

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Robert Pitofsky, Chairman
 Mary L. Azcuenaga
 Janet D. Steiger
 Roscoe B. Starek, III
 Christine A. Varney

In the Matter of)	Docket No. C-3700
Wesley-Jessen Corporation,)	DECISION AND
a corporation)	ORDER
)	

The Federal Trade Commission having initiated an investigation of the proposed acquisition by the respondent named in the caption of all of the voting securities of Pilkington Barnes Hind International, Inc. ("PBH International"), a corporation, Barnes-Hind International Inc. ("Barnes-Hind International"), a corporation, Pilkington Barnes Hind (Services) Limited ("PBH Services"), Pilkington Barnes Hind N.V. ("PBH NV"), Pilkington Barnes Hind SA ("PBH France"), Pilkington Barnes Hind, S.A. ("PBH Spain"), Pilkington Barnes-Hind Pty Ltd. ("PBH Australia"), Pilkington Barnes Hind Japan KK ("PBH Japan"), Pilkington Barnes Hind Nederland B.V. ("PBH BV"), Pilkington Barnes Hind SpA ("PBH SpA"), Pilkington Barnes-Hind Limited ("PBH Ltd."), Pilkington Diffractive Lenses Limited ("Diffractive"), Pilkington Barnes Hind, Inc., a corporation, ("PBH"), and certain assets of Pilkington Deutschland GmbH ("PD"), from Pilkington plc ("Pilkington"), and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

The 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 the 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 respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent Wesley-Jessen Corporation ("Wesley-Jessen") is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business located at 333 East Howard Avenue, Des Plaines, Illinois.

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.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Respondent" or "Wesley-Jessen" means Wesley-Jessen Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, affiliates and groups controlled by Respondent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "PBH" means Pilkington plc, a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its principal place of business at Prescot Road, St. Helens, Merseyside, England WA 10 3TT, and

including all of its subsidiaries, affiliates, divisions and groups.

C. "Commission" means the Federal Trade Commission.

D. "Pilkington Acquisition" means the acquisition which is the subject of an agreement between Wesley-Jessen and Pilkington dated July 5, 1996, in which Respondent will acquire voting securities of Pilkington Barnes Hind International, Inc., Barnes-Hind International Inc., Pilkington Barnes Hind (Services) Limited, Pilkington Barnes Hind N.V., Pilkington Barnes Hind SA, Pilkington Barnes Hind, S.A., Pilkington Barnes-Hind Pty Ltd., Pilkington Barnes Hind Japan KK, Pilkington Barnes Hind Nederland B.V., Pilkington Barnes Hind SpA, Pilkington Barnes-Hind Limited, Pilkington Diffractive Lenses Limited, PBH, and certain assets of Pilkington Deutschland GmbH.

E. "Acquirer" means the person to whom Wesley-Jessen divests PBH's Opaque Lens Business pursuant to Paragraph II.A. of this Order.

F. "New Acquirer" means the person to whom the trustee divests PBH's Opaque Lens Business pursuant to Paragraph V. of this Order.

G. "Divestiture Agreement" means the agreement between

or sale of PBH's Opaque Lens Products by PBH, including, but not limited to:

(1) all books, records, manuals, reports, lists, advertising and promotional materials, computer records and other documents relating to PBH's Opaque Lens Products;

(2) Natural Touch product line Profit and Loss statements relating to each of PBH's Opaque Lens Products for the United States;

(3) all legal or equitable rights in trademarks and tradenames registered in the United States together with all trademark registrations and applications and trade names therefor relating to PBH's Opaque Lens Products;

(4)

(10) all documents containing or relating to product testing and laboratory research data relating to PBH's Opaque Lens Products, including but not limited to all regulatory registrations and correspondence;

(11) all consumer correspondence and documents relating to PBH's Opaque Lens Business;

(12) all documents constituting or relating to price lists for PBH's Opaque Lens Products;

(13) all documents and information relating to costs of production for each of PBH's Opaque Lens Products, including but not limited to raw material costs, packaging costs, and advertising and promotional costs;

(14) all documents containing sales data relating to PBH's Opaque Lens Products;

(15) subject to the Patent Assignment Agreement granted to Allergan, Inc., dated December 17, 1992, a royalty-free license under the patents listed in Appendix A of this Order to manufacture, import, offer for sale, use and sell Opaque Contact Lenses in the Licensed Territory, said license to be exclusive with respect to the sale of Opaque Contact Lenses. Further, Wesley-Jessen Corporation shall release Acquirer or New Acquirer from all claims that Wesley-Jessen has or may have against Acquirer or New Acquirer with respect to PBH's patents listed in Appendix A, including but not limited to the Request for Interference filed on April 11, 1995, by Schering Plough (Wesley-Jessen's U.S. Continuation Application of 07/984,817) against US Patent No. 5,302,978, issued April 12, 1994 (Evans, et al.), provided that said release is not in violation of any applicable law. Further, if, pursuant to any interference proceeding, with respect to the patents listed in Appendix A Wesley-Jessen is awarded claims in any pending patent application in replacement of the claims presently held in the PBH patents listed in Appendix A then Wesley-Jessen shall license those claims to Acquirer or New Acquirer under terms consistent with the terms of the license granted in the first sentence of this paragraph. Moreover, if the US Patent Office declares an interference between any Janke patent application and any PBH patent listed in Appendix A, then Wesley-Jessen shall agree to settle the action consistent with the terms of the license granted in the first sentence of this paragraph with all costs and attorneys fees for both parties paid by Wesley-Jessen;

(16) a non-transferable, irrevocable, non-exclusive, royalty-free license under the patents listed in Appendix B of this Order to manufacture, import, offer for sale, use and sell Opaque Contact Lenses in the Licensed Territory, except that the Acquirer or New Acquirer may transfer this license as part of a sale of all of PBH's Opaque Lens Business of the Acquirer or New Acquirer but not until the Acquirer or the New Acquirer has obtained all necessary United States Food and Drug Administration ("FDA

for the PBH Natural Touch™ lenses by the FDA. The specifications for these are:

The polymacon material is a hydrophilic polymer of 2-hydroxyethyl methacrylate cross-linked with ethylene glycol dimethacrylate. When fully hydrated in 0.9% sodium chloride solution, the composition of the polymacon lens is 62% polymacon polymer and 38% water by weight. The material has a refractive index of 1.44, as measured in 0.9% sodium chloride solution. Lenses are tinted with one or more of the following vat dyes: Cl#59825, 69825, 73335, 61725. Lenses range in power from -10.00 to +4.00 (including plano) in quarter diopters, and are to be disinfected using either a thermal (heat), chemical (not heat), or hydrogen peroxide disinfection system.

N. "Information Relating to Licensing of Patents" means any information not in the public domain disclosed by the Acquirer or New Acquirer to Respondent relating to the assignment of the licensing agreement between Wesley-Jessen and PBH dated August 1, 1994, as referenced in Paragraph I.L.17.

II.

IT IS FURTHER ORDERED that:

A. Wesley-Jessen shall divest, absolutely and in good faith and at no minimum price, PBH's Opaque Lens Business. PBH's Opaque Lens Business shall be divested within four (4) months of the date this Agreement is signed, to an Acquirer that receives the prior approval of the Commission and only pursuant to a Divestiture Agreement that receives the prior approval of the Commission.

The purpose of this divestiture is to create an independent competitor in the research, development, manufacture, distribution and sale of Opaque Contact Lenses and to remedy the lessening of competition resulting from the Pilkington Acquisition as alleged in the Commission's Complaint.

B. Upon reasonable notice and request from the Acquirer or New Acquirer to Wesley-Jessen, Wesley-Jessen shall provide information, technical assistance and advice to the Acquirer or New Acquirer such that the Acquirer or New Acquirer will be capable of continuing the current research, development, manufacture, distribution and sale with respect to PBH's Opaque Lens Products. Such assistance shall include reasonable consultation with knowledgeable employees of Wesley-Jessen and

training at the facility of the Acquirer or New Acquirer, sufficient to satisfy the management of the Acquirer or New Acquirer that its personnel are adequately knowledgeable about PBH's Opaque Lens Products. However, Respondent shall not be required to continue providing such assistance for more than eighteen (18) months after divestiture to the Acquirer or New Acquirer of PBH's Opaque Lens Products. Respondent may require reimbursement from the Acquirer or New Acquirer for all of its own direct costs incurred in providing the services required by this Subparagraph. Direct costs, as used in this Subparagraph, means all actual costs incurred exclusive of overhead costs.

C. Pending the divestiture of PBH's Opaque Lens Business,

III.

IT IS FURTHER ORDERED that:

A. Respondent shall enter into a Supply Agreement with the Acquirer or New Acquirer contemporaneously with the Divestiture Agreement. The Supply Agreement shall be subject to the prior approval of the Commission and shall require the Respondent to supply the Acquirer or New Acquirer with the amount of Supplied Products requested by the Acquirer or New Acquirer. The Supply Agreement will remain in effect for eighteen (18) months; **provided, however,** the 18 month period may be extended by the Commission for a period not to exceed 24 months, if the

all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require Wesley-Jessen to be liable for any negligent act or omission of the Acquirer or New Acquirer or for any representations and warranties, express or implied, made by the Acquirer or New Acquirer that exceed the representations and warranties made by Wesley-Jessen to the Acquirer or New Acquirer, as applicable.

(3) The Divestiture Agreement shall require the Acquirer or New Acquirer to submit to the Commission with the divestiture application, a certification attesting to the good faith intention of the Acquirer or New Acquirer, and including an actual plan by the Acquirer or New Acquirer, to obtain in an expeditious manner all necessary FDA approvals to manufacture PBH's Opaque Lens Products for sale in the United States.

(4) The Divestiture Agreement shall require the Acquirer or New Acquirer to submit to the trustee appointed pursuant to Paragraph IV. of this Order periodic verified written reports setting forth in detail the efforts of the Acquirer or New Acquirer to sell in the United States PBH's Opaque Lens Products supplied by Wesley-Jessen and to obtain all FDA approvals necessary to manufacture its own PBH's Opaque Lens Products for sale in the United States. The Divestiture Agreement shall require such reports to be submitted 60 days from the date the Divestiture Agreement is approved by the Commission and every 90 days thereafter until all necessary FDA approvals are obtained by the Acquirer or New Acquirer to manufacture PBH's Opaque Lens Products for sale in the United States. The Divestiture Agreement shall also require the Acquirer or New Acquirer to report to the Commission and the trustee at least thirty (30) days prior to its ceasing the manufacture or sale of PBH's Opaque Lens Products in the United States for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture its own PBH's Opaque Lens Products for sale in the United States.

C. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or New Acquirer: (1) ceases for sixty (60) days or more the sale of PBH's Opaque Lens Products prior to obtaining all necessary FDA approvals to manufacture PBH's Opaque Lens Products for sale in the United States; (2) abandons its efforts to obtain all necessary FDA approvals to manufacture PBH's Opaque Lens Products for sale in the United States; or (3) fails to obtain all necessary FDA approvals to manufacture PBH's Opaque

Lens Products for sale in the United States within eighteen (18) months from the date the Commission approves a Divestiture Agreement with the Acquirer or New Acquirer; **provided, however,** that the eighteen (18) month period may be extended for a period not to exceed twenty-four (24) months if the Commission determines that the Acquirer or the New Acquirer made good faith efforts to obtain all necessary FDA approvals for manufacturing PBH's Opaque Lens Products for sale in the United States and that such FDA approvals appear likely to be obtained within the extended time period.

D. While the obligations imposed by Paragraphs II. and III. of this Order are in effect, Respondent shall take such actions as are necessary: (1) to maintain all necessary FDA approvals to research, develop, manufacture, offer for sale, use and sell PBH's Opaque Lens Products in the United States; (2) to maintain the viability and marketability of PBH's Opaque Lens Business as well as all tangible assets, including manufacturing facilities needed to contract manufacture the Supplied Products; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of any of PBH's Opaque Lens Business or tangible assets including manufacturing facilities needed to contract manufacture and sell PBH's Opaque Lens Products except for ordinary wear and tear.

E. Respondent shall not provide, disclose or otherwise make available to any department/division of Respondent other than the legal and accounting departments any Information Relating to Licensing of Patents.

F. Respondent shall use any Information Relating to Licensing of Patents obtained by Respondent only in Respondent's capacity as a licensor of certain patents in order to collect royalties, pursuant to Paragraph II. of this Order.

IV.

IT IS FURTHER ORDERED that:

A. Within three (3) months of the date this Agreement is signed, or any time thereafter, the Commission may appoint a trustee to monitor that Wesley-Jessen and the Acquirer or New Acquirer expeditiously perform their respective responsibilities as required by this Order, the Divestiture Agreement, and the Supply Agreement approved by the Commission. Wesley-Jessen shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

(1) The Commission shall select the trustee, subject to the consent of Wesley-Jessen, which consent shall not be unreasonably withheld. If Wesley-Jessen has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Wesley-Jessen of the identity

I. and III. of this Order and the Divestiture Agreement and Supply Agreement with the Acquirer or the New Acquirer.

(6) The trustee shall serve, without bond or other security, at the cost and expense of Wesley-Jessen, on such reasonable and customary terms and conditions as the Commission may set. The trust agreement shall provide that, if the Commission directs the trustee to divest PBH's Opaque Lens Business, the trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting PBH's Opaque Lens Business. The trustee shall have authority to employ, at the cost and expense of Wesley-Jessen, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

(7) Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from the misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

(8) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph IV. of this Order.

(9) The Commission may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of Paragraph II. of this Order and the Divestiture Agreement and Supply Agreement with the Acquirer or the New Acquirer.

(10) The trustee shall report in writing to the Commission every three months concerning compliance by the Respondent and the Acquirer or the New Acquirer with the provisions of Paragraphs II. and III. of this Order and the efforts of the Acquirer or the New Acquirer to receive all necessary FDA approvals to manufacture Opaque Contact Lenses for sale in the United States.

B. Respondent shall comply with all reasonable directives of the trustee regarding Respondent's obligation to cooperate with the trustee's efforts to monitor the compliance of the Respondent and the Acquirer or New Acquirer with this Order, the Divestiture Agreement, and the Supply Agreement.

C. If the Commission terminates the Divestiture Agreement pursuant to Paragraph III.C. of this Order, the Commission may direct the trustee to seek a New Acquirer, as provided for in Paragraph V. of this Order.

V.

IT IS FURTHER ORDERED that:

A. If Wesley-Jessen has not divested PBH's Opaque Lens Business as required by Paragraph II.A. of this Order, or if the Commission terminates the Divestiture Agreement pursuant to Paragraph III.C. of this Order, the Commission may direct the trustee appointed pursuant to Paragraph IV. of this Order to divest PBH's Opaque Lens Business. In the event that the Commission or the Attorney General brings an action pursuant to § 5(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1), or any other statute enforced by the Commission, Wesley-Jessen shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.

B. If the trustee is directed by the Commission or a court pursuant to Paragraph V.A. of this Order to divest PBH's Opaque Lens Business, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

(1) Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest PBH's Opaque Lens Business.

(2) The trustee shall have twelve (12) months from the date the Commission directs the trustee to divest PBH's Opaque Lens Business to accomplish the divestiture of PBH's Opaque Lens Business, which divestiture shall be subject to the prior approval of the Commission. If, however, at the end of this twelve (12) month period, the trustee has submitted a divestiture candidate or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the twelve (12) month period only two (2) times.

(3) The trustee shall have full and complete access to the personnel, documents, books, records and facilities related to PBH's Opaque Lens Business and to any other relevant information, as the trustee may request.

Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time to accomplish the divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(4) The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made pursuant to a Divestiture Agreement approved by the Commission and to a New Acquirer approved by the Commission; provided, however, if the trustee receives bona fide offers from more than one entity, and if the Commission determines to approve more than one such entity, the trustee shall divest to the entity selected by Respondent from among those approved by the Commission.

(5) The trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondent, and the trustee's power to divest PBH's Opaque Lens Business pursuant to this paragraph shall be terminated.

(6) Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims,

or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

(7) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph IV.A. of this Order.

(8) The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

(9) The trustee shall have no obligation or authority to operate or maintain PBH's Opaque Lens Business.

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

VI.

IT IS FURTHER ORDERED that, for a period of ten (10) years after the date the Order becomes final, respondent shall not, without prior notice to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire more than 5% of any stock, share capital, equity, or other interest in any concern, corporate or non-

Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

VII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate structure of Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that Respondent, for the purpose of determining and securing compliance with this Order, and subject to any legally recognized privilege, upon written request and on five (5) days' notice to Respondent, shall permit any duly authorized representative(s) of the Commission:

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

B. Upon five (5) days' notice to Respondent, and without restraint or interference from Respondent, to interview

Respondent's officers, directors, or employees, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on January 3, 2017.

By the Commission.

Donald S. Clark
Secretary

ISSUED: January 3, 1997

[Appendices A-B attached to paper copies of Decision & Order, but not available in electronic format]