IN THE MATTER OF

YKK (U.S.A.) INC.

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

Docket C-3445. Complaint, July l, 1993--Decision, July 1, 1993

This consent order prohibits, among other things, a New Jersey-based manufacturer and seller of zippers from requesting, suggesting, or advocating that any competitor: raise, fix or stabilize prices or price levels; cease providing free equipment or other discounts; cease providing any services or products or engage in any other pricing action. In addition, the respondent is prohibited from entering into, attempting to enter into, adhering to, or maintaining any combination, conspiracy, agreement, plan or program with any competitor to fix, raise, establish, maintain or stabilize prices or service levels.

Appearances

For the Commission: *Richard B. Dagen*, *Michael E. Antalics* and *James C. Egan.*

For the respondent: *James Lundquist*, *Barnes*, *Richardson & Colburn,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that YKK (U.S.A.) Inc., a corporation, hereinafter sometimes referred to as respondent or "YKK," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent YKK (U.S.A.) Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1251 Valley Brook Avenue, Lyndhurst, New Jersey.

PAR. 2. Respondent is now, and for some time has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of zippers and related products; and the leasing of equipment for installing zippers. Zippers and related products means slide fasteners, including, but not limited to, fastener chains, sliders and separating end components.

PAR. 3. Respondent maintains and has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. At all times relevant herein, YKK and Talon, Inc. were competitors in the manufacture, advertising, offering for sale, sale and distribution of zippers and related products. YKK and Talon, Inc. together account for approximately 82 percent of all zippers manufactured and/or sold in the United States.

PAR. 5. On July 1, 1988, an attorney for YKK sent a letter to the President of Talon accusing Talon of "unfair and predatory sales" tactics in the sale of zippers and related products along with a request that Talon stop engaging in these "unfair" practices by taking immediate action to cease offering free equipment to customers and to withdraw outstanding offers of free equipment to customers purchasing at the same time chain, sliders and other zipper components.

PAR. 6. At a meeting on October 21, 1988, YKK's attorney asked an attorney for Talon to urge Talon to desist from offering free installation equipment.

PAR. 7. Talon's provision of free installation equipment to such customers is a form of discounting. An agreement between Talon and YKK to cease this form of discounting would have constituted an unreasonable restraint of competition.

PAR. 8. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices herein alleged are continuing and will continue in the absence of the relief herein requested.

Commissioner Azcuenaga dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent YKK (U.S.A.) Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1251 Valley Brook Avenue, Lyndhurst, New Jersey.

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

ORDER

I.

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

A. "*Respondent*" means YKK (U.S.A.), Inc., its predecessors, subsidiaries, divisions, groups, and affiliates controlled by YKK (U.S.A.), Inc., and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Zippers and related products*" means slide fasteners, including, but not limited to, fastener chains, sliders and separating end components.

II.

It is ordered, That respondent, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any zippers and related products, and leasing of installation equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

A. Requesting, suggesting, urging, or advocating that any competitor raise, fix or stabilize prices or price levels, cease providing free equipment or other discounts, cease providing any services or product, or engage in any other pricing action;

B. Entering into, attempting to enter into, adhering to, or maintaining any combination, conspiracy, agreement, understanding, plan or program with any competitor to fix, raise, establish, maintain or stabilize prices, price levels, or service levels.

Provided, however, that YKK shall remain free to request that a competitor refrain from engaging in illegal conduct.

III.

It is further ordered, That respondent shall:

A. Within thirty (30) days of the date on which this order becomes final, provide a copy of this order to all of its directors, officers, and management employees;

B. For a period of five (5) years from the date on which this order becomes final, and within ten (10) days after the date on which any person becomes a director, officer, or management employee of respondent provide a copy of this order to such person; and

C. Require each person to whom a copy of this order is furnished pursuant to subparagraphs III.A and B of this order to sign and submit to YKK within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject YKK to penalties for violation of the order.

IV.

It is further ordered, That respondent shall:

A. Within sixty (60) days from the date on which this order becomes final, and annually thereafter for five (5) years on the anniversary date of this order, and at such other times as the Commission may by written notice to the respondent require, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order; and

B. For a period of five (5) years after the order becomes final, maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with competitors of respondent relating to any aspect of pricing or services for zippers, related products, and installation equipment, and records pertaining to any action taken in connection with any activity covered by parts II, III and IV, of this order.

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

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today accepts a consent order that significantly inhibits the ability of an attorney fully to represent the interests of his or her client. The order also suggests a view of the Robinson-Patman Act with which I cannot join.

The theory of violation is that an attorney for YKK, on behalf of his client, invited Talon, through its attorney, to fix prices.[1] The attorney for YKK, a member of a private law firm who also is a member of YKK's board of directors, believed that Talon was providing free zipper assembly machinery to some but not other customers and that this practice was unlawful.[2] YKK's attorney requested that Talon cease engaging in this practice. The complaint alleges that the attorney's request violated Section 5 of the Federal Trade Commission Act.

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[1] *I.e.*, to eliminate selective discounting in the form of providing free zipper assembly machinery to certain customers.

[2] Allegations of unlawful pricing practices have surfaced in the U.S. zipper industry for years. Beginning in the 1970's, when YKK was entering the U.S. market, members of the U.S. zipper industry complained that YKK engaged in unlawful pricing practices, including the provision of free installation equipment. *See* In the Matter of Slide Fasteners, Report to the President in Inv. No. TA-201-6, USITC Publication 757 (1976); In the Matter of Certain Slide Fastener Stringers, ITC Inv. No. 337-TA-85, 1981 ITC LEXIS 212 (1981) (ITC opinion); 1980 ITC LEXIS 51 (1980) (ALJ opinion). Although the International Trade Commission took no action against YKK, the FTC in 1981 issued an order against YKK for alleged violations of Section 2(a) of the Robinson-Patman Act. 98 FTC 25 (1981).

I have supported the general theory that invitations to collude may be challenged as unlawful unilateral conduct under Section 5 of the Federal Trade Commission Act when the evidence shows an unambiguous offer to fix prices and no justification is offered for the conduct.[3] Neither of these circumstances exists in this case. First, the alleged invitation to collude is at best highly ambiguous, and the available evidence plainly resolves any ambiguity against liability. Second, the context of the alleged invitation -- a discussion of claims of law violations between two attorneys on behalf of their clients -- suggests an important efficiency: the public interest in encouraging the negotiation and settlement of legal disputes.

A request by an attorney on behalf of his client that one of his client's competitors cease engaging in apparently unlawful conduct is legitimate conduct. Indeed, the order expressly provides that "YKK shall remain free to request that a competitor refrain from engaging in illegal conduct." Although such requests clearly are permitted by the order, the complaint treats the request of YKK's attorney not as a legitimate request to cease unlawful conduct but as an invitation to fix prices. This apparent inconsistency requires explanation.

Since the request alleged in the complaint cannot explain the basis for liability, we must look elsewhere for the allegedly unlawful invitation to collude. According to the Analysis of Proposed Consent Order To Aid Public Comment ("Analysis To Aid Public Comment"),[4] YKK's attorney "went beyond" requesting that Talon cease the unlawful conduct or offering to refrain from suing if Talon ceased the unlawful conduct. Instead, according to the Analysis To Aid Public Comment, "the attorney representing YKK offered to Talon a *quid pro quo* that YKK would refrain from providing free equipment if Talon would." Analysis To Aid Public Comment at 1.

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[3] In addition, the evidence of the alleged invitation should be independent of any testimony or material within the control of the competitor who received the offer. *See* Concurring Statement of Commissioner Mary L. Azcuenaga in Quality Running Gear, Inc., Docket C-3403 (Nov. 5, 1992).

[4] An analysis is prepared in every consent case "to facilitate public comment on the proposed order." By its terms, an Analysis To Aid Public Comment "is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms."

It is not disputed that YKK's attorney requested that Talon cease engaging in allegedly unlawful pricing practices.[5] It also is not disputed that YKK's attorney told Talon's attorney that YKK had "received advice from officials in Washington, that we, YKK, can meet" Talon's discriminatory prices.[6] The apparent willingness of the majority to infer an unlawful invitation to collude from these statements fails to take account of the Robinson-Patman Act.

Under the Robinson-Patman Act, a firm that is facing its competitor's discriminatory prices may elect to meet those prices and defend against a price discrimination case by claiming the meeting competition defense provided in Section 2(b) of the Act.[7] The statement by YKK's attorney that YKK lawfully could meet Talon's discriminatory prices is a paraphrase of the statutory meeting competition defense. The defense is available whether or not a lawyer, in whatever situation, mentions that the option exists. YKK could defend against liability under Section 2(a) of the Act (and against civil penalty liability under the 1981 order) if it could show that its differential prices were offered in "good faith to meet an equally low price of a competitor."[8]

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[5] The complaint identifies two instances in which the request was made: The first was a letter dated July 1, 1988, in which YKK's attorney "request[ed] that Talon stop engaging in these 'unfair' practices by taking immediate action to cease offering free equipment to customers . . . ." Complaint paragraph 5. The second was during a meeting on October 21, 1988, when YKK's attorney "asked an attorney for Talon to urge Talon to desist from offering free equipment." Complaint paragraph 6.

[6] The evidence of the conversation between YKK's attorney and Talon's attorney, including the quoted language, is based on a contemporaneous memorandum prepared by YKK's attorney ("YKK memorandum") and voluntarily provided to the Commission with YKK's report of compliance with the 1981 order. The memorandum and the two requests identified in the complaint (*see* note 5 *supra*) are the evidence on which the alleged "*quid pro quo*" is based. YKK has allowed disclosure of the memorandum (saving the identity of individuals involved), providing a rare opportunity for public discussion of the record on which a Commission consent order is based. The record in the case is scant, and I can find no other evidence that arguably supports liability.

[7] Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), bars sellers from discriminating in price between competing customers, subject to certain statutory requirements. Section 2(b) of the Act, 15 U.S.C. 13(b), permits a seller to rebut a *prima facie* case of price discrimination by showing that the lower price to a customer was made in good faith to meet the equally low price of a competitor. The elements of the meeting competition defense must be proved by its proponent.

[8] 15 U.S.C. 13(b). "Meeting competition" under Section 2(b) is different from engaging in normal competition. The meeting competition defense arises when a firm offers price cuts to selected customers, *i.e.*, discriminates in price.

The flip side of the Section 2(b) meeting competition defense is that it is not available except to meet a competitor's offering. If Talon ceased its discriminatory pricing, YKK could no longer defend its differential prices under Section 2(b).[9] As a consequence, any request that Talon cease allegedly unlawful discriminatory pricing implicitly included a "threat" that YKK could lawfully meet Talon's competition as well as an "offer" that YKK would not meet Talon's discriminatory price competition if Talon acceded to the request. The "threat" and the "offer" are products of the Robinson-Patman Act. The Act creates a mutuality that exists whether or not it is described out loud, and it is from this that the majority apparently infers an unlawful offer of a *"quid pro quo."*

The evidence makes clear that the attorneys for YKK and Talon were concerned with mutual allegations of unlawful pricing practices and that their discussion was grounded in these provisions of the Robinson-Patman Act. YKK's attorney said that a recent "Talon promotion raised a number of questions about fair competition" and described "YKK's position that [Talon's] targeting certain of [YKK's] customers . . . with very low prices . . . constituted an unfair trade practice."[10] Talon's attorney replied that Talon had "'not engaged in any free placement of equipment, since'" the July 1988 letter from YKK's attorney[11] but that Talon would continue to meet the low prices of its competitors. YKK's attorney said that "if Talon continues or restarts any of its programs to give free machines for one year, we have received advice from officials in Washington, that we, YKK, can meet such competition." YKK memorandum.

YKK also was engaging in unlawful pricing, Talon's attorney continued, claiming "'that YKK not only sells at low prices in order

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[9] For the sake of exposition, the text assumes that YKK and Talon were the only competitors in the zipper market.

[10] "Unfair trade practice" has been used by the Commission to refer to "unfair methods of competition . . . or other illegal practices," including unlawful price discrimination. *E.g.*, FTC, Trade Practice Rules for the Slide Fastener Industry (June 21, 1958), rescinded, 42 Fed. Reg. 19,859 (March 16, 1977).

[11] Talon's discontinuance of its free equipment program after receiving the request from YKK's lawyer may have reflected a concern that the program could not withstand challenge under the Robinson-Patman Act.

to target-and-take Talon customers, but that YKK beats, rather [than] simply meets our competition.'" Talon's attorney claimed to have "hard evidence that YKK . . . h[ad] giv[en] away equipment to meet and beat competition from Talon'" and "opened a file and began to read from 'evidence' that YKK priced . . . 'below YKK's list and also, below Talon's prices.'" YKK's attorney said that "the reports [if] true . . . could not be actionable because . . . there was other competition besides head-to-head operations by Talon and YKK . . ." YKK memorandum.

YKK's attorney also said that "YKK would consider it 'a plus . . .' if Talon would continue its current policy of not giving away free equipment to their customers." YKK memorandum. It is hardly surprising and, under the circumstances, not especially troubling that YKK's attorney would view it as "a plus" if Talon acceded to his request and discontinued its discriminatory pricing program. If Talon in fact ceased the practice, as Talon's attorney claimed it had, YKK would no longer face the costs of potential litigation and of documenting its compliance with the meeting competition defense.

At the close of the discussion, YKK's attorney said that YKK had "no intention . . . at this time to file a complaint against Talon." Talon's attorney said "that Talon does not have any intention of preparing legal action against YKK, if the status quo continues." After the meeting, YKK's attorney advised his client in terms of the Robinson-Patman Act and the Act's meeting competition defense: "If, as Talon has alleged, we are beating rather than simply meeting competition, they would have grounds for a complaint unless we could prove affirmatively that we were not meeting a Talon price but a price by some other competitor that was very low." YKK's attorney also told his client that "[w]e have good defenses and they should be reviewed soon."[12] YKK memorandum.

The majority apparently would distinguish between threats to litigate and threats to meet discriminatory prices under Section 2(b). Under the approach described in the Analysis To Aid Public

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12 The availability of the meeting competition defense likely was particularly important to YKK's attorney, because of YKK's potential liability for civil penalties for unlawful price discrimination under the Commission's 1981 order against YKK.

Comment, an attorney can request that the allegedly discriminatory pricing cease, threaten legal action or offer to "refrain from taking legal action,"[13] Analysis To Aid Public Comment at 1, if the discriminatory pricing practices cease. But a statement by an attorney that his client can lawfully avail itself of the statutory meeting competition defense, along with a suggestion that his client would prefer not to be placed in the position of doing so, will be construed by the Commission as an unlawful invitation to fix prices. I see no basis in principle for this approach. Both litigation and meeting competition are lawful options available to a firm meeting discriminatory prices in the marketplace, and a lawyer surely would advise a client charged with or facing discriminatory prices of the availability of these options.[14]

Implicit in the theory of the complaint, as explained in the Analysis To Aid Public Comment, is the notion that YKK was trying to persuade a competitor to stop engaging in beneficial competitive conduct by offering to agree to forgo the same beneficial conduct. This underlying theme has a strong superficial appeal, but it is fundamentally invalid in this situation. The conduct at issue is discriminatory pricing and, by definition under the Robinson-Patman Act, the conduct is not good. Although it may seem counter-intuitive, YKK was not asking Talon to stop doing something right but rather to stop violating Section 2(a).[15]

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13 For example, the statement in the Analysis To Aid Public Comment that "the attorney representing YKK went beyond . . . an offer that YKK would refrain from taking legal action against Talon if Talon ceased illegal conduct" implies that litigation threats are protected. *See Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) ("If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.").

14 *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), is inapposite. In that case, the Court rejected a defense, asserted by firms indicted on criminal price-fixing charges, that their explicit exchanges of price information were necessary to verify each other's prices in order to comply with Section 2(b) of the Robinson-Patman Act. The point is not that YKK should be able to avoid liability under Section 5 by asserting a spurious need to comply with the Robinson-Patman Act but that the majority has derived its alleged unlawful invitation to collude from a recitation of a statutorily created defense.

15 YKK's attorney had a valid interest in protecting his client against unfair competition by attempting to persuade Talon to stop violating Section 2(a). Neither YKK nor Talon, of course, would be barred by the Act from granting across-the-board price discounts to customers on the same functional level; the Act bars price discrimination, not lower prices. We cannot assume, however, that either firm could offer these discounts to all customers without risking its financial health and ability to stay in business.

Also implicit in the theory of the complaint, as explained in the Analysis To Aid Public Comment, is the notion that the better way to level the playing field between YKK and Talon is for YKK to emulate the behavior of Talon and offer its own selective discounts under cover of the Section 2(b) defense.[16] This assumption ignores real world costs and risks of significant dimension. If a firm wants to undertake the risk and cost of documenting conduct in the hope of establishing the protection of Section 2(b), that is one thing. It is quite another for the Commission implicitly to require that course of action in preference to requesting a competitor to cease violating Section 2(a).

One irony pervades this case: YKK is the only zipper firm under a Robinson-Patman order. Because of the Commission's 1981 order against YKK, YKK's attorney must be particularly sensitive to the need for his client, to avoid liability for civil penalties under the Commission's order, to limit differential price offers to meeting competition situations. Indeed, YKK's attorney sought and obtained advice from the FTC that YKK lawfully could meet discriminatory prices offered by its competitors.[17] Then, when YKK's attorney repeated the advice that he had received from the staff of the Commission about compliance with an order of the Commission under a law enforced by the Commission, the Commission alleges an unlawful solicitation to fix prices. YKK surely has been caught between the proverbial devil and the deep blue sea.

The purpose of challenging invitations to collude under Section 5 presumably is to deter such conduct, because of the danger that it will ripen into actual collusion. Although such deterrence has value, we should remember that extending an invitation to fix prices, which is a unilateral act, involves less competitive harm than actual price fixing. This underscores the need scrupulously to protect lawful discussion in these cases. To ensure that legitimate communication is not inhibited we should challenge only naked invitations to

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16 The choice to challenge the request by YKK's attorney, while failing to examine Talon's allegedly unlawful pricing practices, suggests a willingness to tolerate discrimination against some customers so that other customers may benefit from discounting.

17 The 1981 order does not expressly permit YKK to claim the statutory defenses in the Robinson-Patman Act but requires YKK to cease and desist from offering discriminatory prices.

collude, those that unambiguously solicit an unlawful agreement on price and have no other function. *See United States v. American Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984). Because the communications by YKK's attorney were an assertion of his client's lawful alternatives, they did not constitute a naked invitation to collude.[18] The proposed consent order infringes on legitimate communications by an attorney on behalf of his or her client and is inconsistent with the public interest.

I dissent.

CONCURRING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

I share the concern that our efforts in the invitation to collude area should not encompass, and thereby deter, legitimate business activity (or legal representation related thereto), and have repeatedly urged caution by the Commission in this regard.[1] One of the difficulties in the Commission's efforts to explore the frontiers of Section 5 law through consent agreements is that much of the pertinent evidence supporting the Commission's action is not ordinarily a matter of public record. I have found reason to believe that a violation occurred in this matter based on an investigative record which, in my view, is replete with inculpatory evidence that far outweighs any that might be interpreted as exculpatory. This case involves, in my judgment, activity by a corporate official, who incidentally happened to wear a legal hat, that was not in fact a good faith effort to resolve a legal dispute; rather, I find reason to believe that the legal dispute served simply as a pretext for an invitation to engage in a naked price restraint (in the form of ceasing certain discounts) where market power exists. I am therefore thoroughly comfortable with the Commission's decision to issue as final the consent agreement in this matter.[2]

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18 Another puzzling aspect of this case is that the order is imposed on the client for the conduct of its attorney, apparently leaving the attorney free, were he so inclined, to engage in similar conduct for other clients.

1 *See* Concurring Statements of Commissioner Deborah K. Owen in Quality Trailer Products Corporation, C-3403 (Nov. 5, 1992) and AE Clevite, Inc., C-3429 (June 8, 1993).

2 As in the cases cited in note 1 *supra*, I have accepted certain provisions in the Commission's order here, which could preclude some otherwise legal conduct, as fencing-in relief. This should not be interpreted as a finding that otherwise legitimate joint activity that involves ancillary price discussions thereby becomes illegal.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I concur in the Commission's decision to issue the complaint and accord final approval to the consent order in this matter. Given the unusual factual context of the "invitation to collude" that forms the gravamen of the complaint, and the paucity of information that would otherwise appear in the final record of this decision, I feel compelled to explain the analysis underlying my vote.

The consent order in this matter settles charges that YKK solicited an agreement from its largest competitor whereby the firms mutually would refrain from offering free installation equipment with the sale of their zipper products. Such an agreement -- like an agreement mutually to forbear on pricing or any other significant dimension of competition -- is conduct "that appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'" and is, therefore, "inherently suspect" under the standards set forth in the Commission's decision in Massachusetts Board of Registration in Optometry.[1] An unambiguous solicitation of such an agreement is likewise "inherently suspect."[2] I find reason to believe that YKK invited such an anticompetitive agreement and that no plausible efficiency justification exists for this conduct.

YKK's invitation, however, arguably was the consequence of settling allegations of unlawful price discrimination under the Robinson-Patman Act.[3] Indeed, settlement of a competitor's claim of primary line injury for unlawful price discounting implies that the discounting will cease. This could suggest that prosecution of anti-competitive restraints must make an accommodation for such restraints imposed for the purpose of settling such a claim.

The context of private settlement, however, does not remove from antitrust scrutiny inherently suspect conduct that lacks an efficiency justification. In civil cases generally, a legitimate intent or

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[1] 110 FTC 549, 604 (1988).

[2] *See* Quality Trailer Products Corp., Docket C-3403 (Nov. 5, 1992) (consent order based on invitation to agree to fix prices of certain axle products in violation of Section 5 of the FTC Act.).

[3] 15 U.S.C. 13a, *et seq.*

purpose would not justify a restraint that has unreasonably anti-competitive effects.[4] Moreover, even a good faith attempt to avoid Robinson-Patman liability will not excuse anticompetitive conduct that is clearly inconsistent with the broader purposes of the U.S. antitrust laws.[5]

In *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), the Supreme Court held that an exchange of information concerning current prices was *per se* unlawful, even though the stated purpose was to assure compliance with the "meeting competition" defense of Section 2(b) of the Robinson-Patman Act. In that case, the defendants asserted that exchanges of price information allowed each seller to verify that any discriminatory prices it offered were necessary to meet a competitor's price. The Court held, however, that the agreement was not necessary to avoid Robinson-Patman liability. Interseller verification was not necessary to invoke the defense; a "good faith belief, rather than an absolute certainty" that a price concession was being offered by a competitor was all that was necessary to invoke Section 2(b).[6] Noting the potential tension between the rationales underlying the Sherman and Robinson-Patman Acts, the Court held that the requirements of the Robinson-Patman Act should be construed so as to ensure its coherence with the Sherman Act.[7]

Similarly, the anticompetitive conduct in this matter cannot be justified by an attempt to comply with, or settle claims under, the Robinson-Patman Act. The evidence strongly suggests that YKK

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4 *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 25-26 nn. 41 & 42 (1984); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372 (1933) ("[g]ood intentions will not save a plan otherwise objectionable").

5 *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 447-459 (1978); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953) (as a general rule, the Robinson-Patman Act should be construed so as to ensure its coherence with "the broader antitrust policies that have been laid down by Congress.").

6 438 U.S. at 451. The Court held that an exchange of information concerning current prices could not satisfy the "controlling circumstances" test where the stated purpose was to assure compliance with the meeting competition defense of Section 2(b) of the Robinson-Patman Act. *Id.* Settlement of the Robinson-Patman Act dispute in this matter similarly is not a "controlling circumstance" that would excuse the anticompetitive behavior.

7 438 U.S. at 458 (*citing Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953)).

issued an unambiguous invitation to one of its largest competitors to enter into an agreement mutually to discontinue a form of discounting that was an important dimension of competition between the firms. Although YKK's invitation arguably was intended as an offer of settlement to resolve claims of unlawful discounting under the Robinson-Patman Act, the invited agreement far exceeded the scope of what was reasonably necessary to achieve a settlement. The potential effects of such an invitation are unambiguously anticompetitive.

Assuming *arguendo* that YKK's threats of litigation were made in good faith,[8] the appropriate *quid pro quo* for the competitor's commitment to cease from engaging in the putative violation was YKK's commitment to forgo initiating litigation. YKK, however, went further, offering to discontinue an important form of discounting in exchange for the competitor's commitment to discontinue such discounting. This conduct poses a substantial threat to competition, particularly in cases such as this where the evidence strongly suggests that the relevant firms, acting in concert, have market power.[9]

Private settlement discussions of disputes between competitors alleging unlawful discounting do not provide the basis for a defense to anticompetitive conduct. On the contrary, the Supreme Court's analysis in U.S. Gypsum is more consistent with the view that such settlement discussions provide a context for anticompetitive behavior and should be carefully scrutinized.[10] Price-fixing is an obvious means for competitors to resolve allegations of unlawful discounting. Given the potential for abuse in this context, the

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8 I do not find it necessary to determine whether YKK reasonably believed that its competitor was engaged in violations of the Act, since I believe that the solicitation far exceeds the scope of what was reasonably necessary to settle a legitimate Robinson-Patman Act claim.

9 The complaint notes that YKK and Talon, the competitor that was the recipient of the unlawful solicitation account for more than 80% of zippers sold in the United States.

10 The Court rejected even a limited Robinson-Patman compliance exception to unlawful exchanges of contemporaneous price information, finding that such an exception would "remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby." 438 U.S. at 458 (citing *Automatic Canteen*, 346 U.S. at 74).

Commission should make clear that competitors attempting to resolve claims of unlawful discounting under the Robinson-Patman Act understand that any settlement or attempted settlement must pass scrutiny under U.S. antitrust laws forbidding unreasonable restraints of trade, including Section 5 of the FTC Act.[11]

CONCURRING STATEMENT OF COMMISSIONER DENNIS A. YAO

I appreciate the concern that has prompted Commissioner Azcuenaga to dissent in this matter. I am disturbed by the possibility that this consent agreement may be misinterpreted to mean that a simple discussion settling alleged Robinson-Patman Act violations could lead to an FTC enforcement action alleging an "invitation to collude" actionable under Section 5 of the FTC Act. Price-cutting and alleged violations of the Robinson-Patman Act form two sides of the same coin because the Robinson-Patman Act seeks to forestall certain types of price discounts. Because charging that a competitor has violated the Robinson-Patman Act implies that, while the complainant is not discounting, the competitor is and must cease discounting or face a lawsuit, one could interpret a charge of a Robinson-Patman Act violation as an implicit "invitation" that the other side "agree" to end price discounting. Consequently, some might assume that discussions settling alleged Robinson-Patman Act violations could be construed by the FTC as an offer to agree to end price discounts and, hence, an "invitation to collude" by raising prices. To prevent this possible misconception from chilling efficient settlement discussions of legal disputes, it is necessary to explain in greater detail than usual why there is sufficient reason here to believe that YKK's behavior violated Section 5 of the FTC Act.[1]

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[11] A similar analysis would apply to purely private settlements of U.S. international trade law disputes. *See* U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations (1988), *reprinted in* 4 Trade Reg. Rep. (CCH) paragragh 13,109, at Section 7 and Case 17.

[1] The Analysis of Proposed Consent Order to Aid Public Comment which the Commission has issued in this matter also provides a fuller description of this matter than is contained in the complaint and consent order. Because Analyses are not included in the bound final Commission decisions, I have appended the Analysis to my concurring statement for reference purposes.

Most importantly, the lawyer's actions here went beyond requesting that his client's competitor cease an allegedly unlawful practice of offering free installation equipment to customers buying chain, slider and other zipper components. YKK's lawyer, who is also a member of YKK's board of directors, privately met with a lawyer for YKK's competitor, Talon, and suggested that YKK would refrain from providing free equipment if Talon agreed to cease offering free equipment. Because Talon's provision of free equipment is a form of discounting, an agreement between Talon and YKK to cease this form of discounting would have violated the law.[2] Consequently, an offer to agree that both parties end price discounts, as happened here, should similarly be unlawful.[3] Absent an offer to agree on a factor such as price, however, a lawyer's *bona fide* threat of litigation standing alone should not violate Section 5, even if the logical result of that threat is that the other side would have to end a price discount in order to settle the dispute. To suggest otherwise could potentially chill settlement discussions in legal disputes.

The evidence strongly suggests that such a *quid pro quo* offer was made. Although at the meeting YKK's lawyer discussed his apparently good faith belief that Talon's offering of free installation equipment violated the Robinson-Patman Act and other trade regulation rules, his own written description of the meeting demonstrates that he went beyond discussing alleged violations of the law and offered a *quid pro quo*. Specifically, he recounts that he told Talon's lawyer that "it would be good for the industry if no one 'gave away' installation equipment" and, in the same sentence, that "YKK would consider it 'a plus ...' if Talon would continue its current policy of not giving free equipment to their customers."[4]

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[2] *United States v. United States Gypsum Co.*, 438 U.S. 422, 448-59 & n. 23 (1978) (agreement among competitors to verify actual prices is actionable under Section 1 even if supposedly done to avoid Robinson-Patman Act violations).

[3] *See, e.g.*, Quality Trailer Products Corp., Docket C-3403 (Nov. 5, 1992) (FTC complaint charged that respondent violated Section 5 by making an unambiguous offer to fix prices of certain axle products).

[4] (ellipsis in original). At an earlier point in the meeting, Talon's attorney had informed YKK's attorney that Talon was no longer offering free installation equipment.

Further buttressing this case is the fact that this offer of a *quid pro quo* is not the product of disputed deposition testimony between competitors, but rather is described in explicit detail in a document written by YKK's lawyer. While such documentary evidence -- because of its rarity -- is not necessary in order to find clear evidence of an unlawful offer, it serves as a powerful counter to any argument that the evidence here is ambiguous. Finally, these two companies may have market power -- the complaint notes that YKK and Talon together account for approximately 82 percent of all zippers manufactured and/or sold in the United States. Market power increases the incentives of the parties to seek to fix prices (since collusion is more likely to be successful when the parties have market power) and thus increases the probability of an anticompetitive motive on the part of the offeror, further reducing any ambiguity in the evidence concerning the offer.

Although the Commission must take care in cases like this to avoid any misimpression that mere settlement discussions could lead to a Section 5 action, the Commission cannot abdicate its responsibility to challenge an unlawful invitation to collude solely because it occurs during an otherwise lawful conversation. The evidence described above shows that YKK's lawyer, a member of its board of directors, went beyond discussing alleged violations of the Robinson-Patman Act and offered Talon a *quid pro quo* at the meeting. Hence, I find that there is reason to believe that, in doing so, YKK violated Section 5.

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from YKK (U.S.A.) Inc.

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

The complaint alleges that Talon, a competitor of YKK (U.S.A.) in the sale of zippers, was engaged in a form of price discounting, by offering free installation equipment along with its sales of zipper components. An attorney representing YKK complained in a letter to the President of Talon about such offers, characterizing them as "unfair and predatory" sales tactics. At a subsequent meeting between attorneys for the two companies, YKK's attorney then attempted to get Talon to cease this discounting. Specifically, the complaint alleges that, at a meeting on October 2l, 1988, YKK's attorney characterized Talon's discounting as unlawful and asked an attorney for Talon to urge Talon to desist from offering free installation equipment. However, YKK's attorney also told Talon's attorney that YKK could lawfully meet Talon's price discounts.

The Commission has reason to believe that the attorney representing YKK went beyond a demand that Talon cease illegal conduct or an offer that YKK would refrain from taking legal action against Talon if Talon ceased illegal conduct. Rather, the Commission has reason to believe that the attorney representing YKK offered to Talon a *quid pro quo* that YKK would refrain from providing free equipment if Talon would. The complaint further alleges that an agreement between Talon and YKK to cease discounting would have constituted an unreasonable restraint of competition. Finally, the Commission has reason to believe thnt YKK's invitation to Talon to enter into an agreement by which both parties would refrain from offering free equipment to customers violates Section 5 of the Federal Trade Commission Act. The complaint does not allege that Talon accepted YKK's offered agreement to cease discounting.

YKK (U.S.A.) Inc. has signed a consent agreement to the proposed consent order. The order prohibits YKK (U.S.A.) Inc. from requesting, suggesting, urging, or advocating that any competitor raise, fix or stabilize prices or price levels, cease providing free equipment or other discounts, cease providing any services or products or engage in any other pricing action. The proposed consent order, also prohibits YKK (U.S.A.) Inc. from entering into, attempting to enter into, adhering to, or maintaining any combination, conspiracy, agreement, understanding, plan or program with any competitor to fix, raise, establish, maintain or stabilize prices, price levels or service levels. The order, however, permits YKK to request that a competitor refrain from engaging in illegal conduct. The order's provisions apply to zippers and related products, and installation equipment. Zippers and related products are defined as slide fasteners, including, but not limited to, fastener chains, sliders and separating end components.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.