

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

| | | |
|---------------------------|---|--------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | Civil Action No. |
| |) | 77 Civ. 3149 (EW) |
| v. |) | |
| |) | Filed: MAR 22 1978 |
| CULBRO CORPORATION, |) | |
| HAVATAMPA CORPORATION, |) | Entered: |
| HAVATAMPA HOLDING CO., |) | |
| and HAV CORPORATION, |) | |
| |) | |
| Defendants. |) | |

COMPETITIVE IMPACT STATEMENT

This competitive impact statement, relating to the proposed consent judgment submitted for entry in this civil antitrust proceeding, is filed by the United States pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b).

1. The Nature and Purpose of the Proceeding

The complaint in this action was filed on June 28, 1977. The original defendants were Culbro Corporation, which was at the time the second largest manufacturer and third largest wholesale distributor of cigars in the United States; Edgar M. Cullman, President and Chairman of the Board of Culbro; Havatampa Corporation ("Old Havatampa"), at the time the sixth largest manufacturer and the largest wholesale distributor of cigars in the United States; and Havatampa Holding Company ("Holding Company") and its wholly-owned subsidiary, HAV Corporation, corporations formed by Oppenheimer & Company, an investment partnership, to acquire the assets of Old Havatampa.

As the transaction was originally structured, Culbro was to acquire an option to buy up to 25 percent of the

stock of Holding Company and a \$2,750,000 subordinated debenture. Culbro also was to be given the right to name one director to Holding Company's seven-person board of directors. Culbro's original nominee was Edgar M. Cullman. Following the acquisition by HAV of the assets of Old Havatampa, Culbro was to furnish advice and assistance in operating the Havatampa business. (The term "Havatampa" is used herein to include both Holding Company and HAV and the business acquired by them from Old Havatampa.)

The complaint alleged that Culbro's proposed acquisition of the option and subordinated debenture would violate Section 7 of the Clayton Act because competition among cigar manufacturers would be lessened, cigar manufacturers might be foreclosed from selling through the distribution houses owned by Havatampa, and the acquisition of wholesale distributors of cigars by other cigar manufacturers would be encouraged. The complaint also alleged that Mr. Cullman's participation as a member of the board of directors of Holding Company would violate Section 8 of the Clayton Act, which prohibits interlocking directorates. This part of the complaint was dismissed without prejudice when Culbro submitted an affidavit stating that neither Mr. Cullman nor any other director of Culbro would be named to the boards of directors of Holding Company or HAV.

On June 30, 1977, the government obtained a temporary restraining order prohibiting consummation of the transaction. See 1977-1 Trade Cases ¶61,514 (S.D.N.Y.). An evidentiary hearing was held between July 6 and July 13, 1977, on the government's motion for a preliminary injunction. On July 28, 1977, the court denied the government's motion and instead entered a hold separate order which permitted the

acquisition to go forward under conditions strictly limiting Culbro's participation in the Havatampa business pending a trial on the merits. See 436 F. Supp. 746 (S.D.N.Y. 1977).

The transaction, as modified by the terms of the hold separate order, was consummated on July 30, 1977. Old Havatampa sold its assets to HAV, which changed its name to Havatampa Corporation ("New Havatampa"). Old Havatampa then became an investment company known as Eli Securities, Inc., which has had no further involvement with the business of New Havatampa. Eli Securities was dismissed from the case without prejudice and with the consent of the government.

Culbro purchased the \$2,750,000 subordinated debenture and obtained an option to purchase 25% of the stock of Holding Company. Culbro has not yet exercised its option. Culbro has the right under a collateral agreement to name one director to the Holding Company and New Havatampa boards of directors, but it has been prohibited from exercising this right by the hold separate order.

2. The Nature of The Alleged Violation.

The line of commerce involved in this transaction is the manufacture and sale of cigars. According to common industry usage, a cigar is any roll of tobacco wrapped in tobacco leaf or reconstituted tobacco weighing more than three pounds per thousand. The geographic area within which manufacturers sell and wholesalers buy cigars is the United States as a whole.

Cigar manufacturing is a concentrated industry. The top four manufacturers share approximately 72 percent of

total cigar sales, and the top eight share approximately 88 percent. Cigar manufacturing is an industry characterized by declining sales and profitability, excess productive capacity, and consolidation of production facilities. Under these circumstances the combined market shares of Culbro and Havatampa as cigar manufacturers -- approximately 16-18% and 3.5% respectively in 1976 -- would result in a substantial increase in concentration in a market that is already highly concentrated, with a tendency toward increasing concentration in the future, and with little prospect of new entry.

Havatampa, which distributes a broad line of tobacco and non-tobacco products, is the largest wholesale distributor of cigars in the country, with considerable market power in Florida and several other Southeastern states. It is the first or second largest purchaser of cigars from virtually every major cigar manufacturer. In many cities where Havatampa has a distribution house it is the essential wholesaler for most cigar manufacturers. There are significant barriers to entry into cigar wholesaling in the Havatampa distribution areas.

Large wholesale distributors of cigars have the power significantly to affect the sales of individual cigar manufacturers by the degree of distribution, promotion, and service they provide for various brands of cigars. For example, favoritism may be shown for a particular manufacturer's cigars through preference in rack position, number of facings or boxes displayed, commissions paid to salesmen, appearance on the distributor's "push list", passing on of manufacturers' promotions, acceptance of new product introductions, and recommendations to retailers. The power of wholesalers to affect sales is demonstrated by the fact that Culbro and

Havatampa cigars account for a much higher percentage of the sales of their own distribution houses than is represented by their national market shares.

3. The Proposal For a Consent Judgment

Section IV of the proposed consent decree orders divestiture of the cigar manufacturing business of Havatampa within 18 months of the entry of the decree. Unless the government consents to a sale of less, all of the assets devoted to cigar manufacturing must be sold as a going business to a buyer who intends to operate them as a going business, and whose acquisition of them would not violate Section 7 of the Clayton Act. The buyer must be sold or granted a license to use the brand names and trademarks that have been used by Havatampa in its cigar manufacturing business. If the buyer so specifies, Havatampa must guarantee to purchase cigars from the buyer for two years at a level equivalent to the purchases of Havatampa cigars by the Havatampa distribution houses during 1977.

The government has the right under Section VI of the decree to object to a proposed purchaser or plan of divestiture, in which case the proposed divestiture cannot be completed without the court's approval. Section VIII provides that the hold separate order is to remain in effect until divestiture is completed or Culbro sells its interest in Havatampa, except that Culbro is permitted to assist in certain aspects of the divestiture.

If divestiture is accomplished, Section V prohibits Havatampa from manufacturing cigars for 20 years from the date of the judgment. If at the end of 18 months divestiture has not been accomplished, Section VII of the decree

requires Culbro to sell its debt and equity interest in Havatampa within 120 days.

If Culbro is forced to sell all its interest in Havatampa, the government will obtain complete relief on both the horizontal and vertical aspects of the case. If divestiture of the cigar manufacturing business of Havatampa occurs, the divestiture will eliminate only the horizontal aspects of the acquisition, as Culbro will retain its interest in Havatampa. In that event, other provisions are designed to deal with the vertical problems.

Section IX of the decree prohibits Havatampa for a 20 year period from purchasing Culbro cigars having a value in excess of 12.9 percent of the dollar amount of Havatampa's total purchases of cigars from all sources in the preceding calendar year, or \$2,790,327, whichever is greater. The purpose of this restriction is to prevent the defendants from exploiting Havatampa's market power as a wholesaler in order to increase the sales of Culbro cigars through Havatampa at the expense of other manufacturers' cigars. It is also intended to remove the incentive for other cigar manufacturers to acquire wholesale distributors of cigars in reaction to this acquisition.

The 12.9 percent figure equals the average ratio of Culbro cigars to all cigars purchased by Havatampa during the years 1975 through 1977, and thus represents the level of sales to Havatampa that Culbro was able to achieve in competition with other manufacturers. Under the terms of the decree this level of sales may be maintained but cannot be increased.

The dollar amount of purchases by Havatampa from Culbro and from all manufacturers during the years 1975 through

1977 is shown in the table in Appendix A. The Culbro purchases represent 14.1 percent of the total in 1975, 12.5 percent in 1976, and 12.1 percent in 1977. The percentage limitation agreed to by the government does permit Havatampa to increase its purchases of Culbro cigars slightly over those of the last two years if Havatampa's total purchases remain the same; 12.9 percent of Havatampa's 1977 purchases equals \$3,712,790, an increase of approximately \$225,000 over Culbro's actual sales to Havatampa during 1977 of \$3,487,909.

The government considered the three year average acceptable when balanced against the long duration of the restriction and the competitive benefits which will result from increased competition among cigar manufacturers when the Havatampa wholesale houses no longer have an incentive to favor Havatampa cigars. The purchases of Havatampa cigars by Havatampa wholesale houses exceeded \$6 million per year during each of the past three years. See Appendix A. The government also took into account the fact that Culbro's sales to Havatampa during this period represented a smaller percentage of Havatampa purchases than during prior years.

As noted above, the judgment permits Havatampa to purchase \$2,790,327 worth of cigars from Culbro even if this exceeds 12.9% of its total purchases. This figure is equivalent to 80 percent of Havatampa's purchases of Culbro cigars in 1977. This provision is intended to mitigate the effects of the percentage limitation in the event of a precipitous decline in Havatampa's total cigar purchases. If, for example, another major cigar manufacturer stopped selling to Havatampa, the consequent sharp decline in Havatampa's total

cigar purchases would produce an equally sharp decline in the amount of Culbro cigars Havatampa could purchase pursuant to the decree, a penalty that would go beyond the rationale of the restraint. The dollar figure provides a lower limit for the sales restriction, but it is far enough below the present percentage limit that it is not expected to become the operative maximum purchase figure in the ordinary course of market evolution for the foreseeable future.

Section X contains a reporting provision requiring Havatampa to compile annually and furnish to the government a table showing the total dollar amount of Havatampa's cigar purchases, by manufacturer, during the preceding year. This requirement and the sales limitation of Section IX apply only as long as Culbro continues to hold a debt or equity interest in Havatampa.

Section XI prohibits the acquisition by Culbro for a five year period of any additional stock in Havatampa or any assets of Havatampa other than those acquired in the ordinary course of business. This provision insures that for at least five years the interests of Havatampa will not be identical with those of Culbro. The government considers this to be additional protection against the misuse of Havatampa's purchasing power to disadvantage competing manufacturers.

4. Remedies Available to Private Parties

Entry of the proposed Final Judgment will have no effect on the rights of persons who may have been damaged by the alleged violation. Private plaintiffs may sue for money damages or any other legal or equitable remedy. However, this judgment may not be used as prima facie evidence in private litigation pursuant to Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a).

5. Procedures Available for Modification

During the time period provided in the Antitrust Procedures and Penalties Act (a minimum of 60 days following the filing of the proposed consent judgment and its publication in the Federal Register), interested persons may file comments with Gerald A. Connell, Chief, General Litigation Section, Antitrust Division, Department of Justice, Washington, D.C. 20530, urging that the decree not be entered in the form proposed. These comments, and the government's responses to them, will be filed with the court and published in the Federal Register. All comments will be given appropriate consideration by the government, which remains free to withdraw its consent to the proposed judgment at any time prior to its entry. In addition, the proposed judgment provides for retention of jurisdiction over this action by the court, which will permit the parties to apply to the court for such orders as may be necessary or appropriate for modification of the judgment.

7. Alternatives Actually Considered

The prayer for relief in this case asks that a permanent injunction be issued preventing and restraining the defendants from "consummating any of the component transactions of this acquisition, and specifically preventing and restraining Culbro from acquiring any equity interest in or position of control, influence, or management over Holding Company, HAV, or Havatampa". Relief substantially in this form, separating Culbro completely from Havatampa, is an alternative under the proposed judgment.

On September 23, 1977, the defendants proposed that this case be settled by Havatampa divesting its cigar

manufacturing business within two years and by Culbro limiting the sale of its cigars to Havatampa for the next three years to 4.8 million dollars annually. This proposal was unacceptable to the Government.

On November 1, 1977, the defendants proposed that Havatampa divest its cigar manufacturing business within two years in a manner and to a purchaser acceptable to the government and that Culbro permanently limit the sale of its cigars to Havatampa to 4.8 million dollars annually, subject only to increases for inflation and national sales growth. This proposal was also unacceptable to the government; however, it did lead to further negotiations which resulted in the proposed judgment filed with this competitive impact statement.

Although most provisions of the proposed judgment were revised and refined in the course of the negotiations, no relief substantially different in kind was considered by the government. The government did initially propose a clause prohibiting discrimination by Havatampa in its distribution of non-Culbro cigars, but the proposal was withdrawn after further consideration of the difficulties of drafting and enforcing such a provision. It was also deemed unnecessary in view of the other protections in the decree.

7. Determinative Documents

The only materials that the United States considered determinative in formulating this proposed judgment were portions of tables showing annual purchases of cigars by Havatampa from cigar manufacturers. The relevant information from these tables has been filed as an attachment to this

competitive impact statement, as has the option agreement referred to in Section XI of the proposed decree.

Respectfully submitted,


ALAN L. MARX


STEVEN C. DOUSE

HENRY J. VAN WAGENINGEN

Attorneys,
Department of Justice

APPENDIX A

CIGAR PURCHASES BY HAVATAMPA CORP.*

| | <u>1977</u> | <u>1976</u> | <u>1975</u> |
|-------------------------------|--------------|-----------------|-----------------|
| Havatampa Cigar Corp. | \$ 6,483,515 | \$ 6,438,064.12 | \$ 7,144,467.59 |
| General Cigar Co. (Culbro) | 3,487,909 | 3,734,721.19 | 4,221,433.14 |
| Total (all manufacturers) | 28,781,318 | 29,871,667.05 | 30,006,044.73 |

*Information contained in Response to Interrogatory No. 5, Answers of Defendant Havatampa Corporation to Plaintiff's First Set of Interrogatories, and supplemental response.

APPENDIX B

STOCK OPTION AGREEMENT

THIS STOCK OPTION AGREEMENT, dated July 29, 1977
between HAVATAMPA HOLDING COMPANY (hereinafter referred
to as the "Company"), a Delaware corporation, and CULBRO
CORPORATION (hereinafter referred to as "Culbro"), a
~~New York~~
~~Delaware~~ corporation.

WHEREAS, Culbro has agreed to make a subordi-
nated loan to the Company and the Company has agreed to
enter into this Agreement and to grant the option herein
contained;

NOW, THEREFORE, in consideration of the fore-
going and of the mutual agreements contained herein,
the parties agree as follows:

Section 1. Grant of Stock Option. The Company
hereby grants to Culbro the right and option ("the Option")
to purchase from the Company, for a purchase price of
\$330,000, a number of shares of the Company's Common
Stock which shall equal 25% of the shares of such Common
Stock outstanding just after the time of such exercise,
giving effect to the shares issued upon the exercise
of the Option. For the purposes hereof, any shares of
the Company's Common Stock which are then subject to

issuance by reason of option, conversion rights or otherwise shall be deemed outstanding. The Option may not be exercised in part.

Section 2. Term of Option. The Option shall terminate on July 31, 1987.

Section 3. Exercise of Stock Option. At least five (5) days prior to the date upon which Culbro desires to exercise this Option, Culbro shall deliver to the Company written notice of such exercise. Such notice shall specify the date and time for the purchase of the shares of Common Stock. The date specified in any such notice shall be a business day, and the time specified shall be during the regular business hours of the Company.

Section 4. Payment for and Delivery of Common Stock. Culbro shall, at the date and time specified in the notice referred to in Section 3, deliver its certified check for \$330,000 drawn to the order of the Company, in payment for the shares of Common Stock being purchased: provided however, that, Culbro, instead of delivering such certified check, may deliver \$330,000 in principal amount of the Company's 10% Subordinated Debentures due 1987 in payment for the shares of Common Stock being purchased. If Culbro elects to deliver such

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Debentures in payment, the Company agrees to issue to Culbro a replacement Debenture of the principal amount equal to the principal amount of the Debenture being surrendered, less \$330,000. Such delivery of certified check or Debenture shall be made to the Company at the offices of Oppenheimer & Co., One New York Plaza, New York, N.Y. Culbro agrees that with respect to any shares of Common Stock acquired by it upon exercise of the Option it will deliver to the Company an investment letter substantially in the form of Exhibit A annexed hereto. Contemporaneously with the exercise of the Option, payment for the Common Stock to be acquired thereunder, and delivery of the investment letter with respect to such Common Stock, the Company shall deliver to Culbro certificates representing the number of shares of Common Stock of the Company being purchased, registered in the name of Culbro. The certificate for such shares shall have a legend in substantially the following form placed on the face thereof:

"The shares evidenced by this Certificate have been acquired for investment and have not been registered under the Securities Act of 1933 ("the Act"). The shares may not be sold or transferred except in a transaction registered under the Act or in a transaction which, in the opinion of the counsel, in form and substance satisfactory to the Company, is exempt from registration under the Act."

Section 5. Registration of Shares. If at any time, or from time to time, the Company, at its sole election, proposes to register any shares of its Common Stock under the Securities Act of 1933 (the "Securities Act"), in connection with a sale by the Company of Common Stock for cash, it will give to Culbro reasonable notice thereof and the opportunity to include all or any portion of the shares of Common Stock acquired by Culbro pursuant to the exercise of the Option (and any securities issued with respect thereto or in exchange therefor if like securities are then being registered by the Company in such registration), all at the cost of the Company (including, but in no way limited to, all registration and filing fees, printing expenses, fees and disbursements of counsel for the Company, but not the fees and disbursements of counsel acting for Culbro); provided, however, that Culbro shall not request the Company to register less than twenty five percent (25%) of the shares held by Culbro. The Company retains the right in its sole discretion to withdraw such registration at any time prior to its becoming effective. If the offering is being underwritten, then Culbro agrees that (i) if it is not participating in such underwriting, it will enter into an agreement with the Company and the underwriter

not to sell or dispose of such shares until such time after the effective date of the registration statement as the underwriter may reasonably request, or (ii) if Culbro is participating in such underwriting, it will enter into an agreement with the Company and the underwriter that such shares will or may be offered for sale or other disposition at the same time after the effective date of the registration statement as the other shares are being offered in such underwriting.

Section 6. Blue Sky Qualifications. If the Company effects the registration of its Common Stock, the Company shall use all reasonable efforts at its cost to qualify the share of Common Stock under the Securities and Blue Sky laws in such jurisdictions in which the Company is offering such Common Stock for public sale.

Section 7. Indemnifications. For each registration by the Company pursuant to Section 5 hereof:

A. The Company agrees to indemnify and hold harmless Culbro, its officers and directors and each person, if any, who controls Culbro within the meaning of the Securities Act of 1933 and the rules and regulations thereunder against any losses, claims, damages or liabilities, joint or several, to which Culbro, any officer or director thereof

or such controlling person may become subject, under the Securities Act, the Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder, or otherwise, insofar as such losses, claims, damages or liabilities (or actions in respect thereof) arise out of or are based upon (i) any untrue statement or alleged untrue statement of a material fact contained in such registration statement, or (ii) the omission or alleged omission to state in such registration statement a material fact required to be stated therein or necessary to make the statements therein not misleading; and will reimburse Culbro and each officer and director of Culbro and each such controlling person for any legal or other expenses reasonably incurred in connection with investigating or defending any such loss, claim, damage, liability or action; provided, however, that the Company will not be liable in any such case to the extent that any such loss, claim, damage or liability arises out of or is based upon any untrue statement or alleged untrue statement or omission or alleged omission made in reliance upon and in conformity with written information furnished to the Company by or on behalf of Culbro for use with reference to Culbro in the preparation of such registration statement.

B. Culbro will indemnify and hold harmless the Company, its directors, and officers and each person if any, who controls the Company within the meaning of the Securities Act of 1933, against any losses, claims, damages or liabilities to which the Company or any such director or officer or controlling person may become subject under the Securities Act, the Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder, or otherwise, insofar as such losses, claims, damages or liabilities (or actions in respect thereof) arise out of or based upon (i) any untrue statement or alleged untrue statement of a material fact contained in such registration statement, or (ii) the omission to state in such registration statement a material fact required to be stated therein or necessary to make the statements therein not misleading; in each case to the extent that such untrue statement or alleged untrue statement or omission or alleged omission was made in reliance upon and in conformity with written information furnished to the Company by or on behalf of Culbro for use with reference to Culbro in the preparation of such registration statement, and will reimburse each such director or officer or controlling person for any legal

or other expenses reasonable incurred in connection with investigating or defending any such loss, claim, damage, liability or action.

C. Upon the receipt by an indemnified party under this Section of notice of the commencement of any action, such indemnified party will, if a claim in respect thereof is to be made against any indemnifying party under this Section 7, notify in writing the indemnifying party of the commencement thereof. In case any such action is brought against any indemnified party, and it notifies an indemnifying party of the commencement thereof, the indemnifying party will be entitled to participate therein, and to the extent that it may wish, jointly with any other indemnifying party, similarly notified, to assume the defense thereof, with counsel who shall be to the reasonable satisfaction of such indemnified party, and after notice from the indemnifying party to such indemnified party of its election so to assume the defense thereof, the indemnifying party will not be liable to such indemnified party under this Section 7 for any legal or other expenses subsequently incurred by such indemnified party in connection with the defense thereof other than

reasonable costs of investigation. Any such indemnifying party shall not be liable to any such indemnified party on account of any settlement of any claim or action effected without the consent of such indemnifying party.

Section 8. Covenants of Company. The Company covenants with Culbro as follows:

A. Fractional Shares. In the event that any calculation of the number of shares to be issued hereunder results in a fraction, then Culbro shall be entitled to fractional shares in the exact amount of such fraction.

B. Maintenance of Shares. The Company shall at all times maintain authorized but unissued shares of Common Stock in sufficient amounts to issue and deliver to Culbro the number of shares of Common Stock to which Culbro would be entitled upon the full exercise by Culbro of the Option.

Section 9. Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of New York.

Section 10. Survival of Covenants; Successors and Assigns. Except as otherwise provided herein, all covenants, agreements, representations and warranties made by the parties to this Agreement shall inure to the

benefit of and be binding upon any successors and assigns of the parties.

Section 11. Modification; Waiver. This Agreement contains the entire understanding of the parties with respect to the subject matter hereof. Neither this Agreement nor any provision hereof may be changed, waived, discharged or terminated orally, but only by an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought.

Section 12. Communications and Notices. All communications and notices provided for in this Agreement shall be in writing and shall be deemed sufficiently given on the second (2nd) business day after deposited in the mail, registered or certified, postage prepaid, and addressed to the party to whom given. Such communications and notices shall be addressed as follows:

If to the Company:

Havatampa Holding Company
c/o Oppenheimer & Co.
One New York Plaza
New York, New York 10004

Attn: Howard Phillips

with a copy to:

Barrett Smith Schapiro Simon & Armstrong
26 Broadway
New York, New York 10004
Attn: David D. Brown, III

with another copy to:

Oppenheimer & Co.
One New York Plaza
New York, New York 10004
Attn: Howard Phillips

If to Culbro

Culbro Corporation
605 Third Avenue
New York, New York
Attn: Edgar Cullman

with a copy to:

or to such other post office address as such parties
shall from time to time designate by notice in writing.

Section 13. Waivers and Amendments. No
course of dealing between the parties, nor any omission
or delay by the parties in exercising any right or power
under this Agreement will impair such right or power
or be construed to be a waiver of any default or an
acquiescence therein.

Section 14. Counterparts. This Agreement may
be executed simultaneously in two or more counterparts,
each of which shall be deemed an original, but all of

which together shall constitute one and the same instrument.

IN WITNESS WHEREOF the parties have executed this Agreement as of the date first written above:

HAVATAMPA HOLDING COMPANY


By _____


CULBRO CORPORATION

BY _____

DATED: MAR 22 1978

FOR PLAINTIFF:

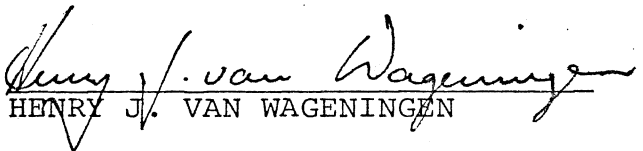

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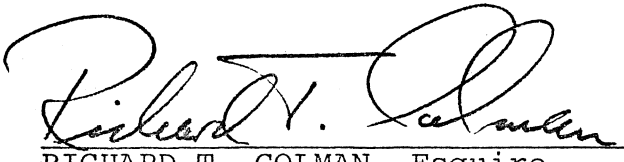

CHARLES F. B. MCALEER

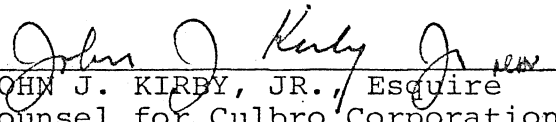

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