) order in the above-captioned matter. The Commission has further determined that Fox Grocery Company would not be bound by the provisions of Clover Farm Stores Corporation's May 1956 compliance report as relating to profit and dividend limitations. Such limitations, standing alone, we consider to be irrelevant to the clear prohibitions of the order as affecting receipt of brokerage. Fox Grocery Company, however, has been and would continue to be bound by the provisions of such 2(c) order should the acquisition be consummated.

This advisory opinion of the Commission is limited solely to the issues of the effect of the 2(c) order upon the proposed acquisition and the effect of the profit and dividend limitations contained in the compliance report filed in May of 1956. The Commission is not addressing itself to, or giving advice with respect to, any of Fox's operations as they may affect any of the statutes administered by the Commission.

By direction of the Commission.

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*For case before the Commission, see 52 F.T.C. 1140.

Letter of Request

June 19, 1972

Dear Mr. Tobin:

We represent Fox Grocery Company (Fox) and on its behalf we request an advisory opinion of the Federal Trade Commission with respect to the proposed acquisition by Fox of the assets and business of Clover Farm Stores Corporation (CFSC). The acquisition will not be consummated until receipt of the requested advisory opinion; to the best of our knowledge, the proposed acquisition is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

Fox is a Pennsylvania corporation with its principal office at Rehoboth Valley, Belle Vernon, Pennsylvania. Its principal business is selling at wholesale a broad line of groceries, produce, dairy products, meats, delicatessen items, tobacco products, housewares and health and beauty aids.

Fox's principal customers consist of approximately 285 independent retail grocery stores in Western Pennsylvania, Eastern Ohio, West Virginia, Northeastern Kentucky and Western Maryland. Of these retail grocery stores, approximately 147 are retailers who operate under their own names; of the balance, 110 are supermarkets operating under the name Foodland, and 28 are stores operating under the name Clover Farm. Fox makes available to all retailers a comprehensive range of store-operating services including advertising and promotion, accounting, personnel selection and assistance in store layout and site selection.

The net sales of Fox for 1971 were $187,645,600 and net earnings $1,176,400. Fox's net worth is approximately $7,500,000. It has presently approximately 110 shareholders. However, on May 31, 1972 it filed with the Securities and Exchange Commission a registration statement under the Securities Act of 1933 in connection with the proposed sale of 425,000 shares of its common stock.

CFSC is an Ohio corporation having its principal office at 2135 Columbus Road, Cleveland, Ohio. CFSC was formed in the late 1920s by a group of some 25 grocery wholesalers in an effort to combat the destructive competition of national and local chains. The group established a central office force to administer a program built around the trademark "Clover Farm". This involved the franchising of retailers to use the name Clover Farm, painting the stores a uniform color and having uniform

signs and supplying window posters and other in-store advertising under a weekly sales program.

Over the years, the operations of CFSC have expanded. The company has adopted new trademarks and trade names including Foodland, Bestmart, Tenderbest and Freshbest. Its stock is now owned by 19 independent wholesale grocers, one of which is Fox. All shareholder-wholesalers hold franchises to use the various trademarks and trade names of CFSC and to license retailers to use the same in various territories located throughout the Eastern part of the United States and in several States West of the Mississippi. (There are also 4 wholesalers holding franchises who are not shareholders of CFSC). These wholesalers, collectively, presently franchise approximately 900 Clover Farm retail stores, 325 Foodland supermarkets and 100 Bestmart retail stores.

As of December 31, 1971, the net worth of CFSC and its wholly-owned subsidiaries (including preferred stock of $47,800 and trademarks and trade names then carried at approximately $126,000) was approximately $500,000. The net income of CFSC and its wholly-owned subsidiaries for the year 1971 was approximately $18,000.

For a number of years, the president of CFSC and its chief executive officer has been Grant A. Mason. Mr. Mason has reached retirement age and the board of directors is faced with the problem of finding a successor who would be acceptable to all the wholesaler-stockholders. As an alternative to naming a successor to Mr. Mason, it has been suggested that Fox take over the operation and management of the company. A proposal is under consideration by which Fox would form a new, wholly-owned subsidiary which would acquire substantially all the assets of CFSC subject to liabilities in exchange for which it would issue its certificates of indebtedness which would be distributed to the common stockholders of the company in liquidation of CFSC. The certificates would not be payable in cash but would be redeemable in payment of services to be performed by the new Fox subsidiary in the future in connection with the servicing of the franchise agreements of the former stockholder-wholesalers. The operations of the company may be moved from Cleveland to some other location.

It is a condition to the execution of a formal agreement for submission to the shareholders of CFSC that Fox receive appropriate assurances from the Federal Trade Commission that the proposed acquisition will not be in violation of a certain cease and

desist order of the Federal Trade Commission entered in 1956 against CFSC, a wholly-owned subsidiary of CFSC and all its stockholder-wholesalers, including Fox, and that Fox will not be bound by the provisions of a Report of Compliance filed by CFSC.

On November 8, 1955, the Commission issued a complaint at Docket No. 6444 charging CFSC, its wholly-owned subsidiary, the Lane Lease Co., Inc., and its member-wholesalers, including Fox, with violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, by receiving and accepting, directly or indirectly, commissions, brokerage or other compensation, or allowances, or discounts in lieu thereof, from various sellers from whom the member-wholesalers purchased food products for resale. A consent cease-and-desist order under subsection (c) was entered by the Commission on April 24, 1956.

On or about May 1, 1956, CFSC and the Lane Lease Co., Inc. filed a Report of Compliance with the Commission. The compliance report incorporated by reference a previously submitted document entitled "Informal Statement of Proposed Compliance with a Consent Cease and Desist Order". A copy of the Report of Compliance is attached hereto as Exhibit "A". Fox and the other wholesaler-respondents filed Reports of Compliance in which they adopted the Report of Compliance of CFSC and Lane Lease Co., Inc.

The Compliance Report contained, inter alia, a statement that the CFSC board had adopted the following policy with respect to dividends and earnings of the company in the future:

1. No dividends shall be paid in any year upon the common stock of this corporation from its earnings from operations which are in excess of $5.00 per share on the presently issued common stock;

2. In case the net earnings of this corporation from its operations for any year, after paying or allowing therefrom an amount equal to $4.00 per share for each share of preferred stock in the corporation outstanding at December 31 of such year, plus such amount (not in excess of $5.00 per share) as shall have been paid during such year as dividends on the common stock, shall exceed an amount equal to 7½ of the aggregate of the common stock capital account and all surplus accounts of the corporation as shown upon its books at the commencement of such year, then during the next succeeding year, amounts aggregating not less than such excess shall be expended by this corporation in institutional advertising.

If Fox acquires the assets of CFSC as above outlined, it proposes to operate the business as a profit-making enterprise and would not be willing to be bound by profit and dividend limitations.

It is our opinion that while Fox as a respondent in the above proceeding at Docket No. 6444 is subject to the cease and desist order under Section 2(c), its acquisition of the CFSC assets and business would not in itself constitute a violation of that order. Further, we believe that if Fox were to acquire the assets and business of CFSC, it would not be bound by the terms and conditions of the CFSC Report of Compliance, since they are not a part of the Commission's order.

We respectfully request an expression of the Commission's views on the points covered in the preceding paragraph.

Respectfully,

/s/JAMES M. HOUSTON

Exhibit "A"

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of CLOVER FARM STORES CORPORATION, THE LANE LEASE CO., INC., et al.	)	Docket No. 6444 REPORT OF COMPLIANCE BY CLOVER FARM STORES CORPORATION AND THE LANE LEASE CO., INC.

Respondents Clover Farm Stores Corporation and The Lane Lease Co., Inc., both Ohio corporations, and being the first named Respondents in these proceedings, hereby, pursuant to Rule No. 2.26 of the Rules of Practice of the Federal Trade Commission, file this report of their compliance with the order to cease and desist issued in these proceedings——, 1956.

Said Respondents hereby incorporate by reference, as if fully rewritten herein, the printed document entitled "Informal Statement of Proposed Compliance With a Consent Cease and Desist Order", a copy of which marked Exhibit A is hereto attached, and:

1. Amend the title of said document to read "Statement of Compliance With Cease and Desist Order".

2. Amend Section I, entitled "INTRODUCTION" of said Statement by deleting the entire first two paragraphs of said Section I and inserting in lieu thereof the following:

"Respondents Clover Farm Stores Corporation and The Lane Lease Co., Inc. submit the following Statement which, to the extent the same sets forth representations of facts as existing at the time of writing thereof, shall be taken to be part of the report of said Respondents of their compliance with the order entered in these proceedings——, 1956."

3. Supplement said Statement by reporting that at a duly called and held special meeting of the stockholders of Clover Farm Stores Corporation held on February 17, 1956, the following resolutions were adopted and are now in full force and effect, namely:

"RESOLVED, that effective January 1, 1956, Article VIII of the Code of Regulations of this corporation captioned "Patronage Refunds" be and the same hereby is repealed in its entirety, provided that nothing herein shall affect in any way any rights or liabilities under said Article hereby repealed which were accrued as at the close of business on December 31, 1955; and

"FURTHER RESOLVED, that there is hereby adopted, effective January 1, 1956, a new Article VIII of the Code of Regulations of this corporation captioned "Policy as to Profits From Operations", reading as follows:

"It is hereby declared to be the policy of this corporation, to be carried out by its Board of Directors that:

1. No dividends shall be paid in any year upon the common stock of this corporation from its earnings from operations which are in excess of $5.00 per share on the presently issued common stock;

2. In case the net earnings of this corporation from its operations for any year, after paying or allowing therefrom an amount equal to $4.00 per share for each share of preferred stock in the corporation outstanding at December 31 of such year, plus such amount (not in excess of $5.00 per share) as shall have been paid during such year as dividends on the common stock, shall exceed an amount equal to 7½% of the aggregate of the common stock capital account and all surplus accounts of the corporation as shown upon its books at the commencement of such year, then during the next succeeding year amounts aggregating not less than such excess shall be expended by this corporation in institutional advertising;

3. All net gains or profits arising from the sale, exchange or liquidation by this corporation of capital or depreciable assets shall not be taken into account in any way in determining the amount to be paid or expended for institutional advertising as aforesaid, and nothing herein contained shall in any way limit or restrict the authority of the Board of Directors to retain and/or distribute among the stockholders of this corporation, in any manner permitted under the laws of Ohio, the Articles and Code of Regulations of this corporation, the net amount realized by this corporation by reason of any such sale, exchange or liquidation; and

4. The policy herein prescribed may be modified, amended or repealed only by the stockholders of this corporation in the manner provided for amendment of the Code of Regulations, but no modification or amendment may become effective so long as this corporation shall be receiving compensation from producers of products sold to the wholesale members of this corporation in the nature of the compensation for Advertising Service now being offered by this corporation to such producers.

"FURTHER RESOLVED, that the officers of this corporation be and they hereby are authorized and empowered to embody the text of the foregoing amendments of the Code of Regulations of this corporation as a part of the report of compliance by this corporation in proceedings under Docket No. 6444 before said Federal Trade Commission."

WHEREFORE, having fully reported, said Respondents Clover Farm Stores Corporation and The Lane Lease Co., Inc. pray that the Federal Trade Commission will advise each of them that, based on this report of

compliance, it does not appear that these Respondents are in violation of said cease and desist order.

Dated this 1 day of May, 1956

CLOVER FARM STORES CORPORATION

By _____

Its _____

THE LANE LEASE CO., INC.

By _____

Its _____

Retention of the stock of an insolvent dairy company by the original acquiring company. (Docket No. 8674*)

Opinion Letter

March 30, 1973

Dear Mr. Jentes:

This is in reference to your letter of March 8, 1973, submitted both as a review of recent developments concerning Bowman Dairy up to and including the March 7, 1973 public sale of Bowman's capital stock and as a request by Dean Foods Company for Commission approval for Dean's retention of Bowman without any further obligation to divest. According to your letter, Dean was the only bidder at the public sale.

Based upon the information furnished and representations made in your letter of March 8, 1973, as well as on other pertinent information and data previously submitted by Dean and Bowman in connection with this matter, the Commission has determined to approve Dean's request. In making this determination, the Commission has relied upon the information submitted and the representations made in connection with respondent's request and has assumed the same to be accurate and complete.

By direction of the Commission.

Letter of Request

March 8, 1973

Dear Mr. Ward:

As a follow-up to our telephone conversation, this letter will briefly review the recent developments regarding Bowman Dairy Company which culminated on March 7, 1973 in the public sale of its capital stock pursuant to the Illinois Commercial Code. Since Dean was the only bidder at that sale and appears to be the only party willing and able to continue the Bowman operations, this letter will also serve as our request that Dean be permitted to retain Bowman without any further obligation to divest.

As we explained during our meeting with the Staff on February 20, 1973, the reason for the public sale of Bowman was

*For case before the Commission, see 71 F.T.C. 731.

the bankruptcy of Dextra Corporation, the company to which Bowman was divested by Dean in 1969. Dextra still owes Dean $481,000, plus interest, on the original purchase price which Dextra has been unable to pay due to its insolvency. As of February 2, 1973, the Referee in the Dextra bankruptcy proceeding lifted his earlier stay on Dean's efforts to realize on its lien against the Bowman stock. Dean thereupon published notice of its intention to sell the Bowman stock at public auction on March 7, 1973.

The notice of the public sale, a copy of which was previously supplied to the Staff, stated that interested parties could secure necessary financial and operating information concerning Bowman from a representative of Lehman Brothers, which has assisted Dean in its original efforts to divest Bowman. Approximately 20 persons contacted Lehman, but only 3 parties attended the auction. These were Mr. Owen Coon, a former director of Dextra; a representative of the Mississippi Valley Milk Producers Association, Inc.; and an attorney for Mr. Raymond Pedtke, a Chicago daily consultant. None of these parties made a bid for Bowman at the auction. As a result, Dean was the only bidder and it is now the owner of the Bowman stock.

As we discussed with the Staff, these developments pose the question of what is now to become of Bowman. When Dean initially made its efforts to divest that company several years ago, it was only able to find two prospects. One was unable to come up with the necessary financing and the other was Dextra which has subsequently gone into bankruptcy. The results of the public sale indicate that there are also no buyers who are presently willing to come forward and take over Bowman. This is undoubtedly explained by the fact that Bowman owes $1,375,000 to the American National Bank which is secured by a lien against all of the company's assets; the loan is in default and the Bank has stated that it will foreclose unless a responsible party takes over the Bowman operations; Bowman has a negative working capital of $1,493,717 and a negative stockholders' equity of $358,744; Bowman has been unable to make more than stop-gap repairs to its facilities for nearly 5 years with the result that they have seriously deteriorated and the Wisconsin Department of Agriculture has threatened to halt processing at its Racine plant; and Bowman is currently operating at a loss which amounted to $178,743 for the 9-month period ending December 31, 1972. In addition, a $1.1 million suit was filed

against Bowman on March 6, 1973 by a company which was formerly involved with Dextra.

In short, Bowman is insolvent and a foreclosure by the Bank will put it out of business. This will have serious repercussions for its employees and its customers. It will also result in a significant loss for Dean, since a forced sale of the Bowman assets would be unlikely to realize more than the amount owing to the Bank. Thus, Dean would be forced to write off not only the $481,000 still owing on the purchase price, but also approximately $400,000 owed by Bowman on open account for milk which Dean has processed for Bowman in the Louisville and Racine markets.

Not only is the situation critical, but time is of the essence. The Bank has stated that unless it receives assurances in the next 30 days that Bowman's financial house is in order, the Bank will stop advancing the working capital funds which are necessary to Bowman's continued operation. Dean is not prepared to assume this undertaking if it is faced with the prospect of once again attempting to find a buyer for Bowman, a task which it believes is hopeless. Employee morale is deteriorating; creditors are expressing deep concern about extending further credit; and customers have become uneasy about their source of supply since the notice of the Bowman auction was published.

For these reasons, we respectfully request that the Commission permit Dean to retain Bowman and not be required to make further efforts at divesture. Since the matter is a pressing one, we sincerely hope that it will receive the earliest possible attention of the Staff and the Commission. Any assistance which you can render in this regard would be greatly appreciated.

Very truly yours,
William R. Jentes

Acquisition of three department stores, located in shopping centers in the Washington, D.C. metropolitan area, by a realty and development corporation. (Docket C–1106)

Opinion Letter

Re: E.J. Korvette, Inc., Docket No. C–1106

May 30, 1973

Dear Mr. Harkrader:

This is in reference to your letter of April 23, 1973 with annexed exhibits, requesting Commission approval for a transaction in which Arlen Realty and Development Corp. (Arlen), successor to E. J. Korvette, Inc., will accept assignment of leases and purchase fixtures and leasehold improvements of Lansburgh department stores in Langley Park, Maryland and Tyson's Corner, Virginia; and additionally will purchase the real estate and fixtures of the Lansburgh store in Springfield Mall, Virginia from City Stores Company, New York, New York.

Based upon all attendant circumstances, the Commission has concluded that the proposed acquisition will not significantly affect competition and, therefore, has approved the proposed acquisition as set forth in your letter of April 23, 1973, and supplemental materials thereafter furnished. In according its approval, the Commission has relied upon the information submitted and the representations made in connection with respondent's application and has assumed the same to be accurate and complete.

By direction of the Commission.

Letter of Request

Dear Sir:

April 23, 1973

Pursuant to Commission Rule 3.61(f), Arlen Realty and Development Corp. successor to E. J. Korvette, Inc., respondent in FTC Docket C–1106, (hereinafter referred to as Korvettes) hereby seeks Commission approval on an expedited basis, for a

transaction in which Korvettes would purchase certain real property interests and store fixtures owned by City Stores Company (City). The real property interests pertain to City's Lansburgh's stores in Tyson's Corners and Springfield Mall, Virginia, and Langley Park, Maryland, and the fixtures located in those stores. Lansburgh's is a six-store operation which, because of increasing losses, City determined to discontinue prior to beginning negotiations for this transaction. If the transaction is consummated, it is anticipated that the Korvettes stores would commence operating at the locations mentioned from thirty to sixty days after City's closing.

At the present time there are two Korvettes stores in the Washington area. Like Lansburgh's, the Korvettes stores have experienced deteriorating sales and earnings in recent years. It is the hope of Korvettes' management that the opening of three new stores in the area will permit Korvettes to compete effectively in the area.

The added stores will provide a greater sales base to support Korvettes advertising efforts. This will permit Spreading advertising expenditures sales volume than is presently possible, thus achieving a substantial operating economy in this vital area. It will also permit resort to more expensive and effective media such as television. The additional stores will also permit area management and distribution costs to be spread over a larger sales base. Finally, Korvettes existing Washington stores—unlike the three proposed locations—are not located in regional shopping centers, the most desirable location for retailers today. There is, in addition, no likelihood of additional centers in the foreseeable future (for environmental and other reasons [1]). Thus, this transaction represents the only realistic means for Korvettes to obtain regional shopping center locations and thus become a viable competitive force in the area.

The Order in Docket No. C–1106 requires Korvettes to obtain advance approval from the Commission for acquisition of "any department store or other GMAF store". The order also expressly states that nothing contained in the order restricts Korvettes right to open additional stores "through lawful internal expansion". On April 12, 1973 the Commission advised Korvettes that "the proposed arrangements [with City] require

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[1] Moratoria have been imposed in a number of counties and districts prohibiting development of regional shopping centers for reasons relating to adequate sewerage disposal facilities, access roads, residential buffer zones and other similar matters. For example, Prince Georges County, Maryland has recently imposed a sewer moratorium. In addition to environmental factors, economic factors such as land costs, rising interest rates and the ability of major department stores to attract sufficient customer traffic to make regional centers viable have resulted in a drastic reduction of the development of such centers.

prior approval of the Commission under the above-mentioned order". In view of its prior agreement to abide by this determination, Korvettes does not intend to proceed with this transaction without the prior consent of the Commission.

We submit that approval of the transaction is in the public interest, since it will permit a highly aggressive price-and-quality-competitive firm now encumbered by an inadequate sales base to offer vigorous, widespread competition to the entrenched store operators in the Washington area. Meanwhile, no competitor in the market will be lost by virtue of the transaction.

THE NEED FOR EXPEDITED ACTION

For the reasons stated below; we urge Commission action on this request at the earliest possible time permitted by its Rules. Thus we ask (1) that this matter be placed on the public record as soon as possible; (2) that the staff make its recommendation during the 30-day notice period; and (3) that the Commission take action immediately upon the close of the 30-day period.

The agreements with City mentioned in our letter to the Commission of April 11, 1973, have been reinstated by the parties, subject solely to Commission approval of the transaction being obtained no later than May 31, 1973.[2]

Submitted with this letter is the affidavit of Louis Melchoir, executive vice president of City Stores, (Attachment A) which emphasizes City's critical need for expedited consideration of this request.

That affidavit establishes, first, that City has decided to cease its Lansburgh operation in the Washington area whether or not the Korvettes transactions are consummated. It shows, further, that City's decision to cease the Lansburgh's operation has become a matter of public knowledge. The virtually untenable position in which City has been suffering arises out of substantial losses sustained by its Lansburgh stores. City faces rapidly increasing losses with the public knowledge of Lansburgh's coming demise. Its personnel organization is melting away, and customers are increasingly unwilling to deal with a store to which they know they will not be able to turn for servicing or redress. City has ceased ordering new merchandise for these stores, causing their selections to be increasingly unsatisfactory to customers. Meanwhile, despite its mounting

[2] The failure of certain conditions precedent had caused these agreements to terminate on April 13, 1973. However, by virtue of an agreement of the parties all matters other than Commission approval by May 31, 1973 have been waived.

losses, Lansburgh's cannot halt operations because, at several locations, its leases require continuous operation of the stores. Thus, if the stores are closed, City may lose its leases. Indeed, such closings, and consequent loss of lease rights, will thwart the proposed transactions with Korvettes, which, as hereinafter detailed, are clearly pro-competitive. City cannot even conduct going-out-of-business sales since, under law, such sales must be followed by an actual closing within a limited time period, an event City cannot be sure of while Commission review of the Korvettes transactions is pending.

Thus, the Commission is presented, on the one hand, with a transaction which, Korvettes submits, clearly merits approval as a desirable pro-competitive development in the Washington area department store market. On the other hand, the necessity for Commission review results in the imposition of extreme hardship on one of the parties to the transaction. Clearly, expedited Commission action is not merely justified, but imperative. Korvettes urges the Commission to take every step possible to ensure that its action is taken promptly following the 30 day notice period contemplated by its rules.

DESCRIPTION OF THE TRANSACTION

Copies of the operative agreements between the parties are submitted with this letter. (Attachment B) [3] The essential terms of the proposed transaction are as follows: Korvettes will accept assignments of the leases to the Tyson's Corner and Langley Park sites without paying any premium therefor and will acquire title to land and buildings in Springfield Mall. Korvettes will also purchase from City Stores at book value (depreciated to date of closing) certain fixtures located in the three premises. The transaction specifically *excludes* (1) the "goodwill" of City, (2) the name "Lansburgh's", (3) the inventory or stock of merchandise of either City or Lansburgh's, (4) customer or credit lists or applications therefor, (5) licensees and lease departments (*e.g.*, the shoe department), (6) any other tangible or intangible property or property rights of City except as set forth in the Agreements. Nor does the transaction involve any commitment to the Lansburgh's employees or any assumption of

[3] Korvettes requests that two one page letters to Arlen from City dated March 30, 1973 and paragraph 3 of a letter from City to Arlen also dated March 30, 1973 be accorded confidential treatment by the Commission pursuant to its Rules. This material deals with possible future relations with some or all of the landlords at the three sites involved. Such non-published commercial and financial information would conceivably be used either by landlords to delay or frustrate the proposed pro-competitive transaction or by competitors. As such, the information contained therein is highly confidential. Such information falls within the protection of Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f) and § 552(6)(4) of the Freedom of Information Act, 5 U.S.C. § 552(6)(4).

maintenance and service contracts. In addition, all leased departments involved in the Lansburgh's operation must be removed.

Korvettes is obligated to pay the following consideration: At Langley Park, in addition to assuming the lease, there is to be paid an aggregate of $127,740 (book value as of February 3, 1973) for leasehold improvements and fixtures less the depreciation (12½ percent annual rate at all three stores) to Date of Closing, and $1,000 (or actual cost) for those leased departments (*e.g.*, the shoe department) fixtures which City Store must repurchase from its lessees. The aggregate cost for purchase of leased department fixtures in all three stores is not to exceed $100,000. At Tyson's Corner, in addition to accepting an assignment of the lease, Korvettes is to pay an aggregate of $1,781,908 (book value as of February 3, 1973) less depreciation to Date of Closing for leasehold improvements and fixtures and $39,000 (or actual cost) for those leased department fixtures which City Stores must repurchase from its lessees. At Springfield, City Stores will receive $3,730,795.68 for the land and building (less depreciation to Date of Closing) and $1,600,000 (book value as of February 3, 1973) for leasehold improvements and fixtures (less depreciation to Date of Closing), and $60,000 (or actual cost) cash for those leased department fixtures which City Stores must repurchase from its lessees. Pursuant to this agreement, Franconia Associates, the developer of Springfield Mall, may realize a profit. If Korvettes is able to operate a Korvettes store at Tyson's Corner, it will pay Franconia Associates $700,000 to $800,000; if not, City is obligated to repurchase the Tyson's Corner fixtures from Korvettes for the original purchase price and City in turn is obligated to sell the fixtures to Franconia Associates for $1.00. Additionally, Korvettes has agreed to indemnify City up to $60,000 annually for a possible lease loss in connection with City Stores' Rockville store. Finally, in connection with the extension of the closing date necessitated by seeking FTC approval, certain provision of the agreements were modified in a manner which provides an additional $130,000 for City if the transaction is approved by the Commission.

A DESCRIPTION OF THE KORVETTES OPERATION

A complete description and recent history of Arlen's business and, in particular, its Korvettes department store division is contained in the reports to shareholders and prospectuses (from 1969 to present) that are submitted with this letter. (Attachment C) A brief summary of this description here follows:

In addition to operating Korvettes, Arlen is engaged in the development and construction of a wide variety of income-producing real estate, including shopping centers, residential complexes, office buildings and planned communities in 30 states. In its fiscal year ending February 29, 1972, Arlen had total net sales of $759,699,000 and net earnings of $5,817,000 (after an extraordinary loss of $5,355,000).

A majority of the Korvettes department stores are located in major metropolitan areas, including New York, Chicago, Philadelphia, Detroit, Baltimore, Washington and St. Louis. The stores sell, for cash or credit, a wide assortment of merchandise including apparel and home furnishings, principally in the medium-priced lines. At the end of fiscal 1972, Korvettes operated 51 stores.

In the last few years Korvettes, in common with all of the nation's major department store retailers, experienced rising costs and reduced profit margins. For Korvettes, retailing on a national level has become more competitive than ever.

In the Washington area in particular, Korvettes has experienced an adverse sales and profit trend contrary to the area in general. Thus, Chart 1, attached hereto,[4] relating to the sales and earnings of the two Korvettes stores in the Washington area is to be contrasted to the increase in total retail volume in Washington from 1970 to 1972 of 16% (From $5.95 to $6.9 billion) [Source: Washington Post research department] and a 13.8% increase in monthly sales figures from October 1971 to October 1972 (from $77.5 million to $88.2 million[5]). Accordingly, Korvettes sales have not even reflected the pressures and increases attributable to inflation.

In considerable part, this experience is believed to be attributable to the relationship between advertising costs and an inadequate sales base in the Washington area which has prevented Korvettes from being a meaningful competitive force. At the present time, Korvettes spends a percentage of its Washington area sales on advertising which is disproportionate to its chain-wide average and department stores averages

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[4] Korvettes requests that Chart 1 be accorded confidential treatment by the Commission, pursuant to its Rules. Korvettes does not disclose performance records of individual stores because it considers such information highly confidential from a competitive standpoint. Such non-published commercial and financial information could be used to Korvettes detriment by competitors. Such information falls within the protection of Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f) and § 552(6)(4) of the Freedom of Information Act, 5 U.S.C. § 552(6)(4).

[5] Economic Indicators of the Washington Metropolitan Economy for October 1972 is compiled by Department of Regional Planning, Metropolitan Washington Council of Governments.

generally.[6] (See Chart 2, attached hereto.[7]) Korvettes management estimates that a retail volume in the range of $50,000,000 is necessary to support the advertising program, both as to type and volume, which is necessary for effective operations. Korvettes, for instance, has not been able to use the more expensive and effective television medium in Washington. Other fixed area management and distribution costs could be used more effectively if more stores were involved.

Meaningful expansion of the sales base by means of new locations is not viable by virtue of the absence of development of new regional centers. The proposed construction of a Korvettes store at what was deemed to be a marginal location at Springfield, Virginia has been abandoned. It is Korvettes understanding that the space may be used for other retail purposes.

A DESCRIPTION OF CITY STORES, INC., LANSBURGH'S DIVISION

City is fully described in the Melchior affidavit and its Exhibits (Attachment A). In summary, it is a general merchandise retailer which operates, among others, Lansburgh's Department Stores as a division of the company in the greater Washington, D.C., area consisting of department stores located in downtown Washington, Shirlington (Va.), Rockville (Md.), Langley Park, Tyson's Corner and Springfield Mall.[8] Lansburgh's has been owned by City since 1951.

Lansburgh's was late in expanding from a single downtown site to the suburbs, where most area department store sales are made. Starting in 1968 Lansburgh's began to experience a severe decline in sales and profits. It has lost an aggregate of $11 million during the fiscal years 1968 and 1972. While Lansburgh's in the fiscal year ending February 28, 1973, produced but 8% of City's sales, its losses of $3.7 million partially offset the profit contribution of $5.2 million made by City's 10 other divisions. At present Lansburgh's is losing $100,000 a week. This weekly loss is expected to increase due to factors previously noted.

By 1972, City's management realized the Lansburgh's situation was hopeless, and on January 5, 1973, City's board of Directors ordered the liquidation of the Lansburgh's division.

[6] These difficulties are compounded by the high lineage rates for Washington advertising, *e.g.*, Washington Post of $1.10 per line as compared to Baltimore Sun $.59 per line.

[7] Korvettes requests that Chart 2 be accorded confidential treatment, pursuant to its Rules, for the reasons set out in the footnote on page 10 hereof.

[8] The location of these stores, the two Korvettes stores and the other Washington area department stores are identified on the attached map (Map Attachment).

This decision and negotiations with other companies antedates the discussions which resulted in the instant transaction. Two facts are thus clear: (1) Lansburgh's intends to close without regard to whether the Commission approves this transaction and (2) the transaction with Korvettes is the only one available to City which provides City with a viable business arrangement. Further, the Melchior affidavit (Paragraphs 4, 11 and 12) provides solid ground for the belief that disapproval of the transaction with Korvettes will lead to expansion by companies which are already present and dominant in the area, such as Sears, Roebuck & Co., J. C. Penney, Federated Department Stores, Garfinkel's and L. S. Good.

DESCRIPTION OF THE MARKET

Since there is no single readily available source of department store statistics, we set forth below market share data for the Metropolitan Washington market from a variety of sources. In the October 30, 1972 issue, *Sales Management* magazine reported (p. 98) that Metropolitan Washington would generate over $7.7 billion in retail sales during the year 1973. That same publication estimated that department store sales in Metropolitan Washington amounted to $1.3 billion in 1971. According to Editor & Publisher's Market Guide, 1972 ed., general merchandise sales for 1972 were $1,297,746,000 and, when added to the furniture and apparel sales, totalled over $2 billion for combined department and "GMAF" store sales.

Based upon assumptions that total department store sales are $1.3 billion and total department store GMAF store sales are $2 billion, upon the number of stores operated by certain retailers in the area, upon sales figures published in the April 16, 1973, issue of Women's Wear Daily and upon certain estimates by Korvettes officials, the following chart provides dollar sales volume and market shares of what are believed to be the fourteen leading department store chains in the Washington area.

Rank	Stores	Sales In Millions	Total Dept. Store Percent	Total Dept. Store GMAF Percent
1. Sears Roebuck	8	$165	12.7	8.3
2. Woodward & Lothrop	12	153	11.8	7.7
3. Hecht	10	140	10.8	7.0
4. Montgomery Ward	4	90	6.9	4.5
5. J.C. Penney	7	70	5.4	3.5
6. Zayre	12	40	3.1	2.0
7. Garfinkels	6	38.5	3.0	1.9
8. Lansburgh's	6	28.5	2.2	1.4
9. K-Mart	7	25	1.9	1.25
10. Korvettes	2	20	1.5	1.0
11. Kleins	2	16	1.2	0.8
12. Giant	2	16	1.2	0.8
13. GEM	5	15	1.1	0.75
14. MEMCO	5	15	1.1	0.75
Total Sales of Top Fourteen		$832.0	63.9	41.65

Moreover, while the discussion in the following section deals with competitive impact in terms of the department store market, such stores are in competition with many specialized retailers which sell the same sorts of goods (apparel, appliances, home furnishings, automatic accessories, etc.). Of total retail sales in the area, the competing store groups account for the percentages shown in the following table.

Category	Number of Establishments[1]	Percent of Area Retail Sales 1971[2]
Department stores	63	15.39
Furniture, appliances, home furnishings	829	4.31
Apparel	1,055	5.33
Drug	529	5.06
Variety and other general merchandise	358	4.65
Tires-batteries-accessories	1,411	2.50[3]

[1] Number of establishments are for 1967 and are derived from the Census of Retailing. The current number is believed to be greater.

[2] Based on *Sales Management* estimates, October 30, 1972, p. 78.

[3] Estimated from national average.

Korvettes sells appliances and thus competes not only with Sears, Montgomery Wards, Hechts, etc., but also with George's, Dalmo, and many other highly effective retailers. Korvettes drug department competes with Drug Fair, Dart, and Peoples, among others. Its shoe and apparel departments are faced with competition from local and nationally-identified shoe chains and more than a thousand other stores selling diverse soft goods. In the sale of tires, batteries, and other auto accessories Korvettes competes with Market Tire outlets for Firestone and other tire manufacturers, similar specialized sellers, and about 1,500 gasoline service stations. All told, as revealed in the table, the Washington area specialized stores that sell the same types of merchandise as are vended by Korvettes account for substantially more in dollar sales than all the department stores combined.

COMPETITIVE IMPACT

It is relevant to note again that City's decision to close its declining Lansburgh's operation in 1973 is irrevocable and that Korvettes is paying City book value of certain assets and is not acquiring a going operation. No customer lists, accounts receivable, trade name, goodwill or similar assets are involved. These are all retained by City. Indeed, by virtue of City's less-than-vigorous merchandising since March (see Melchior affidavit ¶15–16) there is, if anything, a negative public image of the stores now operated at the location at which Korvettes stores would operate if the transaction is approved. In light of these facts, this transaction should not be viewed as a conventional merger between two active competitors where the surviving firm can be anticipated to retain the share of the market equal to the sum of the two firms prior to the merger. Korvettes, in attempting to project anticipated sales for 1973, regards the Lansburgh's transaction as an internal expansion whereby Korvettes increased market share will depend solely upon the success of its own merchandising and promotional activities without any carry-over benefits from the Lansburgh's operation.

Korvettes Washington operation has not been as effective a competitor as might be hoped principally because the volume of its Washington sales cannot support an effective advertising effort and fixed area management and distribution costs are disproportionately high for two stores (see p. 10). By increasing the number of its Washington stores from two to five, Korvettes sales volume will increase to a level which will enable it to

undertake the kind of promotional and merchandising activity needed to compete effectively in Washington.

While this transaction will thus enable Korvettes to compete more effectively, Korvettes prospective market share increase is no cause for concern. On the basis of the estimates of the total market and existing shares set forth on page 15 above, Korvettes market share after the transaction will not be adverse to competition. Even if one made the invalid assumption that the dollar volume generated by all six Lansburgh's stores in 1972 would flow to Korvettes in 1973 (although only 3 of the sites are to become Korvettes stores), the transaction with City would only result in a 3.7% share of the Washington market for Korvettes, based on 1972 figures.

We also note that the 3.7% market share for Korvettes projected as a result of this transaction does not fall within the Department of Justice Guidelines for horizontal mergers which the Department stated that it would ordinarily challenge. Further, this market share figure, even if it were a meaningful measure within the department store market, must be regarded as a ceiling figure because of the competition from other retailers, as discussed at pages 15-17, *supra*.

Moreover, given Korvettes limited market penetration and adverse trend in the area, it can fairly be regarded as analogous to a company not yet in the area. This is particularly true when the proposed transaction is reviewed in the light of likely alternative operations at the locations in question.

Finally, the Commission should not ignore the fact that the proposed transaction will result in the acquisition of a site for Korvettes, an aggressive, price-and-quality competitive merchandiser, in the Tyson's Corner Shopping Center, an objective consistent with the Commission's own actions regarding that center (complaint issued on May 8, 1972, FTC Dkt. 8886, 3 Trade Req. Rep. ¶20,003).

Thus, the effects of the transaction can in no way be suggested to have any adverse implications on the market. No corporate merger activity appears likely to be encouraged. No dominant or significant share of the market appears likely to be concentrated. No trend toward concentration has existed or appears likely to be encouraged by the transaction. No meaningful anti-competitive effect upon the suppliers or other firms or companies appears likely to occur as a result of the transaction.

In fact, this transaction has pro-competitive effects which can only be a positive force in the Washington market. The

anti-competitive and restrictive agreements which purport to exclude Korvettes and other promotional department stores from the original shopping centers in the District of Columbia area would receive a sharp setback. A potentially vital competitive force would be added to the market, quickly and with no apparent loss of any competitor or competition in the area by virtue of the transaction.

Respectfully submitted, WALD, HARKRADER & ROSS

BY

_____

Carleton A. Harkrader

_____

George A. Avery

_____

Alexander W. Sierck

Of Counsel:

Donald R. Levin
Barry J. Bratt

Parker, Chapin & Flattau
520 Fifth Avenue
New York, New York 10026

Proposed establishment of a wholly-owned subsidiary which would collect consumer indebtedness without identyfying American Oil Co. as owner (File 733 7005).

Opinion Letter

May 16, 1973

Dear Mr. Goetsch:

This is in response to your letter requesting an advisory opinion regarding the establishment by American Oil Company of a wholly-owned subsidiary to engage in the business of collecting consumer indebtedness without identifying American Oil as the owner thereof.

In that letter, you requested answers to two specific questions:

1) Would the operation of the collection subsidiary violate the Commission's Guides Against Debt Collection Deception; and

2) Would the operation of the proposal violate the September 13, 1967, Assurance of Voluntary Compliance entered into by American Oil?

The answers to each of these questions are in the affirmative.

The Commission's Guides Against Debt Collection Deception provide that:

> An industry member shall not use any deceptive representation or deceptive means to collect or attempt to collect debts or to obtain information concerning debtors.

The Guides describe misrepresentations that the Commission has prohibited, including:

> (6) that debts have been turned over to an attorney or an independent organization engaged in the business of collecting past-due accounts.

Your proposal to create a wholly-owned subsidiary to engage in debt collection *without identifying American Oil as the owner of the subsidiary* is therefore precisely the type of deceptive representation prohibited by the Guides.

The Assurance of Voluntary Compliance entered into by American Oil on September 13, 1967, contains the representation of American Oil that it would discontinue representing to the public that its receivables had been referred for collection to an independent agency or organization unless such receivables were in fact so referred. American Oil's present proposal differs little in substance from the activity terminated by the 1967

Assurance of Voluntary Compliance. The subsidiary proposed does not appear to the Commission to possess the attributes of an independent organization. That lack of independence, coupled with the intention not to identify American Oil as its owner, effectively brings the present proposal within the ambit of the 1967 Assurance.

Accordingly, you are hereby advised that your proposal that American Oil Company establish a wholly-owned subsidiary for the purpose of collecting consumer indebtedness without identifying themselves as the owner of said subsidiary is disapproved.

By direction of the Commission.

Letter of Request

September 8, 1972

Dear Sir:

The American Oil Company, a wholly owned subsidiary of Standard Oil Company (Indiana) engaged in the refining, marketing, and transportation of petroleum products, is currently evaluating the economic feasibility of establishing a subsidiary company to engage in the business of collecting consumer indebtedness.

It is contemplated that such a collection subsidiary would be wholly owned by American, that its directors would be employees of American, but that it would operate independently of American and that its officers and employees would not be employees of American. The subsidiary would operate in all 48 contiguous states and would accept business from the public at large as well as from American. It is anticipated that, when established, this subsidiary would obtain no more than 50% of its business from American Oil with the remaining 50% coming from unconnected outside clients. In the initial stages, somewhat more than 50% of its business may come from American. The subsidiary would be an autonomous business and would have to be self-sustaining.

I would like to solicit your advise on the following two issues. First, would operation of such a collection subsidiary without identifying American Oil as the owner thereof be considered an infringement of any of the Commission's Guides against Debt Collection Deception. Secondly, would operation of such a collection subsidiary infringe the Assurance of Voluntary Compliance filed by American with the Commission on

September 13, 1967 in which American declared that it would not represent that its receivables had been referred for collection to an independent agency or organization unless such receivables were so referred.

In accordance with § 1.2 of the Commission's Procedures and Rules of Practice, I can assure you that a collection subsidiary is not presently owned or operated by American Oil nor does it form the basis for any investigation or other proceeding by the Commission or any other governmental agency.

Thank you for your consideration of this matter.

Very truly yours,

/s/ RICHARD J. GOETSCH

Personal deodorant spray, Digest No. 265. Regal Chemical Corporation, (File 683 9004).

Letter Granting Access to Advisory Opinion Request

June 26, 1973

Dear Mr. Young:

This is in response to your letters dated January 23 and February 13, 1973, in which you requested access to the file identified above.

Access to the request for the advisory opinion, together with the material submitted by the requesting party has been granted.

You also have been granted access to the Secretary's response which contains the advisory opinion. You have not been granted access to other materials such as internal working papers which are exempt from disclosure pursuant to Section 552(b) (5) of the FOIA.

You should contact Mr. Gerald Thuot in the office of the Commission's Secretary to arrange a mutually convenient time to examine the file and to make arrangements to obtain copies you may want. Mr. Thuot's telephone number is 962–3321.

By direction of the Commission.

Correspondence Pertaining to Request for Access.

May 9, 1973

Dear Mr. Engman:

As attorneys for Mr. Anthony L. Young, we are forced to appeal to your office in order to obtain a prompt agency disposition on Mr. Young's request for the advisory opinion and the information upon which the Commission based its conclusion, in the matter of Advisory Opinion No. 265 (16 C.F.R. § 15.265).

Pursuant to the Freedom of Information Act, Mr. Young requested these records in a letter on January 23, 1973. In a subsequent letter dated January 31, 1973, Mr. Charles A. Tobin, Secretary to the Commission, advised Mr. Young that his request had been "placed in the proper channel for expeditious treatment". On April 12, 1973 the Institute advised Mr. Tobin, by letter, that the Institute represents Mr. Young in his efforts to obtain disclosure

of the records. We reiterated Mr. Young's immediate need for the records, restated the mandate of the Freedom of Information Act for prompt disclosure, pointed out the serious delay in agency action on the request, and urged prompt disclosure.

In a letter dated April 20, 1973, Mr. Tobin advised us that a recommendation as to what action the Commission should take was prepared in the Office of General Counsel, and that the request must be considered by the Commission. To this date, we have received no agency disposition on the matter.

In view of the extreme and unwarranted delay in Commission action on the request, Mr. Young's immediate need for the information, and the Freedom of Information Act's mandate for prompt disclosure of identifiable records, we respectfully request that the information be made available by May 25, 1973. Alternatively, we request that the Commission's written reasons for nondisclosure on the merits, be sent to us by that date.

If neither the requested records nor the Commission's written reasons for nondisclosure is made available by that date, we will be compelled to conclude that the Commission's inaction constitutes final agency denial of the request and will take further action consistent with the Act's requirement of prompt disclosure.

Sincerely,

/s/ Richard B. Wolf, Esq.

/s/ Caliph Johnson, Esq.

Apr. 20, 1973

Richard B. Wolf, Esquire
Caliph Johnson, Esquire
Institute for Public Interest Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Gentlemen:

This is in response to your letter dated April 12, 1973 in behalf of Mr. Anthony L. Young who requested access to the Commission's file which is identified above.

The request for access to the file must be considered by the Commission (see Commission Rule 4.11). A recommendation as to what action the Commission should take was prepared in the Office of General Counsel.

Promptly after the Commission considers the request and acts upon it you will be apprised of the result.

Sincerely,

/s/ Charles A. Tobin
Secretary

April 12, 1973

Dear Mr. Secretary:

Please be advised that the Institute represents Mr. Anthony L. Young in his efforts to obtain disclosure of the request for the advisory opinion and the information upon which the Commission based its conclusion in the matter of Advisory Opinion No. 265 (16 C.F.R. § 15.265).

Mr. Young requested disclosure of these records in a letter dated January 23, 1973. In a letter dated January 31, 1973, you advised him that his request had been "placed in the proper channel for expeditious treatment." To this date, Mr. Young has received no agency disposition on his request.

Because Mr. Young has an immediate need for the information, the Commission has failed to act in nearly four months, and the Freedom of Information Act mandates prompt disclosure of identifiable records, we respectfully request that the information be made available by April 30, 1973. In the alternative, we request that the Commission's written reasons for nondisclosure be sent to us by that date.

If neither the requested records nor the Commission's written reasons for nondisclosure is made available by that date, we will be compelled to conclude that the Commission's inaction constitutes a denial of the request for disclosure. Based on the provisions of 16 C.F.R. § 4.10(d) (revised as of February 3, 1973), we will also be compelled to conclude that the inaction constitutes

final agency action and will take further action consistent with the Act's requirement of prompt disclosure.

Sincerely,

/s/ Richard B. Wolf, Esq.

/s/ Caliph Johnson, Esq.

February 13, 1973

Dear. Mr. Dietrich:

By letter of January 23, 1973, I sought to inspect, pursuant to the Freedom of Information Act, 5 U.S.C. 552, the request and the information upon which the Commission based its conclusion in the matter of Advisory Opinion No. 265, 33 F.R. 9816, July 9, 1968.

On January 31, 1973, Mr. Tobin acknowledged receipt of my request and advised that it had been placed in the proper channel for expeditious treatment.

On February 9, 1973, Mr. Neil Arthur of your Office of Legal Services advised by telephone that the file in the matter could be inspected at the Commission's Public Documents Room at my convenience. On February 12, 1973, Mr. Arthur advised that he had been in error on February 9, and that this file was protected by some kind of grandfather clause and further that the request for inspection must be cleared either by you or the full Commission.

On February 13, 1973, Mr. Arthur advised me that the request, the digest and the opinion in the matter would be available but that the facts and scientific information to which the Commission specifically referred might be exempt from disclosure.

REASON FOR REQUEST

While the Freedom of Information Act does not require that a person requesting information from a federal agency give reasons for such request, I would like to explain that I am concerned with the regulatory status of feminine deodorant sprays, most of which contain ingredients which cause the products to inhibit the growth of body odor causing bacteria. Advisory Opinion No. 265 concludes that such products are cosmetics.

Inasmuch as the growth of body odor causing bacteria is a function of the body of man and inasmuch as "articles intended to affect the structure or any function of the body of man" are drugs

by definition, it would appear that the Commission has made an error.

The Commission's possible error has been compounded by the reliance which the Food and Drug Administration, through its General Counsel, places on Advisory Opinion No. 265. In a telephone conversation with Mr. Hutt on December 22, 1972, I raised the question of whether feminine deodorant sprays might be drugs since they utilize antibacterial ingredients to obtain deodorant effect. While not specifically agreeing with it, Mr. Hutt cited Advisory Opinion No. 265 as authority for the proposition that these products are not drugs.

I might add that the Advisory Opinion No. 265 has the potential of clouding other important regulatory action. The FDA is now reviewing the safety and efficacy of antimicrobial ingredients used in bar soaps. Some of these products make claims of antibacterial effect (Safeguard) and are classified as drugs while others claim only deodorant effect (Lifebuoy) and are classified as cosmetics. All, however, contain the same antimicrobial ingredients and all are intended to inhibit the growth of odor causing bacteria.

The pernicious impact of Advisory Opinion No. 265 is so great that FDA has considered asking the Commission to withdraw it. Because of all this, it is necessary that I examine the facts and scientific information utilized by the Commission in reaching its decision. This is preliminary to asking that the opinion be reconsidered.

SECRECY

From my conversations with Mr. Arthur, it is my understanding that prior to October 11, 1969, the Commission granted blanket confidentiality to requests for advisory opinions in order to encourage competitors to look before leaping. Although it is not apparent from the Code of Federal Regulations, the Commission advised its staff that this policy had changed on the above date. I would assume that only trade secrets are now protected.

The Freedom of Information Act became law on July 4, 1967. I would consider that any blanket grant of confidentiality by the Commission after that date to be *ultra vires* and without effect.

I do not desire to see Regal Chemical's trade secrets. Nor do I desire to see any of their commercial or financial information which is privileged or confidential. None of the above classes of information appear to have been necessary to the decision of the Commission.

I do not desire to see inter-agency or intra-agency memoranda. However, if these memoranda contain factual or scientific data which can be disentwined from the staff recommendation process, and the factual data is not within some other exemption, so much of the memoranda as is of a factual character must be disclosed.

By copy of this letter, I am advising Mr. Hutt of my request. I would also ask that you contact him with regard to this matter inasmuch as Advisory Opinion No. 265 appears to be covered by paragraph III(a)(1) and (2) of the FTC–FDA Memorandum of Understanding.

It is requested that the written reply I receive from you or from the Commission constitute final agency action.

Sincerely yours,

/s/ Anthony L. Young

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23 January 1973

The Secretary
Federal Trade Commission
Washington D.C., 20580

Dear Sir:

Pursuant to the Freedom of Information Act, 5 U.S.C. 552, it is requested that the following information be made available for my inspection at the offices of the Federal Trade Commission;

1) The request for advisory opinion submitted by a manufacturer of a personal deodorant spray that resulted in Advisory Opinion #265, 16 C.F.R. § 15.265, 33 F.R. 9816, July 9, 1968.

2) All facts and scientific information, including submissions by the manufacturer, upon which the Commission based its conclusion in paragraph (c) of Advisory Opinion #265.

If there are any problems with this request the undersigned may be reached at 624–8379. Thank you for your consideration.

Sincerely yours,

/s/ Anthony L. Young

Opinion Letter

June 17, 1968

Dear Mr. Heilig:

This reply is in response to your request for an advisory opinion in regard to four proposed advertising concepts of your Code No. 3047 Medicated Personal Deodorant Spray designated "Skin Mate." The advertising was submitted to the Commission by the Market Planning Corporation of New York City.

The Commission has given careful consideration to all of the data, reports, etc., submitted with your letter of March 13, 1968, in regard to this matter. After due consideration of all the facts and scientific information available to it, the Commission is of the opinion that the product is not a drug but a cosmetic, and that it has not been cleared, approved or endorsed by the Food and Drug Administration. Under these circumstances, therefore, the Commission is of the opinion that the following claims appearing in concept ad #1 are false and misleading:

> "The government would not let us print this if it were not true."
>
> "Skin Mate * * * is cleared as a drug proven effective and safer for your skin."
>
> "And while no government agency endorses a product, the facts of this clearance are important to you * * * because 'safe' and 'effective' are precisely what you hope your deordorant will be."
>
> "No other personal deodorant you can buy has been so cleared."

The Commission is also of the opinion that any advertising claims with respect to the safety and efficacy of the product which go beyond those which appear in the label would be improper. In essence, advertising claims should not exceed the claim that the product inhibits the growth of body odor causing bacteria. In view thereof, the Commission is of the opinion that the following claims, if published, would violate Sections 5 and 12 of the Federal Trade Commission Act:

Concept Ad #1:

> "* * * tested against the three most popular spray deodorants by Price Research Laboratories and found to be more effective as measured by the scientifically accepted test of deodorant effectiveness."

"* * * use the one that has been proved effective and safer for you."

Concept Ad #2:

"* * * a medical answer to perspiration odor."

"So, the medical answer is to find the most effective way of stopping the bacteria and you will find the most effective deodorant."

"This is what Skin Mate does and is. Scientific tests in Price Laboratories prove that Skin Mate with Triamite plus is more effective against the six 'odor bacteria' than any one of the three most popular deodorants—and safer for your skin. Skin Mate destroys bacteria that the other deodorants leave behind."

"* * * you can have extra protection, more effective protection and safer protection against perspiration odor."

"* * * why not use the one proven to be effective and safer."

Concept Ad #3:

"Skin Mate is a *safe* deodorant—created to stop perspiration odor without irritation."

"Skin Mate eliminates the cause of odor . . . proven most effective against the six skin bacteria that cause odor. Scientific tests show that Skin Mate is more effective against the cause of odor than the three most popular deodorants."

"* * * the safe deodorant * * * will stop odor without irritation, no matter how much you perspire."

"The Safe Deodorant."

Concept Ad #4:

"This double deodorant provides extra protection for those tense moments, and longer lasting protection so you won't be surprised at the end of a long evening."

"By attacking the * * * six 'odor bacteria' found on everyone's skin. Skin Mate is more effective at getting rid of these odor causers. It kills the bacteria other deodorants leave behind. Yet Skin Mate is completely safe to your skin."

"Skin Mate. The safe * * * deodorant."

Finally, and with regard to the word "new" which appears in all four advertising concepts, it is the policy of the Commission, as a general rule, to question the use of any claim that a product is "new" for a period of time longer than six months.

By direction of the Commission.

Letter of Request for Advisory Opinion

May 3, 1967

Dear Mr. Helm:

We are contract aerosol fillers and do not market any products for our own account. We sell to distributors who accept our formulation and claims as "Cleared" by the Food and Drug Administration (pursuant to the Kefauver-Harris Drug Act of 1962) and market our product under their name.

In particular, a nationally known company, is interested in distributing and advertising our MEDICATED PERSONAL DEODORANT SPRAY (Code 3017) as per attached copy of claim sheet submitted to the Food and Drug Administration and their "Clearance" of same dated December 6, 1966. Since this product meets United States government standards for safety and effectiveness as implied in the enclosed FDA "Clearance", our account wants to use the following statement in their advertising—

> This product meets United States Government standards for safety and effectiveness

It is not intended to vary from this particular phrase because it is a truthful statement.

We would appreciate your advisory opinion in the above matter.

Sincerely,

REGAL CHEMICAL CORPORATION

/s/ Theodore Heilig
President

Encl.

"SKIN MATE"
MEDICATED PERSONAL DEODORANT SPRAY

1. Contains Triamite—the new antibacterial agent.
2. Immediately effective—prevents odor all day.
3. Helps dry moisture.
4. Does not clog skin pores.
5. Does not irritate skin.
6. Quick drying—non-sticky or gummy.
7. Does not stain clothing; or damage fabrics.
8. As an aerosol, it is completely sanitary—convenient to use by the whole family.
9. Body odor is a social matter—be socially safe—obtain relief by using *SKIN MATE* Medicated Personal Deodorant for that extra deodorant effectiveness.

10. Tests have proven *SKIN MATE* effective against 97% of bacteria normally found on the body.

Meets safety and effectiveness requirements of government agencies.

December 6, 1966

Regal Chemical Corporation
115 Dobbin Street
Brooklyn, New York 11222

Attention: Mr. Theodore Heilig

Gentlemen:

This is in reply to your letter of September 6, 1966, regarding your "Code No. 3017 Medicated Personal Deodorant Spray."

In our opinion, this proposed drug is not a new drug as defined in the Federal Food, Drug, and Cosmetic Act. We offer no objection to this formulation under the proposed labeling.

Sincerely yours,

/s/ John F. Palmer, M.D.
Assistant to the Director
for Industry Coordination
Bureau of Medicine
Food and Drug Administration

CODE NO. 3017

MEDICATED PERSONAL DEODORANT SPRAY
contains
TRIAMITE*, SURTENOL**, HEXACHLOROPHENE
ALCOHOL 40%
ANTIBACTERIAL—INHIBITS THE GROWTH OF BODY ODOR CAUSING BACTERIA
2 SECOND SPRAY HELPS PREVENT ODOR ALL DAY
DOES NOT DRIP, AND IS NOT STICKY OR MESSY
REFRESHING, COOLING & SOOTHING—QUICK DRYING
DRIES EXCESSIVE MOISTURE—UNDERARM OR FEET
DOES NOT HARM FABRICS

DIRECTIONS:

Hold about 6" from area to be sprayed (underarm or feet), point arrow and push button.

WARNING:

Do not spray toward face. Do not apply to broken or irritated skin. If rash develops, discontinue use. Contents under pressure. Do not store near heat, or open flame. Exposure to temperatures over 130° Fahrenheit

may cause bursting. Do not puncture. Never throw container into fire or incinerator. KEEP OUT OF CHILDREN'S REACH.

*Benzoic acid, n-propyl parahydroxybenzoate, parahydroxybenzoic acid, trihydroxybenzoic acid (gallic).

**equivalent to alkyl phenols, as amyl phenol ----------0.15%
and aryl phenols, as phenyl phenols (o- and p-) ----------0.45%

Net contents oz.

Manufactured by
Regal Chemical Corporation Brooklyn, N.Y.

#3017

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[1] Commodities involved in dismissing or vacating orders are indicated by *italicized* page references.

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