Findings, Opinions, and Orders

IN THE MATTER OF

WESLEY-JESSEN CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3700. Complaint, Jan. 3, 1997--Decision, Jan. 3, 1997

This consent order requires, among other things, an Illinois-based manufacturer of opaque contact lenses to divest, within four months, the Pilkington Barnes Hind's opaque lens business to a Commission-approved acquirer.

Appearances

For the Commission: *Catharine M. Moscatelli* and *Ann Malester*.

For the respondent: *William C. Pelster, Skadden Arps,* New York, N.Y. and *Mary Lou Steptoe, Skadden Arps,* 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 ("Commission"), having reason to believe that respondent, Wesley-Jessen Corporation ("Wesley-Jessen"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire 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

Deustchland GmbH ("PD"), from Pilkington plc ("Pilkington"), subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act as amended, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

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

II. THE ACQUIRED COMPANY

2. Pilkington plc ("PBH") is a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its principal place of business located at Prescot Road, St. Helens, Merseyside, England.

III. JURISDICTION

3. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

4. On or about March 27, 1996, Wesley-Jessen and PBH signed a Letter of Intent whereby Wesley-Jessen would acquire all the voting securities of PBH, voting securities of certain foreign issuers controlled by PBH and certain assets located outside the United States for approximately $80 million ("Acquisition").

V. THE RELEVANT MARKETS

5. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture and sale of opaque contact lenses.

6. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

VI. STRUCTURE OF THE MARKET

7. The market for the manufacture and sale of opaque contact lenses is highly concentrated as measured by the Herfindahl-Hirschmann Index. The parties to the Acquisition combined account for over 90% of the market.

VII. BARRIERS TO ENTRY

8. Entry into the manufacture and sale of opaque contact lenses is difficult and time consuming, requiring the expenditure of significant resources over a period of many years with no assurance that a viable commercial product will result. The existence of broad patents governing design and manufacture make new entry both difficult and unlikely.

VIII. EFFECTS OF THE ACQUISITION

9. The effects of the Acquisition if consummated may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, by, among others:

(a) Eliminating actual, direct and substantial competition based on pricing, service and innovation between Wesley-Jessen and PBH International in the relevant market;

(b) Increasing the likelihood that Wesley-Jessen will unilaterally exercise market power in the relevant market;

(c) Creating a dominant firm in the relevant market; and

(d) Enhancing the likelihood of collusion or coordinated interaction between or among the remaining firms in the relevant market.

IX. VIOLATIONS CHARGED

10. The Acquisition described in paragraph four, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

11. The Acquisition agreement described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND 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 Deustchland 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 Section 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 Deustchland 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 Wesley-Jessen and the Acquirer or New Acquirer whereby PBH's Opaque Lens Business is divested.

H. *"Supply Agreement"* means the agreement between Wesley-Jessen and the Acquirer or New Acquirer required by paragraph III.A. of this order.

I. *"Licensed Territory"* means the United States and its territories and possessions.

J. *"Opaque Contact Lenses"* means contact lenses containing opaque materials that cover the iris and that are designed to change the apparent color of the eye.

K. *"PBH's Opaque Lens Products"* means Opaque Contact Lenses researched, developed, manufactured, distributed and sold by PBH in the United States, including but not limited to those marketed and sold under the brand name Natural Touch™.

L. *"PBH's Opaque Lens Business"* means the following rights and assets (other than assets that are part of PBH's physical facilities) relating to the research, development, distribution 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) All lists of stock keeping units ("SKUs"); *i.e.*, all forms, package sizes and other units in which PBH's Opaque Lens Products are sold and which are used in records of sales and inventories;

(5) All Bills of Materials for each of PBH's Opaque Lens Products, consisting of full manufacturing standards and procedures, quality control specifications, specifications for raw materials and components, including all lists of authorized sources for materials and components;

(6) All artwork and mechanical drawings currently in use relating to each of PBH's Opaque Lens Products;

(7) All customer lists, including but not limited to, lists of distributors, opticians, ophthalmologists, optometrists, and eye-care chains who have bought PBH's Opaque Lens Products, including, but not limited to, all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales monthly, by product, to each customer in the United States;

(8) All marketing information relating to PBH's Opaque Lens Products, including but not limited to PBH's consumer and trade promotion, marketing and business programs;

(9) Inventories of finished goods, packaging and raw materials relating to PBH's Opaque Lens Products equal to the percentage of PBH's worldwide sales of Opaque Lens Products for which United States sales account as of August 31, 1996;

(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") approvals to manufacture PBH's Opaque Lens Products for sale in the United States;

(17) A non-transferable, irrevocable, non-exclusive assignment of PBH's rights and obligations under the licensing agreement between Wesley-Jessen and PBH dated August 1, 1994, (or a license providing at least equivalent rights and obligations) to enable the Acquirer or New Acquirer to manufacture, import, offer for sale, use, distribute and sell PBH's Opaque Lens Products in the Licensed Territory, except that the Acquirer or New Acquirer may transfer this assignment 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 New Acquirer has obtained all necessary FDA approvals to manufacture PBH's Opaque Lens Products and otherwise consistent with the terms of the licensing agreement between Wesley-Jessen and PBH dated August 1, 1994; and

(18) All trade secrets, technology and knowhow of PBH relating to researching, developing, manufacturing, distributing, and selling PBH's Opaque Lens Products, including, but not limited to, books and records, documents containing the results of research and development efforts, filings with the FDA, scientific and clinical reports, designs, manuals, drawings, and design material and equipment specifications.

Provided, however, that Wesley-Jessen may retain copies of documents or information to the extent such documents or information relate to products other than PBH Opaque Lens Products.

M. *"Supplied Products"* means non-disposable opaque colored contact lenses approved by the FDA as daily wear lenses having a planned replacement period of ninety (90) days or more, and which are promoted, advertised or marketed solely as daily wear lenses and are sold in vials with labeling claims for frequency of use and replacement no less restrictive than those currently approved 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, respondent shall take such actions as are necessary to maintain the viability and marketability of PBH's Opaque Lens Business (including, but not limited to, any planned research and development programs, marketing plans, capital improvements, or business plans) and to prevent the destruction, removal, wasting, or impairment of PBH's Opaque Lens Business except for ordinary expiration of patents and ordinary wear and tear.

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 Commission determines that the Acquirer or New Acquirer made a good faith effort to obtain all necessary FDA approvals for the manufacture of PBH's Opaque Lens Products and that such FDA approvals appear likely to be obtained within the extended time period.

During the term of the Supply Agreement, upon reasonable request by the Acquirer or New Acquirer Wesley-Jessen shall make available to the Acquirer or New Acquirer all records kept in the normal course of business that relate to the cost of manufacturing the Supplied Products.

B. The Divestiture Agreement shall include the following and Wesley-Jessen shall commit to satisfy the following:

1. Wesley-Jessen shall commence delivery of Supplied Products to the Acquirer or the New Acquirer within two (2) months from the date the Commission approves the Acquirer and the Divestiture Agreement (or the New Acquirer and its Divestiture Agreement), or such later time as the Acquirer or New Acquirer may require.

2. Wesley-Jessen shall make representations and warranties to the Acquirer or New Acquirer that the Supplied Products meet FDA approved specifications therefor and are not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act, 21 U.S.C. 321, *et seq*. Wesley-Jessen shall agree to indemnify, defend and hold the Acquirer or New Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Supplied Products supplied by Wesley-Jessen to meet FDA specifications. This obligation may be contingent upon the Acquirer or the New Acquirer giving Wesley-Jessen prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting Wesley-Jessen to assume the sole control of 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 of any proposed trustee, Wesley-Jessen shall be deemed to have consented to the selection of the proposed trustee.

(2) The trustee shall have the power and authority to monitor respondent's compliance with the terms of this order and the compliance of the respondent with the terms of the Divestiture Agreement and the Supply Agreement. If directed by the Commission to divest PBH's Opaque Lens Business pursuant to paragraph V of this order, the Trustee shall also have the power and the authority as described in paragraph V to divest those assets.

(3) Within ten (10) days after appointment of the trustee, Wesley-Jessen shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the trustee all the rights and powers necessary to permit the trustee to monitor respondent's compliance with the terms of this order and with the Divestiture Agreement and the Supply Agreement with the Acquirer or New Acquirer and to monitor the compliance of the Acquirer or New Acquirer under the Divestiture Agreement and the Supply Agreement. Further, the trust agreement shall confer on the trustee all the rights and powers necessary for the trustee to divest PBH's Opaque Lens Business pursuant to paragraphs II and V of this order, if necessary.

(4) The trustee shall serve until such time as the Acquirer or the New Acquirer has received all necessary FDA approvals to manufacture PBH's Opaque Lens Products for sale in the United States.

(5) The trustee shall have full and complete access to the personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of PBH's Opaque Lens Products, or to any other relevant information, as the trustee may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to the cost of manufacturing PBH's Opaque Lens Products. Respondent shall cooperate with any reasonable request of the trustee. Respondent shall take no action to interfere with or impede the trustee's ability to monitor respondent's compliance with paragraphs 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 Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), 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 Section 5(l) 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-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition, the research, development, manufacture, importation, distribution or sale of opaque contact lenses in the United States; or

B. Acquire any assets at the time of the proposed acquisition used for or used in the previous two years for (and still suitable for use for) the research, development, manufacture, distribution or sale of Opaque Contact Lenses in the United States. Provided, however, that this paragraph VI shall not apply to the acquisition of equipment, machinery, supplies or facilities constructed, manufactured or developed by or for respondent.

The prior notifications required by this paragraph VI shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as

amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, 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.

APPENDIX A

Patent No.	Title	Inventor	Country	Issue or Grant Date
5,034,166	Method of Molding a Colored Contact Lens	Rawlings, et. al.	U.S.	July 23, 1991
5,116,112	Colored Lens and Method of Manufacture	Rawlings	U.S.	May 26, 1992
5,120,121	Colored Lens	Rawlings, et. al.	U.S.	June 9, 1992
5,158,718	Contact Lens Casting (corona mold treatment)	Thakrar et. al.	U.S.	October 27, 1992
5,160,463	Method of Manufacturing Contact Lens	Evans et. al.	U.S.	November 3, 1992
5,302,978	Contact Lens (limbal ring)	Evans, et. al.	U.S.	April 12, 1994
Application 08/053,504	Novel Colored lens and method of manufacture	Rawlings, et. al.	U.S.	April 26, 1993 filing date. Earliest effective filing date July 21, 1988
Application 08/143,373	Colored Contact Lens and Method for Making Same	Thakrar, et. al.	U.S.	October 26, 1993, filing date. Earliest effective date, February 16, 1989

APPENDIX B

Patent No.	Title	Inventor	Issue or Country	Grant Date
4,955,580	Contact Lens Mold (no lip molding)	Seden et. al.	U.S.	September 11, 1990
5,036,971	Molding Contact Lenses (no lip molding)	Seden et. al.	U.S.	August 6, 1991
5,114,629	Process for Casting Lenses (lens casting)	Morland, et. al.	U.S.	May 19, 1992
4,944,899	Process and Apparatus for Casting Lenses (lens casting)	Morland, et. al.	U.S.	July 31, 1990

IN THE MATTER OF

FILTRATION MANUFACTURING, INC., ET AL.

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

Docket C-3702. Complaint, Jan. 6, 1997--Decision, Jan. 6, 1997

This consent order prohibits, among other things, an Alabama-based corporation and three of its officers from making any representation regarding the performance, health or other benefits, or efficacy of air cleaning products, and from using the name "Allergy 2000" or any other trade names that represents that such products will relieve allergy symptoms, unless the respondents possess competent and reliable scientific evidence to substantiate such representations.

Appearances

For the Commission: *Brinley H. Williams* and *Michael Milgrom*.
For the respondents: *Thomas Collins, Jr.*, Cleveland, OH.

COMPLAINT

The Federal Trade Commission, having reason to believe that Filtration Manufacturing, Inc., a corporation, and Gary L. Savell, Horace R. Allen, and Brandon R. Clausen, individually and as officers of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Filtration Manufacturing, Inc., is an Alabama corporation with its principal office or place of business at 1110 Montlimar Place, Suite 290, Mobile, Alabama.

Respondent Gary L. Savell is the President, Chief Executive Officer, and an owner and director of the corporate respondent. His principal office or place of business is the same as that of the corporate respondent. Individually or in concert with others, he formulates, directs, and controls the acts and practices of the

corporate respondent, including the acts and practices alleged in this complaint.

Respondent Horace R. Allen is the Secretary, Treasurer, and an owner and director of the corporate respondent. His principal office or place of business is the same as that of the corporate respondent. Individually or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint.

Respondent Brandon R. Clausen is the Vice President, and an owner and director of the corporate respondent. His principal office or place of business is the same as that of the corporate respondent. Individually or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint.

PAR. 2. Respondents have manufactured, labeled, advertised, promoted, offered for sale, sold, and distributed the "Allergy 2000" air filters.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Allergy 2000 air filters, including but not necessarily limited to the attached Exhibits A through G. These advertisements contain the following statements and depictions:

1. Prescribe the ultimate in care for your patient's indoor air today!

* * *

Clearly improving the quality of air your patients breathe can be an important step to improving their overall health.

How? By prescribing the Allergy 2000 air conditioning filter. This super high efficiency four-stage electrostatic air filter with advanced state-of-the-art materials and a computerized design to provide the perfect mixture of air filtration and air flow.

Studies by independent labs have confirmed that the Allergy 2000 gathers an exceptionally wide range of indoor contaminants, including microscopic germ-carrying particles of 5 microns or less. By contrast, most commercially purchased fiberglass filters are only 7% efficient in stopping dirt, dust, pollen, etc. passing through it, according to ASHRAE.

The extremely low resistance of the Allergy 2000 means less strain on the air conditioning unit, which means higher efficiency and energy savings-so it can literally pay for itself! (Exhibit A.)

2. Isn't it time you stopped leaving your family's health up in the air?

Introducing the amazing Allergy 2000. The last air conditioning filter you'll ever buy.

* * *

Superior arrestance capability, 83% average with 85% peak. Superior loading capacity, 150 grams holding capacity.

* * *

The ultimate care for your air!

The Allergy 2000 represents the absolute state-of-the-art in air conditioning filter technology, providing the perfect mixture of air filtration and air flow. Scientific studies have shown that it gathers an exceptionally wide range of indoor contaminants, including microscopic germ-carrying particles. In fact, the ALLERGY 2000 can be paid for by some health insurance when prescribed by a doctor! Considering all the contaminants floating around in the air, installing an ALLERGY 2000 may be the best thing you will ever do for the health of you and your family. (Exhibit B.)

3. Traps allergy causing contaminants: Dust, Pollen, Mold Spores, Pet Dander & Smoke.

* * *

Traps more particles while maintaining greater air flow.

* * *

For a cleaner, healthier indoor environment! (Exhibit C.)

4. The Ultimate Care for your indoor air!

* * *

Among the lowest initial resistance in the industry, .13, meaning less strain on the unit, higher efficiency and energy savings.

* * *

Your indoor pollution solution! (Exhibit D.)

5. The cold and flu season, traditionally only associated with the winter months (when people are forced to stay indoors), has gradually expanded to almost year-round. Why? One key factor may well be that buildings are now much more tightly sealed and energy efficient. They just don't "breathe" like they used to, and the air in them is more polluted than ever.

What can you do to help? Plenty. You can treat these illnesses before they become illnesses. You can treat the cause instead of the effects. You can treat the air.

How? By prescribing the Allergy 2000 air filter for your patients suffering from sinus or respiratory ailments. The Allergy 2000's unique design and construction removes many allergy and disease-causing contaminants from the air before they're inhaled. The result—a cleaner, healthier indoor environment. (Exhibit E.)

6. Constructed of durable space-age materials, ALLERGY 2000's unique design uses static electricity to attract and hold indoor pollutants and germ-carrying particles of 5 microns or less.

* * *

Superior arrestance capabilities, 85% peak.

Superior loading capacity, 150 grams psi. (Exhibit F.)

7. DID YOU KNOW . . .

-- That common house dust is more dangerous than outside dust? (Environmental Protection Agency.)

-- That indoor air is found to be up to 70 times more polluted than outdoor air?

-- That 50% of all illnesses are either caused or aggravated by polluted indoor air? (American College of Allergists.) (Exhibit G.)

PAR. 5. Through the use of the trade name, Allergy 2000, and the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through G, respondents have represented, directly or by implication, that:

A. Use of the Allergy 2000 filter will substantially reduce the incidence of allergies caused by indoor allergens under household living conditions.

B. Use of the Allergy 2000 filter will substantially reduce the amount of disease-causing germs in the air people breathe under household living conditions.

C. Use of the Allergy 2000 filter will substantially reduce the incidence of disease caused by germs in the air people breathe under household living conditions.

D. People living in homes using the Allergy 2000 air filter will be healthier and have fewer illnesses than they would if a conventional filter were used.

E. The Allergy 2000 air filter removes substantially all of the airborne contaminants, including allergens, from the air people breathe under household living conditions.

F. Replacement of conventional air filters with the Allergy 2000 will result in lower utility bills for households.

PAR. 6. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through G, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such

representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

EXHIBIT G

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondents, Filtration Manufacturing, Inc., Gary L. Savell, Horace R. Allen and Brandon R. Clausen, and the respondents having been furnished thereafter with a copy of a draft of the complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have violated the said Act, 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 finding and enters the following order:

1. Respondent Filtration Manufacturing, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama with its office and principal place of business at 1110 Montlimar Place, Suite 290, Mobile, Alabama.

Respondent Gary L. Savell is the President, Chief Executive Officer, and an owner and director of the corporate respondent. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

Respondent Horace R. Allen is the Secretary, Treasurer, and an owner and director of the corporate respondent. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

Respondent Brandon R. Clausen is the Vice President, and an owner and director of the corporate respondent. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

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

DEFINITIONS

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

1. The term *"air cleaning product"* or *"product"* means any device, equipment or appliance designed or advertised to remove, treat or reduce the level of any contaminant(s) in the air.

2. The term *"contaminant(s)"* refers to one or more of the following: fungal (mold) spores, pollen, lint, tobacco smoke, household dust, animal dander or any other gaseous or particulate matter found in indoor air.

ORDER

I.

It is ordered, That respondents Filtration Manufacturing Inc., a corporation, its successors and assigns, and its officers, and Gary L. Savell, individually and as an officer of said corporation, Horace R. Allen, individually and as an officer of said corporation, and Brandon R. Clausen, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of the Allergy 2000 or any other air cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, in any manner, directly or by implication, regarding the performance, health or other benefits, or efficacy of such product, unless, at the time of making such

representation, respondents possess and rely upon competent and reliable evidence which, when appropriate, must be competent and reliable scientific evidence that substantiates such representation.

B. Making any representation, directly or by implication, that any air cleaning product will perform under any set of conditions, including household living conditions, unless at the time of making the representation(s) respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation(s) either by being related to those conditions or by having been extrapolated to those conditions by generally accepted procedures.

For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That respondents Filtration Manufacturing, Inc., a corporation, its successors and assigns, and its officers, and Gary L. Savell, individually and as an officer of said corporation, Horace R. Allen, individually and as an officer of said corporation, and Brandon R. Clausen, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of the Allergy 2000 air cleaning product or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the name "Allergy 2000" or any other trade name that represents, directly or by implication, that such product will relieve allergy symptoms unless, at the time of making the representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation.

III.

It is further ordered, That, for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers, and complaints or inquiries from governmental organizations.

IV.

It is further ordered, That respondent Filtration Manufacturing, Inc., its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, provide a copy of this order to each of respondent's current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of ten (10) years from the date of service of this order, provide a copy of this order to each of respondent's principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order within three (3) days after the person assumes his or her position.

V.

It is further ordered, That respondents Gary L. Savell, Horace R. Allen and Brandon R. Clausen shall, for a period of ten (10) years from the date of service of this order, notify the Commission within thirty (30) days of the discontinuance of their present business or employment and of their affiliation with any new business or

employment involving the manufacturing, labeling, advertising, marketing, promotion, offering for sale, sale or distribution of any air filter or substantially similar device. Each notice of affiliation with any new business or employment shall include respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

VI.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the 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 which may affect compliance obligations arising under this order.

VII.

It is further ordered, That respondents shall, within sixty (60) days after service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on January 6, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

AAF-McQUAY, INC.

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

Docket C-3703. Complaint, Jan. 6, 1997--Decision, Jan. 6, 1997

This consent order prohibits, among other things, a Kentucky-based manufacturer of residential air filters from making any representation regarding the performance, health or other benefits, or efficacy of air cleaning products, unless the respondent possesses competent and reliable scientific evidence to substantiate such representations.

Appearances

For the Commission: *Brinley H. Williams* and *Michael Milgrom*.
For the respondent: *Dennis J. Reinhold*, Louisville, KY.

COMPLAINT

The Federal Trade Commission, having reason to believe that AAF-McQuay, Inc., d/b/a AAF International, a corporation, ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent AAF-McQuay, Inc., d/b/a AAF International, is a Delaware corporation with its principal office or place of business at 215 Central Avenue, Louisville, Kentucky.

PAR. 2. Respondent has manufactured, labeled, advertised, promoted, offered for sale, sold, and distributed air filters for use in residences under the brand names ElectroKlean and Dirt Demon.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for the ElectroKlean and Dirt Demon air filters, including but not necessarily

limited to the attached Exhibits A through E. These advertisements contain the following statements and depictions:

A. ElectroKlean ELECTROSTATIC Permanent Air Filter Eliminates 95% of Household Dust, Lint and Pollen

.....

Helps reduce sources of allergy problems by eliminating microscopic airborne particles, including pet dander. [Depiction of cat and dog]

Stops pollen, molds, dust and lint from recirculating through-out your home. [Depiction of flowers releasing pollen].

Special filter material is noticeably better than ordinary air filters in purifying the air you breathe. [Depiction of cigarette releasing smoke]

* * * *

Treated with EPA Registered Intersept Antimicrobial Special additive makes ElectroKlean superior to ordinary filters, helps to significantly improve indoor air quality. Inhibits growth of odor-causing bacteria, mold, mildew and other organisms that can quickly multiply in your heating and cooling system.

* * * *

Breathe cleaner air all the time with ElectoKlean. Eliminate 95% of household dust, lint and pollen.

* * * *

What is Intersept Antimicrobial?

The ElectroKlean Air Filter is treated with Intersept Antimicrobial, a special additive that inhibits the growth and build up of bacteria, mold, mildew and other organisms in your heating and cooling system. This means you're breathing cleaner and healthier air!

* * * *

I have allergies. Will this filter help?

It should. ElectroKlean removes most of the contaminants that aggravate your condition. It eliminates 95% of household dirt, lint, animal danders, pollen and other irritants.

* * * *

Is this filter considered an allergy relief aid?

It can be. Your doctor may actually prescribe a special home air filter to help eliminate the sources (dust, pollen, etc.) of your allergies. The purchase price of this filter may be tax deductible. (Exhibit A)

B. DIRT DEMON

High Efficiency Pleated Air Filter

6 TIMES BETTER THAN STANDARD AIR FILTERS REMOVES 95% OF HOUSEHOLD DIRT, DUST, POLLEN & LINT HELPS RELIEVE ALLERGY SYMPTOMS

* * * *

Stops pollen, molds, dust and lint from recirculating throughout your home. [Depiction of flowers releasing pollen]

* * * *

Special filter material and pleated design are noticeably better than ordinary air filters in purifying the air you breathe. [Depiction of cigarette releasing smoke] (Exhibit B)

C. ElectroKlean ELECTROSTATIC Permanent Air Filter

-Removes 95% of household dust, dirt, lint and pollen

-Inhibits growth of bacteria, molds and mildews that effect [sic] allergy sufferers (Exhibit C)

D. DIRT DEMON

HIGH EFFICIENCY PLEATED AIR FILTER

REMOVES 95% OF HOUSEHOLD DIRT, DUST, POLLEN & LINT.

HELPS RELIEVE ALLERGY SYMPTOMS (Exhibit D)

E. DIRT DEMON

High Efficiency Pleat with Intersept Extraordinary pleated design removes up to 95% of lint, dust and pollen passing through the filter. Keeps air throughout the house cleaner and easier to breathe in any season.

* * * *

Intersept Antimicrobial

Air filters can be a source of microbial contamination. American AirFilter products treated with Intersept will keep the filter from being a potential incubator of mold, mildew, fungi and bacteria. Intersept inhibits the growth of these microorganisms in the filter media, thereby removing it as a potential source of contamination.

* * * *

The filter effectively removes airborne dust mite allergens [Depiction of dust mite (magnified)]

Reduces pollen, molds, mildew, bacteria, fungi, dust and lint [Depiction of pollen grain (magnified)]

Helps reduce aggravating particles such as pet dander [Depiction of cat]

Special media is more effective in reducing pollutants in the air you breathe. [Depiction of cigarette smoker exhaling smoke] (Exhibit E)

PAR. 5. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through E, respondent has represented, directly or by implication, that:

A. Use of the ElectroKlean and Dirt Demon filters will substantially reduce the incidence of allergies caused by indoor allergens under household living conditions.

B. The ElectroKlean and Dirt Demon air filters remove 95 percent of airborne contaminants from the air that people breathe under household living conditions.

C. The Dirt Demon traps 95% of the lint, dust and pollen from the household air passing through it.

D. The Dirt Demon filter is six times as efficient at removing pollutants as a standard air filter.

E. The addition of Intersept antimicrobial to the ElectroKlean makes air cleaner and healthier than it would otherwise be under household living conditions.

F. The addition of Intersept antimicrobial to the ElectroKlean inhibits the growth of microbes in household heating and cooling systems.

G. The addition of Intersept antimicrobial to the Dirt Demon removes the filter as a potential source of contamination of household air.

PAR. 6. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through E, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits B, D, and E, respondent has represented, directly or by implication, that the Dirt Demon is a HEPA (High Efficiency Particulate Air) filter.

PAR. 9. In truth and in fact the Dirt Demon is not a HEPA filter according to industry standards. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a)of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT E

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent, AAF-McQuay, Inc., and the respondent having been furnished thereafter with a copy of a draft of the complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 Act, 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 finding and enters the following order:

1. AAF-McQuay, Inc., d/b/a AAF International, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 215 Central Avenue, Louisville, Kentucky.

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

DEFINITIONS

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

1. The term *"air cleaning product"* or *"product"* means any device, equipment or appliance designed or advertised to remove, treat or reduce the level of any contaminant(s) in the air.

2. The term *"contaminant(s)"* refers to one or more of the following: fungal (mold) spores, pollen, lint, tobacco smoke, household dust, animal dander or any other gaseous or particulate matter found in indoor air.

ORDER

I.

It is ordered, That respondent AAF-McQuay, Inc., d/b/a AAF International, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any air cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, in any manner, directly or by implication, regarding the performance, health or other benefits, or efficacy of such product, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which, when appropriate, must be competent and reliable scientific evidence, that substantiates such representation.

B. Making any representation, directly or by implication, that any air cleaning product will perform under any set of conditions, including household living conditions, unless at the time of making the representation(s) respondent possesses and relies upon competent and reliable scientific evidence that substantiates such representation(s) either by being related to those conditions or by having been extrapolated to those conditions by generally accepted procedures.

For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by

persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That respondent AAF-McQuay, Inc., d/b/a AAF International, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of the Dirt Demon, the ElectroKlean, or any other air filter for insertion into household central heating and/or cooling systems, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication that such filter is a HEPA (High Efficiency Particulate Air) filter.

III.

It is further ordered, That, for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers, and complaints or inquiries from governmental organizations.

IV.

It is further ordered, That respondent AAF-McQuay, Inc., d/b/a AAF International, its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, provide a copy of this order to each of respondent's current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of ten (10) years from the date of service of this order, provide a copy of this order to each of respondent's principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order within three (3) days after the person assumes his or her position.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change, 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 which may affect compliance obligations arising under this order.

VI.

It is further ordered, That respondent shall, within sixty (60) days after service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

This order will terminate on January 6, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

THE PENN TRAFFIC COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3577. Consent Order, May 15, 1995--Modifying Order, Jan. 10, 1997

This order reopens a 1995 consent order -- that required the respondent to divest one supermarket in each of the three Pennsylvania areas designated -- and this order modifies the consent order by terminating the respondent's obligation to divest one of its two supermarkets in Mount Carmel, Pennsylvania, in part, because Penn Traffic has demonstrated that new entrants into the Mount Carmel market has eliminated the need for the divestiture.

ORDER REOPENING AND MODIFYING ORDER

On September 13, 1996, respondent The Penn Traffic Company ("Penn Traffic") filed a Petition of Respondent the Penn Traffic Company to Reopen and Set Aside the Provisions of Paragraph II.A.3 of the Order Entered Herein ("Petition"). In its Petition, Penn Traffic requests that the Commission reopen the order in Docket No. C-3577 ("order") to set aside paragraph II.A.3 which requires Penn Traffic to divest either one of two supermarkets it owns in Mt. Carmel, Pennsylvania. The Petition addresses the remaining one of three supermarket divestitures required by the order. The Commission previously approved Penn Traffic's application for divestiture of the other two supermarkets on June 17, 1996.[1]

For the reasons discussed below, the Commission has determined that Penn Traffic has demonstrated changed conditions of fact sufficient to require the reopening and modification of the order.

I. THE PETITION

[1] Penn Traffic completed the sale of the assets of the supermarket in Towanda, Pennsylvania on July 2, 1996 (required pursuant to ¶ II.A.1 of the order), and completed the sale of the supermarket in Pittston, Pennsylvania on July 5, 1996 (required pursuant to ¶ II.A.2 of the order).

In its Petition,[2] Penn Traffic requests that the Commission modify the order to eliminate the remaining required divestiture under the order--*i.e.* a supermarket divestiture in Mt. Carmel.[3] Penn Traffic bases its Petition on changed conditions of fact and public interest considerations.[4] The changes of fact alleged by Penn Traffic include the actual entry into the Mt. Carmel market of a Sav-A-Lot store and the prospective entry (in March 1997) of a Wal-Mart Supercenter (featuring a large supermarket), just outside the Mt. Carmel Township limits. At the time the order became final (May 22, 1995), Sav-A-Lot had not opened its store and Wal-Mart had not announced its decision to build a Supercenter near Mt. Carmel.

In addition to change of fact, Penn Traffic argues that it is in the public interest to grant its Petition, because a further divestiture would, in effect, force Penn Traffic to exit the local Mt. Carmel market. Penn Traffic alleges that the above-described changes in the competitive conditions have contributed to its inability to effect a divestiture in Mt. Carmel. According to Penn Traffic, these conditions have eroded the marketability and long-term viability of its smaller Mt. Carmel supermarket location for use as a supermarket. Therefore, Penn Traffic states that if required to divest in Mt. Carmel, it will attempt to sell its larger supermarket and then close the smaller supermarket, thereby exiting the local Mt. Carmel market.[5]

II. STANDARD FOR REOPENING AND MODIFYING FINAL ORDERS

Section 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes

[2] In support of its Petition, Penn Traffic provided the affidavit of Robert G. Coleman, Director of Real Estate for the Riverside Division of the Penn Traffic Company ("Coleman Affidavit").

[3] Order, ¶ II.A.3.

[4] Penn Traffic does not assert that any change of law requires reopening the order.

[5] Petition at pp. 11-13. Coleman Affidavit at ¶¶ 8-9, 22-24.

causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[6]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.[7] In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order.[8] For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order."[9] Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification.[10] The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.[11]

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must

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[6] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

[7] Hart Letter at 5; 16 CFR 2.51.

[8] Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damond Letter"), *reprinted in* [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207.

[9] *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983).

[10] Damon Letter at 2.

[11] Damon Letter at 4.

reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III. PENN TRAFFIC HAS DEMONSTRATED CHANGED CONDITIONS OF FACT THAT REQUIRE THE REOPENING AND MODIFICATION OF THE ORDER

Penn Traffic's Petition demonstrates that new entry into the relevant market eliminates the need for a divestiture pursuant to paragraph II.A.3 of the order. The Petition does not contain sufficient information for the Commission to conclude that the Sav-A-Lot is a "supermarket," as defined by the order, and is, thereby, in the relevant product market.[12] However, the Wal-Mart Supercenter will feature a full-line supermarket of at least 40,000 square-feet[13] (larger than either of Penn Traffic's two Mt. Carmel supermarkets)[14] and is, thus, in the relevant product market.[15]

This Supercenter will be located approximately one mile from the city limits of Mt. Carmel, the geographic market identified in the complaint,[16] and less than two miles from either of Penn Traffic's two Mt. Carmel supermarkets.[17] The Supercenter location is in a relatively undeveloped area between Mt. Carmel and Shamokin and is easily accessible by car from both of these more developed population

[12] Although Sav-A-Lot offers many items sold through supermarkets, Penn Traffic has not demonstrated that the Sav-A-Lot carries all relevant product categories identified in paragraph I.D of the order as defining a "supermarket," *e.g.* fresh meat, nor that the Sav-A-Lot carries the variety of brands and sizes within a category that would be found in Penn Traffic's comparable supermarkets.

[13] Wal-Mart sources estimate the grocery and grocery-related product area of this Supercenter to be between 40,000 and 60,000 square feet.

[14] Penn Traffic operates one 29,000 square foot supermarket and one 25,000 square foot supermarket in Mt. Carmel.

[15] The Supercenter, currently under construction, will have a total of 186,000 square feet.

[16] Paragraph 7(b) of the complaint in this matter identifies the Mount Carmel, Pennsylvania area to include "the Borough of Mount Carmel and the Township of Mount Carmel."

[17] Prior to the opening of the Supercenter, the nearest supermarkets to Penn Traffic's Mt. Carmel supermarkets are in Shamokin, Pennsylvania, eight miles east of Mt. Carmel.

centers. Such a sizable, well-recognized entrant, in this semi-rural area, where most supermarket shopping is done by car, will draw customers from a broader geographic region than is identified in the complaint.[18] Therefore, unlike the competitive conditions that existed when the order became final, supermarket competition will expand outside the Mt. Carmel Township limits to include the Supercenter.

Further, Penn Traffic has responded to these anticipated competitive changes by initiating plans to expand (to about 40,000 square feet) and improve the larger of its Mt. Carmel supermarkets.[19] Accordingly, when the Wal-Mart Supercenter opens, it appears certain that it will be in direct competition with Penn Traffic's supermarkets in Mt. Carmel.

Given the sales volume that can reasonably be expected to be generated from the residents of Mt. Carmel,[20] the additional competition from a large competitor, such as Wal-Mart, is sufficient to remedy the competitive concerns that the order is designed to address.[21] Therefore, the imminent entry of the Wal-Mart Supercenter constitutes a change of fact that eliminates the need for Penn Traffic to divest a supermarket in Mt. Carmel and requires the reopening and modification of the order to set aside paragraph II.A.3 which requires such a divestiture.

Because the Commission has determined to grant Penn Traffic's Petition based on change of fact, we do not reach a determination with respect to Penn Traffic's public interest arguments.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's order be, and it hereby is, modified to set aside paragraph II.A.3, as of the effective date of this order.

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[18] In addition, Wal-Mart's general merchandise product selection further increases its potential drawing power from these areas.

[19] Coleman Affidavit at ¶¶ 27-28.

[20] Studies conducted by Penn Traffic estimate the total weekly potential food store sales from Mt. Carmel, Atlas, and Kulpmont boroughs, and Mt. Carmel Township in Pennsylvania to be $361,000. Coleman Affidavit at ¶ 12.

[21] Penn Traffic estimates that the Supercenter may succeed in taking approximately $150,000 in weekly sales, or about 41.5% of the total potential sales (of $361,000) from the Mt. Carmel trade area identified in the Coleman Affidavit ¶ 12. Coleman Affidavit ¶ 19.

IN THE MATTER OF

MONTANA ASSOCIATED PHYSICIANS, INC., ET AL.

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

Docket C-3704. Complaint, Jan. 13, 1997--Decision, Jan. 13, 1997

This consent order prohibits, among other things, two Montana-based organizations from entering or attempting to enter into any agreement with physicians to: negotiate or refuse to deal with any third-party payer; determine the terms on which physicians deal with such payers; or fix the fees charged for any physician's services. In addition, the consent order prohibits the respondents from advising physicians to raise, maintain or adjust the fees charged for their medical services, or encouraging adherence to any fee schedule for physician's services.

Appearances

For the Commission: *Robert Leibenluft, Steve Osnowitz* and *William Baer*.

For the respondents: *James Kirkland, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo,* Washington, D.C. and *James Sneed, McDermott, Will & Emery,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Montana Associated Physicians, Inc. ("MAPI") and the Billings Physician Hospital Alliance, Inc. ("BPHA"), hereinafter sometimes referred to as respondents, have violated and are violating 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 MAPI is a corporation organized, existing, and doing business under and by virtue of the laws of the

State of Montana, with its office and principal place of business located at 1242 North 28th Street, Suite 1A, Billings, Montana.

PAR. 2. There are approximately 115 shareholders of MAPI, all of whom are physicians, and they constitute the membership of MAPI. MAPI's members provide medical services in over 30 independent physician practices in Billings, Montana. MAPI's members constitute approximately 43 percent of all physicians in Billings, Montana, and primarily practice fee-for-service medicine. An approximately equal number of the other physicians in Billings are part of a single multispecialty physician practice. MAPI's members constitute over 80 percent of all "independent" Billings physicians, that is, those who are not part of the multispecialty physician practice or employed by a hospital. A significant portion of MAPI's activities furthers the pecuniary interests of its members.

PAR. 3. Respondent BPHA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1233 North 30th Street, Billings, Montana.

PAR. 4. BPHA is a physician-hospital organization, whose membership consists of Saint Vincent Hospital and Health Center ("Saint Vincent") of Billings, Montana, and a majority of the physicians on Saint Vincent's active medical staff. Almost all of MAPI's members are also physician members of BPHA. BPHA contracts with third-party payers on behalf of its members to provide services to third-party payers' subscribers and enrollees. There are approximately 126 physician members of BPHA, practicing in over 30 independent physician practices, located almost exclusively in Billings, Montana. Physician members of BPHA constitute approximately 45 percent of all physicians in Billings, Montana, and over 80 percent of all independent Billings physicians. The single multispecialty physician practice, referred to in paragraph two, was acquired by the only other hospital in Billings, and has approximately the same number of physicians as BPHA. A significant portion of BPHA's activities furthers the pecuniary interests of its members.

PAR. 5. The general business practices of MAPI, BPHA, and their members, including those herein alleged, are in or affect "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. Except to the extent that competition has been restrained as alleged herein, the physician members of MAPI and BPHA have

been, and are now, in competition among themselves and with other providers of physician services in Billings, Montana.

PAR. 7. Physicians, including the physician members of MAPI and BPHA, are often paid directly or indirectly for their services by third-party payers. Third-party payers such as health insurance companies, preferred provider organizations ("PPOs"), and health maintenance organizations ("HMOs"), reimburse for, purchase, or pay for all or part of the health care services provided to their enrollees or subscribers. Third-party payers generally contract with physicians to become participating providers in plans such payers offer to consumers. These contracts establish the terms and conditions of the relationship between the physician and the third-party payer, including the fees to be paid the physician for treating subscribers or enrollees of the third-party payer. Through such contracts, third-party payers may obtain capitated payment systems or discounts from physicians' usual fees, and physicians may obtain access to additional patients.

PAR. 8. Third-party payers in Billings, Montana, compete with each other on the basis of price, coverage offered, physician and hospital quality and availability, and other factors that are important to consumers. Payments to physicians for services rendered to third-party payer subscribers are a large component of a third-party payer's costs, and, therefore, are significant to a third-party payer in determining the price to charge consumers for health care coverage.

PAR. 9. Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by third-party payers, competing physicians decide individually whether to enter into contracts with third-party payers to provide services to subscribers or enrollees, and what prices to charge pursuant to such contracts.

PAR. 10. In 1986, most of the independent physicians in Billings were members of an organization called Ultracare. At this time, there were no HMOs or PPOs operating in Billings. Ultracare concluded that such plans would soon attempt to contract with physicians in Billings, and that competitive pressure could force physicians to deal with such plans at reduced prices or on other than fee-for-service terms. Accordingly, in March 1987, physician members of Ultracare formed MAPI, in substantial part to be a vehicle for its members to deal collectively with managed care plans. The purpose of engaging

in collective dealings was to obtain greater bargaining power with third-party payers by presenting a united front, and thereby to resist competitive pressures to discount fees and to avoid accepting reimbursement on other than the traditional fee-for-service basis.

PAR. 11. Beginning in 1986, and continuing to the present, MAPI and MAPI's predecessor, Ultracare, have acted as a combination of their members, have combined with at least some of their members, and have acted to implement agreements among their members to restrain competition by, among other things, facilitating, entering into, and implementing agreements, express or implied, to delay entry of HMOs and PPOs into Billings, to engage in collective negotiations over terms and conditions of dealing with third-party payers, to have MAPI members refrain from negotiating directly with third-party payers or contracting on terms other than those endorsed by MAPI, and to resist cost containment measures of third-party payers.

PAR. 12. During 1987 and continuing into 1993, MAPI acted to prevent and delay HMO Montana, an HMO owned and operated by Blue Cross/Blue Shield of Montana, from successfully contracting with physicians in Billings. Beginning in 1987, Blue Cross/Blue Shield of Montana sought to enter into agreements with MAPI's members to participate in HMO Montana. MAPI, on behalf of its members collectively, negotiated with HMO Montana concerning the terms of physicians' contracts with HMO Montana, including price terms, and rejected all contracts proposed by HMO Montana. Members of MAPI told Blue Cross/Blue Shield of Montana that they would negotiate with HMO Montana only through MAPI, and no member of MAPI entered into a contract with HMO Montana.

PAR. 13. Beginning in 1987, MAPI gathered detailed fee information from individual competing MAPI physicians and their physician practices, which enabled MAPI to determine for most physician services the prevailing fees and the maximum reimbursement allowed by Blue Cross/Blue Shield of Montana. After collecting and analyzing this fee information, MAPI advised certain physicians to raise their fees, and some fees were increased in accordance with these recommendations.

PAR. 14. Beginning in 1988, MAPI acted to obstruct efforts by a health plan seeking to establish the first PPO program in Billings. The health plan entered into a PPO contract with Saint Vincent in November 1988 and then sought to contract with physicians on the hospital's medical staff. Some members of MAPI indicated to the plan

that they would follow MAPI's recommendations in regard to dealings with the plan. MAPI, on behalf of its members collectively, offered its own proposed physician contract to the plan that provided for physicians to be paid their usual fees with no discounts, represented to the plan that this was what MAPI's members would accept, and objected to any discounts in fees to be paid by MAPI members. After negotiating with MAPI for a year without MAPI ever agreeing to MAPI physicians charging less than their usual fees, the plan contacted individual physicians about signing a PPO contract. When the plan sought to collect current fee information from MAPI members in order to devise a proposed fee schedule to offer to physicians, MAPI urged its members to submit prices higher than they were currently charging in order to inflate the fee schedule. By June 1990, the plan had contracts with only about 30 percent of MAPI's members.

PAR. 15. MAPI was actively involved in the formation of BPHA, which was created in 1991 by Saint Vincent and physicians on its medical staff. A substantial majority of BPHA's physician members are also members of MAPI. Through BPHA's Physician Agreements, MAPI is designated as the agent of almost all MAPI physician members of BPHA with respect to their membership in BPHA. As a result, MAPI has the authority to elect and remove physician members of BPHA's Board of Directors. Until 1993, MAPI's agency authority extended to the acceptance or rejection of any contract negotiated by BPHA with any third-party payer.

PAR. 16. The physician members of BPHA, most of whom are MAPI members, concertedly control BPHA's pricing and other terms of contracts for physician services. BPHA's Bylaws designate that its Contracting Committee shall negotiate the terms and conditions of contracts for physician services with third-party payers, including price terms of those contracts, and recommend acceptance or rejection of said contracts to the members of BPHA. BPHA's Contracting Committee consists almost entirely of physicians and their employees and agents, including for a significant period of time the Executive Director of MAPI. No action of BPHA's Contracting Committee or BPHA's Board of Directors can be taken without the support of a majority of physician representatives on each body. BPHA did not enter into any contract for physician services until nearly two years after its creation.

PAR. 17. MAPI has combined and is combining with its physician members, and has acted and is acting to implement an agreement among them, to restrain competition among physicians, through an agreement, express or implied, that BPHA would negotiate the terms and conditions of agreements between BPHA physician members and others, including the prices to be paid for their services.

PAR. 18. The physician members of MAPI and the physician members of BPHA have not integrated their practices in any economically significant way, nor have they created efficiencies sufficient to justify their acts or practices described in paragraphs ten through seventeen.

PAR. 19. By engaging in the acts or practices described above, both MAPI and BPHA have combined or conspired with their respective physician members to fix and/or increase the fees received from third-party payers for the provision of physician services, to conduct boycotts, or otherwise to restrain competition among physicians in Billings, Montana.

PAR. 20. The actions of the respondents described in this complaint have had and have the purpose, tendency, and capacity to result in the following effects, among others:

A. Restraining competition among physicians in Billings, Montana;

B. Fixing or increasing the prices that are paid for physician services in Billings, Montana; and

C. Depriving third-party payers, their subscribers, and patients of the benefits of competition among physicians in Billings, Montana.

PAR. 21. The combinations or conspiracies and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a

copy of a draft of a complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all of 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 respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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. Respondent MAPI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1242 North 28th Street, Suite 1A, Billings, Montana.

2. Respondent BPHA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1233 North 30th Street, Billings, Montana.

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

ORDER

I.

It is ordered, That, for purposes of this order, the following definitions shall apply:

A. *"Montana Associated Physicians, Inc."* or *"MAPI"* means Montana Associated Physicians, Inc., its subsidiaries, divisions, committees, and groups and affiliates controlled by MAPI; their directors, officers, representatives, agents, and employees; and their successors and assigns.

B. *"Billings Physician Hospital Alliance, Inc."* or *"BPHA"* means Billings Physician Hospital Alliance, Inc., its subsidiaries, divisions, committees, and groups and affiliates controlled by BPHA; their directors, officers, representatives, agents, and employees; and their successors and assigns.

C. *"Third-party payer"* means any person or entity that reimburses for, purchases, or pays for all or any part of the health care services provided to any other person, and includes, but is not limited to: health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs.

D. *"Risk-sharing joint venture"* means a joint arrangement to provide health care services in which physicians who would otherwise be competitors share a substantial risk of loss from their participation in the venture.

E. *"Fees"* means any and all cash or non-cash charges, rates, prices, benefits, or other compensation received, to be received, or charged to a patient or third-party payer for the rendering of physician services.

II.

It is further ordered, That MAPI, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, facilitating, attempting to

facilitate, ratifying, or attempting to ratify any combination, contract, agreement, understanding, or conspiracy with or among any physician(s) to:

A. Negotiate, deal, or refuse to deal with any third-party payer, employer, hospital, or any other provider of health care services;

B. Determine the terms, conditions, requirements, or any other aspect of becoming or remaining a participating physician in any program or plan of any third-party payer; and

C. Fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services.

Provided that nothing in this order shall be construed to prohibit MAPI from forming, facilitating, or participating in the formation of a risk-sharing joint venture, which may deal with a third-party payer on collectively determined terms, as long as the physicians participating in the risk-sharing joint venture also remain free to deal individually with any third-party payer.

Further provided that nothing in this order shall be construed to prohibit MAPI from forming, facilitating, or participating in the formation of any other joint venture for which MAPI receives the prior approval of the Commission.

III.

It is further ordered, That MAPI, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from:

A. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any physician or physician's practice to fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services;

B. Creating, formulating, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees for physicians' services, including, but not limited to, suggested fees, proposed fees, fee guidelines, discounts, discounted fees, standard fees, or recommended fees;

C. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action prohibited by this order; and

IV.

It is further ordered, That BPHA, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, facilitating, attempting to facilitate, ratifying, or attempting to ratify any combination, contract, agreement, understanding, or conspiracy with or among any physician(s) to:

A. Negotiate, deal, or refuse to deal with any third-party payer for physician services;

B. Determine the terms, conditions, requirements, or any other aspect of becoming or remaining a participating physician in any program or plan of any third-party payer; and

C. Fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services.

Provided that nothing in this order shall be construed to prohibit BPHA from forming, facilitating, or participating in the formation of a risk-sharing joint venture, which may deal with a third-party payer on collectively determined terms, as long as the physicians participating in the risk-sharing joint venture also remain free to deal individually with any third-party payer.

Further provided that nothing in this order shall be construed to prohibit BPHA from forming, facilitating, or participating in the formation of any other joint venture for which BPHA receives the prior approval of the Commission.

Further provided that nothing in this order shall be construed to prohibit BPHA from implementing, attempting to implement, continuing, or attempting to continue, for the express term thereof, contracts with third-party payers that were in effect on September 30, 1994.

Further provided that nothing in this order shall be construed to prohibit BPHA from continuing to function as a physician-hospital

organization that is not a risk-sharing or otherwise integrated entity, as long as each of the following conditions is met:

(a) Saint Vincent Hospital and Health Center is the only hospital in Yellowstone County, Montana, that participates in BPHA;

(b) BPHA's role in the contracting process between third-party payers and physician members of BPHA is limited to:

(i) Soliciting or receiving from an individual physician member of BPHA, and conveying to a third-party payer, information relating to fees or other aspects of reimbursement, outcomes data, practice parameters, utilization patterns, credentials, and qualifications;

(ii) Conveying to a physician member of BPHA any contract offer made by a third-party payer;

(iii) Soliciting or receiving from a third-party payer, and conveying to a physician member of BPHA, clarifications of proposed contract terms;

(iv) Providing to a physician member of BPHA objective information about proposed contract terms, including comparisons with terms offered by other third-party payers;

(v) Conveying to a physician member of BPHA any response made by a third-party payer to information conveyed, or clarifications sought, by BPHA;

(vi) Conveying, in individual or aggregate form, to a third-party payer, the acceptance or rejection by a physician member of BPHA of any contract offer made by such third-party payer; and

(vii) At the request of a third-party payer, providing the individual response, information, or views of each physician member of BPHA concerning any contract offer made by such third-party payer.

(c) Each physician member of BPHA makes an independent, unilateral decision to accept or reject each contract offer made by a third-party payer;

(d) BPHA does not: (i) disseminate to any physician another physician's fees, other aspects of reimbursement, or views or intentions as to possible terms of dealing with a third-party payer; (ii) act as an agent for the collective negotiation or agreement by the physician members of BPHA; or (iii) encourage or facilitate collusive behavior among physician members of BPHA; and

(e) Each physician member of BPHA remains free to deal individually with any third-party payer.

V.

It is further ordered, That MAPI and BPHA shall:

A. Within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each of their members, officers, directors, managers, and employees;

B. For a period of five (5) years after the date this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each new MAPI or BPHA member, officer, director, manager, and employee within thirty (30) days of their admission, election, appointment, or employment; and

C. For a period of five (5) years after the date this order becomes final, publish annually in an official annual report or newsletter sent to all members, a copy of this order and the accompanying complaint with such prominence therein as is given to regularly featured articles.

VI.

It is furthered ordered, That MAPI and BPHA shall each file a verified written report within sixty (60) days after the date this order becomes final, annually thereafter for five (5) years on the anniversary of the date this order became final, and at such other times as the Commission or its staff may by written notice require, setting forth in detail the manner and form in which they have complied and are complying with the order.

VII.

It is further ordered, That MAPI and BPHA shall:

A. Notify the Commission at least thirty (30) days prior to any proposed change in such corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other

change in such corporation that may affect compliance obligations arising out of the order; and

B. For a period of five (5) years after the date this order becomes final, notify the Commission in writing forty-five (45) days prior to forming or participating in the formation of, or joining or participating in, any risk-sharing joint venture.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, MAPI and BPHA shall permit any duly authorized representative of the Commission:

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

B. Upon five days' notice to a respondent and without restraint or interference from it, to interview officers, directors, or employees of a respondent.

IX.

It is further ordered, That this order shall terminate on January 13, 2017.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to issue the complaint and order and write separately to emphasize two points. First, the complaint and order do not directly challenge the organization and conduct of the Billings Physician Hospital Alliance, Inc., as a physician hospital organization ("PHO"), and in my view, this order should cast no shadow on the activities of PHO's. Second, although I concur in the unusual and complicated fencing-in relief in the particular circumstances of this case, in my view, this negotiated order is not, and should not be read as, a guide for what a PHO can and cannot do.

IN THE MATTER OF

COMPUTER BUSINESS SERVICES, INC., ET AL.

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

Docket C-3705. Complaint, Jan. 21, 1997--Decision, Jan. 21, 1997

This consent order prohibits, among other things, an Indiana home-based computer business opportunity firm and three principals from misrepresenting the earnings or success rate of investors; the existence of a market for their products or services; the amount of time it would take investors to recoup their investments and from making any representation regarding the performance, benefits, efficacy or success rate of any product or service unless they possess reliable evidence to substantiate the claims. The consent order also prohibits the use of misleading testimonials or endorsements. In addition, the consent order requires that advertisements for automatic telephone dialing systems disclose federal restrictions on their use and requires the respondents to pay $5 million in consumer redress.

Appearances

For the Commission: *C. Steven Baker, Catherine Fuller, Mary E. Tortorice* and *Evan Siegel.*

For the respondents: *Lewis Keiler, Sonnenschein, Nath & Rosenthal,* Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Computer Business Services, Inc. ("CBSI"); Andrew L. Douglass, individually and as an officer of CBSI; Matthew R. Douglass, individually; and Peter B. Douglass, individually ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent CBSI is an Indiana Corporation with its principal place of business at CBSI Plaza, Sheridan, Indiana.

2. Respondent Andrew L. Douglass is an officer of CBSI. Individually or in concert with others, he formulates, directs, controls,

or participates in the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CBSI.

3. Respondent Matthew R. Douglass is a supervisory employee of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CBSI.

4. Respondent Peter B. Douglass is a supervisory employee of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CBSI.

5. Respondents have advertised, offered for sale, sold, and distributed to the public home-based business ventures. Prospective consumers who purchase home-based business ventures from CBSI come to be known by the company as "Center Owners." A "center" ordinarily consists of computer hardware, software, training manuals, marketing materials, and available technical assistance which, together, are represented to enable the owner to create products and services that can be resold profitably to the general public.

6. Beginning no later than April 1988, and continuing through the present, respondents have disseminated or have caused to be disseminated magazine, newspaper and postcard advertisements, including but not necessarily limited to the attached Exhibit A, to induce consumers nationwide to call a toll-free number to order a free information kit. Respondents represent through these advertisements that consumers can expect to earn $4,000 per month using CBSI's "proven turnkey business." Exhibit A.

7. Respondents have also disseminated or have caused to be disseminated advertisements for their home-based business ventures through commercial online services, including, but not limited to, Compuserve and America Online. Respondents represent through these advertisements that consumers can expect to earn $4,000 per month through CBSI's home-based business ventures. Exhibit B.

8. Respondents have disseminated or have caused to be disseminated several information packets containing brochures and an audio cassette tape recording by the co-founders of CBSI, George and Jeanette Douglass. These materials, which are sent to prospective

purchasers of home-based business ventures, contain the following statements:

(a) In the last 13 years, we've identified over 30 needs and wants. Each one of them is easy to run, helps other people, and provides you a good profit. Computer Business Services has not only identified these 30 needs, but has developed the technology to perform these services easily and profitably. Along with the technology, we've developed all the strategies to perform these services, plus the ways to find the people that need these services, and you can do it all from your home.

(b) Most of the couples and individuals that we've helped start their business have been extremely successful. . . .

(c) Each one of the programs I'm about to explain to you provides a needed service to the people or organizations in your community. Each service adds value to the people's lives you serve, and you can be proud to provide these services. Each program is a proven money-maker, and is now being operated successfully by our present center owners.

(d) Once you start to advertise your CBSI center, people know about it immediately and start coming to you for your services. Every business or organization needs to contact people and you have the only way to contact people quickly, inexpensively and effectively. Once this word gets out, you'll have to expand your services very rapidly, just as we did.

(e) Now we've already helped thousands of couples and individuals turn into successful business people, and we believe we can help you, too.

(f) If you get our CBSI computer program and follow our proven strategies, I really don't believe that you can do it badly enough not to be successful. Once you get the word out that you've got these programs available, people will come to you.

(g) We right now have 30 services you can perform. We have thousands of center owners already earning good money, and I believe you can, too.

(h) Now you have 24 hours in a day. You work 8, sleep 8, and have 8 free hours. If you take 8 free hours times 7 days a week, you have 56 hours. Divide that by two, and you have 28 hours that you can use in this business. Now I realize I've not included weekends. If you use 28 hours per week to do this program, you will be extremely successful.

(i) I can't guarantee your success. I can't guarantee that you'll make $4,000 to $10,000 a month. I don't know what's inside of you. But I do know this. Our services are needed in every community in the United States. Our programs really work, and you can earn more money than you ever dreamed possible if you will work our programs.

(j) Most of the couples and individuals that we've helped start their business have been extremely successful and our relationship with them has been exhilarating.

(k) This is a business that you can build a few customers at a time and reap the profits for a long time to come. I call it stack up income. You set it up once and get paid for it every month. So after a few years, you have big money coming in every month, even if you take a month off.

(l) Each of these services is a proven money-maker in large cities, small towns and rural communities throughout the country.

(m) Now some of our center owners use the computer dialing equipment for telemarketing on the unattended mode. Some just don't like to use the computer for telemarketing at all, and in some states, there are regulations that limit the use in the unattended mode. . . . Again, you must make the decision how you use your equipment. Some center owners do very well using their computer dialing equipment for finding people who want their products. Others use the unattended mode to find qualified prospects for insurance, real estate, chimney cleaning and so forth. If they call from 9:00 a.m. to 9:00 p.m., they usually can call around 1,000 people a day.

9. Respondents also have disseminated or have caused to be disseminated materials containing endorsements by and photographs of purported Center Owners who convey the impression that ordinary consumers can successfully start and operate one or a combination of respondents' home-based business ventures. These materials include but are not necessarily limited to the attached Exhibit C. For example, these materials contain the following statements and depictions:

(a) "LEE STOUT: I am a very satisfied CBSI Center Owner. Without my involvement with CBSI the opportunities that have become realities would not have been possible. The CBSI telecommunications program has enabled me to grow my business to the point where I can make $100,000+ per year. . . . If I can be successful at this, anyone can!"

(b) "DOUG STROUD: I earned $101,865 in one year with my own CBSI business. I am running Voice Mail and Computer Home Monitor. CBSI software is the best available."

(c) "CURTIS MAPP: I now have 258 subscribers to the CBSI Computerized Monitor Service program. Each subscriber is billed at $30.00 per month, which means I'm earning over $7,700 per month with this program alone."

10. Beginning no later than January 1991, and continuing through the present, respondents have sold their home-based business ventures to approximately 15,000 consumers. Center Owners ordinarily spent between $3,000 and $16,000 on respondents' products and services.

PROFITABILITY

11. Through the means described in paragraphs five through ten, respondents have represented, expressly or by implication, that CBSI Center Owners ordinarily operate profitable businesses out of their own homes.

12. In truth and in fact CBSI Center Owners do not ordinarily operate profitable businesses out of their own homes. Indeed, it is rare for CBSI Center Owners to recoup even their initial investments.

13. Therefore, the representation set forth in paragraph eleven was, and is, false or misleading.

SUBSTANTIAL INCOME

14. Through the means described in paragraphs five through ten, respondents have represented, expressly or by implication, that:

a. CBSI Center Owners ordinarily earn substantial income.

b. CBSI Center Owners can reasonably expect to achieve a specific level of earnings, such as income of $4,000 per month.

15. In truth and in fact:

a. CBSI Center Owners do not ordinarily earn substantial income. Indeed, the vast majority of Center Owners never even recoup their initial average investments of approximately $9,000.

b. CBSI Center Owners can not reasonably expect to achieve a specific level of earnings, such as income of $4,000 per month. Indeed, the vast majority of Center Owners not only never earn $4,000 per month, but never earn $4,000 over the duration of their businesses.

16. Therefore, the representations set forth in paragraph fourteen were, and are, false or misleading.

ENDORSEMENTS: ACTUAL EXPERIENCES

17. Through the means described in paragraph nine, respondents have represented, expressly or by implication, that CBSI Center Owner endorsements appearing in respondents' advertisements and promotional materials reflect the actual experiences of those Center Owners.

18. In truth and in fact, in numerous instances, CBSI Center Owner endorsements appearing in respondents' advertisements and promotional materials do not reflect those Center Owners' actual experiences.

19. Therefore, the representation set forth in paragraph seventeen was, and is, false or misleading.

ENDORSEMENTS: TYPICALITY AND ORDINARINESS

20. Through the means described in paragraph nine, respondents have represented, expressly or by implication, that CBSI Center Owner endorsements appearing in respondents' advertisements and promotional materials reflect the typical or ordinary experiences of Center Owners who have attempted to use CBSI's products or services.

21. In truth and in fact, CBSI Center Owner endorsements appearing in respondents' advertisements and promotional materials do not reflect the typical or ordinary experiences of Center Owners who have attempted to use CBSI's products or services.

22. Therefore, the representation set forth in paragraph twenty was, and is, false or misleading.

SUBSTANTIATION FOR EARNINGS CLAIMS

23. Through the use of the statements and depictions contained in the respondents' advertisements and promotional materials referred to in paragraph fourteen, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph fourteen, at the time the representations were made.

24. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph fourteen, at the time the representations were made. Therefore, the representation set forth in paragraph twenty-three was, and is, false or misleading.

AUTOMATIC TELEPHONE DIALING SYSTEMS

25. Through the means described in paragraphs five through ten, respondents have represented, expressly or by implication, that consumers can successfully utilize automatic telephone dialing systems to market their businesses.

26. Respondents have failed to disclose in their advertisements and promotional materials for the outbound telemarketing programs

that federal law prohibits the use of an automatic telephone dialing system in the unattended mode to initiate a telephone call to any residential telephone line to transmit an unsolicited advertisement for commercial purposes without the prior express consent of the called party. This fact would be material to consumers in their purchase or use of respondents' home-based business ventures. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

27. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT C

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have violated the said Act, 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, 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. Respondent CBSI is an Indiana Corporation with its principal place of business at CBSI Plaza, Sheridan, Indiana.

2. Respondent Andrew L. Douglass is an officer of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CBSI.

3. Respondent Matthew R. Douglass is a supervisory employee of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the

corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CBSI.

4. Respondent Peter B. Douglass is a supervisory employee of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CBSI.

5. The acts and practices of the respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

ORDER

DEFINITIONS

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

1. *"Business venture"* means any written or oral business arrangement, however denominated, whether or not covered by the Federal Trade Commission's trade regulation rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 CFR Part 436, and which consists of payment of any consideration for:

A. The right to offer, sell, or distribute goods, or services (whether or not identified by a trademark, service mark, trade name, advertising, or other commercial symbol); and

B. More than nominal assistance to any person or entity in connection with or incident to the establishment, maintenance, or operation of a new business or the entry by an existing business into a new line or type of business.

2. *"Clearly and prominently"* shall mean as follows:

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume

and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In a print or electronic advertisement, the disclosure shall be in a type size, and in a location, that is sufficiently noticeable for an ordinary consumer to see and read, in print that contrasts with the background against which it appears.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

3. Unless otherwise specified, *"respondents"* shall mean Computer Business Services, Inc., a corporation, its successors and assigns and its officers; Andrew L. Douglass, individually and as an officer of the corporation; Matthew R. Douglass, individually; and Peter B. Douglass, individually; and each of the above's agents, representatives and employees.

4. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. *"Automatic telephone dialing system"* shall mean as defined in the Telephone Consumer Protection Act, 47 U.S.C. 227(a)(1).

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any business venture, shall not misrepresent, expressly or by implication:

A. That consumers who purchase or use such business ventures ordinarily succeed in operating profitable businesses out of their own homes;

B. That consumers who purchase or use such business ventures ordinarily earn substantial income;

C. The existence of a market for the products and services promoted by respondents;

D. The amount of earnings, income, or sales that a prospective purchaser could reasonably expect to attain by purchasing a business venture;

E. The amount of time within which the prospective purchaser could reasonably expect to recoup his or her investment; or

F. By use of hypothetical examples or otherwise, that consumers who purchase or use such business ventures earn or achieve from such participation any stated amount of profits, earnings, income, or sales. Nothing in this paragraph or any other paragraph of this order shall be construed so as to prohibit respondents from using hypothetical examples which do not contain any express or implied misrepresentations or from representing a suggested retail price for products or services.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any business venture, shall not represent, expressly or by implication, the performance, benefits, efficacy or success rate of any product or service that is a part of such business venture, unless such representation is true and, at the time of making the representation, respondents possess and rely upon competent and reliable evidence that substantiates such representation. For purposes of this order, if such evidence consists of any test, analysis, research, study, or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if it has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any business venture or any product or service that is part of any business venture in or affecting commerce, shall not:

A. Use, publish, or refer to any user testimonial or endorsement unless respondents have good reason to believe that at the time of such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained; or

B. Represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

1. The representation is true and, at the time it is made, respondents possess and rely upon competent and reliable evidence that substantiates the representation; or

2. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

a. What the generally expected results would be for users of the product, or

b. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

Provided, however, that when endorsements and user testimonials are used, published, or referred to in an audio cassette tape recording, such disclosure shall be deemed to be in close proximity to the endorsements or user testimonials when the disclosure appears at the beginning and end of each side of the audio cassette tape recording containing such endorsements or user testimonials. Provided further, however, that when both sides of an audio cassette tape recording contain such endorsements or user testimonials, the disclosure need only appear at the beginning and end of the first side and the end of the second side of the audio cassette tape recording.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of

any business venture utilizing, employing or involving in any manner, an automatic telephone dialing system, shall disclose, clearly and prominently, and in close proximity to any representation regarding the use or potential use of an automatic telephone dialing system to transmit an unsolicited advertisement for commercial purposes without the prior express consent of the called party, that federal law prohibits the use of an automatic telephone dialing system to initiate a telephone call to any residential telephone line using an artificial or prerecorded voice to transmit an unsolicited advertisement for commercial purposes without the prior express consent of the called party unless a live operator introduces the message. Nothing in this paragraph or any other paragraph of this order shall be construed so as to prohibit respondents from making truthful statements or explanations regarding the laws and regulations regarding the use of automatic telephone dialing systems.

V.

It is further ordered, That respondent Computer Business Services, Inc., directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any product or service, shall not make any false or misleading statement or representation of fact, expressly or by implication, material to a consumer's decision to purchase respondents' products or services.

VI.

It is further ordered, That:

A. Respondents Computer Business Services, Inc., its successors and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, shall pay to the Federal Trade Commission by electronic funds transfer the sum of five million dollars ($5,000,000) no later than fifteen (15) days after the date of service of this order. In the event of any default on any obligation to make payment under this Part, interest, computed pursuant to 28 U.S.C. 1961(a) shall accrue from the date of default to the date of payment. In the event of default, respondents Computer Business Services, Inc., its successors

and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, shall be jointly and severally liable.

B. Payment of the sum of five million dollars ($5,000,000) in accordance with subpart A above shall extinguish any monetary claims the FTC has against Jeanette L. Douglass and George L. Douglass based on the allegations set forth in the complaint as of the date of entry of this order. Nothing in this paragraph or any other paragraph of this order shall be construed to prohibit the FTC from seeking administrative or injunctive relief against Jeanette L. Douglass or George L. Douglass.

C. The funds paid by respondents Computer Business Services, Inc., its successors and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, pursuant to subpart A above shall be paid into a redress fund administered by the FTC and shall be used to provide direct redress to purchasers of Computer Business Services, Inc. Payment to such persons represents redress and is intended to be compensatory in nature, and no portion of such payment shall be deemed a payment of any fine, penalty, or punitive assessment. If the FTC determines, in its sole discretion, that redress to purchasers is wholly or partially impracticable, any funds not so used shall be paid to the United States Treasury. Respondents Computer Business Services, Inc., its successors and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, shall be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Commission. Customers of respondents, as a condition of their receiving payments from the Redress Fund, shall be required to execute releases waiving all claims against respondents, their officers, directors, employees, and agents, arising from the sale of Computer Business Services, Inc. business ventures by respondents prior to the date of issuance of this order. The Commission shall provide respondents Computer Business Services, Inc., its successors and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, with the originals of all such executed releases received from respondents' customers.

VII.

It is further ordered, That respondents Computer Business Services, Inc., its successors and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, shall for a period of

five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

It is further ordered, That respondent Computer Business Services, Inc., and its successors and assigns, and respondent Andrew L. Douglass, for a period of five (5) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IX.

It is further ordered, That respondent Computer Business Services, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this

order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn fewer than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

It is further ordered, That respondents Andrew L. Douglass, Matthew R. Douglass and Peter B. Douglass, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondents' new business addresses and telephone numbers and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

It is further ordered, That Computer Business Services Inc. and its successors and assigns, and respondents Andrew L. Douglass, Matthew R. Douglass and Peter B. Douglass shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XII.

This order will terminate on January 21, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation

of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in fewer than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

VICTORIA BIE

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3708. Complaint, Jan. 22, 1997--Decision, Jan. 22, 1997

This consent order prohibits, among other things, a California-based dietary supplement manufacturer, Victoria Bie d/b/a Body Gold, from making certain claims for dietary supplements, without competent and reliable scientific evidence to support them; from misrepresenting the results of any test, study or research; and from representing that any testimonial or endorsement is the typical experience of users of the advertised product, unless the claim is substantiated or the respondent discloses the generally expected results clearly and prominently.

Appearances

For the Commission: *Janice Charter* and *Sohni Bendiks.*
For the respondent: *H. Patrick Noonan,* Woodland Hills, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Victoria Bie doing business as Body Gold ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Victoria Bie is the sole proprietor of Body Gold, a California company with its principal office or place of business located at 5930 La Jolla Hermosa, La Jolla, California. Respondent formulates, directs, and controls the acts and practices of Body Gold, including the acts and practices alleged in this complaint.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed nutritional supplements, including, but not limited to, Chromium Picolinate (200 and 400 mcg), 24K with Chromium Picolinate, Daily Energy Formula (with Chromium Picolinate), and CitriGold (with Chromium Picolinate and Hydroxycitric Acid), collectively referred to as "Chromium Picolinate," as weight loss, fat

loss, muscle enhancing and/or muscle building aids. Respondent has also advertised, offered for sale, sold and distributed the nutritional supplements L-Carnitine and Super Fat Burner Formula (containing L-Carnitine) as products that increase stamina or endurance, as well as aid in fat loss, weight loss and muscle toning. Each of respondent's nutritional supplements is a "food" and/or "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52, 55.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for Chromium Picolinate, including but not necessarily limited to the attached Exhibits A-L. These advertisements and promotional materials contain the following statements:

1. "LOSE THE FAT BUT KEEP THE MUSCLE...Chromium Picolinate" (Exhibit A, pgs. 1 and 2)

2. "There is now excellent scientific evidence that Chromium Picolinate can accelerate fat loss while helping to preserve or even increase muscle." (Exhibit A, pg. 2)

3. "Another double blind-study [Evans'] was conducted in young off-season football players participating in a six-week weight-training program. The results were the same: more muscle, less fat with Chromium Picolinate. Chromium Picolinate more than doubled the net benefits of exercise alone." (Exhibit A, pg. 2, col. 2)

4. "Stimulates Metabolism" (Exhibit A, pg. 3, col. 1)

5. "Chromium Picolinate helps you to KEEP THE MUSCLE - and maintain or increase your metabolic rate - while LOSING THE FAT." (Exhibit B, pg. 2, col. 2)

6. "CHROMIUM PICOLINATE FOR LESS FAT AND MORE MUSCLE" (Exhibits F, I, J, and K)

7. "BODY GOLD will rev up your sluggish metabolism so that you'll 'burn' fat and calories the way Mother Nature intended." (Exhibit C, pg. 1, col. 2)

8. "In fact, because of the way BODY GOLD works, you may even find that your 'inch loss' is much more dramatic than your overall weight loss." (Exhibit C, pg. 1, col. 2)

9. "...[Chromium Picolinate] has been shown in numerous human and animal studies to reduce body fat while increasing muscle." (Exhibit B, pg. 2, col. 2)

10. "In the 1988-89 groundbreaking studies, people given 200 micrograms of Chromium Picolinate daily lost 22% of their body fat in six weeks!" (Exhibit D, pg. 2, col. 2)

11. "People given Chromium Picolinate lost 22% of their body fat in six weeks. Moderate exercise routines were followed: no dietary restrictions were imposed." (Exhibit F)

12. "22% LESS BODY FAT IN SIX WEEKS with Chromium Picolinate" (Exhibit G)

13. "22% LESS BODY FAT"

"In a breakthrough university study with Chromium Picolinate, fat loss was dramatic: [GRAPH] Unhealthy body fat decreased 17% in only 2 weeks and continued to an average 22% loss at the end of the 6-week study. In only six weeks, participants given Chromium Picolinate lost 22% of their body fat!" (Exhibit H)

14. "Numerous studies now show that supplemental CHROMIUM PICOLINATE promotes fat loss and increases lean muscle. 200 micrograms taken daily can offer dramatic fitness benefits." (Exhibits G, I, K)

15. "UNIVERSITY STUDIES IDENTIFY CHROMIUM PICOLINATE as a 'trigger' for fat loss and lean muscle development." (Exhibit F)

16. "People taking Chromium Picolinate lost 22% of their body fat in only six weeks in a 1989 university study. Since then, numerous studies and millions of people have confirmed the exciting benefits of this safe, essential nutrient. Men and women across the country are talking about: LESS BODY FAT * WEIGHT LOSS * 'INCH LOSS' * MORE ENERGY * MORE LEAN MUSCLE * GREATER STAMINA * APPETITE CONTROL * LESS DESIRE FOR SWEETS" (Exhibits I, J, K)

17. "These and subsequent published studies show that Chromium Picolinate:

*increases body fat metabolism
*lowers elevated cholesterol levels
*builds stronger, leaner muscle
*regulates blood sugar
*promotes longer life span in laboratory rats" (Exhibit D, pg. 2, col. 2)

18. "Medical studies show that Chromium Picolinate can also:

*reduce cholesterol levels
*regulate blood sugar" (Exhibit C, pg. 1, col. 1)

19. "The Fitness Essential * CHROMIUM PICOLINATE Less body fat * More muscle * Lower cholesterol * Blood sugar control * Weight loss" (Exhibit D, pg. 2)

20. "Recent clinical studies have used 400 micrograms of chromium to produce excellent weight-loss and fat-loss results. Your reward can be substantially greater fitness benefits when you DOUBLE THE CHROMIUM POWER. And Chromium Picolinate is perfectly safe at these reasonable, healthy amounts." (Exhibit E)

21. Testimonials from Exhibit L, Body Gold advertisement:

A. "Lost 13 pounds and feel great-thanks to Body Gold!" G.B., Mohrsville, PA

B. "Since I started Body Gold products I have lost a total of 36 inches and 64 pounds. I'm a proud Body Gold user." Karen Suleiman, Livonia, MI

C. "I've lost 20 pounds so far, and many, many inches!!...." Jennifer Papagno, Marlboro, MA

D. "Body Gold has become an important part of my daily life. I no longer crave chocolate or any sweets, and my appetite has decreased also. I've lost inches all over." Joan Decker, Troy, NY

E. "I saw inch loss in just a few days, and also a loss of appetite. I have more energy than ever." N.W., Wichita, TX

F. "Your product (Chromium Picolinate) is so great, in 2 weeks, I've lost inches already. I haven't eaten or craved sweets..." S.C., Buena Park, CA

G. "You have made me a believer. I could not get any of my dresses to fit when I needed to attend a special event. I started the 200 mcg chromium that day. One month later I can once again wear my clothes. I feel great! Thank you!" Marcy Baker, Bend, OR

H. "This is the best thing that I have ever tried and got results so fast! I have several friends as well as myself who have lost 20 pounds or more." M.G., Rocky Mtn., NC

I. "I lost lots of inches and 2 dress sizes!" G.H., Columbus, OH

J. "I feel great since starting Daily Energy Formula and I have lost 10 lbs. in the past month since starting Chromium Picolinate." M.S., Madison Hts., VA

K. "I tried your Dual Pak of Super Fat Burner Formula in combination with the Chromium Picolinate, and I AM HOOKED! I noticed immediate and dramatic fat loss, while I've noticed more muscle. I've finally managed to lose those impossible last 5 lbs. almost effortlessly." K.M., Edgewood, NM

L. "I lost 7-1/2 lbs. in 2 weeks with absolutely no change in diet -I feel better and want less food." Mary Guzy, Los Angeles, CA

M. "I've lost 10 pounds without trying to diet with this product. I feel great!" Sally Wymer, Friendswood, TX

22. Testimonials from Exhibit D, Body Gold flier:

BODY GOLD Customers write...About Chromium Picolinate:

[A] "This is my second order. I've lost 5 pounds and almost 2 jeans sizes..." R.N., Bucyrus, NY

[B] "It has definitely decreased my interest in sugar, specifically chocolate. Thanks so much!" Bonnie Murphy, Central Point, OR

[C] "I can't believe how much more energy I have. I've lowered my cholesterol by about 30 points. I've lost weight." Anonymous (by request), River Falls, WI

[D] "Initially I lost 9 lbs. in 11 days. I am hypoglycemic - which has virtually been totally controlled, no headaches - no sugar highs & lows. I love BODY GOLD!" D.T., Flushing, NY

About 24K with Chromium Picolinate:

[E] "I (lost) 10 lbs., and am able to maintain. BODY GOLD does make me feel better." Diane Wiles, Everett, WA

[F] "It makes me feel better. They (the tablets) are easy to take. I noticed I've lost inches." M.R.Y., Daytona Beach, FL

[G] "I am on a very strict diet, find it easier to stick with it. Also have control over hypoglycemia, never could get control before." L.P., Easley, SC

PAR. 5. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-L, respondent has represented, directly or by implication, that:

A. Chromium Picolinate significantly reduces body fat.
B. Chromium Picolinate causes significant weight loss.
C. Chromium Picolinate causes rapid weight or fat loss.
D. Chromium Picolinate significantly reduces serum cholesterol.
E. Chromium Picolinate significantly increases human metabolism.
F. Chromium Picolinate increases lean body mass and builds muscle.
G. Chromium Picolinate causes weight loss without diet and/or strenuous exercise.
H. Chromium Picolinate controls appetite and craving for sugar.
I. Chromium Picolinate lowers or regulates blood sugar.
J. Chromium Picolinate increases energy and/or stamina.
K. Testimonials from consumers appearing in advertisements or promotional materials for Chromium Picolinate reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 6. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-L, respondent has represented, directly or by implication, that at the time she made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time she made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and

promotional materials attached as Exhibits A-L, respondent has represented, directly or by implication, that scientific studies demonstrate that Chromium Picolinate:

A. Significantly reduces body fat;
B. Causes rapid body fat loss;
C. Increases lean body mass and builds muscle;
D. Causes significant weight loss;
E. Significantly reduces serum cholesterol;
F. Lowers or regulates blood sugar; and
G. Increases energy and/or stamina.

PAR. 9. In truth and in fact, scientific studies do not demonstrate that Chromium Picolinate:

A. Significantly reduces body fat;
B. Causes rapid body fat loss;
C. Increases lean body mass and builds muscle;
D. Causes significant weight loss;
E. Significantly reduces serum cholesterol;
F. Lowers or regulates blood sugar; or
G. Increases energy and/or stamina.

Therefore the representations set forth in paragraph eight were, and are, false and misleading.

PAR. 10. Respondent has disseminated or caused to be disseminated advertisements and promotional materials for L-Carnitine and Super Fat Burner Formula, including but not necessarily limited to the attached Exhibits D and L. These advertisements and promotional materials contain the following statements:

1. "L-Carnitine - A powerful fat metabolizer praised by athletes for its ability to transport fatty acids more efficiently to the body's "fat burning energy centers"... By improving your fat metabolism, L-Carnitine can enhance your efforts at fat loss, weight loss, and muscle toning." (Exhibit D, pg. 1, col. 1)

2. "I have been particularly pleased with the Super Fat Burner Formula. I had a baby and within 2 months I have lost the 40 lbs. gained and have rebuilt the muscle definition I had lost during the pregnancy." Carol Lough Henderson, Stone Mtn., GA (Exhibit L)

3. "Adding the L-Carnitine has been really effective. It has dramatically improved my athletic performance and increased my overall stamina. Your products give me the fuel I need." Gail Smart, W. Medford, MA (Exhibit L)

PAR. 11. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph ten, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits D and L, respondent has represented, directly or by implication, that:

A. Taking L-Carnitine as a supplement reduces body fat.
B. Taking L-Carnitine as a supplement causes weight loss.
C. Taking L-Carnitine as a supplement tones muscles.
D. Taking L-Carnitine as a supplement increases stamina and enhances athletic performance.
E. Testimonials from consumers appearing in advertisements or promotional materials for L-Carnitine reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 12. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph ten, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits D and L, respondent has represented, directly or by implication, that at the time she made the representations set forth in paragraph eleven, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 13. In truth and in fact, at the time she made the representations set forth in paragraph eleven, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. Respondent has disseminated or caused to be disseminated advertisements and promotional materials for CitriGold, including but not necessarily limited to, the attached Exhibit M. These advertisements and promotional materials contain the following statements:

1. "CitriGold is the weight-loss aid that combines the latest, most potent ingredients to help you:

*Lose weight *Reduce Body Fat *Control your appetite"

2. "Add CitriGold to your weight loss and exercise program for a leaner, slimmer, sleeker body than you would have thought possible."

PAR. 15. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit M, respondent has represented, directly or by implication, that:

A. CitriGold causes weight loss.
B. CitriGold reduces body fat.
C. CitriGold controls appetite.

PAR. 16. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit M, respondent has represented, directly or by implication, that at the time she made the representations set forth in paragraph fifteen, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 17. In truth and in fact, at the time she made the representations set forth in paragraph fifteen, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph sixteen was, and is, false and misleading.

PAR. 18. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

96 Complaint

EXHIBIT A

EXHIBIT A

96 Complaint

EXHIBIT A

EXHIBIT A

96 Complaint

EXHIBIT B

EXHIBIT B

96 Complaint

EXHIBIT C

EXHIBIT C

96 Complaint

EXHIBIT D

EXHIBIT D

96 Complaint

EXHIBIT D

EXHIBIT E

96 Complaint

EXHIBIT F

EXHIBIT G

96 Complaint

EXHIBIT H

EXHIBIT I

96 Complaint

EXHIBIT J

EXHIBIT K

EXHIBIT L

EXHIBIT M

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 complaint which the Denver Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, her attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforementioned 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Victoria Bie d/b/a Body Gold is a sole proprietor doing business under and by virtue of the laws of the State of California, with her office and principal place of business located at 5930 La Jolla Hermosa Ave., La Jolla, California.

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

DEFINITIONS

For the purposes of this order:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results; and

2. *"Clearly and prominently"* as used herein shall mean as follows:

(a) In a television or videotape advertisement: (1) an audio disclosure shall be delivered in a volume and cadence and for a duration sufficient for an ordinary consumer to hear and comprehend it; and (2) a video disclosure shall be of a size and shade, and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend it.

(b) In a print advertisement, the disclosure shall be in close proximity to the representation that triggers the disclosure in at least twelve (12) point type.

(c) In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

I.

It is ordered, That respondent Victoria Bie, doing business as Body Gold or under any other name, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of Chromium Picolinate, 24K with Chromium Picolinate, Daily Energy Formula, CitriGold, or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product causes, aids, facilitates or contributes to reducing body fat;

B. Such product causes, aids, facilitates or contributes to causing weight loss;

C. Such product causes, aids, facilitates or contributes to causing rapid weight or body fat loss;

D. Such product causes or assists in causing weight or fat loss without dieting or strenuous exercise;

E. Such product reduces serum cholesterol levels;

F. Such product increases human metabolism;

G. Such product increases lean body mass and builds muscle;

H. Such product increases energy or stamina;

I. Such product controls appetite and/or craving for sugar; or

J. Such product regulates or controls blood sugar;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is ordered, That respondent Victoria Bie, doing business as Body Gold or under any other name, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of L-Carnitine, Super Fat Burner Formula, or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product improves fat metabolism, which causes loss of body fat;

B. Such product causes, aids, facilitates or contributes to achieving fat loss;

C. Such product causes, aids, facilitates or contributes to achieving weight loss;

D. Such product causes, aids, facilitates or contributes to muscle toning; or

E. Such product enhances athletic performance and/or stamina;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondent Victoria Bie, doing business as Body Gold or under any other name, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, do forthwith cease and desist from making, in any manner, directly or by implication, any representation regarding the performance, benefits, efficacy, or safety of such product, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondent Victoria Bie, doing business as Body Gold or under any other name, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

V.

It is further ordered, That respondent Victoria Bie, doing business as Body Gold or under any other name, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, or offering for sale, sale or distribution of any product or program in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, do forthwith cease and desist from representing, in any manner, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of a product or program represents the typical or ordinary experience of members of the public, who use the product or program, unless at the time of making such a representation, the representation is true, and respondent possessed and relied upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

Provided, however, respondent may use such endorsements if the statements or depictions that comprise the endorsements are true and accurate, and if respondent discloses clearly and prominently and in close proximity to the endorsement:

a. What the generally expected performance would be in the depicted circumstances; or

b. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, *i.e.*, that consumers should not expect to experience similar results.

VI.

Nothing in this order shall prohibit respondent from making any representation that is specifically permitted in labeling for any product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VII.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VIII.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in her possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

IX.

It is further ordered, That respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the company, such as dissolution, assignment, or sale resulting in the emergence of a successor entity, the creation or dissolution of subsidiaries or affiliates, or any other change in the company that may affect compliance obligations arising under this order.

X.

It is further ordered, That the respondent shall, within thirty (30) days after service of this order, distribute a copy of this order to all agents, representatives, or employees engaged in the preparation or placement of advertisements, promotional materials, product labels or other sales materials covered by this order, and shall obtain from each such agent, representative or employee a signed statement acknowledging receipt of the order.

XI.

It is further ordered, That respondent shall, within sixty (60) days after service of this order and at such other times as the Federal Trade Commission may require, file with the Commission a report, in

writing, setting forth in detail the manner and form in which she has complied with this order.

XII.

This order will terminate twenty years from the date of its issuance, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

CONOPCO, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3706. Complaint, Jan. 23, 1997--Decision, Jan. 23, 1997

This consent order prohibits, among other things, Conopco, Inc., a New York-based manufacturer of margarine and spreads, doing business as Van Den Bergh Foods Company, from misrepresenting the amount of fat, saturated fat, cholesterol or calories in any spread or margarine; and requires the respondent to have adequate scientific substantiation for claims that any margarine or spread reduces the risk of heart disease, or causes or contributes to a risk factor for any disease or health-related condition. In addition, the consent order requires, for three years, that advertisements for Promise margarine or spreads must include the total fat disclosure and must disclose either the percentage of calories derived from fat or the fact that the product is not low in fat.

Appearances

For the Commission: *Anne V. Maher, Rosemary Rosso, Maureen Enright* and *Jill Samuels*.

For the respondent: *Nancy Schnell,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Conopco, Inc., doing business as Van Den Bergh Foods Company ("respondent"), has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a New York corporation with its office and principal place of business located at 390 Park Avenue, New York, New York. Van Den Bergh Foods Company is an unincorporated operating division of Conopco, Inc. Conopco, Inc. is a wholly-owned subsidiary of Unilever United States, Inc., a Delaware corporation with its office and principal place of business also located at 390 Park Avenue, New York, New York.

PAR. 2. Respondent, through its operating division known as Van Den Bergh Foods Company, has manufactured, advertised, labeled, offered for sale, sold and distributed margarines and spreads, including Promise spread, Promise Extra Light margarine and Promise Ultra (26%) spread (hereinafter sometimes collectively referred to as "Promise margarines and spreads") and other foods to consumers. Promise spread, Promise Extra Light margarine and Promise Ultra (26%) spread are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for Promise margarines and spreads, including but not necessarily limited to the advertisements attached as Exhibits A through E. These advertisements contain the following statements and depictions:

A. "HEART DISEASE: NATION'S #1 KILLER" [Depiction of Newspaper Headline] [SFX: Dramatic Tone]
MUSIC: YOU MAKE ME FEEL SO YOUNG. YOU MAKE ME FEEL THERE ARE SONGS TO BE SUNG.
[Depiction of an adult male with two young children, one child male and the other female]
[Depiction of a plate of pancakes with two heart-shaped pats of margarine on the pancakes; behind the plate is a package of Promise spread (stick form), with the following statements on the package label: "Low in Saturated Fat" and "NO CHOLESTEROL"]
[Depiction of adult male smiling and looking down, moving to depiction of the young girl smiling and looking up]
"HEALTH TODAY Serum Cholesterol: the warning is real." [Depiction of Newspaper Headline] [SFX: Dramatic Tone] MUSIC: AND EVERY TIME I SEE YOU GRIN ... [Depictions of the adult male with the two children] "FIT -OR- FAT"
[Depiction of Newspaper Headline, shown several times] [SFX: Printing Press Sounds]
VOICEOVER: "Promise spread has no cholesterol" [Depiction of the adult male with the two children; a super at the bottom of the screen states: "Include Promise as part of a low saturated fat, low cholesterol diet."]
VOICEOVER: "...and is lower in saturated fat than leading margarines." [Depiction of a knife spreading margarine on pancakes with a package of Promise spread (stick form) behind the plate; the Promise package label states "Low in Saturated Fat" and "NO CHOLESTEROL" and a super at the bottom of the screen continues to state: "Include Promise as part of a low saturated fat, low cholesterol diet."]

MUSIC: YOU MAKE ME FEEL SO YOUNG [Depiction of the adult male with two children at a table moving to screen depicting the female child eating and then to a depiction of the male child eating and then to the adult male eating]
VOICEOVER: "Promise. Get Heart Smart."
[Depiction of packages of Promise spread (tub form), Promise spread (stick form) and Promise Extra Light margarine in top third of screen] A super in large caps in the center of screen reads: "PROMISE. GET HEART SMART" [Depiction of the male adult with the two children in the bottom of the screen] (Exhibit A).

B. "GET HEART SMART." (Exhibits A through E).

C. Depiction of Heart-Shaped Pat[s] of Margarine in conjunction with depictions of packages of Promise spread, Promise Extra Light margarine and Promise Ultra (26%) spread. (Exhibits A through E).

D. "Low in Saturated Fat." [Depiction of package of Promise spread (stick form)] (Exhibit B).

E. "ZERO FAT BREAKTHROUGH" [Depiction of Headline] [SFX MUSICAL/ELECTRONIC]

* * * * *

"EXCLUSIVE THE FIRST Fat Free MARGARINE" [Depiction of Headline] SFX COMPUTER PRINTER

* * * * *

VOICEOVER: "Discover Fat Free Promise Ultra." [Depiction of plate with two muffin halves with heart-shaped pats of margarine on the muffins; behind the plate is a package of Promise Ultra Fat Free spread]
"Zero Fat with ...just five delicious calories a serving." [Depiction of young girl with three adults, moving to depiction of a knife spreading margarine on a muffin half]; a super at the bottom of the screen states: "Include Promise Ultra as part of a low saturated fat, low cholesterol diet."]
[Depiction of adults and young girl at a table; a super at the bottom of the screen states: "Include Promise Ultra as part of a low saturated fat, low cholesterol diet."]

* * * * *

VOICEOVER: It's the first fat free...margarine. Definitely one of a kind." [Depiction of people at table moving to male adult eating muffin with margarine on it]
"SPREAD THE FAT FREE NEWS" SFX ELECTRONIC

* * * * *

VOICEOVER: "Regular or Fat Free Promise Ultra ... " [Depiction of packages of Promise Ultra (26%) spread and Promise Ultra Fat Free spread in top third of screen]
VOICEOVER: "Get Heart Smart." [Depiction of packages of Promise Ultra (26%) spread and Promise Ultra Fat Free spread in top third of screen; a super in large caps in the center of screen reads: "GET HEART SMART"] (Exhibit D).

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through E, respondent has represented, directly or by implication, that eating Promise spread, Promise Extra Light

margarine or Promise Ultra (26%) spread helps reduce the risk of heart disease.

PAR. 6. Through the use of the statements and depictions set forth in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through E, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 7. In truth and in fact, at the time it made the representation set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and D, respondent has represented, directly or by implication, that Promise spread and Promise Extra Light margarine [Exhibit A] and Promise Ultra (26%) spread [Exhibit D] are low in total fat.

PAR. 9. In truth and in fact, Promise spread, Promise Extra Light margarine and Promise Ultra (26%) spread are not low in total fat. At the time respondent made the representation, Promise spread contained 9.5 grams of fat per 14 gram serving and 34 grams of fat per 50 grams; Promise Extra Light margarine contained 5.6 grams of fat per 14 gram serving and 20 grams of fat per 50 grams; and Promise Ultra (26%) spread contained 3.64 grams of fat per 14 gram serving and 13 grams of fat per 50 grams. Therefore, the representation set forth in paragraph eight was and is false and misleading.

PAR. 10. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that Promise spread is low in saturated fat.

PAR. 11. In truth and in fact, Promise spread is not low in saturated fat. At the time respondent made the representation, Promise spread contained 1.6 grams of saturated fat per 14 gram serving with 17 percent of calories derived from saturated fat.

Therefore, the representation set forth in paragraph ten was and is false and misleading.

PAR. 12. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that Promise spread and Promise Extra Light margarine have no dietary cholesterol. Respondent has failed to adequately disclose that Promise spread and Promise Extra Light margarine contain a significant amount of total fat. In light of respondent's representation that Promise spread and Promise Extra Light margarine have no dietary cholesterol, the significant total fat content of the products would be material to consumers and the failure to adequately disclose this fact is deceptive.

PAR. 13. The acts or practices of respondent, as alleged in this complaint, constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A-1

EXHIBIT A-2

"HEADLINES" AD

(VIDEOCASSETTE)

EXHIBIT B

EXHIBIT C-1

EXHIBIT C-2

EXHIBIT D

EXHIBIT E

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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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, and having duly considered the comments received, 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. Respondent Conopco, Inc. is a New York corporation with its office and principal place of business located at 390 Park Avenue, New York, New York. Van Den Bergh Foods Company is an unincorporated operating division of Conopco, Inc. Conopco, Inc. is a wholly-owned subsidiary of Unilever United States, Inc., a Delaware corporation with its office and principal place of business also located at 390 Park Avenue, New York, New York.

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

ORDER

I.

It is ordered, That Conopco, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device (including but not limited to Van Den Bergh Foods Company), in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale or distribution of Promise spread, Promise Extra Light margarine, Promise Ultra (26%) spread, or any other margarine or spread in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

A. Eating Promise spread, Promise Extra Light margarine or Promise Ultra (26%) spread or any other margarine or spread will help to reduce the risk of heart disease; or

B. Any margarine or spread has the relative or absolute ability to cause or contribute to any risk factor for a disease or any health-related condition;

unless at the time of making such representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation; provided however, that any such representation that is specifically permitted in labeling for such food product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to have a reasonable basis as required by this paragraph. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That respondent Conopco, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device (including but not limited to Van Den Bergh Foods Company), in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale or distribution of Promise spread, Promise Extra Light margarine, Promise Ultra (26%) spread, or any other margarine or spread in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of fat, saturated fat, cholesterol or calories in any such product. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

III.

It is further ordered, That respondent Conopco, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device (including but not limited to Van Den Bergh Foods Company), in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale or distribution of Promise spread, Promise Extra Light margarine, or any other margarine or spread that contains a total fat disclosure amount as defined in Part V of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose clearly and prominently in any advertisement or promotional material that refers, directly or by implication, to the absolute or comparative amount of cholesterol in such food:

A. The total number of grams of fat per serving; and

B. For three (3) years from the effective date of this order, any advertising or promotion of any margarine or spread advertised, promoted, offered for sale, sold or distributed under the Promise brand name that contains a total fat disclosure amount as defined in Part V of this order shall also disclose the percentage of calories derived from fat or a statement that the margarine or spread is not a "low fat" food.

IV.

Nothing in this order shall prohibit respondent from making any representation that is specifically permitted in labeling for any margarine or spread by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

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

A. The term "spread" shall mean any spread that has organoleptic properties similar to butter or margarine;

B. The term "margarine" or "spread" shall not include:

1. Any foodservice margarine or spread sold in bulk sizes for use by restaurants or foodservice establishments or sold in individual portion packs for table service use by restaurants or foodservice operators, provided that said products bear no nutrient content or health benefit claims in any context on any such product package and provided further that respondent, its successors or assigns, does not advertise, promote, offer for sale, sell or distribute any such product to consumers; or

2. Any margarine or spread sold or distributed to consumers by third parties under private labeling agreements with respondent, its successors or assigns, provided respondent, its successors or assigns, does not participate in the funding, preparation or dissemination of any advertising of said products to consumers; and

C. For purposes of Part III of this order, the term "total fat disclosure amount" shall mean the disclosure level of fat as set forth in final regulations concerning cholesterol content claims as promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VI.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change which may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondent shall, within thirty (30) days after service upon it of this order, distribute a copy of this order to its Van Den Bergh Foods Company division and any other operating division engaged in the sale or marketing of margarines or spreads, to each of its managerial employees in its Van Den Bergh Foods Company division and any other operating division engaged in the sale or marketing of margarines or spreads, and to each of its officers,

agents, representatives, or employees engaged in the preparation or placement of advertising or other material covered by this order.

IX.

It is further ordered, That this order will terminate on January 23, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

X.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

UNIVERSAL MERCHANTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3707. Complaint, Jan. 23, 1997--Decision, Jan. 23, 1997

This consent order prohibits, among other things, a California-based dietary supplement manufacturer and its president from claiming, without competent and reliable scientific substantiation, that any food, dietary supplement or drug reduces body fat, causes weight loss, increase lean body mass, or controls appetite or craving for sugar; from misrepresenting the results of any test, study or research; and from representing that any testimonial or endorsement is the typical experience of users of the advertised product, unless the claim is substantiated or the respondent discloses the generally expected results clearly and prominently.

Appearances

For the Commission: *Rosemary Rosso, Maureen Enright, Anne V. Maher* and *Jill Samuels.*

For the respondents: *Ed Glynn* and *Gary Hailey, Venable, Baetjer, Howard & Civiletti*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Universal Merchants, Inc., a corporation, and Steven Oscherowitz, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Universal Merchants, Inc. is a Delaware corporation with its principal office or place of business at 4727 Wilshire Blvd., Suite 510, Los Angles, CA.

2. Respondent Steven Oscherowitz is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal

office or place of business is the same as that of Universal Merchants, Inc.

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including ChromaTrim and ChromaTrim-100 ("ChromaTrim"), chewing gums containing chromium picolinate. ChromaTrim is a "drug," and/or "food," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have disseminated or have caused to be disseminated advertisements for ChromaTrim, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements and depictions:

A. "100% natural, ChromaTrim™ is the sugar-free, fat-reducing chewing gum that is proven to reduce body fat and decrease your appetite (especially sugar cravings). ChromaTrim works fast and is extremely safe. ChromaTrim's active ingredient Chromium Picolinate is so unique, it's patented by the U.S.D.A."

"No special diets, no tiring exercise, and no harmful chemicals, ChromaTrim is simply the secret to successful fat loss. Guaranteed. The fact is, thousands of formerly over-weight men and women have successfully changed their lives."

"I lost 40 pounds with ChromaTrim-100." [The advertisement depicts a slender woman with the caption Belinda Woodruff.]

"I lost 35 pounds using ChromaTrim." [The advertisement depicts a woman in a two-piece bathing suit with the caption Nicky Peters.] (Exhibit A)

B. Susan Ruttan: "This is not another fad diet or crash program. ChromaTrim is a chewing gum that contains chromium picolinate, a very special form of chromium. Now chromium is an essential mineral like iron and zinc. Your body needs it every day. It's important. And scientific research has shown that chromium works with your body's insulin, helping it to burn fat, preserve and build muscle, and control cravings and hunger. And when your body gets the chromium it needs by chewing ChromaTrim, listen to what can happen." (Exhibit B, p. 2)

Veronica Hall: "I lost 80 pounds. And I went down from a size 28, to a size 18." (Exhibit B, p. 2)

Donna Allison: "I've lost 36 pounds and I still have 20 or so more to lose." (Exhibit B, p. 2)

Susan Ruttan: "So how do you know it can work for you? Well, according to the U.S. Department of Agriculture, nine out of ten of us don't get enough chromium in our diet....And if you don't get enough chromium in your diet, your body's natural system for burning fat, building muscle, and controlling cravings isn't going to work as well as it should." (Exhibit B, p. 3)

Susan Ruttan: "And with this system you don't have to starve yourself, or sweat buckets to see a real change." (Exhibit B, p. 3)

Susan Ruttan: "The real goal is to keep and even build muscle, and burn off that fat. And that's where ChromaTrim comes in because it helps your body's natural fat burning and muscle building system work better. So, how do we know? Well, there have been studies, many of them testing what chromium does." (Exhibit B, p. 4)
Susan Ruttan: "ChromaTrim helps your body by helping it work better to burn fat, preserve and build muscle and to help control hunger and cravings. And it's so easy." (Exhibit B, p. 4)
Rick Gordon: "In the afternoon when I get this craving for a candy bar or sweets, I just grab the gum, throw it in my mouth. Cuts the craving just like that." (Exhibit B, pp. 4-5)
Wendy Wilburn: "I did notice that my cravings for chocolate and things like that changed. But I didn't go out of my way to make this a diet plan whatsoever." (Exhibit B, p. 5)
Susan Ruttan: "Look, your body needs chromium to work properly. And nine out of ten people don't get enough from their daily diet. In fact, in order to get enough chromium it's been estimated that the average person if they didn't change their diet would have to consume as much as 13,000 calories a day." (Exhibit B, p. 5)
Female Announcer Wearing Lab Coat: "Nine out of ten of us don't get enough chromium from our daily diet. And chromium . . . is an essential mineral. You need it to survive. So, what does chromium do? Scientists have shown that chromium plays a key role in helping your body's insulin work better. And insulin is your body's key to burning fat and preserving and building muscle. Insulin is also known as the hunger hormone. It helps control cravings and hunger. So you need to get enough chromium in your diet every day to help your insulin work the way it should. And remember, chances are nine out of ten you're not getting enough chromium right now." (Exhibit B, pp. 5-6)
Announcer in Lab Coat: "In a double blind study of 150 people conducted in conjunction with the University of Texas, . . . people who were given a chromium picolinate supplement lost an average of 4.2 pounds of body fat . . . [a]nd gained 1.2 pounds of muscle mass. . . . Now you can get the chromium advantage with ChromaTrim. . . . You simply chew two to three pieces of the mint flavored gum every day. That way your body gets the chromium it needs to help your insulin work better, to burn fat, preserve muscle and control cravings." (Exhibit B, p. 11)

6. Through the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. ChromaTrim significantly reduces body fat.

B. ChromaTrim causes significant weight loss.

C. ChromaTrim significantly reduces body fat and causes weight loss without dieting or exercise.

D. ChromaTrim increases lean body mass and builds muscle.

E. ChromaTrim controls appetite and craving for sugar.

F. Testimonials from consumers appearing in the advertisements for ChromaTrim reflect the typical or ordinary experience of members of the public who use the product.

G. Nine out of ten people do not consume enough chromium to support normal insulin function, resulting in decreased ability to burn fat, preserve muscle, and control hunger and cravings.

7. Through the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. Through the means described in paragraph five, respondents have represented, expressly or by implication, that scientific studies demonstrate that:

A. ChromaTrim significantly reduces body fat.
B. ChromaTrim causes significant weight loss.
C. ChromaTrim significantly reduces body fat and causes weight loss without dieting or exercise.
D. ChromaTrim increases lean body mass and builds muscle.
E. ChromaTrim controls appetite and craving for sugar.

10. In truth and in fact, scientific studies do not demonstrate that:

A. ChromaTrim significantly reduces body fat.
B. ChromaTrim causes significant weight loss.
C. ChromaTrim significantly reduces body fat and causes weight loss without dieting or exercise.
D. ChromaTrim increases lean body mass and builds muscle.
E. ChromaTrim controls appetite and craving for sugar.

Therefore, the representations set forth in paragraph nine were, and are, false or misleading.

11. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the

making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

VOICE OVER: The following is a paid advertisement for ChromaTrim presented by Universal Merchants.
RICK GORDON: I'm probably in better shape now than I was in high school or college.
["Testimonials describe best case results and are not intended to represent typical results," displayed on screen for approximately two seconds during Gordon testimonial.]
ROSEANNE WALKEY: That day that I put some pants on and they fell off, then I thought ooooh, that's a clue.
["Testimonials describe best case results and are not intended to represent typical results," displayed on screen for approximately two seconds during Walkey testimonial.]
KATHLEEN DEEMS: The last time I looked this trim and fit I was in my 20's.
["Individual results will vary based on personal commitment and other factors," displayed on screen for approximately two seconds during Deems testimonial.]
MELISSA LINDSAY: People ask me all the time what do you use? How did you do it?
DONNA ALISON: Every time I get on the scale I can see it go down another pound or two.
VERONICA HALL: I haven't worn jeans in over 13 years.
ROSEANNE BRADSHAW: The last time my body looked this good was back when I was married.
ADRIENNE ANTOINE: I looked in the mirror, and I'm like, oh my God! Can I get over how slim I am now.
DAVID ALVARADO: If someone would have told me a year ago that hey, you could chew this gum and it's going to help you lose weight, I would have said yeah, right.
VOICE OVER: Coming up next, discover how you can lose fat and get fit the smart way, with ChromaTrim. The breakthrough chewing gum and fat loss system with chromium picolinate.
DR. GARY EVANS: Americans have reduced their fat intake. And what's happened? We continued to find that more and more are overweight. So something else is wrong. The something else is probably a lack of chromium in the diet.
DR. GIL KAATS: And here's a product that can potentially help the burning of excess fat without depleting any muscle. And may even be adding muscle mass.
SUSAN RUTTAN: Hi, I'm Susan Ruttan. Now when you hear the word struggle and weight, do you say that's me? Well, a recent poll showed that almost three out of four people are overweight. Look, diets don't work. We've all lived through them. Exercise fads and machines come and go. And fat grams have become an obsession. Are you depressed yet? Well here's something that's very new and very exciting. The ChromaTrim system. Over the next half hour you're going to learn how to finally get control of your body, and your weight with this. Keep your hands off that clicker. This is not another fad diet or crash program. ChromaTrim is a chewing gum that contains chromium picolinate. A very special form of chromium. Now chromium is an essential mineral like iron and zinc. Your body needs it every day. It's important. And scientific research has shown that chromium works with your

body's insulin, helping it to burn fat, preserve and build muscle, and control cravings and hunger. And when your body gets the chromium it needs by chewing ChromaTrim, listen to what can happen.

RICK GORDON: I had to get all my suits altered now. That's the biggest thing. Going down from 34 down to 31 and a half inch waist.

["Weight loss varies with individuals. Adherence to the complete ChromaTrim system including exercise and a sensible diet is necessary for success," displayed on screen for approximately five seconds during Gordon testimonial.]

VERONICA HALL: I lost 80 pounds. And I went down from a size 28, to a size 18. And that's a new person.

DONNA ALLISON: I've lost 36 pounds and I still have 20 or so more to lose. But it's not like I've got to get to the top of the mountain. I just go along and it just keeps happening.

ROSEANNE WALKEY: I have a cat and the litter box comes in eight things, eight pound things. And I carried all three of them in and I thought that's what I used to carry around with me.

MELISSA LINDSAY: Well I was wearing like a 24-W, and now I'm only down to size 14 and my goal was a size 13, 14, because that's what I wore in high school.

WENDY WILBURN: I was a size 9. And I'm a size one to three right now. There's a big difference between a nine and a three.

ADRIENNE ANTOINE: I had plateaued at 195, and I stayed right there and wasn't budging, wasn't going anywhere. So I started using the gum and it was just a gradual weight loss.

DAVID ALVARADO: Some where between 10 to 15 pounds overall weight loss. But in the body changes I've noticed there's definitely been here in what they call the "love handles."

BELINDA WOODRUFF: You're getting people saying, you know you're looking better. What are you doing? And I have to say, well, I'm chewing gum. You know? They go, what are you doing? I'm chewing gum. And it's just that simple.

SUSAN RUTTAN: ChromaTrim really works. Have you noticed I can't stop talking about it? And neither can magazines like Newsweek, Prevention, The Los Angeles Time, Longetivity and many more. So how do you know it can work for you? Well, according to the U.S. Department of Agriculture, nine out of ten of us don't get enough chromium in our diet. You get chromium from foods like brewers yeast, broccoli, lobster, calves liver, oysters and wheat germ. And surprise, we just don't eat enough of these foods. And if you don't get enough chromium in your diet, your body's natural system for burning fat, building muscle, and controlling cravings isn't going to work as well as it should. Are you starting to get the picture? So here's what you do. You follow the ChromaTrim system and every day you chew a few pieces of ChromaTrim. The chromium is in the gum. And with this system you don't have to starve yourself, of sweat buckets to see a real change.

["Individual results vary," displayed on screen for approximately three seconds while Susan Ruttan is speaking.]

JOYCE CURZON: The skin just sort of sagged off of me. And I never had the muscle tone that I do now. Never. Not even in my 20's.

ROSEANNE BRADSHAW: I just saw muscle developing all over my body. And the fat was disappearing. And I couldn't believe it.

KATHLEEN DEEMS: I know I have the muscle, but I think I lost the cellulite, the fat that dimpled. The look that you sometimes get when you get heavier.
RUSS MANNEX: I'm not Adonis, but I'm on my way. I don't have a six pack, but I definitely have more definition than I have before. Definitely.
ADRIENNE ANTOINE: I just really started to see definition in my arms, my body, my waist, my thighs and everything. I just -- I was being sculpted. Gum was sculpting my body.
DONA HEIDER: There's not that sense of I'm on a diet. I have to deprive myself. I have to watch everything I eat. It was working. It all came together. And I was eating better because I felt better.
SUSAN RUTTAN: When you use the ChromaTrim system, you choose to lose the smart way. And fat loss, not scale weight, is the key. With ordinary dieting you may lose pounds, but pounds of what? Low calorie diets often cause your body to lose muscle, but muscle gives your body shape and burns calories. You don't want to loss it. But that's what you lose on the dieting roller coaster. The real goal is to keep and even build muscle, and burn off that fat. And that's were ChromaTrim comes in because it helps your body's natural fat burning and muscle building system work better. So, how do we know? Well, there have been studies, many of them testing what chromium does. One of the largest and most dramatic ones was conducted by Dr. Gil Kaats of the Health and Medical Research Foundation, along with the University of Texas. It was double blind, which means that nobody knew who was getting chromium in their diet, and who was getting nothing, a placebo, until the end of the study.
DR. GIL KAATS: What we did in the beginning was we measured how much fat and how much lean they had using underwater technology -- the displacement method, the most accurate measurement we could get. Then we had them use this supplement over a sixty day period of time and they followed whatever program they wanted. Then we measured them again. And when we measured them again, then we compared how much change occurred in the body fat they had, and how much change occurred in the lean that they had. And then we sent the statistics over to the medical school and said now, here's the statistics of what happened. Call this third party and break the code and so forth. And we'll find out whether or not this stuff really works. And what we found was when we compared the two groups, those who didn't get any chromium at all, what happened was that they stayed pretty much the same. But the people who took the chromium had some dramatic losses over a two month period -- we see them as dramatic in body fat they lost. They lost over four pounds of body fat and gained over a pound of lean. Even more importantly to us, is we went out then and measured a variety of different products over the past four years containing chromium picolinate and again and again we find out those products containing the chromium typically produce results very similar to what we found here.
SUSAN RUTTAN: ChromaTrim isn't a magic pill or gum. but it can become your secret weapon to finally help you lose fat and get fit. Remember, diets starve your body and can end of [sic] doing more harm than good. ChromaTrim helps your body by helping it work better to burn fat, preserve and build muscle and to help control hunger and cravings. And it's so easy.
["Individual results vary," appears at bottom of screen for approximately 2 seconds while Susan Ruttan is speaking.]

RICK GORDON: In the afternoon when I get this craving for a candy bar or sweets, I just grab the gum, throw it in my mouth. Cuts the craving just like that.
WENDY WILBURN: I did notice that my cravings for chocolate and things like that changed. But I didn't go out of my way to make this a diet plan whatsoever.
DONNA ALISON: I just realized one day after I had been on the gum for about three weeks that I wasn't having that bowl of ice cream at 10:00 at night any more.
BELINDA WOODRUFF: You don't notice you have lost those cravings until you're sitting down and you're eating a piece of pie, not the whole pie.
RUSS MANNEX: The gum was a great idea because I tend to be very hand to mouth. When I'm just sitting there in my office I've got a bag of chips or something. It's a easy thing to do. And grabbing for the gum was a lot easier and it did the trick.
ADRIENNE ANTOINE: Well, I would just pop in a piece of gum whenever I felt this urge to have a piece of chocolate. Instead of the chocolate I substituted the gum.
SUSAN RUTTAN: Look, your body needs chromium to work properly. And nine out of ten people don't get enough from their daily diet. In fact, in order to get enough chromium it's been estimated that the average person if they didn't change their diet would have to consume as much as 13,000 calories a day. It would kind of defeat the purpose. And by the way, doctors agree that taking chromium to supplement your diet is extremely safe. So here's how the system works. You chew a few pieces of ChromaTrim a day. Many people chew before or after meals, or when they get cravings for sweets or just when they want fresh breath. It's mint falvored and tastes great. By chewing ChromaTrim you know your body can get the chromium it needs. You'll also get the ChromaTrim no diet nutritional program that tells you how to figure out your optimum calorie intake for maximum fat loss. And the smart exercise program that shows you how to tone those areas of your body, your hips, thighs, stomach, where fat loss is key. Now you can help your body do what it's supposed to do. Take control. Win the battle of the bulge. And loss the fat the smart way. With ChromaTrim.
FEMALE ANNOUNCER WEARING LAB COAT: Hi. You've heard the facts. Nine out of ten of us don't get enough chromium from our daily diet. And chromium, like iron or zinc, is an essential mineral. You need it to survive. So, what does chromium do? Scientists have shown that chromium plays a key role in helping your body's insulin work better. And insulin is your body's key to burning fat and preserving and building muscle. Insulin is also known as the hunger hormone. It helps control cravings and hunger. So you need to get enough chromium in your diet every day to help your insulin work the way it should. And remember, chances are nine out of ten you're not getting enough chromium right now. That's where ChromaTrim comes in. It seems almost too simple. You chew a few pieces of ChromaTrim every day. The gum contains a very special type of chromium, called chromium picolinate that gets released when you chew. You follow a simple diet and exercise program you create. And you're done. No starvation, no sweat. It seems almost too good to be true, but it works.
RICK GORDON: I'm probably in better shape now than I was in high school or college.
["Lost 25 pounds with ChromaTrim," displayed on screen during Gordon testimonial.]
KATHLEEN DEEMS: The last time I looked this trim and fit I was in my 20's.

ROSEANNE WALKEY: Having the weight off I feel younger.
["Weight Loss varies with individuals. Adherence to the complete ChromaTrim system including exercise and a sensible diet is necessary for success," displayed on screen for approximately five seconds during testimonials of Kathleen Deems and Roseanne Walkey.]
VERONICAL HALL: You don't have to mix any powders or you know anythng like that. And that's what makes it so good. Just pop some gum and go.
["Lost 81 pounds with ChromaTrim," displayed on screen during Hall testimonial.]
DONNA ALISON: Every time I get on the scale I can put down another pound or two.
["Lost 36 pounds with ChromaTrim," displayed on screen during Alison testimonial.]
WENDY WILBURN: From a size nine to a size three in three to four months is pretty drastic.
["Lost 15 pound with ChromaTrim," displayed on screen during Wilburn testimonial.]
ADRIENNE ANTOINE: And this skirt is a size -- ye gads -- it's 26, 28. And now I'm a size 8.
LAB COAT ANNOUNCER: Listen to this. In a double blind study of 150 people conducted in conjunction with the University of Texas, people who were not given a chromium picolinate supplement -- the placebo group -- saw little fat loss or muscle gain over two months. But people who were given a chromium picolinate supplement lost an average of 4.2 pounds of body fat. The bad stuff. And gained 1.2 pounds of muscle mass. The good stuff. Again in just two months. Now you can get the chromium advantage with ChromaTrim. When you call right now we'll rush you a sixty day supply of ChromaTrim. You simply chew two to three pieces of the mint flavored gum every day. That way your body gets the chromium it needs to help your insulin work better, to burn fat, preserve muscle and control cravings. You'll also get ChromaTrim's no diet nutritional program that allows you to maximize fat loss without starving yourself. And the ChromaTrim smart exercise program to target and tone as you lose the fat. You'll get it all. The complete ChromaTrim system for just $39.95. And when you call right now you'll also get this ChromaTrim travel case so you'll never be without ChromaTrim when you are on the go. And it all comes with ChromaTrim's choose to lose money back guaranty. Try ChromaTrim in your own home for a full 30 days. See the results for yourself. And if for any reason you're not satisfied just return the system for a full refund. The only thing you have to lose is fat. Here's how to get your own ChromaTrim right now.

[SILENT STILL SHOT OF HOW TO ORDER INFORMATION]

SUSAN RUTTAN: Welcome back. I'm Susan Ruttan. You know we've all struggled with our weight at some time. And for many it's a constant battle. For me, the weight always came back when I went off a diet or got busy with work or taking care of my son. The problem with diets is that you often feel hungry and deprived. ChromaTrim takes a different approach. And that's what is so exciting. It explains why it's been so hard for so many people to get rid of excess weight. And it offers a solution too. When you get enough chromium in your diet, your body's natural mechanism to burn fat and preserve muscle works better. The way it's supposed to. And when it works better, you can win the battle and see a real change.

ChromaTrim was recently given to a group of people who were tired of struggling with their weight. Listen to some of the outstanding stories -- results they got in just 30 days.

["Weight loss varies with individuals. Adherence to the complete ChromaTrim system including exercise and a sensible diet is necessary for success," displayed on screen for approximately five seconds while Susan Ruttan is speaking.]

TESTIMONIALIST #1: In little over four weeks I'd lost eight and a half pounds.

TESTIMONIALIST #2: I've lost about five pounds.

TESTIMONIALIST #3: It was about nine and a half, ten pound difference.

TESTIMONIALIST #4: In one month I lost six pounds, which was amazing.

TESTIMONIALIST #5: Because I've lost so much weight, and I'm feeling so much better I have a special energy in me.

TESTIMONIALIST #2: I just felt like I had more energy. That I wanted to go on my morning walks.

TESTIMONIALIST #5: I'm really toning down. And that's better.

TESTIMONIALIST #4: It's really smoothed out my legs too.

TESTIMONIALIST #3: You know the turkey waddle in your arm? When you can slap people when they walk by? I don't have it any more. It's starting to go away.

TESTIMONIALIST #1: It just seems like the weight melts off.

TESTIMONIALIST #2: I didn't feel I was on a diet.

TESTIMONIALIST #1: That craving or that sensation of you know, I want my food, I'm starving. It just isn't there.

TESTIMONIALIST #4: My doctor had recommended many months ago that take some chromium because I'm a chocoholic.

TESTIMONIALIST #3: I have a chocolate craving so bad. I love chocolate. That's my weakness.

TESTIMONIALIST #4: And he gave me these pills that were this big, and said here, take these. I said no, I'd rather have a Hershey Bar.

TESTIMONIALIST #3: I don't crave it. I don't crave it at all.

TESTIMONIALIST #4: I just don't have the craving for sweets any more.

TESTIMONIALIST #2: Instead of grabbing something at a fast food restaurant, the drive-in, I would have my gum. I keep some in my purse.

TESTIMONIALIST #4: My pants are all baggy. I going to have to go to the store.

TESTIMONIALIST #3: I am so tired of shopping in the big women's shop.

TESTIMONIALIST #4: I'm probably going to have to go to a smaller size now.

TESTIMONIALIST #3: I could really look fashionable. And to a young person like me that's important.

TESTIMONIALIST #2: People kept saying where can I get some? Where can I get some?

TESTIMONIALIST #5: I'm getting compliments all the time now.

TESTIMONIALIST #2: Of everything I've done, it really worked. And it was the easiest.

TESTIMONIALIST #4: I don't believe in easy answers. And this has been remarkably easy.

SUSAN RUTTAN: Scientists have been studying the link between chromium and insulin for some time. But in the last five years scientists have discovered that different forms of chromium are absorbed differently in your body. The U.S. Department of Agriculture was at the forefront of this research, when a biochemist

-- Dr. Gary Evans -- discovered chromium picolinate. A highly bioavailable form of chromium. Now bioavailable means that your body absorbs it well. And it's the type of chromium that's found in ChromaTrim. Dr. Evans has continued his research at the university level. He's a professor whose discovery and research has given new hope to millions of us.

DR. GARY EVANS: When insulin is not working right two bad things happen. One, more fat goes into the fat cells and far less comes out. Insulin does not work 100 percent efficiently without chromium. And I think that that's why people often times think that this is too good to be true because they don't realize that all of a sudden insulin is working right and the body metabolism is now doing what it's supposed to, so the body is working the way Mother Nature intended. Americans have reduced their fat intake. And what's happened? We continue to find that more and more are overweight. So something else is wrong. The something else is probably the lack of chromium in the diet.

SUSAN RUTTAN: What I love most about ChromaTrim is that it takes something that has been so hard and so negative for so many people, losing fat, and makes it much easier. And when you finally start seeing results and start feeling good about your body, you want to eat right. And you want to exercise and you start feeling better. Your clothes fit. It's really exciting.

["Individual results vary," displayed on screen for approximately two seconds while Susan Ruttan is speaking.]

ROSEANNE WALKEY: I got rid of things that had elastic waste lines. Now I have pants that you can fasten.

["Lost 25 pounds with ChromaTrim," displayed on screen during Walkey testimonial.]

VERONICA HALL: I'm trying on clothes. I like looking at myself now. I used to just walk by a mirror and not even look.

["Lost 81 pounds with ChromaTrim," displayed on screen during Hall testimonial."]

DONNA ALISON: I don't even look at the tent dresses any more. I just walk right by them. Over to the skirts and blouses and slacks and things.

["Lost 36 pounds with ChromaTrim," displayed on screen displayed on screen during Alison testimonial."]

MELISSA LINDSAY: While we say outfits are cute, but you can never get back in to them usually. And I am able to get back in to them.

["Lost 40 pounds with ChromaTrim," displayed on screen during Lindsay testimonial."]

ADRIENNE ANTOINE: Now it's a breeze, it's a joy to get dressed and look in the mirror and say, wow, I look really great.

["Lost 65 pounds with ChromaTrim," displayed on screen during Antoine testimonial."]

DONA HEIDER: I remember putting on a leotard and going wow. This is great. I can wear one of those thong things. And taking it off immediately. Because I didn't want to go out in public with it.

["Lost 18 pounds with ChromaTrim," displayed on screen displayed on screen during Heider testimonial.]

RUSS MANNEX: The jeans had about an extra two inches in the waist. And I knew that jeans don't normally gain size. You can't add to the size of jeans. You can only shrink them by washing them. So I thought well, it's got to be the ChromaTrim.

LAB COAT ANNOUNCER: Now you can make the decision to lose fat the smart way. Once and for all with ChromaTrim. The chewing gum with chromium picolinate. Discovered and patented by the U.S. Department of Agriculture, chromium picolinate is a highly bioavailable source of chromium. In simple terms, that means your body absorbs and uses it better than ordinary chromium found in foods and other supplements. Chromium is an essential mineral that makes your body's insulin work better. And when your insulin works better, you lose fat and preserve muscle. Insulin is also know as the hunger hormons. And when it works better people report that those cravings for sweets disappear. So all you have to do is chew a few pieces of chromatrim everyday. It's so easy and so safe. And when you see what the entire system can do for you, you'll say good-bye to yo-yo dieting once and for all.

["Adherence to the complete ChromaTrim system including exercise and a sensible diet is necessary for success," displayed on screen for approximately five seconds while spokesperson is speaking.]

KATHLEEN DEEMS: ChromaTrim definitely helped me take off the weight and take off the fat.

TESTIMONIALIST #A: I was completely impressed with the fact that it worked, and it worked so quickly.

MELISSA LINDSAY: Dave asks me all the time, what do you use? How did you do it? God you know, you're a new person.

VERONICA HALL: It's a new me now. It's a different me. It's a happier me. It's the same me I could have had years ago.

TESTIMONIALIST #B: You kind of get into a mind set where you don't think anything is going to happen. And then suddenly you take something that works and it's wonderful.

ADRIENNE ANTOINE: You just chew the gum and that's it. It's that simple.

LAB COAT ANNOUNCER: Listen to this. In a double blind study of 150 people conducted in conjunction with the University of Texas people who were not given a chromium picolinate supplement -- the placebo group -- saw little fat loss or muscle gain over two months. But, people who were given a chromium picolinate supplement, lost an average of 4.2 pounds of body fat. The bad stuff. And gained 1.2 pounds of muscle mass. The good stuff. Again, in just two months. Now you can get the chromium advantage with ChromaTrim. When you call right now we'll rush you a 60 day supply of ChromaTrim. You simply chew two to three pieces of the mint flavored gum every day. That way your body gets the chromium it needs to help your insulin work better, to burn fat, preserve muscle and control cravings. You'll also get ChromaTrim's no diet nutritional program that allows you to maximize fat loss without starving yourself. And the ChromaTrim smart exercise program to target and tone as you lose the fat. You'll get it all. The complete ChromaTrim system for just $39.95. And when you call right now you'll also get this ChromaTrim travel case, so you'll never be without ChromaTrim when you're on the go. And it all comes with ChromaTrim's choose-to-lose money back guaranty. Try ChromaTrim in your own home for a full 30 days. See the results for yourself. And if for any reason you're not satisfied just return the system for a full refund. The only thing you have to lose is fat. Here's how to get your own ChromaTrim right now.

[SILENT STILL SHOT OF HOW TO ORDER INFORMATION]

SUSAN RUTTAN: Hi. Welcome back. I'm Susan Ruttan. It seems too easy doesn't it? After years of struggling with your weight, here we are telling you that chewing some gum can help you get control? Yeah, I had the same reaction when I heard about ChromaTrim. It's so simple. But, by understanding how our bodies work, it offers a whole new way to approach losing fat. No, you can't go out and eat a whole box of cookies. You can't be a couch potato and expect to see dramatic results. But once you start seeing results with ChromaTrim, you realize that you've been trying to force your body to lose weight. Rather than working with it. And wait until you see what happens when the people in your life start noticing the new you.

MELISSA LINDSAY: Everybody likes to have someone tell them they look good. But when you actually hear it from people who have seen you big and reduced to little, and they've actually seen your progress on a day-to-day basis, it feels really good.

WENDY WILBURN: A girlfriend was looking at my pictures and she didn't know it was me. She was like who is this? That was me. I was that big.

BELINDA WOODRUFF: Not to have to want to get dressed in another room, you know, to be able to have him appreciate how I look. Those are wonderful experiences. And those are things you don't ever, ever, ever forget.

VERONICA HALL: And there are days sometimes when for people -- man, you look so great. What are you doing? How do you feel? You know? And everybody wants to know how much weight I lost. I don't really mind telling them because it's an encouragement for other people.

TESTIMONIALIST #A: I think they think that I spend a lot more time than I really do. And that's the best part. Because it's kind of like my secret.

SUSAN RUTTAN: You've heard the stories over and over on this program. When you follow the ChromaTrim system and your body gets what it needs, the chromium, you start seeing results. And you'll want to eat healthy. You'll start getting those cravings under control. And you'll look forward to exercise, and with that you'll see that you can feel young again.

RICK GORDON: I feel great. I mean every day when I watch myself on the rebroadcast of the newscast and stuff, I personally can see the results.

ROSEANNE WALKEY: Yeah, I used to be very active. And then there was a period of just kind of giving up. And now it's like I'm getting going.

VERONICA HALL: Sometimes when you have these people act like you're not even in the room, you know. But now, not only am I in the room, they are looking at me and wanting to know what's her secret.

KATHLEEN DEEMS: I have a new boy friend. And I attribute it to the weight loss. I like how I look.

DONNA ALISON: I'm back in the mainstream. I'm doing things that I hadn't done for years. I go dancing. I go out. I go to the movies. I go to plays. I literally stayed in my house when I was carrying all that weight.

WENDY WILBURN: Back when I was a little heavy it was harder for me. It was harder for me to look in the mirror and like myself. To the point where I wanted to get out of bed and motivate myself. Now it's easier. I can motivate myself and get my job done and motivate others.

ADRIENNE ANTONIE: It's really just made me come out of this shell. I was hiding inside this big person.

SUSAN RUTTAN: I want you to know how proud I am to have the opportunity to bring ChromaTrim to you. I know you're sitting out there wondering if it can really work for you. I had the same feeling. But all the people you've seen on the show today are real. The ChromaTrim system worked, really worked for them. And with ChromaTrim's money back gurantee you've got nothing to lose. Remember, order ChromaTrim right now. Try it out for a full 30 days. And if you don't start feeling better and start losing the fat and keeping and even building muscle, you'll get your money back. No questions asked. And please take before pictures of yourself so you can show the world your results too. Here's to losing fat the smart way with ChromaTrim.

BELINDA WOODRUFF: I see again the person full of hope that I was when I was in my 20's. I see that same person. I don't see a person now who is 40 some years old. I mean I just don't see that. And losing the weight has done that for me. The ChromaTrim has helped me get that back.

RUSS MANNEX: Now when I come in in the morning and take a shower, I look in the mirror. Whereas before it might have been a little scary. Now I can look in the mirror and see how I'm doing and say hey, this is working. We're on our way down now.

LAB COAT ANNOUNCER: ChromaTrim. It really is exciting isn't it? You've heard all of the stories and heard what the scientists have discovered too. And now finally you can get control of your body and lose fat the smart way. Doctors agree that taking a chromium picolinate supplement is extremely safe. And with our money back guarantee all you have to lose is unwanted and unhealthy fat. Our ChromaTrim operators are standing by right now to take your order. Just have your credit card ready, and call the toll free number that appears on your screen. If the lines are busy, please try back in a few minutes. Here's to looking and feeling great with ChromaTrim. Bye-bye.

VOICE OVER: This has been a paid advertisement for ChromaTrim. Presented by Universal Merchants.

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DISCLOSURES:

1) Testimonial participants have been renumerated for their appearances.

2) David Alvarado and Belinda Woodruff are employees of a company affiliated with the producer of this advertisement.

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having hereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules, and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Universal Merchants, Inc. is a corporation organized, existing and doing business under by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4727 Wilshire Blvd., Suite 510, in the City of Los Angeles, State of California.

Respondent Steven Oscherowitz is an officer of said corporation. He formulates, directs, and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

ORDER

DEFINITIONS

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

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondents"* shall mean Universal Merchants, Inc., a corporation, its successors and assigns and its officers; Steven Oscherowitz, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

3. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of ChromaTrim or ChromaTrim-100 ("ChromaTrim") or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

A. ChromaTrim significantly reduces body fat;
B. ChromaTrim causes significant weight loss;
C. ChromaTrim significantly reduces body fat or causes weight loss without dieting or exercise;
D. ChromaTrim increases lean body mass or builds muscle;
E. ChromaTrim controls appetite or craving for sugar; or
F. Nine out of ten people do not consume enough chromium to support normal insulin function, resulting in decreased ability to burn fat, preserve muscle, and control hunger and cravings,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of ChromaTrim or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the health benefits, performance, efficacy, or safety of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not represent, in any manner, expressly or by implication, that any endorsement of the product represents the typical or ordinary experience of members of the public who use the product or program, unless:

A. At the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation, or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

V.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VI.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VII.

It is further ordered, That respondent Universal Merchants, Inc., and its successors and assigns, and respondent Steven Oscherowitz shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

It is further ordered, That respondent Universal Merchants, Inc., and its successors and assigns, and respondent Steven Oscherowitz shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IX.

It is further ordered, That respondent Universal Merchants, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such

knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

It is further ordered, That respondent Steven Oscherowitz, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

It is further ordered, That respondent Universal Merchants, Inc., and its successors and assigns, and respondent Steven Oscherowitz shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XII.

This order will terminate on January 23, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

TIME WARNER INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3709. Complaint, Feb. 3, 1997--Decision, Feb. 3, 1997

This consent order requires the restructuring of the acquisition by Time Warner of Turner Broadcasting Systems, Inc. by, among other things, requiring Tele-Communications, Inc. ("TCI") to divest its interest in Time Warner to a separate company, requiring TCI, Turner and Time Warner to cancel long-term carriage agreements, barring Time Warner's programming interests from discriminating in carriage decisions against rival programmers, and requiring Time Warner's cable interests to carry a rival to CNN.

Appearances

For the Commission: *William Baer, George Cary, James Fishkin, Thomas Dahdouh* and *Phillip Broyles.*

For the respondents: *Christopher Bogart, Cravath, Swaine & Moore,* New York, N.Y. *Kathryn Fenton, Jones, Day, Reavis & Pogue,* New York, N.Y. and *Neal Stoll, Skaddens, Arps, Slate, Meagher & Flom,* New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondents Time Warner Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corporation, all subject to the jurisdiction of the Commission, have entered into various agreements in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that if the terms of such agreements were to be consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a

proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

a. *"Cable Television Programming Service"* means satellite-delivered video programming that is offered, alone or with other services, to Multichannel Video Programming Distributors ("MVPDs") in the United States.

b. *"Fully Diluted Equity of Time Warner"* means all Time Warner common stock actually issued and outstanding plus the aggregate number of shares of Time Warner common stock that would be issued and outstanding assuming the exercise of all outstanding options, warrants and rights (excluding shares that would be issued in the event a poison pill is triggered) and the conversion of all outstanding securities that are convertible into Time Warner common stock.

c. *"Multichannel Video Programming Distributor"* or *"MVPD"* means a person providing multiple channels of video programming to subscribers in the United States for which a fee is charged, by any of various methods including, but not limited to, cable, satellite master antenna television, multichannel multipoint distribution, direct-to-home satellite (C-band, Ku-band, direct broadcast satellite), ultra high-frequency microwave systems (sometimes called LMDS), open video systems, or the facilities of common carrier telephone companies or their affiliates, as well as buying groups or purchasing agents of all such persons.

d. *"Turner Cable Television Programming Service*" means each Cable Television Programming Service, whether or not satellite-delivered, that is currently owned, controlled by, or affiliated with Turner.

II. RESPONDENT TIME WARNER INC.

2. Respondent Time Warner Inc. ("Time Warner") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters

office and principal place of business located at 75 Rockefeller Plaza, New York, New York. Time Warner had sales of approximately $8 billion in 1995.

3. Respondent Time Warner is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Time Warner's primary Cable Television Programming Services include Home Box Office ("HBO") and Cinemax, and their multiplexed versions. Other Cable Television Programming Services that are controlled by or affiliated with Time Warner include E! Entertainment Television, Comedy Central, and Court TV. Time Warner also owns approximately 20 percent of the outstanding stock of Turner. Time Warner is the nation's largest producer of Cable Television Programming Services sold to MVPDs, measured on the basis of subscription revenues. Time Warner's subscription revenues from the sale of Cable Television Programming Services to MVPDs in 1995 were approximately $1.5 billion, and its total revenues from Cable Television Programming Services in 1995 were approximately $1.6 billion.

4. Respondent Time Warner's HBO, the largest Cable Television Programming Service measured on the basis of subscription revenues, is viewed by MVPDs as a "marquee" or "crown jewel" service, *i.e.*, those services necessary to attract and retain a significant percentage of their subscribers.

5. Respondent Time Warner is, and at all times relevant herein has been, an MVPD. Time Warner currently serves, either directly or indirectly, approximately 11.5 million households in selected areas in the United States. These 11.5 million households are approximately 17 percent of all of the households in the United States that purchase Cable Television Programming Services from MVPDs. Time Warner is the nation's second largest MVPD. Time Warner's total revenues in 1995 from serving as an MVPD were approximately $3.25 billion.

6. Respondent Time Warner is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C.4.

III. RESPONDENT TURNER BROADCASTING SYSTEM, INC.

7. Respondent Turner Broadcasting System, Inc. ("Turner") is a corporation existing and doing business under and by virtue of the laws of the State of Georgia with its headquarters and principal place of business located at One CNN Center, Atlanta, Georgia. Turner had sales of approximately $3.4 billion in 1995.

8. Respondent Turner is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Turner's Cable Television Programming Services include Cable News Network ("CNN"), Headline News ("HLN"), Turner Network Television ("TNT"), TBS Superstation ("WTBS"), Cartoon Network, Turner Classic Movies ("TCM"), CNN International USA ("CNNI USA"), CNN Financial Network ("CNNfn"), and services emphasizing regional sports programming. Turner is one of the nation's largest producers of Cable Television Programming Services sold to MVPDs as measured by subscription revenue. Turner's subscription revenues from the sale of Cable Television Programming Services to MVPDs in 1995 were approximately $700 million, and its total revenues from Cable Television Programming Services in 1995 were approximately $2 billion. As a programmer that does not own its own distribution systems, Turner had no incentive to, and generally did not, charge significantly higher prices for the same Cable Television Programming Services to new MVPD entrants compared to the prices offered to established MVPDs.

9. Respondent Turner's CNN, TNT, and WTBS are viewed by MVPDs as "marquee" or "crown jewel" services, *i.e.*, those services necessary to attract and retain a significant percentage of their subscribers.

10. Respondent Turner is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. RESPONDENT TELE-COMMUNICATIONS, INC.

11. Respondent Tele-Communications, Inc. ("TCI") is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 5619 DTC Parkway, Englewood, Colorado. TCI had sales of approximately $6.85 billion in 1995.

12. Respondent TCI is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Some of the larger Cable Television Programming Services that are controlled by or affiliated with TCI include Starz!, Encore, Discovery Channel, The Learning Channel, Court TV, E! Entertainment Television, BET, The Family Channel, Home Shopping Network, and services emphasizing regional sports programming. TCI also owns, directly or indirectly, approximately 24 percent of the outstanding stock of Turner. TCI's subscription revenues from the sale of Cable Television Programming Services controlled by TCI to MVPDs in 1995 were approximately $300 million. TCI's total revenues, excluding home shopping retail sales, from Cable Television Programming Services that are controlled by or affiliated with TCI in 1995 were approximately $520 million.

13. Respondent TCI is, and at all times relevant herein has been, an MVPD. TCI currently serves approximately 14 million households in selected areas in the United States. TCI also has either direct or indirect interests in cable television systems that distribute Cable Television Programming Services to an additional approximately 4 million households in the United States. These 18 million households are approximately 27 percent of all of the households in the United States that subscribe to Cable Television Programming Services from MVPDs. TCI is the nation's largest MVPD. TCI's total revenues in 1995 from serving as an MVPD were approximately $5 billion.

14. Respondent TCI is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. RESPONDENT LIBERTY MEDIA CORPORATION

15. Respondent Liberty Media Corporation ("LMC") is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 8101 East Prentice Avenue, Englewood, Colorado. LMC is a wholly-owned subsidiary of respondent TCI.

16. Respondent LMC is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States.

17. Respondent LMC is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

VI. THE AGREEMENTS

18. This matter comprises three related principal agreements: (a) the acquisition by Time Warner of Turner; (b) the acquisition by TCI and LMC of an interest in Time Warner; and (c) the long-term mandatory carriage agreements between TCI, Turner, and Time Warner requiring TCI to carry Turner's CNN, Headline News, TNT, and WTBS at a discounted price based on the industry average price.

A. The Time Warner-Turner Acquisition

19. On or about September 22, 1995, respondent Time Warner and respondent Turner entered into an agreement for Time Warner to acquire the approximately 80 percent of the outstanding shares in Turner that it does not already own.

20. The value of the Time Warner-Turner acquisition as of the date the Time Warner-Turner agreement was entered into was approximately $7.5 billion. As initially structured, the transaction called for each share of Turner Class A Common Stock and Turner Class B Common Stock to be converted into the right to receive .75 of a share of New Time Warner Common Stock. In addition, each share of Turner Class C Convertible Preferred Stock was to be converted into the right to receive 4.8 shares of New Time Warner Common Stock.

B. The TCI-Time Warner Acquisition

21. Respondents TCI and LMC have, directly or indirectly, an approximately 24 percent existing interest in respondent Turner. By trading their interest in Turner for an interest in Time Warner, TCI and LMC would have acquired approximately a 7.5 percent interest in the Fully Diluted Equity of Time Warner, or approximately 10 percent of the outstanding shares of Time Warner, valued at approximately $2 billion as of the date the respondents signed the proposed consent agreement.

22. Respondent TCI also would acquire a right of first refusal on the approximately 7.4 percent interest in the Fully Diluted Equity of Time Warner that R. E. Turner, III, chairman of Turner, would receive as result of trading his interest in Turner for an interest in respondent Time Warner. Although Time Warner has a "poison pill" that would prevent TCI from acquiring more than a certain amount of stock without triggering adverse consequences, that poison pill would still allow TCI to acquire approximately 15 percent of the Fully Diluted Equity of Time Warner, and if the poison pill were to be altered or waived, TCI could acquire more than 15 percent of the Fully Diluted Equity of Time Warner.

C. The Long-Term Mandatory Carriage Agreements

23. On or about September 14, 1995, and September 15, 1995, in anticipation of and contingent upon the Time Warner-Turner and TCI-Time Warner acquisitions, TCI, Turner, and Time Warner entered into two long-term mandatory carriage agreements formally referred to as the Programming Services Agreements ("PSAs"). Under the terms of these PSAs, TCI would be required, on virtually all of its cable television systems, to carry CNN, Headline News, TNT, and WTBS for a 20-year period. The price to TCI would be 85 percent of the average price paid by the rest of the industry for these services.

VII. TRADE AND COMMERCE

24. One relevant line of commerce (*i.e.*, the product market) in which to analyze the effects of the proposed transaction is the sale of Cable Television Programming Services to MVPDs.

25. Another relevant line of commerce in which to analyze the effects of the proposed transaction is the sale of Cable Television Programming Services to households.

26. Cable Television Programming Services are a relevant line of commerce because over-the-air broadcast television, video cassette rentals, and other forms of news and entertainment do not have a sufficient price-constraining effect on the sales of Cable Television Programming Services to MVPDs, or the resale of Cable Television Programming Services by MVPDs to households so as to prevent the exercise of market power.

27. The relevant section of the country (*i.e.*, the geographic market) in which to analyze the effects of the sale of Cable Television Programming Services to MVPDs is the entire United States.

28. The entire United States is the relevant section of the country in which to analyze the effects of the proposed transactions in the sale of Cable Television Programming Services to MVPDs because most Cable Television Programming Services are distributed throughout the United States.

29. The relevant sections of the country in which to analyze the effects of the sale of Cable Television Programming Services by MVPDs to households are each of the local areas in which either respondent Time Warner or Respondent TCI operate as MVPDs.

VIII. MARKET STRUCTURE

30. The sale of Cable Television Programming Services to MVPDs in the United States is highly concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.

31. The post-acquisition HHI for the sale of Cable Television Programming Services to MVPDs in the United States measured on the basis of subscription revenues would increase by approximately 663 points, from 1,549 to 2,212, and will increase further if Time Warner converts WTBS from a "superstation" to a cable network charging subscriber fees. Post-acquisition Time Warner will be the largest provider of Cable Television Programming Services to MVPDs in the United States and its market share will be in excess of 40 percent.

32. The post-acquisition HHI in the sale of Cable Television Programming Services by MVPDs to households in each of the local

areas in which respondent Time Warner and respondent TCI sell Cable Television Programming Services is unchanged from the proposed acquisitions and remains highly-concentrated. Time Warner, as an MVPD, serves, either directly or indirectly, approximately 11.5 million households in selected areas in the United States that represent approximately 17 percent of all of the households in the United States that purchase Cable Television Programming Services. TCI, as an MVPD, serves, either directly or indirectly, approximately 18 million households that represent 27 percent of all of the households in the United States that subscribe to Cable Television Programming Services.

IX. ENTRY CONDITIONS

33. Entry into the relevant markets is difficult, and would not be timely, likely or sufficient to prevent anticompetitive effects.

34. Entry into the production of Cable Television Programming Services for sale to MVPDs that would have a significant market impact and prevent the anticompetitive effects is difficult. It generally takes more than two years to develop a Cable Television Programming Service to a point where it has a substantial subscriber base and competes directly with the Time Warner and Turner "marquee" or "crown jewel" services throughout the United States. Timely entry is made even more difficult and time consuming due to a shortage of available channel capacity.

35. Entry into the sale of Cable Television Programming Services to households in each of the local areas in which respondent Time Warner and respondent TCI operate as MVPDs is dependent upon access to a substantial majority of the high quality, "marquee" or "crown jewel" programming that MVPD subscribers deem important to their decision to subscribe, and that such access is threatened by increasing concentration at the programming level, combined with vertical integration of such programming into the MVPD level.

X. COMPETITION AFFECTED

36. Respondent Time Warner and respondent Turner are actual competitors with each other and with other sellers in the sale of Cable Television Programming Services to MVPDs, and Time Warner's HBO, and Turner's CNN, TNT, and WTBS, are a large percentage of

the limited number of "marquee" or "crown jewel" Cable Television Programming Services which disproportionately attract subscribers to MVPDs.

37. Respondent Time Warner faces actual and potential competition from other MVPDs and potential MVPD entrants in the sale of Cable Television Programming Services to households in each of the local areas in which it serves as an MVPD.

38. The effects of the agreements, if consummated, may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. Enabling respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs, directly or indirectly (*e.g.*, by requiring the purchase of unwanted programming), through its increased negotiating leverage with MVPDs, including through conditioning purchase of one or more "marquee" or "crown jewel" channels on purchase of other channels;

b. Enabling respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs by raising barriers to entry by new competitors or to repositioning by existing competitors, by preventing such rivals from achieving sufficient distribution to realize economies of scale; these effects are likely, because

(1) Respondent Time Warner has direct financial incentives as the post-acquisition owner of the Turner Cable Television Programming Services not to carry other Cable Television Programming Services that directly compete with the Turner Cable Television Programming Services; and

(2) Respondent TCI has diminished incentives and diminished ability to either carry or invest in Cable Television Programming Services that directly compete with the Turner Cable Television Programming Services because the PSA agreements require TCI to carry Turner's CNN, Headline News, TNT, and WTBS for 20 years, and because TCI, as a significant shareholder of Time Warner, will have significant financial incentives to protect all of Time Warner's Cable Television Programming Services; and

c. Denying rival MVPDs and any potential rival MVPDs of respondent Time Warner competitive prices for Cable Television Programming Services, or charging rivals discriminatorily high prices for Cable Television Programming Services.

XI. VIOLATIONS CHARGED

39. The agreement entered into between Time Warner and Turner for Time Warner to acquire Turner violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate 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.

40. The agreement entered into between TCI, LMC, and Time Warner for TCI and LMC to acquire an equity interest in Time Warner violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate 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.

41. The PSAs entered into between TCI, Turner, and Time Warner violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Azcuenaga and Commissioner Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Turner Broadcasting System, Inc. ("Turner") by Time Warner Inc. ("Time Warner"), and Tele-Communications, Inc.'s ("TCI") and Liberty Media Corporation's ("LMC") proposed acquisitions of interests in Time Warner, and it now appearing that Time Warner, Turner, TCI, and LMC (collectively, "respondents") having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondents that the law has been violated as alleged in such complaint, 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 respondents have 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, 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. Respondent Time Warner is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 75 Rockefeller Plaza, New York, New York.

2. Respondent Turner is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at One CNN Center, Atlanta, Georgia.

3. Respondent TCI is a corporation organized, existing and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at 5619 DTC Parkway, Englewood, Colorado.

4. Respondent LMC is a corporation organized, existing and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at 8101 East Prentice Avenue, Englewood, Colorado.

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

ORDER

I.

As used in this order, the following definitions shall apply:

A) *"Acquisition"* means Time Warner's acquisition of Turner and TCI's and LMC's acquisition of interest in Time Warner**.**

B) *"Affiliated"* means having an Attributable Interest in a person.

C) *"Agent"* or *"representative"* means a person that is acting in a fiduciary capacity on behalf of a principal with respect to the specific conduct or action under review or consideration.

D) *"Attributable Interest"* means an interest as defined in 47 CFR 76.501 (and accompanying notes), as that rule read on July 1, 1996.

E) *"Basic Service Tier"* means the Tier of video programming as defined in 47 CFR 76.901(a), as that rule read on July 1, 1996.

F) *"Buying Group"* or *"Purchasing Agent"* means any person representing the interests of more than one person distributing multichannel video programming that: (1) agrees to be financially liable for any fees due pursuant to a Programming Service Agreement which it signs as a contracting party as a representative of its members, or each of whose members, as contracting parties, agrees to be liable for its portion of the fees due pursuant to the programming service agreement; (2) agrees to uniform billing and standardized contract provisions for individual members; and (3) agrees either collectively or individually on reasonable technical quality standards for the individual members of the group.

G) *"Carriage Terms"* means all terms and conditions for sale, licensing or delivery to an MVPD for a Video Programming Service and includes, but is not limited to, all discounts (such as for volume, channel position and Penetration Rate), local advertising availabilities, marketing, and promotional support, and other terms and conditions.

H) *"CATV"* means a cable system, or multiple cable systems controlled by the same person, located in the United States.

I) *"Closing date"* means the date of the closing of the Acquisition.

J) *"CNN"* means the Video Programming Service Cable News Network.

K) *"Commission"* means the Federal Trade Commission.

L) *"Competing MVPD"* means an Unaffiliated MVPD whose proposed or actual service area overlaps with the actual service area of an Time Warner CATV.

M) *"Control," "controlled"* or *"controlled by"* has the meaning set forth in 16 CFR 801.1 as that regulation read on July 1, 1996, except that Time Warner's 50% interest in Comedy Central (as of the closing date) and TCI's 50% interests in Bresnan Communications,

Intermedia Partnerships and Lenfest Communications (all as of the closing date) shall not be deemed sufficient standing alone to confer control over that person.

N) *"Converted WTBS"* means WTBS once converted to a Video Programming Service.

O) *"Fully Diluted Equity of Time Warner"* means all Time Warner common stock actually issued and outstanding plus the aggregate number of shares of Time Warner common stock that would be issued and outstanding assuming the exercise of all outstanding options, warrants and rights (excluding shares that would be issued in the event a poison pill is triggered) and the conversion of all outstanding securities that are convertible into Time Warner common stock.

P) *"HBO"* means the Video Programming Service Home Box Office, including multiplexed versions.

Q) *"Independent Advertising-Supported News and Information Video Programming Service*" means a National Video Programming Service (1) that is not owned, controlled by, or affiliated with Time Warner; (2) that is a 24-hour per day service consisting of current national, international, sports, financial and weather news and/or information, and other similar programming; and (3) that has national significance so that, as of February 1, 1997, it has contractual commitments to supply its service to 10 million subscribers on Unaffiliated MVPDs, or, together with the contractual commitments it will obtain from Time Warner, it has total contractual commitments to supply its service to 15 million subscribers. If no such service has such contractual commitments, then Time Warner may choose from among the two services with contractual commitments with Unaffiliated MVPDs for the largest number of subscribers.

R) *"Independent Third Party"* means (1) a person that does not own, control, and is not affiliated with or has a share of voting power, or an ownership interest in, greater than 1% of any of the following: TCI, LMC, or the Kearns-Tribune Corporation; or (2) a person which none of TCI, LMC, or the TCI control shareholders owns, controls, is affiliated with, or in which any of them has a share of voting power, or an Ownership Interest in, greater than 1%. Provided, however, that an Independent Third Party shall not lose such status if, as a result of a transaction between an Independent Third Party and The Separate Company, such Independent Third Party becomes a successor to The Separate Company and the TCI control shareholders

collectively hold an Ownership Interest of 5% or less and collectively hold a share of voting power of 1% or less in that successor company.

S) *"LMC"* means Liberty Media Corporation, all of its directors, officers, employees, agents, and representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, and divisions, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing; and (2) partnerships, joint ventures, and affiliates that Liberty Media Corporation controls, directly or indirectly.

T) *"The Liberty Tracking Stock"* means Tele-Communications, Inc. Series A Liberty Media Group Common Stock and Tele-Communications, Inc. Series B Liberty Media Group Common Stock.

U) *"Multichannel Video Programming Distributor"* or *"MVPD"* means a person providing multiple channels of video programming to subscribers in the United States for which a fee is charged, by any of various methods including, but not limited to, cable, satellite master antenna television, multichannel multipoint distribution, direct-to-home satellite (C-band, Ku-band, direct broadcast satellite), ultra high-frequency microwave systems (sometimes called LMDS), open video systems, or the facilities of common carrier telephone companies or their affiliates, as well as Buying Groups or Purchasing Agents of all such persons.

V) *"National Video Programming Service"* means a Video Programming Service that is intended for distribution in all or substantially all of the United States.

W) *"Ownership Interest"* means any right(s), present or contingent, to hold voting or nonvoting interest(s), equity interest(s), and/or beneficial ownership(s) in the capital stock of a person.

X) *"Penetration Rate"* means the percentage of total subscribers on an MVPD who receives a particular Video Programming Service.

Y) *"Person"* includes any natural person, corporate entity, partnership, association, joint venture, government entity or trust.

Z) *"Programming Service Agreement"* means any agreement between a Video Programming Vendor and an MVPD by which a Video Programming Vendor agrees to permit carriage of a Video Programming Service on that MVPD.

AA) *"The Separate Company"* means a separately incorporated person, either existing or to be created, to take the actions provided by paragraph II and includes without limitation all of The Separate Company's subsidiaries, divisions, and affiliates controlled, directly

or indirectly, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing, other than any Independent Third Party.

BB) *"Service Area Overlap"* means the geographic area in which a Competing MVPD's proposed or actual service area overlaps with the actual service area of a Time Warner CATV.

CC) *"Similarly Situated MVPDs"* means MVPDs with the same or similar number of total subscribers as the Competing MVPD has nationally and the same or similar Penetration Rate(s) as the Competing MVPD makes available nationally.

DD) *"TCI"* means Tele-Communications, Inc., all of its directors, officers, employees, agents, and representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, and divisions, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing; and (2) partnerships, joint ventures, and affiliates that Tele-Communications, Inc. controls, directly or indirectly. TCI acknowledges that the obligations of subparagraphs (C)(6), (8)-(9), (D)(1)-(2) of paragraph II and of paragraph III of this order extend to actions by Bob Magness and John C. Malone, taken in an individual capacity as well as in a capacity as an officer or director, and agrees to be liable for such actions.

EE) *"TCI Control Shareholders"* means the following persons, individually as well as collectively: Bob Magness, John C. Malone, and the Kearns-Tribune Corporation, its agents and representatives, and the respective successors and assigns of any of the foregoing.

FF) *"TCI's and LMC's Interest in Time Warner"* means all the Ownership Interest in Time Warner to be acquired by TCI and LMC, including the right of first refusal with respect to Time Warner stock to be held by R. E. Turner, III, pursuant to the Shareholders Agreement dated September 22, 1995 with LMC or any successor agreement.

GG) *"TCI's and LMC's Turner-Related Businesses"* means the businesses conducted by Southern Satellite Systems, Inc., a subsidiary of TCI which is principally in the business of distributing WTBS to MVPDs.

HH) *"Tier"* means a grouping of Video Programming Services offered by an MVPD to subscribers for one package price.

II) *"Time Warner"* means Time Warner Inc., all of its directors, officers, employees, agents, and representatives, and also includes (1)

all of its predecessors, successors, assigns, subsidiaries, and divisions, including, but not limited to, Turner after the closing date, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing; and (2) partnerships, joint ventures, and affiliates that Time Warner Inc. controls, directly or indirectly. Time Warner shall, except for the purposes of definitions OO and PP, include Time Warner Entertainment Company, L.P., so long as it falls within this definition.

JJ) *"Time Warner CATV"* means a CATV which is owned or controlled by Time Warner. *"Non-Time Warner CATV"* means a CATV which is not owned or controlled by Time Warner. Obligations in this order applicable to Time Warner CATVs shall not survive the disposition of Time Warner's control over them.

KK) *"Time Warner National Video Programming Vendor"* means a Video Programming Vendor providing a National Video Programming Service which is owned or controlled by Time Warner. Likewise, *"Non-Time Warner National Video Programming Vendor"* means a Video Programming Vendor providing a National Video Programming Service which is not owned or controlled by Time Warner.

LL) *"TNT"* means the Video Programming Service Turner Network Television.

MM) *"Total subscribers"* means the total number of subscribers to an MVPD other than subscribers only to the Basic Service Tier.

NN) *"Turner"* means Turner Broadcasting System, Inc., all of its directors, officers, employees, agents, and representatives, and also includes (1) all of its predecessors, successors (except Time Warner), assigns (except Time Warner), subsidiaries, and divisions; and (2) partnerships, joint ventures, and affiliates that Turner Broadcasting System, Inc., controls, directly or indirectly.

OO) *"Turner Video Programming Services"* means each Video Programming Service owned or controlled by Turner on the closing date, and includes (1) WTBS, (2) any such Video Programming Service and WTBS that is transferred after the closing date to another part of Time Warner (including TWE), and (3) any Video Programming Service created after the closing date that Time Warner owns or controls that is not owned or controlled by TWE, for so long as the Video Programming Service remains owned or controlled by Time Warner.

PP) *"Turner-Affiliated Video Programming Services"* means each Video Programming Service, whether or not satellite-delivered, that is owned, controlled by, or affiliated with Turner on the closing date, and includes (1) WTBS, (2) any such Video Programming Service and WTBS that is transferred after the closing date to another part of Time Warner (including TWE), and (3) any Video Programming Service created after the closing date that Time Warner owns, controls or is affiliated with that is not owned, controlled by, or affiliated with TWE, for so long as the Video Programming Service remains owned, controlled by, or affiliated with Time Warner.

QQ) *"TWE"* means Time Warner Entertainment Company, L.P., all of its officers, employees, agents, representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, divisions, including, but not limited to, Time Warner Cable, and the respective successors and assigns of any of the foregoing, but excluding Turner; and (2) partnerships, joint ventures, and affiliates that Time Warner Entertainment Company, L.P., controls, directly or indirectly.

RR) *"TWE's Management Committee"* means the Management Committee established in Section 8 of the Admission Agreement dated May 16, 1993, between TWE and U S West, Inc., and any successor thereof, and includes any management committee in any successor agreement that provides for membership on the management committee for non-Time Warner individuals.

SS) *"TWE Video Programming Services"* means each Video Programming Service owned or controlled by TWE on the closing date, and includes (1) any such Video Programming Service transferred after the closing date to another part of Time Warner and (2) any Video Programming Service created after the closing date that TWE owns or controls, for so long as the Video Programming Service remains owned or controlled by TWE.

TT) *"TWE-Affiliated Video Programming Services"* means each Video Programming Service, whether or not satellite-delivered, that is owned, controlled by, or affiliated with TWE, and includes (1) any such Video Programming Service transferred after the closing date to another part of Time Warner and (2) any Video Programming Service created after the closing date that TWE owns or controls, or is affiliated with, for so long as the Video Programming Service remains owned, controlled by, or affiliated with TWE.

[sic]

VV) *"Unaffiliated MVPD"* means an MVPD which is not owned, controlled by, or affiliated with Time Warner.

WW) *"United States"* means the fifty states, the District of Columbia, and all territories, dependencies, or possessions of the United States of America.

XX) *"Video Programming Service"* means a satellite-delivered video programming service that is offered, alone or with other services, to MVPDs in the United States. It does not include pay-per-view programming service(s), interactive programming service(s), over-the-air television broadcasting, or satellite broadcast programming as defined in 47 CFR 76.1000(f) as that rule read on July 1, 1996.

YY) *"Video Programming Vendor"* means a person engaged in the production, creation, or wholesale distribution to MVPDs of Video Programming Services for sale in the United States.

ZZ) *"WTBS"* means the television broadcast station popularly known as TBS Superstation, and includes any Video Programming Service that may be a successor to WTBS, including Converted WTBS.

II.

It is ordered, That:

(A) TCI and LMC shall divest TCI's and LMC's Interest in Time Warner and TCI's and LMC's Turner-Related Businesses to The Separate Company by:

(1) Combining TCI's and LMC's Interest in Time Warner Inc. and TCI's and LMC's Turner-Related Businesses in The Separate Company;

(2) Distributing The Separate Company stock to the holders of Liberty Tracking Stock ("Distribution"); and

(3) Using their best efforts to ensure that The Separate Company's stock is registered or listed for trading on the Nasdaq Stock Market or the New York Stock Exchange or the American Stock Exchange.

(B) TCI and LMC shall make all regulatory filings, including, but not limited to, filings with the Federal Communications Commission

and the Securities and Exchange Commission that are necessary to accomplish the requirements of paragraph II(A).

(C) TCI, LMC, and The Separate Company shall ensure that:

(1) The Separate Company's by-laws obligate The Separate Company to be bound by this order and contain provisions ensuring compliance with this order;

(2) The Separate Company's board of directors at the time of the Distribution are subject to the prior approval of the Commission;

(3) The Separate Company shall, within six (6) months of the Distribution, call a shareholder's meeting for the purpose of electing directors;

(4) No member of the board of directors of The Separate Company, both at the time of the Distribution and pursuant to any election now or at any time in the future, shall, at the time of his or her election or while serving as a director of The Separate Company, be an officer, director, or employee of TCI or LMC or shall hold, or have under his or her direction or control, greater than one-tenth of one percent (0.1%) of the voting power of TCI and one-tenth of one percent (0.1%) of the Ownership Interest in TCI or greater than one-tenth of one percent (0.1%) of the voting power of LMC and one-tenth of one percent (0.1%) of the Ownership Interest in LMC;

(5) No officer, director or employee of TCI or LMC shall concurrently serve as an officer or employee of The Separate Company. Provided further, that TCI or LMC employees who are not TCI Control Shareholders or directors or officers of either Tele-Communications, Inc. or Liberty Media Corporation may provide to The Separate Company services contemplated by the attached Transition Services Agreement;

(6) The TCI Control Shareholders shall promptly exchange the shares of stock received by them in the Distribution for shares of one or more classes or series of convertible preferred stock of The Separate Company that shall be entitled to vote only on the following issues on which a vote of the shareholders of The Separate Company is required: a proposed merger; consolidation or stock exchange involving The Separate Company; the sale, lease, exchange or other disposition of all or substantially all of The Separate Company's assets; the dissolution or winding up of The Separate Company; proposed amendments to the corporate charter or bylaws of The Separate Company; proposed changes in the terms of such classes or

series; or any other matters on which their vote is required as a matter of law (except that, for such other matters, The Separate Company and the TCI Control Shareholders shall ensure that the TCI Control Shareholders' votes are apportioned in the exact ratio as the votes of the rest of the shareholders);

(7) No vote on any of the proposals listed in subparagraph (6) shall be successful unless a majority of shareholders other than the TCI Control Shareholders vote in favor of such proposal;

(8) After the Distribution, the TCI Control Shareholders shall not seek to influence, or attempt to control by proxy or otherwise, any other person's vote of The Separate Company stock;

(9) After the Distribution, no officer, director or employee of TCI or LMC, or any of the TCI Control Shareholders shall communicate, directly or indirectly, with any officer, director, or employee of The Separate Company. Provided, however, that the TCI Control Shareholders may communicate with an officer, director or employee of The Separate Company when the subject is one of the issues listed in subparagraph 6 on which TCI Control Shareholders are permitted to vote, except that, when a TCI Control Shareholder seeks to initiate action on a subject listed in subparagraph six on which the TCI Control Shareholders are permitted to vote, the initial proposal for such action shall be made in writing. Provided further, that this provision does not apply to communications by TCI or LMC employees who are not TCI Control Shareholders or directors or officers of either Tele-Communications, Inc. or Liberty Media Corporation in the context of providing to The Separate Company services contemplated by the attached Transition Services Agreement or to communications relating to the possible purchase of services from TCI's and LMC's Turner-Related Businesses;

(10) The Separate Company shall not acquire or hold greater than 14.99% of the Fully Diluted Equity of Time Warner. Provided, however, that, if the TCI Control Shareholders reduce their collective holdings in The Separate Company to no more than one-tenth of one percent (0.1%) of the voting power of The Separate Company and one-tenth of one percent (0.1%) of the Ownership Interest in The Separate Company or reduce their collective holdings in TCI and LMC to no more than one-tenth of one percent (0.1%) of the voting power of TCI and one-tenth of one percent (0.1%) of the Ownership Interest in TCI and one-tenth of one percent (0.1%) of the voting power of LMC and one-tenth of one percent (0.1%) of the Ownership

Interest in LMC, then The Separate Company shall not be prohibited by this order from increasing its holding of Time Warner stock beyond that figure; and

(11) The Separate Company shall not acquire or hold, directly or indirectly, any Ownership Interest in Time Warner that is entitled to exercise voting power except (a) a vote of one-one hundredth (1/100) of a vote per share owned, voting with the outstanding common stock, with respect to the election of directors and (b) with respect to proposed changes in the charter of Time Warner Inc. or of the instrument creating such securities that would (i) adversely change any of the terms of such securities or (ii) adversely affect the rights, power, or preferences of such securities. Provided, however, that any portion of The Separate Company's stock in Time Warner that is sold to an Independent Third Party may be converted into voting stock of Time Warner. Provided, further, that, if the TCI Control Shareholders reduce their collective holdings in The Separate Company to no more than one-tenth of one percent (0.1%) of the voting power of The Separate Company and one-tenth of one percent (0.1%) of the Ownership Interest in The Separate Company or reduce their collective holdings in both TCI and LMC to no more than one-tenth of one percent (0.1%) of the voting power of TCI and one-tenth of one percent (0.1%) of the Ownership Interest in TCI and one-tenth of one percent (0.1%) of the voting power of LMC and one-tenth of one percent (0.1%) of the Ownership Interest in LMC, The Separate Company's Time Warner stock may be converted into voting stock of Time Warner.

(D) TCI and LMC shall use their best efforts to obtain a private letter ruling from the Internal Revenue Service to the effect that the Distribution will be generally tax-free to both the Liberty Tracking Stock holders and to TCI under Section 355 of the Internal Revenue Code of 1986, as amended ("IRS Ruling"). Upon receipt of the IRS Ruling, TCI and LMC shall have thirty (30) days (excluding time needed to comply with the requirements of any federal securities and communications laws and regulations, provided that TCI and LMC shall use their best efforts to comply with all such laws and regulations) to carry out the requirements of paragraph II(A) and (B). Pending the IRS Ruling, or in the event that TCI and LMC are unable to obtain the IRS Ruling,

(1) TCI, LMC, Bob Magness and John C. Malone, collectively or individually, shall not acquire or hold, directly or indirectly, an Ownership Interest that is more than the lesser of 9.2% of the Fully Diluted Equity of Time Warner or 12.4% of the actual issued and outstanding common stock of Time Warner, as determined by generally accepted accounting principles. Provided, however, that day-to-day market price changes that cause any such holding to exceed the latter threshold shall not be deemed to cause the parties to be in violation of this subparagraph; and

(2) TCI, LMC and the TCI Control Shareholders shall not acquire or hold any Ownership Interest in Time Warner that is entitled to exercise voting power except (a) a vote of one-one hundredth (1/100) of a vote per share owned, voting with the outstanding common stock, with respect to the election of directors and (b) with respect to proposed changes in the charter of Time Warner Inc. or of the instrument creating such securities that would (i) adversely change any of the terms of such securities or (ii) adversely affect the rights, power, or preferences of such securities. Provided, however, that any portion of TCI's and LMC's Interest in Time Warner that is sold to an Independent Third Party may be converted into voting stock of Time Warner.

In the event that TCI and LMC are unable to obtain the IRS Ruling, TCI and LMC shall be relieved of the obligations set forth in subparagraphs (A), (B) and (C).

III.

It is further ordered, That, after the Distribution, TCI, LMC, Bob Magness and John C. Malone, collectively or individually, shall not acquire or hold, directly or indirectly, any voting power of, or other Ownership Interest in, Time Warner that is more than the lesser of 1% of the Fully Diluted Equity of Time Warner or 1.35% of the actual issued and outstanding common stock of Time Warner, as determined by generally accepted accounting principles (provided, however, that such interest shall not vote except as provided in paragraph II(D)(2)), without the prior approval of the Commission. Provided, further, that day-to-day market price changes that cause any such holding to exceed the latter threshold shall not be deemed to cause the parties to be in violation of this paragraph.

IV.

It is further ordered, That:

(A) For six months after the closing date, TCI and Time Warner shall not enter into any new Programming Service Agreement that requires carriage of any Turner Video Programming Service on any analog Tier of TCI's CATVs.

(B) Any Programming Service Agreement entered into thereafter that requires carriage of any Turner Video Programming Service on TCI's CATVs on an analog Tier shall be limited in effective duration to five (5) years, except that such agreements may give TCI the unilateral right(s) to renew such agreements for one or more five-year periods.

(C) Notwithstanding the foregoing, Time Warner, Turner and TCI may enter into, prior to the closing date, agreements that require carriage on an analog Tier by TCI for no more than five years for each of WTBS (with the five year period to commence at the time of WTBS' conversion to Converted WTBS) and Headline News, and such agreements may give TCI the unilateral right(s) to renew such agreements for one or more five-year periods.

V.

It is further ordered, That Time Warner shall not, expressly or impliedly:

(A) Refuse to make available or condition the availability of HBO to any MVPD on whether that MVPD or any other MVPD agrees to carry any Turner-Affiliated Video Programming Service;

(B) Condition any Carriage Terms for HBO to any MVPD on whether that MVPD or any other MVPD agrees to carry any Turner-Affiliated Video Programming Service;

(C) Refuse to make available or condition the availability of each of CNN, WTBS, or TNT to any MVPD on whether that MVPD or any other MVPD agrees to carry any TWE-Affiliated Video Programming Service; or

(D) Condition any Carriage Terms for each of CNN, WTBS, or TNT to any MVPD on whether that MVPD or any other MVPD agrees to carry any TWE-Affiliated Video Programming Service.

VI.

It is further ordered, That:

(A) For subscribers that a Competing MVPD services in the Service Area Overlap, Time Warner shall provide, upon request, any Turner Video Programming Service to that Competing MVPD at Carriage Terms no less favorable, relative to the Carriage Terms then offered by Time Warner for that Service to the three MVPDs with the greatest number of subscribers, than the Carriage Terms offered by Turner to Similarly Situated MVPDs relative to the Carriage Terms offered by Turner to the three MVPDs with the greatest number of subscribers for that Service on July 30, 1996. For Turner Video Programming Services not in existence on July 30, 1996, the pre-closing date comparison will be to relative Carriage Terms offered with respect to any Turner Video Programming Service existing as of July 30, 1996.

(B) Time Warner shall be in violation of this paragraph if the Carriage Terms it offers to the Competing MVPD for those subscribers outside the Service Area Overlap are set at a higher level compared to Similarly Situated MVPDs so as to avoid the restrictions set forth in subparagraph (A).

VII.

It is further ordered, That:

(A) Time Warner shall not require a financial interest in any National Video Programming Service as a condition for carriage on one or more Time Warner CATVs.

(B) Time Warner shall not coerce any National Video Programming Vendor to provide, or retaliate against such a Vendor for failing to provide exclusive rights against any other MVPD as a condition for carriage on one or more Time Warner CATVs.

(C) Time Warner shall not engage in conduct the effect of which is to unreasonably restrain the ability of a Non-Time Warner National Video Programming Vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of Vendors in the selection, terms, or conditions for carriage of video programming provided by such Vendors.

VIII.

It is further ordered, That:

(A) Time Warner shall collect the following information, on a quarterly basis:

(1) For any and all offers made to Time Warner's corporate office by a Non-Time Warner National Video Programming Vendor to enter into or to modify any Programming Service Agreement for carriage on an Time Warner CATV, in that quarter:

(a) The identity of the National Video Programming Vendor;
(b) A description of the type of programming;
(c) Any and all Carriage Terms as finally agreed to or, when there is no final agreement but the Vendor's initial offer is more than three months old, the last offer of each side;
(d) Any and all commitment(s) to a roll-out schedule, if applicable, as finally agreed to or, when there is no final agreement but the Vendor's initial offer is more than three months old, the last offer of each side;
(e) A copy of any and all Programming Service Agreement(s) as finally agreed to or, when there is no final agreement but the Vendor's initial offer is more than three months old, the last offer of each side; and

(2) On an annual basis for each National Video Programming Service on Time Warner CATVs, the actual carriage rates on Time Warner CATVs and

(a) The average carriage rates on all Non-Time Warner CATVs for each National Video Programming Service that has publicly-available information from which Penetration Rates can be derived; and
(b) The carriage rates on each of the fifty (50) largest (in total number of subscribers) Non-Time Warner CATVs for each National Video Programming Service that has publicly-available information from which Penetration Rates can be derived.

(B) The information collected pursuant to subparagraph (A) shall be provided to each member of TWE's Management Committee on the last day of March, June, September and December of each year. Provided, however, that, in the event TWE's Management Committee ceases to exist, the disclosures required in this paragraph shall be made to any and all partners in TWE; or, if there are no partners in TWE, then the disclosures required in this paragraph shall be made to the Audit Committee of Time Warner.

(C) The General Counsel within TWE who is responsible for CATV shall annually certify to the Commission that it believes that Time Warner is in compliance with paragraph VII of this order.

(D) Time Warner shall retain all of the information collected as required by subparagraph (A), including information on when and to whom such information was communicated as required herein in subparagraph (B), for a period of five (5) years.

IX.

It is further ordered, That:

(A) By February 1, 1997, Time Warner shall execute a Programming Service Agreement with at least one Independent Advertising-Supported News and Information National Video Programming Service, unless the Commission determines, upon a showing by Time Warner, that none of the offers of Carriage Terms are commercially reasonable.

(B) If all the requirements of either subparagraph (A) or (C) are met, Time Warner shall carry an Independent Advertising-Supported News and Information Video Programming Service on Time Warner CATVs at Penetration Rates no less than the following:

(1) If the Service is carried on Time Warner CATVs as of July 30, 1996, Time Warner must make the Service available:

(a) By July 30, 1997, so that it is available to 30% of the Total Subscribers of all Time Warner CATVs at that time; and

(b) By July 30, 1999, so that it is available to 50% of the Total Subscribers of all Time Warner CATVs at that time.

(2) If the Service is not carried on Time Warner CATVs as of July 30, 1996, Time Warner must make the Service available:

(a) By July 30, 1997, so that it is available to 10% of the Total Subscribers of all Time Warner CATVs at that time;

(b) By July 30, 1999, so that it is available to 30% of the Total Subscribers of all Time Warner CATVs at that time; and

(c) By July 30, 2001, so that it is available to 50% of the Total Subscribers of all Time Warner CATVs at that time.

(C) If, for any reason, the Independent Advertising-Supported News and Information National Video Programming Service chosen by Time Warner ceases operating or is in material breach of its Programming Service Agreement with Time Warner at any time before July 30, 2001, Time Warner shall, within six months of the date that such Service ceased operation or the date of termination of the Agreement because of the material breach, enter into a replacement Programming Service Agreement with a replacement Independent Advertising-Supported News and Information National Video Programming Service so that replacement Service is available pursuant to subparagraph (B) within three months of the execution of the replacement Programming Service Agreement, unless the Commission determines, upon a showing by Time Warner, that none of the Carriage Terms offered are commercially reasonable. Such replacement Service shall have, six months after the date the first Service ceased operation or the date of termination of the first Agreement because of the material breach, contractual commitments to supply its Service to at least 10 million subscribers on Unaffiliated MVPDs, or, together with the contractual commitments it will obtain from Time Warner, total contractual commitments to supply its Service to 15 million subscribers; if no such Service has such contractual commitments, then Time Warner may choose from among the two Services with contractual commitments with Unaffiliated MVPDs for the largest number of subscribers.

X.

It is further ordered, That:

(A) Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs IV(A) and IX(A) of this order and, with respect to paragraph II, until the Distribution, respondents shall submit jointly or individually to the Commission a verified written report or reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II, IV(A) and IX(A) of this order.

(B) One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file jointly or individually a verified written report or reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with each paragraph of this order.

XI.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in respondents (other than this Acquisition) 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 the order.

XII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request, respondents shall permit any duly authorized representative of the Commission:

1. Access, during regular business hours upon reasonable notice and in the presence of counsel for respondents, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

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

XIII.

It is further ordered, That this order shall terminate on February 3, 2007.

Commissioner Azcuenaga and Commissioner Starek dissenting.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Time Warner Inc. ("Time Warner"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business at New York, New York; Turner Broadcasting System, Inc. ("Turner"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Georgia with its office and principal place of business at Atlanta, Georgia; Tele-Communications, Inc. ("TCI"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at Englewood, Colorado; Liberty Media Crop. ("LMC"), a corporation organized, existing and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at Englewood, Colorado, and the Federal Trade Commission ("Commission"), and independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41 *et seq.*

Whereas, Time Warner entered into an agreement with Turner for Time Warner to acquire the outstanding voting securities of Turner, and TCI and LMC proposed to acquire stock in Time Warner thereinafter "the Acquisition");

Whereas, the Commission is investigating the Acquisition to determine whether it would violate any statute enforced by the Commission;

Whereas, TCI and LMC are willing to enter into an Agreement Containing Consent Order (hereafter "Consent Order") requiring them, *inter alia,* to divest TCI's and LMC's interest in Time Warner and TCI's and LMC's Turner-Related Businesses," by contributing those interests to a separate corporation, The Separate Company, the stock of which will be distributed to the holders of Liberty Tracking Stock ("the Distribution"), but, in order to fulfill paragraph II(D) of that Consent Order, TCI and LMC must apply now to receive an Internal Revenue Service ruling as to whether the Distribution will be generally tax-free to both the Liberty Tracking Stock holders and to TCI under Section 355 of the Internal Revenue Code of 1986, as amended ("IRS Ruling");

Whereas, "TCI's and LMC's Interest in Time Warner" means all of the economic interest in Time Warner to be acquired by TCI and LMC, including the right of first refusal with respect to Time Warner stock to be held by R.E. Turner, III, pursuant to the Shareholders Agreement dated September 22, 1995 with LMC or any successor agreement;

Whereas, "TCI's and LMC's Turner-Related Businesses" means the businesses conducted by Southern Satellite Systems, Inc., a subsidiary of TCI which is principally in the business of distributing WTBS to MVPDs;

Whereas, "Liberty Tracking Stock" means Tele-Communications, Inc. Series A Liberty Media Group Common Stock and Tele-Communications, Inc. Series B Liberty Media Group Common Stock;

Whereas, Time Warner, Turner, TCI, and LMC are willing to enter into a Consent Order requiring them, *inter alia*, to forego entering into certain new programming service agreements for a period of six months from the date that the parties close this Acquisition ("Closing Date"), but, in order to comply more fully with that requirement, they must cancel now the two agreements that were negotiated as part of this Acquisition: namely, (1) the September 15, 1995, program service agreement between TCI's subsidiary, Satellite Services, Inc. ("SSI"), and Turner and (2) the September 14, 1995, cable carriage agreement between SSI and Time Warner for WTBS (hereafter "Two Programming Service Agreements");

Whereas, if the Commission accepts the attached Consent Order, the Commission is required to place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Rule 2.34 of the Commission's Rules of Practice and Procedure, 16 CFR 2.34;

Whereas, the Commission is concerned that if the parties do not, before this order is made final, apply to the IRS for the IRS Ruling and cancel the Two Programming Service Agreements, compliance with the operative provisions of the Consent Order might not be possible or might produce a less than effective remedy;

Whereas, Time Warner, Turner, TCI, and LMC's entering into this Agreement shall in no way be construed as an admission by them that the Acquisition is illegal;

Whereas, Time Warner, Turner, TCI, and LMC understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws of the

Federal Trade Commission Act by reason of anything contained in this Agreement;

Now, therefore, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from Time Warner, Turner, TCI, and LMC with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which this Agreement is annexed and made a part thereof, the parties agree as follows:

1. Withing thirty (30) days of the date the Commission accepts the attached Consent Order for public comment, TCI and LMC shall apply to the IRS for the IRS Ruling.

2. On or before the Closing Date, Time Warner, Turner and TCI shall cancel the Two Programming Service Agreements.

3. This Agreement shall be binding when approved by the Commission.

APPENDIX II

NOTE: THIS AGREEMENT WILL BE ENTERED INTO IMMEDIATELY PRIOR TO THE DISTRIBUTION AND SPEAKS AS OF THAT DATE.

TRANSITION SERVICES AGREEMENT

Transition Services Agreement (this "Agreement"), dated as of _____ _____, 1996, between Tele-Communications, Inc., a Delaware corporation ("TCI"), and TCI Turner Preferred, Inc., a Colorado corporation (the "Company").

RECITALS

A. TCI owns all the issued and outstanding capital stock of the Company (the "Company Stock").

B. TCI intends to distribute (the "Distribution") the Company Stock to the holders of its Tele-Communications, Inc. Series A Liberty Media Group Common Stock and Tele-Communications, Inc. Series B Liberty Media Group Common Stock. As a result of the

Distribution, the Company will cease to be a subsidiary of TCI, and TCI and the Company will be separate public companies.

C. This Agreement sets forth the general terms upon which, for a period following the Distribution, TCI will continue to provide to the Company certain services currently being provided to the Company by TCI.

Now, therefore, in consideration of the mutual covenants contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, TCI and the Company hereby agree as follows:

Section 1. Services.

(a) *Agreement to Provide Services.* At the request of the Company, TCI shall provide services to the Company for the administration and operation of the businesses of the Company and its subsidiaries and affiliates and shall devote thereto such time as may be necessary for the proper and efficient administration and operation of such businesses. The services to be provided by TCI to the Company pursuant to this Agreement (collectively, the "Services") shall include such of the following services as the Company may request from time to time:

(i) Tax reporting, financial reporting, payroll, employee benefit administration, workers' compensation administration, general liability and risk management, and advance information technology services;

(ii) Other services typically performed by TCI's accounting, finance, treasury, corporate, legal, tax and insurance department personnel; and

(iii) Use of telecommunications and data facilities and of systems and software developed, acquired or licensed by TCI from time to time for financial forecasting, budgeting and similar purposes, including without limitation any such software for use on personal computers, in any case to the extent available under copyright law or any applicable third-party contract.

TCI shall also, upon the request of the Company, lease office space and other property to the Company pursuant to terms to be agreed upon between TCI and the Company.

(b) *Compensation for Services.* As compensation for Services rendered to the Company pursuant to this Agreement, the Company shall reimburse TCI for: (i) all direct expenses incurred by TCI in providing such Services, provided that the incurrence of such expenses is consistent with practices generally followed by TCI in managing or operating its own business and the businesses of its subsidiaries and affiliates and (ii) the Company's pro rata share of TCI's indirect expenses attributable to the provision of Services hereunder, based on a determination by TCI management of the usage by the Company of such Services during the relevant period. Such indirect expenses shall include a pro rata share of (A) the salaries and other compensation of TCI's officers and employees who perform Services for the Company, (B) general and administrative overhead expenses, and (C) the costs and expenses of TCI's physical facilities that are utilized by TCI's employees and contractors for the benefit of the Company. TCI shall keep true, complete and accurate books of account containing such particulars as may be necessary for the purpose of calculating the above costs. Reimbursement amounts shall be billed quarterly by TCI and shall be due and payable in full within__days after receipt of invoice.

Section 2. Term.

(a) *Commencement.* This Agreement shall become effective immediately upon the effectiveness of the Distribution.

(b) *Termination.* The obligations of TCI to provide Services to the Company as provided in Section 1 hereof shall remain in effect until terminated:

(i) By the Company at any time on not less than 60 days' prior written notice to TCI;

(ii) By TCI at any time after [five years] from the effective date of the Distribution on not less than 60 days' prior written notice to the Company; or

(iii) By either party, upon written notice to the other party, if such other party shall file a petition in bankruptcy or insolvency, or a petition for reorganization or adjustment of debts or for the appointment of a receiver or trustee of all or a substantial portion of its property, or shall make an assignment for the benefit of creditors, or if a petition in bankruptcy or other petition described in this

paragraph shall be filed against such other party and shall not be discharged within 120 days thereafter.

In the event of any termination of this Agreement, each party shall remain liable for all obligations of such party accrued hereunder prior to the date of such termination, including, without limitation, all obligations of the Company to reimburse TCI for services provided hereunder, as provided in Section 1(b) hereof. The provisions of Section 3 of this Agreement shall survive indefinitely, notwithstanding any termination hereof.

Section 3. Limitation of Liability.

TCI, its affiliates, directors, officers, employees, agents and permitted assigns (each, a "TCI Party" and, together, the "TCI Parties") shall not be liable (whether such liability is direct or indirect, in contract or tort or otherwise) to the Company or any of the Company's affiliates, directors, officers, employees, agents, securityholders, auditors or permitted assigns, for any liabilities, claims, damages, losses or expenses (including, without limitation, any special, indirect, incidental or consequential damages) ("Losses") arising out of, related to, or in connection with the Services or this Agreement, except to the extent that such Losses result from the gross negligence or willful misconduct of TCI, in which case TCI's liability shall be limited to a refund of that portion of the amounts actually paid by the Company hereunder which, as determined by TCI, represented the cost to the Company of the Services in question. The Company hereby agrees to indemnify and hold harmless the TCI Parties from and against any and all Losses (including, without limitation, reasonable fees and expenses of counsel) incurred by any TCI Party arising out of or in connection with or by reason of this Agreement or any Services provided by TCI hereunder, other than any liability of TCI to refund amounts paid by the Company as contemplated by the preceding sentence.

Section 4. Miscellaneous.

(a) *Entire Agreement.* This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all previous agreements, negotiations,

understandings and commitments with respect to such subject matter, whether or not in writing.

(b) *Governing Law*. This Agreement and the legal relations between the parties hereto shall be governed by and construed in accordance with the laws of the State of Colorado, without regard to conflicts of laws rules thereof.

(c) *Notices*. All notices, demands and other communications under this Agreement shall be in writing and shall be deemed to have been duly given: (i) on the day of transmission if sent via facsimile transmission to the facsimile number given below, and telephonic confirmation of receipt is obtained promptly after completion of transmission; (iii) on the day of delivery by Federal Express or similar overnight courier; or (iv) on the third day after mailing, if mailed to the party to whom notice is to be given, by United States first class mail, registered or certified, postage prepaid and properly addressed, to the party as follows:

If to TCI: Tele-Communications, Inc.
5619 DTC Parkway
Englewood, Colorado 80111
Attention: General Counsel
Facsimile: (303) 488-3245

If to the Company: TCI Turner Preferred, Inc.
[Address]

Attention: President
Facsimile:

with a separate copy to the Company's Corporate Counsel at the same address.

Any party may change its address for the purpose of this Section by giving the other party written notice of its new address in the manner set forth above.

(d) *Amendment*. This Agreement may not be amended or modified in any respect except by a written agreement signed by the parties hereto.

(e) *Successors and Assigns: No Third-Party Beneficiaries*. This Agreement and all of the provisions hereof shall be binding upon and

inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests and obligations hereunder shall be assigned by either party hereto, by operation of law or otherwise, without the prior written consent of the other party. Nothing contained in this Agreement, except as expressly set forth, is intended to confer upon any other persons other than the parties hereto and their respective successors and permitted assigns, and rights or remedies.

(f) *Counterparts*. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

(g) *No Waiver*. No waiver by either party hereto of any term or condition of this Agreement, in any one or more instances, shall operate as a waiver of such term or condition at any other time.

(h) *Relations Between the Parties*. The parties are independent contractors. Nothing in this Agreement shall constitute either party, or any of such party's officers, directors, agents or employees, a partner, agent or employee of, or joint venturer with, the other party.

(i) *Severability*. If any provision of this Agreement shall be invalid or unenforceable, such invalidity or unenforceability shall not render the entire Agreement invalid. Rather, the Agreement shall be construed as if not containing the particular invalid or unenforeceable provisions, and the rights and obligations of each party shall be construed and enforced accordingly.

STATEMENT OF CHAIRMAN PITOFSKY, AND COMMISSIONERS STEIGER AND VARNEY

The merger and related transactions among Time Warner, Turner, and TCI involve three of the largest firms in cable programming and delivery -- firms that are actual or potential comptetitors in many aspects of their businesses. The transaction merges the first and third largest cable programmers (Time Warner and Turner). At the same time, absent the relief in our consent order, the transaction would have further aligned the interests of TCI and Time Warner, the two largest cable distributors. Finally, the transaction greatly increases the

level of vertical integration in an industry in which the threat of foreclosure is both real and substantial.[1] While the transaction posed

[1] Both Congress and the regulators have identified problems with the effects of vertical foreclosure in this industry. *See* generally James W. Olson and Lawrence J. Spiwak, Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?, 13 Cardozo Arts & Entertainment Law Journal 283 (1995). Enforcement action in this case is wholly consistent with the goals of Congress in enacting the 1992 Cable Act: providing greater access to programming and promoting competition in local cable markets.

complicated and close questions of antitrust enforcement, the conclusion of the dissenters that there was no competitive problem at all is difficult to understand, especially since none of the public comments received suggested that relief was unnecessary.

Many of the concerns raised in the dissenting Commissioners statements are carefully addressed in the analysis to aid public comment, which we append to this statement. We write to clarify our views on certain specific issues raised in the dissents.

Product market. The dissenting Commissioners suggest that the product market alleged, "the sale of Cable Television Programming Services to MVPDs (Multichannel Video Programming Distributors)," cannot be sustained. The facts suggest otherwise. Substantial evidence, confirmed in the parties' documents and testimony, as well as documents and sworn statements from third-parties, indicated the existence of an all cable television market. Indeed, there was significant evidence of competitive interaction in terms of carriage, promotions and marketing support, subscriber fees, and channel position between different segments of cable programming, including basic and premium channel programming. Cable operators look to all types of cable programming to determine the proper mix of diverse content and format to attract a wide range of subscribers.

Although a market that includes both CNN and HBO may appear somewhat unusual on its face, the Commission was presented here with substantial evidence that MVPDs require access to certain "marquee" channels, such as HBO and CNN, to retain existing subscribers or expand their subscriber base. Moreover, we can not concur that evidence in the record supports Commissioner Azcuenaga's proposed market definition, which would segregate offerings into basic and premium cable programming markets.

Entry. Although we agree that entry is an important factor, we cannot concur with Commissioner Azcuenaga's overly generous view of entry conditions in this market. While new program channels have entered in the past few years, these channels have not become competitively significant. None of the channels that has entred since 1991 has acquired more than a 1% market share.

Moreover, the anticompetitive effects of this acquisition would have resulted from one firm's control of several marquee channels. In that aspect of the market, entry has proven slow and costly. The potential for new entry in basic services cannot guarantee against

competitive harm. To state the matter simply, the launch of a new "Billiards Channel," "Ballet Channel," or the like will barely make a ripple on the shores of the marquee channels through which Time Warner can exercise market power.

Technology. Commissioner Azcuenaga also seems to suggest that the Commission has failed to recognize the impact of significant technological changes in the market, such as the emergence of new delivery systems such as direct broadcast satellite networks ("DBS").[2] We agree that these alternative technologies may someday become a significant competitive force in the market. Indeed, that prospect is one of the reasons the Commission has acted to prevent Time Warner from being able to disadvantage these competitors by discriminating in access to programming.

But to suggest that these technologies one day may become more widespread does not mean they currently are, or in the near future will be, important enough to defeat anticompetitive conduct. Alternative technologies such as DBS have only a small foothold in the market, perhaps a 3% share of total subscribers. Moreover, DBS is more costly and lacks the carriage of local stations. It seems rather unlikely that the emerging DBS technology is sufficient to prevent the competitive harm that would have arisen from this transaction.

Horizontal competitive effects. Although Commissioner Starek presents a lengthy argument on why we need not worry about the horizontal effects of the acquisition, the record developed in this investigation strongly suggests anticompetitive effects would have resulted without remedial action. This merger would combine the first and third largest providers of cable programming, resulting in a merged firm controlling over 40% of the market, and several of the key marquee channels including HBO and CNN. The horizontal concerns are strengthened by the fact that Time Warner and TCI are the two largest MVPDs in the country. The Commission staff received an unprecedented level of concern from participants in all segments of the market about the potential anticompetitive effects of this merger.

One of the most frequent concerns expressed was that the merger heightens the already formidable entry barriers into programming by further aligning the incentives of both Time Warner and TCI to deprive entrant of sufficient distribution outlets to achieve the

[2] DBS providers are included as participants in the relevant product market.

necessary economies of scale. The order addresses the impact on entry barriers as follows. First, the prohibition on bundling would deter Time Warner from using the practice to compel MVPDs to accept unwanted channels which would further limit available channel capacity to non-Time Warner programmers. Second, the conduct and reporting requirements in paragraphs VII and VIII provide a mechanism for the Commission to become aware of situations where Time Warner discriminates in handling carriage requests from programming rivals.

Third, the order reduces entry barriers by eliminating the programming service agreements (PSAs), which would have required TCI to carry certain Turner networks until 2015, at a price set at the lower of 85% of the industry average price or the lowest price given to any other MVPD. The PSAs would have reduced the ability and incentives of TCI to handle programming from Time Warner's rivals. Channel space on cable systems is scarce. If the PSAs effectively locked up significant channel space on TCI, the ability of rival programmers to enter would have been harmed. This effect would have been exacerbated by the unusually long duration of the agreement and the fact that TCI would have received a 15% discount over the most favorable price given to any other MVPD. Eliminating the twenty-year PSAs and restricting the duration of future contracts between TCI and Time Warner will restore TCI's opportunities and incentives to evaluate and carry non-Time Warner programming.

We believe that his remedy carefully restricts potential anticompetitive practices arising from this acquisition that would have heightened entry barriers.

Vertical foreclosure. The complaint alleges that post-acquisition Time Warner and TCI would have the power to: (1) foreclose unaffiliated programming from their cable systems to protect their programming assets; and (2) disadvantage competing MVPDs, by engaging in price discrimination. Commissioner Azcuenaga contends that Time Warner and TCI lack the incentives and the ability to engage in either type of foreclosure. We disagree.

First, it is important to recognize the degree of vertical integration involved. Post-merger Time Warner alone controls more than 40% of the programming assets (as measured by subscriber revenue obtained by MVPDs). Time Warner and TCI, the nation's two largest MVPDs,

control access to about 44% of all cable subscribers. The case law have found that these levels of concentration can be problematic.[3]

Second, the Commission received evidence that these foreclosure threats were real and substantial. There was clearly reason to believe that this acquisition would increase the incentives to engage in this foreclosure without remedial action. For example, the launch of a new channel that could achieve marquee status would be almost impossible without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers.

Commissioner Starek suggests that we need not worry about foreclosure because there are sufficient numbers of unaffiliated programmers and MVPDs so that each can survive by entering into contracts. With all due respect, this view ignores the competitive realities of the marketplace. TCI and Time Warner are the two largest MVPDs in the U.S. with market shares of 27% and 17% respectively.[4] Carriage on one or both systems is critical for new programming to achieve competitive viability. Attempting to replicate the coverage of these systems by lacing together agreements with the larger number of much smaller MVPDs is costly and time consuming.[5] The Commission was presented with evidence that denial of coverage on the Time Warner and TCI systems could further delay entry of potential marquee channels for several years.

TCI ownership of Time Warner. Commissioner Azcuenaga suggests that TCI's acquisition of a 15% interest in Time Warner, with the prospect of acquiring up to 25% without further antitrust review, does not pose any competitive problem. We disagree. Such a substantial ownership interest, especially in a highly concentrated market with substantial vertically interdependent relationships and

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[3] *See Ash Grove Cement Co. v. FTC*, 577 F.2d 1368 (9th Cir. 1978); *Mississippi River Corp. v. FTC*, 454 F.2d 1083 (8th Cir. 1972); *United States Steel Corp. v. FTC*, 426 F.2d 592 (6th Cir. 1970); *See* generally Herbert Hovenkamp, Federal Antitrust Policy Section 9.4 (1994).

[4] They are substantially larger than the next largest MVPD, Continental, which has an approximately 6% market share.

[5] *See* U.S. Department of Justice Horizontal Merger Guidelines, ¶13,103 Trade Cas. (CCH) at 20,565-66, Sections 4.2, 4.21 (June 14, 1984), incorporated in U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, ¶13,104 Trade Cas. (CCH) (April 7, 1992).

high entry barriers, poses significant competitive concerns.[6] In particular, the interest would give TCI greater incentives to disadvantage programmer competitors of Time Warner, similarly it would increase Time Warner's incentives to disadvantage MVPDs that compete with TCI. The Commission's remedy would eliminate these incentives to act anticompetitively by making TCI's interest truly passive.

Efficiencies. Finally, Commissioner Azcuenaga seems to suggest that the acquisition may result in certain efficiencies in terms of "more and better programming options" and "reduced transaction costs." There was little or no evidence presented to the Commission to suggest that these efficiencies were likely to occur.

Public comments. Although our colleagues did not address the issue of scope of relief, some public comments raised questions about the requirement that Time Warner carry an alternative news network to CNN. In particular, Fox News and Bloomberg stated that the effectiveness of the carriage requirement is undermined by the Commission's decision to allow Time Warner to select which competitor to carry. Both firms contend that Time Warner's incentive is to select the weakest competitor to CNN.

We do no agree that the carriage requirement is made ineffective by Time Warner's right to choose. The order ensures that Time Warner must select a programming service that has the potential to be competitive with CNN.

In addition, the Commission sought to avoid any requirement that may interfere with other Time Warner programming decisions. Thus, the order does not require, but it does permit, Time Warner to carry more than one additional news channel. Moreover, the order requires that Time Warner place the additional news channel on cable systems reaching at least half of its subscribers, but it is up to Time Warner to decide whether to go beyond that. Requiring a greater level of market penetration might have compelled Time Warner to drop current programming (or abandon planned programming) to make room for the CNN rival.

Finally, the Commission abstained from the role of selecting the rival to CNN. The Commission restricts its role in divestiture applications to simply determining whether the seller's selection

[6] *See United States v. Dupont de Nemours & Co.*, 353 U.S. 586 (1957); *F&M Schaefer Corp. v. C. Schmidt & Sons, Inc.* 597 F.2d 814, 818-19 (2d Cir. 1979); *Gulf & Western Indus. v. Great Atlantic & Pacific Tea Co.*, 476 F.2d 687 (2d Cir. 1973).

meets the requirements of the order. In this case, there is even greater reason to avoid a more intrusive role, since programming content would be unavoidably implicated -- the selection of one competitor over another inevitably determines to some degree the content of the new entry. In addition, excessive involvement in the selection process could conflict with the goal that the antitrust laws, and antitrust remedies, are intended to protect competition, not competitors.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today issues a consent order to settle allegations that the acquisition by Time Warner Inc. ("Time Warner") of Turner Broadcasting System, Inc. ("Turner"), and related agreements with Tele-Communications, Inc. ("TCI"),[1] would be unlawful. Alleging that this transaction violates the law is possible only by abandoning the rigor of the Commission's usual analysis under Section 7 of the Clayton Act. To reach this result, the majority adopts a highly questionable market definition, ignores any consideration of efficiencies and blindly assumes difficulty of entry in the antitrust sense in the face of overwhelming evidence to the contrary. The decision of the majority also departs from more general principles of antitrust law by favoring competitors over competition and contrived theory over facts.

The usual analysis of competitive effects under the law, unlike the apparent analysis of the majority, would take full account of the swirling forces of innovation and technological advances in this dynamic industry. Unfortunately, the complaint and the underlying theories on which the order is based do not begin to satisfy the rigorous standard for merger analysis that this agency has applied for years. Instead, the majority employs a looser standard for liability and a regulatory order that threatens the likely efficiencies from the transaction. Having found no reason to relax our standards of analysis for this case, I cannot agree that the order is warranted.

PRODUCT MARKET

We focus in merger analysis on the likelihood that the transaction will create or enhance the ability to exercise market power, *i.e.*, raise prices. The first step usually is to examine whether the merging firms

[1] Liberty Media Corporation, a wholly-owned subsidiary of TCI, also is named in the complaint and order. For simplicity, references in this statement to TCI include Liberty.

sell products that are substitutes for one another to see if there is a horizontal competitive overlap. This is important in a case based on a theory of unilateral anticompetitive effects, as this one is, because the theory requires a showing that the products of the merging firms are the first and second choices for consumers.[2]

In this case, it could be argued from the perspective of cable system operators and other multichannel video program distributors ("MVPDs"), who are purchasers of programming services, that all video programming networks[3] are substitutes. This is the horizontal competitive overlap that is alleged in the complaint.[4]

One problem with the alleged all-programming market is that basic cable programming services (such as Turner's CNN) and premium cable programming services (such as Time Warner's HBO) are not substitutes along the usual dimensions of competition. Most significantly, they do not compete on price. CNN is sold to MVPDs for a fee per subscriber that is on average less than one-tenth of the average price for HBO, and it is resold as part of a package of basic services for an inclusive fee. HBO is sold at wholesale for more than ten times as much; it is resold to consumers on an a la carte basis or in a package with other premium services, and a subscription to basic service usually is a prerequisite. It is highly unlikely that a cable operator, to avoid a price increase, would drop a basic channel and replace it with a significantly more expensive premium channel. Furthermore, cable system operators tell us that when the price for basic cable services increases, consumers drop pay services, suggesting that at least at the retail level these goods are complementary rather than substitutes for one another.

Another possible argument is that CNN and HBO should be in the same product market because from the cable operator's perspective,

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[2] *See* 1992 Horizontal Merger Guidelines ¶ 2.2. The theory is that when the post-merger firm raises the price on product A or on products A and B, sales lost due to the price increase on the first-choice product (A) will be diverted to the second-choice product (B). The price increase is unlikely to be profitable unless a significant share of consumers regard the products of the merged firm as their first and second choices.

[3] The terms "programming services," "networks," and "channels" are used interchangeably in this statement. For example, The History Channel is a video programming service or network that is sold to MVPDs for distribution to consumers.

[4] Complaint ¶ 24. Note that this market excludes broadcast programming, which "is a primary source of programming for most viewers regardless of distribution media." Federal Communications Commission, Third Annual Report on the Status of Competition in the Market for the Delivery of Video Programming at 7 (Dec. 26, 1996) (hereafter "1996 FCC Report").

each is "necessary to attract and retain a significant percentage of their subscribers."[5] If CNN and HBO were substitutes in this sense, we would expect to see cable system operators playing them against one another to win price concessions in negotiations with programming sellers. But there is no evidence that they have been used in this way, and cable system operators have told us that basic and premium channels do not compete on price.[6] There are closer substitutes, in terms of price and content, for CNN (in basic cable services) and for HBO (in premium cable services).

I am not persuaded that the product market alleged in the complaint could be sustained. CNN and HBO are not substitutes, and they are not the first and second choices for consumers (or for cable system operators or other MVPDs). There are no other horizontal overlaps warranting enforcement action in any other cable programming market.[7] Under these circumstances, it would seem appropriate to withdraw the complaint.

ENTRY

The complaint alleges that entry is difficult and unlikely.[8] This is an astonishing allegation, given the amount of entry in the cable programming market. The number of cable programming services or networks increased from 106 to 129 in 1995, according to the FCC.[9] One source reported thirty national 24-hour networks expected to launch in 1996,[10] and another source identified seventy-three

[5] Complaint ¶¶ 4 & 9. To the extent that each network (CNN and HBO) is viewed as "necessary" to attract subscribers, as alleged in the complaint, each would appear to have market power quite independent of the proposed transaction and of each other.

[6] If the market includes premium cable programming services, it probably ought also to take account of video cassette rentals, which constrain the pricing of premium channels. *See* Federal Communications Commission, Second Annual Report on the Status of Competition in the Market for Delivery of Video Programming ¶ 121 (Dec. 7, 1995) (hereafter "1995 FCC Report"). If the theory is that HBO and CNN (and other networks) compete for channel space (*i.e.*, for carriage on cable systems), the market probably should include over-the-air broadcast networks, at least to the extent that they compete for cable channel space as the price for retransmission rights. *See* complaint ¶ 34 (alleging "shortage of available channel capacity").

[7] In the two product markets most likely to be sustained under the law, basic cable services and premium cable services, the transaction falls within safe harbors described in the 1992 Horizontal Merger Guidelines, which strongly suggests that no enforcement action is warranted.

[8] Complaint ¶¶ 33-35.

[9] 1995 FCC Report ¶ 10.

[10] National Cable Television Association, Cable Television Developments 103-17 (Fall 1995) (hereafter "1995 NCTA").

networks "on the launch pad."[11] That adds up to between fifty-three and ninety-six new and announced video programming networks in two years. According to an industry trade association, thirty-three new basic networks and thirteen new premium networks were launched between 1992 and 1995.[12] Another source listed 141 national 24-hour cable networks launched or announced between January 1993 and March 1996.[13]

This does not mean that entry is easy or inexpensive. Not all the channels that have announced will launch a service, and not all those that launch will succeed.[14] But some of them will. Some recent entrants include CNNfn (December 1995), Nick at Nite's TV Land (April 1996), MSNBC (July 1996), and the History Channel (January 1995).[15] The Fox News Channel, offering twenty-four hour news, began service in October 1996, and Westinghouse and CBS Entertainment have announced that they will launch a new entertainment and information cable channel, Eye on People, in March 1997.[16] The fact of so much ongoing entry indicates that at any given moment, entry from somewhere is imminent, and this, translated for purposes of antitrust analysis, means that entry should be regarded as virtually immediate.

Recent entrants have achieved some measure of success. TV Land reports 15 million subscribers (almost 24% of cable households) less than one year after its launch.[17] The History Channel has obtained

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[11] "On the Launch Pad," Cable World, April 29, 1996, at 143; *see also* Cablevision, Jan. 22, 1996, at 54 (98 services announced plans to launch in 1996).

[12] National Cable Television Association, Cable Television Developments 6 (Fall 1996) (hereafter "1996 NCTA").

[13] "A Who's Who of New Nets," Cablevision, April 15, 1996 (Special Supp.), at 27A-44A (as of March 28, 1996, 163 new networks when regional, pay-per-view and interactive services are included).

[14] "The stamina and pocket-depth of backers of new players [networks] still remain key factors for survival. However, distribution [*i.e.*, obtaining carriage on cable systems] is still the name of the game." Cablevision, April 15, 1996 (Special Supp.), at 3A.

[15] The History Channel reportedly had one million subscribers at its launch in January 1995, reached 8 million subscribers by the end of the year and was seen in 18 million homes by May 1996. Carter, "For History on Cable, the Time Has Arrived," N.Y. Times, May 20, 1996, at D1. The History Channel now reports more than 26 million subscribers (which accounts for more than 41% of basic cable television households). *See* 1996 NCTA at 57.

[16] Carmody, "The TV Channel," The Washington Post, Aug. 21, 1996, at D12.

[17] 1996 NCTA at 70. The percentage figure is derived from the number of subscribers for the network, divided by the number of basic cable households (62.8 million, as estimated by Paul Kagan Associates, Inc.), reported in 1996 NCTA. As a comparison, CNN has 69.9 million subscribers. 1996 NCTA at 39. HBO has 20.8 million subscribers (about one-third of basic cable households). *Id.* at 56.

carriage to more than 40% of cable households in less than two years. Home & Garden Television, launched in December 1994, reports 18 million subscribers (more than 28% of cable households).[18] The SciFi Channel, launched in September 1992, has 36 million subscribers (57% of cable households).[19] The TV Food Network, launched in November 1993, reportedly has 21 million subscribers (about one-third of cable households).[20]

New networks need not be successful or even launched before they can exert significant competitive pressure. Announced launches can affect pricing immediately. The launch of MSNBC and the announcement of Fox's cable news channel, for example, enabled cable system operators to mount credible threats to switch to one of the new news networks in negotiations with CNN, the incumbent all-news channel.[21]

Any constraint on cable channel capacity does not appear to be deterring entry of new networks. Indeed, the amount of entry that is occurring apparently reflects confidence that channel capacity will expand, for example, by digital technology. In addition, alternative MVPDs, such as direct broadcast satellite ("DBS"), may provide a launching platform for new networks.[22] For example, CNNfn was launched in 1995 with 4 to 5 million households, divided between DBS and cable.[23]

Nor should we ignore significant technological changes in video distribution that are affecting cable programming. One such change is the development and commercialization of new distribution methods that can provide alternatives for both cable programmers and subscribers. DBS is one example. With digital capacity, DBS can provide hundreds of channels to subscribers. By September 1995,

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[18] 1996 NCTA at 58.

[19] 1996 NCTA at 77.

[20] 1996 NCTA at 86. *Cf.* the reply of the majority, at 3 ("None of the channels that has entered since 1991 has acquired more than a 1% market share.") (Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, Time Warner Inc., Docket C-3709).

[21] This is the kind of competition we would expect to see between cable networks that are substitutes for one another and the kind of competition that does not exist between CNN and HBO.

[22] The entry of alternative MVPD technologies may put competitive pressure on cable system operators to expand capacity more quickly. *See* "The Birth of Networks," Cablevision, April 15, 1996 (Special Supp.), at 8A (cable system operators "don't want DBS and the telcos to pick up the services of tomorrow while they are being overly arrogant about their capacity").

[23] CNNfn has 5.7 million subscribers, with 2.4 million on cable and 3.3 million on satellite. 1996 NCTA at 39.

DBS was available in all forty-eight contiguous states and Alaska.[24] In April 1996, DBS had 2.6 million customers; in August 1996, DBS had 3.34 million subscribers;[25] by the end of January 1997, DBS had more than 4.7 million subscribers[26] (compared to 62 million cable customers in the U.S.). AT&T last year invested $137.5 millon in DirecTV, a DBS provider, began to sell satellite dishes and programming to its long distance customers in four markets, and planned to expand to the rest of the country in September 1996.[27] By the end of 1996, DirecTV had 2.3 million subscribers (up from 1.2 million in 1995[28]), giving DirecTV more subscribers than all but the six largest cable system operators.[29] Echostar and AlphaStar both have launched DBS services, and MCI Communication and News Corp. last year announced a partnership to enter DBS.[30] Some industry analysts predict that DBS will serve 15 million subscribers by 2000.[31] Direct broadcast satellite already is offering important competition for cable systems.[32]

Digital technology, which would expand cable capacity to as many as 500 channels, is another important development. DBS

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[24] 1995 FCC Report ¶ 49.

[25] DBS Digest, Aug. 22, 1996 (http://www.dbsdish.com/dbsdata.html (Sept. 5, 1996)).

[26] DBS Digest, Jan. 20, 1997 (http://www.dbsdish.com/dbsdata.html (Jan. 27, 1997)).

[27] *See* Breznick, "Crowded Skies," Cable World, April 29, 1996 (http://www.mediacentral.com/magazines/CableWorld/News961996042913.htm/539128 (Sept. 3, 1996)). National and regional advertising campaigns have helped popularize DBS. *E.g.*Newsweek, Dec. 2, 1996, at 23 (DISH Network full page ad for digital satellite system and programming); USA Today, Aug. 20, 1996, at 5D (DISH Network full page ad for digital satellite system and programming); N.Y. Times, July 14, 1996, at 23 (AT&T full page ad for digital satellite system, DirectTV and USSB). For a cable system response to DBS competition, *see, e.g.*, The Georgetown Current (Washington, D.C.), Dec. 18, 1996, at 25 (District Cablevision full page ad: "The DISH Network's real charge to hook up your home is out of this world.")

[28] Paikert, "Strong Christmas Revives DBS Sales," Multichannel News Digest, Jan. 13, 1997 (http://www.multichannel.com/digest.htm (Jan. 13, 1997)); *see also* Breznick, "DBS Celebrates the Holidays: Brisk Year End Sales a Boon for DirecTV, EchoStar," Jan. 6, 1997 (http://www.mediacentral.com/Magazines/CableWorld/News96/19970106O1.htm (Jan. 6, 1997)).

[29] *See* 1996 NCTA at 14 (ranking the 50 largest MSOs by number of subscribers).

[30] Breznick, "Crowded Skies," Cable World, April 29, 1996 (http://www.mediacentral.com/magazines/CableWorld/News96/1996042913.htm/539128 (Sept. 3, 1996)).

[31] *Id.*

[32] *See* Robichaux, "Time Warner Inc. Is Expected To Buy New Set-Top Boxes," Wall Street Journal, Dec. 10, 1996, at B10 (reporting that Time Warner is "look[ing] for new bells and whistles to protect its base of 12 million subscribers against an escalating raid by direct-broadcast-satellite companies"); Robichaux, "Once a Laughingstock, Direct Broadcast TV Gives Cable a Scare," Wall Street Journal, Nov. 7, 1996, at A1. *See also* Cable World, Dec. 3, 1996 (reporting that "analysts and industry observers agree that cable operators are losing customers to DBS").

already uses digital technology, and some cable operators were planning to begin providing digital service in 1996. Last fall, Discovery Communications (The Discovery Channel) announced four new programming services designed for digital boxes for TCI's "digital box rollout."[33] (Even without digital service, cable systems have continued to upgrade their capacity; in 1994, about 64% of cable systems offered thirty to fifty-three channels, and more than 14% offered fifty-four or more channels.[34]) Local telephone companies have entered as distributors via video dialtone, MMDS[35] and cable systems, and the telcos are exploring additional ways to enter video distribution markets.[36] Digital compression and advanced television technologies could make it possible for multiple programs to be broadcast over a single over-the-air broadcast channel.[37] When these developments will be fully realized is open to debate, but it is clear that they are on their way and affecting competition. According to one trade association official, cable operators are responding to competition by "upgrading their infrastructures with fiber optics and digital compression technologies to boost channel capacity . . . . What's more, cable operators are busily trying to polish their images with a public that has long registered gripes over pricing, customer service and programming choice."[38]

Ongoing entry in programming suggests that no program seller could maintain an anticompetitive price increase and, therefore, there is no basis for liability under Section 7 of the Clayton Act. Changes in the video distribution market will put additional pressure on both cable systems and programming providers to be competitive by providing quality programming at reasonable prices. The quality and quantity of entry in the industry warrants dismissal of the complaint.

HORIZONTAL THEORY OF LIABILITY

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[33] Katz, "Discovery Goes Digital," Multichannel News Digest, Sept. 3, 1996 ("The new networks . . . will launch Oct. 22 in order to be included in Tele-Communication Inc.'s digital box rollout in Hartford, Conn.") (http://www.multichannel.com/digest.htm (Sept. 5, 1996)).

[34] 1995 FCC Report at B-2 (Table 3).

[35] MMDS stands for multichannel multipoint distribution service, a type of wireless cable. *See* 1995 FCC Report ¶¶ 68-85. Industry observers project that MMDS will serve more than 2 million subscribers in 1997 and grow more than 280% between 1995 and 1998. 1995 FCC Report ¶ 71.

[36] *See* 1996 FCC Report ¶¶ 67-79.

[37] *See* 1995 FCC Report ¶ 116; 1996 FCC Report ¶ 93.

[38] Pendleton, "Keeping Up With Cable Competition," Cable World, April 29, 1996, at 158.

The complaint alleges that Time Warner will be able to exploit its ownership of HBO and the Turner basic channels by "bundling" Turner networks with HBO, that is, by selling them as a package.[39] As a basis for liability in a merger case, this appears to be without precedent.[40] Bundling is not always anticompetitive, and we cannot predict when bundling will be anticompetitive.[41] Bundling can be used to transfer market power from the "tying" product to the "tied" product, but it also is used in many industries as a means of discounting. Popular cable networks, for example, have been sold in a package at a discount from the single product price. This can be a way for a programmer to encourage cable system operators to carry multiple networks and achieve cross-promotion among the networks in the package. Even if it seemed more likely than not that Time Warner would package HBO with Turner networks after the merger, we could not *a priori* identify this as an anticompetitive effect.

The alleged violation rests on a theory that the acquisition raises the potential for unlawful tying. To the best of my knowledge, Section 7 of the Clayton Act has never been extended to such a situation. There are two reasons not to adopt the theory here. First, challenging the mere potential to engage in such conduct appears to fall short of the "reasonable probability" standard under Section 7 of the Clayton Act. We do not seek to enjoin mergers on the mere possibility that firms in the industry may later choose to engage in unlawful conduct. It is difficult to imagine a merger that could not be enjoined if "mere possibility" of unlawful conduct were the standard. Here, the likelihood of anticompetitive effects is even more removed, because tying, the conduct that might possibly occur, in turn might or might not prove to be unlawful. Second, anticompetitive tying is unlawful, and Time Warner would risk private law suits and public law enforcement action for such conduct.

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[39] Complaint ¶ 38a.

[40] *Cf. Heublein, Inc.*, 96 FTC 385, 596-99 (1980) (rejecting a claim of violation based on leveraging).

[41] *See* Whinston, "Tying, Foreclosure, and Exclusion," 80 Am. Econ. Rev. 837, 855-56 (1990) (tying can be exclusionary, but "even in the simple models considered [in the article], which ignore a number of other possible motivations for the practice, the impact of this exclusion on welfare is uncertain. This fact, combined with the difficulty of sorting out the leverage-based instances of tying from other cases, makes the specification of a practical legal standard extremely difficult.").

The remedy for the alleged bundling is to prohibit it,[42] with no attempt to distinguish efficient bundling from anticompetitive bundling.[43] Assuming liability on the basis of an anticompetitive horizontal overlap, the obvious remedy would be to enjoin the transaction or to require the divestiture of HBO. Divestiture is a simple, easily reviewable and complete remedy for an anticompetitive horizontal overlap. The weakness of the Commission's case seems to be the only impediment to imposing that remedy here.

VERTICAL THEORIES

The complaint also alleges two vertical theories of competitive harm. The first is foreclosure of unaffiliated programming from Time Warner and TCI cable systems.[44] The second is anticompetitive price discrimination against competing MVPDs in the sale of cable programming.[45] Neither of these alleged outcomes appears particularly likely.

FORECLOSURE

Time Warner cannot foreclose the programming market by refusing carriage on its cable system, because Time Warner has less than 20% of cable television subscribers in the United States. Even if TCI were willing to join in an attempt to barricade programming produced by others from distribution, TCI and Time Warner together control less than 50% of the cable television subscribers in the country. In that case, entry of programming via cable might be more expensive (because of the costs of obtaining carriage on a number of smaller systems), but it need not be foreclosed.[46] And even if Time

[42] Order ¶ V.

[43] Although the proposed order would permit any bundling that Time Warner or Turner could have implemented independently before the merger, the reason for this distinction appears unrelated to distinguishing between pro- and anti-competitive bundling.

[44] Complaint ¶ 38b.

[45] Complaint ¶ 38c.

[46] According to the FCC, "[t]he available evidence suggests that a successful launch of a new mass market national programming network -- that is, the initial subscriber requirement for long-term success -- requires that the new channel be available to at least ten to twenty million households," which amounts to about 16% to 32% of cable households. 1996 FCC Report ¶ 135 (footnote omitted). *Cf.* the reply of the majority, at 7 ("the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers") (Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, Time Warner Inc., Docket C-3709).

Warner and TCI together controlled a greater share of cable systems, the availability of alternative distributors of video programming and the technological advances that are expanding cable channel capacity make foreclosure as a result of this transaction improbable.

The foreclosure theory also is inconsistent with the incentives of the market. Cable systems operators want more and better programming, to woo and win subscribers. To support their cable systems, Time Warner and TCI must satisfy their subscribers by providing programming that subscribers want at reasonable prices. Given competing distributors and expanding channel capacity, neither of them likely would find it profitable to attempt to exclude new programming.

TCI as a shareholder of Time Warner, as the transaction was proposed to us (with a minority share of less than 10%), would have no greater incentive than it had as a 23% shareholder of Turner to protect Turner programming from competitive entry. Indeed, TCI's incentive to protect Turner programming would appear to be diminished.[47] If TCI's interest in Time Warner increased, it stands to reason that TCI's interest in the well-being of the Turner networks also would increase. But it is important to remember that TCI's principal source of income is its cable operations, and its share of Time Warner profits from Turner programming would appear to be insufficient incentive for TCI to jeopardize its cable business.[48] It may be that TCI could acquire an interest in Time Warner that could have anticompetitive consequences, but the Commission should analyze that transaction when and if TCI increases its holdings.

Another aspect of the foreclosure theory alleged in the complaint is a carriage agreement (programming service agreement or PSA) between TCI and Turner. Under the PSA, TCI would carry certain Turner networks for twenty years, at a discount from the average price at which Time Warner sells the Turner networks to other cable operators. The complaint alleges that TCI's obligations under the PSA would diminish TCI's incentives and ability to carry programming that competes with Turner programming,[49] which in turn would raise

[47] Turner programming would account for only part of TCI's interest in Time Warner.

[48] Looking only at cash flow, even if its share of Time Warner were increased to 18%, TCI's interest in the combined Time Warner/Turner would be only slightly greater than TCI's pre-transaction interest in Turner, and it still would amount to only an insignificant fraction of the cash flow generated by TCI's cable operations.

[49] Complaint ¶ 38b(2).

barriers to entry for unaffiliated programming. The increased difficulty of entry, so the theory goes, would in turn enable Time Warner to raise the price of Turner programming sold to cable operators and other MVPDs.

It is hard to see that the PSA would have anticompetitive effects. TCI already has contracts with Turner that provide for mandatory carriage of CNN and TNT, and TCI is likely to continue to carry these programming networks for the foreseeable future.[50] The current agreements do not raise antitrust issues, and the PSA raises no new ones. Any theoretical bottleneck on existing systems would be even further removed by the time the carriage requirements under the PSA would have become effective (when existing carriage agreements expire), because technological changes will have expanded cable channel capacity and alternative MVPDs will have expanded their subscribership. The PSA could even give TCI incentives to compete with Time Warner's programming and keep TCI's costs down.[51] The PSA would have afforded Time Warner long term carriage for the Turner networks, provided TCI with long term programming commitments with some price protection, and eliminated the costs of renegotiating a number of existing Turner/TCI carriage agreements as they expire. These are efficiencies. No compelling reason has been advanced for requiring that the carriage agreement be cancelled.[52]

In addition to divestiture by TCI of its Time Warner shares and cancellation of the TCI/Turner carriage agreement, the proposed remedies for the alleged foreclosure include:

(1) Antidiscrimination provisions by which Time Warner must abide in dealing with program providers;[53] (2) recordkeeping requirements to police compliance with the antidiscrimination

[50] Cable system operators like to keep their subscribers happy, and subscribers do not like to have popular programming cancelled. For example, TCI recently "decided to yield to subscriber cries of 'I Want My MTV and VH1' and restore the channels on cable systems . . . ." Media Central, Jan. 23, 1997 (http://www.mediacentral.com/Magazines/MediaDaily/#08).

[51] TCI would have incentives to encourage new programming entry, to the extent that such entry would reduce the "industry average price" referred to in the PSA and thereby reduce the price that TCI would pay under the PSA.

[52] *See* Order ¶ IV. There would appear to be even less justification for cancelling the PSA in light of the requirements (Order ¶¶ II & III) that TCI spin off or cap its shareholdings in Time Warner.

[53] Order ¶ VII.

provision;[54] and (3) a requirement that Time Warner carry "at least one Independent Advertising-Supported News and Information National Video Programming Service."[55] These remedial provisions are unnecessary, and they may be harmful.

Paragraph VII of the order, the antidiscrimination provision, seeks to protect unaffiliated programming vendors from exploitation and discrimination by Time Warner. The order provision is taken almost verbatim from a regulation of the Federal Communications Commission.[56] It is highly unusual, to say the least, for an order of the FTC to require compliance with a law enforced by another federal agency, and it is unclear what expertise we might bring to the process of assuring such compliance. Although a requirement to obey existing law and FCC regulations may not appear to burden Time Warner unduly, the additional burden of complying with the FTC order may be costly for both Time Warner and the FTC. In addition to imposing extensive recordkeeping requirements,[57] the order apparently would create another forum for unhappy programmers, who could seek to instigate an FTC investigation of Time Warner's compliance with the order, instead of or in addition to citing the same conduct in a complaint filed with and adjudicated by the FCC.[58] The burden of attempting to enforce compliance with FCC regulations is one that this agency need not and should not assume.

The order also requires Time Warner to carry an independent all-news channel.[59] This requirement is entirely unwarranted. A duty to deal might be appropriate on a sufficient showing if Time Warner were a monopolist. But with less than 20% of cable subscribers in the United States, Time Warner is neither a monopolist nor an "essential facility" in cable distribution.[60] CNN, the apparent target of the FTC-

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[54] Order ¶ VIII.

[55] Order ¶ IX.

[56] *See* 47 CFR 76.1301(a)-(c).

[57] To the extent that the recordkeeping requirements may replicate what is required by the FCC, no additional costs would appear to be imposed by the order on Time Warner.

[58] *See* 47 CFR 76.1302. The FCC may mandate carriage and impose prices, terms and other conditions of carriage.

[59] Order ¶ IX.

[60] Even in New York City, undoubtedly an important media market, available data indicate that Time Warner apparently serves only about one-quarter of cable households. *See* Cablevision, May 13, 1996, at 57; April 29, 1996, at 131 (Time Warner has about 1.1 million subscribers in New York, which has about 4.5 million cable households). We do not have data about alternative MVPD subscribers in the

sponsored entry, also is not a monopolist but is one of many cable programming services in the all-programming market alleged in the complaint. Clearly, CNN also is one of many sources of news and information readily available to the public, although neither televised news programming nor ad-supported cable TV news programming is a market alleged in the complaint.

Antitrust law, properly applied, provides no justification whatsoever for the government to help establish a competitor for CNN on the Time Warner cable systems. Nor is there any apparent reason, other than the circular reason that it would be helpful to them, why Microsoft, NBC or Fox needs a helping hand from the FTC in their new programming endeavors. CNN and other programming networks did not obtain carriage mandated by the FTC when they launched; why should the Commission now tilt the playing field in favor of other entrants?

PRICE DISCRIMINATION

The complaint alleges that Time Warner could discriminatorily raise the prices of programming services to its MVPD rivals,[61] presumably to protect its cable operations from competition. This theory assumes that Time Warner has market power in the all-cable programming market. As discussed above, however, there are reasons to think that the alleged all-cable programming market would not be sustained, and entry into cable programming is widespread and, because of the volume of entry, immediate. Under the circumstances, it appears not only not likely but virtually inconceivable that Time Warner could sustain any attempt to exercise market power in the alleged all-cable programming market.

Whatever the merits of the theory in this case, however, discrimination against competing MVPDs in price or other terms of sale of programming is prohibited by federal statute[62] and by FCC regulations,[63] and the FCC provides a forum to adjudicate complaints of this nature. Unfortunately, the majority is not content to leave policing of telecommunications to the FCC.

New York area.

[61] Complaint ¶ 38c.

[62] 47 U.S.C.A. 548.

[63] 47 CFR 76.1000 - 76.1002.

The order addresses the alleged violation in the following way: (1) it requires Time Warner to provide Turner programming to competing MVPDs on request; and (2) it establishes a formula for determining the prices that Time Warner can charge MVPDs for Turner programming in areas in which Time Warner cable systems and the MVPDs compete.[64] The provision is inconsistent with two antitrust principles. Antitrust traditionally does not impose a duty to deal absent monopoly, which does not exist here, and antitrust traditionally has not viewed price regulation as an appropriate remedy for market power. Indeed, price regulation usually is seen as antithetical to antitrust.

Although the provision ostensibly has the same nondiscrimination goal as federal telecommunications law and FCC regulations, the bright line standard in the proposed order for determining a nondiscriminatory price fails to take account of the circumstances Congress has identified in telecommunications statutes in which price differences could be justified, such as, for example, cost differences, economies of scale or "other direct and legitimate economic benefits reasonably attributable to the number of subscribers serviced by the distributor."[65] These are significant omissions, particularly for an agency that has taken pride in its mission to prevent unfair methods of competition and, in so doing, to identify and take account of efficiencies. There is no apparent reason or authority for creating this exception to a congressional mandate. To the extent that the proposed order creates a regulatory scheme different from that afforded by Congress and the FCC, disgruntled MVPDs may find it to their advantage to seek sanctions against Time Warner at the FTC.[66] This is likely to be costly for the FTC and for Time Warner, and the differential scheme of regulation also could impose other, unforeseen costs on the industry.

EFFICIENCIES

As far as I can tell, the consent order entirely ignores the likely efficiencies of the proposed transaction. The potential vertical efficiencies include more and better programming options for

[64] Order ¶ VI.

[65] 47 U.S.C. 548(c)(2)(B)(i)-(iii).

[66] Most people outside the FTC and the FCC already confuse the two agencies. Surely we do not want to contribute to this confusion.

consumers and reduced transaction costs for the merging firms. The potential horizontal efficiencies include savings from the integration of overlapping operations and of film and animation libraries. For many years, the Commission has devoted considerable time and effort to identifying and evaluating efficiencies that may result from proposed mergers and acquisitions. Although cognizable efficiencies occur less frequently than one might expect, the Commission has not stinted in its efforts to give every possible consideration to efficiencies. That makes the apparent disinterest in the potential efficiencies of this transaction decidedly odd.

INDUSTRY COMPLAINTS

We have heard many expressions of concern about the transaction. Cable system operators and alternative MVPDs have been concerned about the price and availability of programming from Time Warner after the acquisition. Program providers have been concerned about access to Time Warner's cable system. These are understandable concerns, and I am sympathetic to them. To the extent that these industry members want assured supply or access and protected prices, however, this is (or should be) the wrong agency to help them. Because Time Warner cannot foreclose either level of service and is neither a monopolist nor an "essential facility" in the programming market or in cable services, there would appear to be no basis in antitrust for the access requirements imposed in the order.

The Federal Communications Commission is the agency charged by Congress with regulating the telecommunications industry, and the FCC already has rules in place prohibiting discriminatory prices and practices. While there may be little harm in requiring Time Warner to comply with communications law, there also is little justification for this agency to undertake the task. To the extent that the consent order offers a standard different from that promulgated by Congress and the FCC, it arguably is inconsistent with the will of Congress. To the extent that the consent order would offer a more attractive remedy for complaints from disfavored competitors and customers of Time Warner, they are more likely to turn to us than to the FCC. There is much to be said for having the FTC confine itself to FTC matters, leaving FCC matters to the FCC.

I dissent.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue a complaint and final order against Time Warner Inc. ("TW"), Turner Broadcasting System, Inc. ("TBS"), Tele-Communications, Inc. ("TCI"), and Liberty Media Corporation. The complaint against these producers and distributors of cable television programming alleges anticompetitive effects arising from (1) the horizontal integration of the programming interests of TW and TBS and (2) the vertical integration of TBS's programming interests with TW's and TCI's distribution interests. I am not persuaded that either the horizontal or the vertical aspects of this transaction are likely "substantially to lessen competition" in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, or otherwise to constitute "unfair methods of competition" in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Moreover, even if one were to assume the validity of one or more theories of violation underlying this action, the order does not appear to prevent the alleged effects and may instead create inefficiency.

HORIZONTAL THEORIES OF COMPETITIVE HARM

This transaction involves, *inter alia*, the combination of TW and TBS, two major suppliers of programming to multichannel video program distributors ("MVPDs"). Accordingly, there is a straightforward theory of competitive harm that merits serious consideration by the Commission. In its most general terms, the theory is that cable operators regard TW programs as close substitutes for TBS programs. Therefore, the theory says, TW and TBS act as premerger constraints on each other's ability to raise program prices. Under this hypothesis, the merger eliminates this constraint, allowing TW -- either unilaterally or in coordination with other program vendors -- to raise prices on some or all of its programs.

Of course, this story is essentially an illustration of the standard theory of competitive harm set forth in Section 2 of the 1992 Horizontal Merger Guidelines.[1] Were an investigation pursuant to this theory to yield convincing evidence that it applies to the current transaction, under most circumstances the Commission would seek

[1] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 2 (1992), 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,573-6 *et seq.*

injunctive relief to prevent the consolidation of the assets in question. The Commission has eschewed that course of action, however, choosing instead a very different sort of "remedy" that allows the parties to proceed with the transaction but restricts them from engaging in some (but not all) "bundled" sales of programming to unaffiliated cable operators.[2] Clearly, this choice of relief implies an unusual theory of competitive harm from what ostensibly is a straightforward horizontal transaction. The Commission's remedy does nothing to prevent the most obvious manifestation of postmerger market power -- an across-the-board price increase for TW and TBS programs. Why has the Commission forgone its customary relief directed against its conventional theory of harm?

The plain answer is that there is little persuasive evidence that TW's programs constrain those of TBS (or vice-versa) in the fashion described above. In a typical FTC horizontal merger enforcement action, the Commission relies heavily on documentary evidence establishing the substitutability of the parties' products or services.[3] For example, it is standard to study the parties' internal documents to determine which producers they regard as their closest competitors. This assessment also depends frequently on internal documents supplied by customers that show them playing off one supplier against another -- via credible threats of supplier termination -- in an effort to obtain lower prices.

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[2] In the Analysis of Proposed Consent Order to Aid Public Comment (Section IV.C) that it released in connection with acceptance of the consent agreement in this case, the Commission asserted that "the easiest way the combined firm could exert substantially greater negotiating leverage over cable operators is by combining all or some of such 'marquee' services and offering them as a package or offering them along with unwanted programming." As I note below, it is far from obvious why this bundling strategy represents the "easiest" way to exercise market power against cable operators. The easiest way to exercise any newly-created market power would be simply to announce higher programming prices.

[3] The Merger Guidelines emphasize the importance of such evidence. Section 1.11 specifically identifies the following two types of evidence as particularly informative: "(1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables [and] (2) evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables."

To illustrate, in Coca-Cola Bottling Co. of the Southwest, Docket No. 9215, complaint counsel argued in favor of a narrow product market consisting of "all branded carbonated soft drinks" ("CSDs"), while respondent argued for a much broader market. In determining that all branded CSDs constituted the relevant market, the Commission placed great weight on internal documents from local bottlers of branded CSDs showing that those bottlers "[took] into account only the prices of other branded CSD products [and not the prices of private label or warehouse-delivered soft drinks] in deciding on pricing for their own branded CSD products." 5 Trade Reg. Rep. (CCH) ¶ 23,681 at 23,413 (Aug. 31, 1994), *vacated and remanded on other grounds*, *Coca-Cola Bottling Co. of the Southwest v. FTC*, 85 F.3d 1139 (5th Cir. 1996). (The Commission dismissed its complaint on September 6, 1996.)

In this matter, however, documents of this sort are conspicuous by their absence. Notwithstanding a voluminous submission of materials from the respondents and third parties (and the considerable incentives of the latter -- especially other cable operators -- to supply the Commission with such documents), there are no documents that reveal cable operators threatening to drop a TBS "marquee" network (*e.g.*, CNN) in favor of a TW "marquee" network (*e.g.*, HBO). There also are no documents from, for instance, TW suggesting that it sets the prices of its "marquee" networks in reference to those of TBS, taking into account the latter's likely competitive response to unilateral price increases or decreases. Rather, the evidence supporting any prediction of a postmerger price increase consists entirely of customers' contentions that program prices would rise following the acquisition. Although customers' opinions on the potential effects of a transaction often are important, they seldom are dispositive. Typically the Commission requires substantial corroboration of these opinions from independent information sources.[4]

Independent validation of the anticompetitive hypothesis becomes particularly important when key elements of the story lack credibility. For a standard horizontal theory of harm to apply here, one key element is that, prior to the acquisition, an MVPD could credibly threaten to drop a marquee network (*e.g.*, CNN), provided it had access to another programmer's marquee network (*e.g.*, HBO) that it could offer to potential subscribers. This threat would place the MVPD in a position to negotiate a better price for the marquee networks than if those networks were jointly owned.

Here, the empirical evidence gathered during the investigation reveals that such threats would completely lack credibility. Indeed,

[4] For example, in *R.R. Donnelley Sons & Co., et al.*, Docket No. 9243, the Administrative Law Judge's decision favoring complaint counsel rested in part on his finding that "[a]s soon as the Meredith/Burda acquisition was announced, customers expressed concern to the FTC and the parties about the decrease in competition that might result." (Initial Decision Finding 404.) In overturning the ALJ's decision, the Commission cautioned: "There is some danger in relying on these customer complaints to draw any general conclusions about the likely effects of the acquisition or about the analytical premises for those conclusions. The complaints are consistent with a variety of effects, and many -- including those the ALJ relied upon -- directly contradict [c]omplaint [c]ounsel's prediction of unilateral price elevation." 5 Trade Reg. Rep. (CCH) ¶ 23,876 at 23,660 n.189 (July 21, 1995).

Also, in several instances involving hospital mergers in concentrated markets, legions of third parties came forth to attest to the transaction's efficiency. The Commission has discounted this testimony, however, when these third parties could not articulate or document the source of the claimed efficiency, or when the testimony lacked corroboration from independent information sources. I believe that the Commission should apply the same evidentiary standards to the third-party testimony in the current matter.

there appears to be little, if any, evidence that such threats ever have been made, let alone carried out. CNN and HBO are not substitutes, and both are carried on virtually all cable systems nationwide. If, as a conventional horizontal theory of harm requires, these program services are truly substitutes -- if MVPDs regularly play one off against the other, credibly threatening to drop one in favor of another -- then why are there virtually no instances in which an MVPD has carried out this threat by dropping one of the marquee services? The absence of this behavior by MVPDs undermines the empirical basis for the asserted degree of substitutability between the two program services.[5]

Faced with this pronounced lack of evidence to support a conventional market power story and a conventional remedy, the Commission has sought refuge in what appears to be a very different theory of postmerger competitive behavior. This theory posits an increased likelihood of program "bundling" as a consequence of the transaction.[6] But there are two major problems with this theory as a basis for an enforcement action. First, there is no strong theoretical or empirical basis for believing that an increase in bundling of TW and TBS programming would occur postmerger. Second, even if such bundling did occur, there is no particular reason to think that it would be competitively harmful.

Given the lack of documentary evidence to show that TW intends to bundle its programming with that of TBS, I do not understand why the majority considers an increase in program bundling to be a likely feature of the postmerger equilibrium, nor does economic theory supply a compelling basis for this prediction. Indeed, the rationale for this element of the case (as set forth in the Analysis to Aid Public Comment) can be described charitably as "incomplete." According to the Analysis, unless the FTC prevents it, TW would undertake a bundling strategy in part to foist "unwanted programming" upon cable

[5] In virtually any case involving less pressure to come up with something to show for the agency's strenuous investigative efforts, the absence of such evidence would lead the Commission to reject a hypothesized product market that included both marquee services. Suppose that two producers of product A proposed to merge and sought to persuade the Commission that the relevant market also included product B, but they could not provide any examples of actual substitution of B for A, or any evidence that threats of substitution of B for A actually elicited price reductions from sellers of A. In the usual run of cases, this lack of substitutability would almost surely lead the Commission to reject the expanded market definition. But not so here.

[6] As I noted earlier, a remedy that does nothing more than prevent "bundling" of different programs would fail completely to prevent the manifestations of market power -- such as across-the-board price increases -- most consistent with conventional horizontal theories of competitive harm.

operators.[7] Missing from the Analysis, however, is any sensible explanation of why TW should wish to pursue this strategy, because the incentives to do so are not obvious.[8]

A possible anticompetitive rationale for "bundling" might run as follows: by requiring cable operators to purchase a bundle of TW and TBS programs that contains substantial amounts of "unwanted" programming, TW can tie up scarce channel capacity and make entry by new programmers more difficult. But even if that strategy were assumed *arguendo* to be profitable,[9] the order would have only a trivial impact on TW's ability to pursue it. The order prohibits only

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[7] As I have noted, *supra* n.2, the Analysis also claimed that TW could obtain "substantially greater negotiating leverage over cable operators . . . by combining all or some of [the merged firm's] 'marquee' services and offering them as a package . . ." If the Analysis used the term "negotiating leverage" to mean "market power" as the latter is conventionally defined, then it confronts three difficulties: (1) the record fails to support the proposition that the TW and TBS "marquee" channels are close substitutes for each other; (2) even assuming that those channels are close substitutes, there are more straightforward ways for TW to exercise postmerger market power; and (3) the remedy does nothing to prevent these more straightforward exercises of market power. *See* discussion *supra*.

[8] In "A Note on Block Booking" in THE ORGANIZATION OF INDUSTRY (1968), George Stigler analyzed the practice of "block booking" -- or, in current parlance, "bundling" -- "marquee" motion pictures with considerably less popular films. Some years earlier, the United States Supreme Court had struck this practice down as an anticompetitive "leveraging" of market power from desirable to undesirable films. *United States v. Loew's Inc.*, 371 U.S. 38 (1962). As Stigler explained (at 165), it is not obvious why distributors should wish to force exhibitors to take the inferior film:

> Consider the following simple example. One film, Justice Goldberg cited *Gone with the Wind*, is worth $10,000 to the buyer, while a second film, the Justice cited *Getting Gertie's Garter*, is worthless to him. The seller could sell the one for $10,000, and throw away the second, for no matter what its cost, bygones are forever bygones. Instead the seller compels the buyer to take both. But surely he can obtain no more than $10,000, since by hypothesis this is the value of both films to the buyer. Why not, in short, use his monopoly power directly on the desirable film? It seems no more sensible, on this logic, to block book the two films than it would be to compel the exhibitor to buy *Gone with the Wind* and seven Ouija boards, again for $10,000.

[9] The argument here basically is a variant of the argument often used to condemn exclusive dealing as a tool for monopolizing a market. Under this argument, an upstream monopolist uses its market power to obtain exclusive distribution rights from its distributors, thereby foreclosing potential manufacturing entrants and obtaining additional market power. But there is [sic] problem with this argument, as Bork explains in THE ANTITRUST PARADOX (1978):

> [The monopolist] can extract in the prices it charges retailers all that the uniqueness of its line is worth. It cannot charge the retailer that full worth in money and then charge it again in exclusivity the retailer does not wish to grant. To suppose that it can is to commit the error of double counting. If [the firm] must forgo the higher prices it could have demanded in order to get exclusivity, then exclusivity is not an imposition, it is a purchase.

Id. at 306; *see also id.* at 140-43.

Although modern economic theory has established the theoretical possibility that a monopolist might, under very specific circumstances, outbid an entrant for the resources that would allow entry to occur (thus preserving the monopoly), modern theory also has shown that this is not a generally applicable result. It breaks down, for example, when (as is likely in MVPD markets) many units of new capacity are likely to become available sequentially. *See, e.g.*, Krishna, "Auctions with Endogenous Valuations: The Persistence of Monopoly Revisited," 83 Am. Econ. Rev. 147 (1993); Malueg and Schwartz, "Preemptive investment, toehold entry, and the mimicking principle," 22 RAND J. Econ. 1 (1991).

the bundling of TW programming with TBS programming; TW remains free under the order to create new "bundles" comprising exclusively TW, or exclusively TBS, programs. Given that many TW and TBS programs are now sold on an unbundled basis -- a fact that calls into question the likelihood of increased postmerger bundling[10] -- and given that, under the majority's bundling theory, any TW or TBS programming can tie up a cable channel and thereby displace a potential entrant's programming, the order hardly would constrain TW's opportunities to carry out this "foreclosure" strategy.

Finally, all of the above analysis implicitly assumes that the bundling of TW and TBS programming, if undertaken, would more likely than not be anticompetitive. The Analysis to Aid Public Comment, however, emphasizes that bundling programming in many other instances can be procompetitive. There seems to be no explanation of why the particular bundles at issue here would be anticompetitive, and no articulation of the principles that might be used to differentiate welfare-enhancing from welfare-reducing bundling.[11]

Thus, I am neither convinced that increased program bundling is a likely consequence of this transaction nor persuaded that any such bundling would be anticompetitive. Were I convinced that anticompetitive bundling is a likely consequence of this transaction, I would find the remedy inadequate.

VERTICAL THEORIES OF COMPETITIVE HARM

The consent order also contains a number of provisions designed to alleviate competitive harm purportedly arising from the increased degree of vertical integration between program suppliers and program

[10] If bundling is profitable for anticompetitive reasons, why do we not observe TW and TBS now exploiting all available opportunities to reap these profits?

[11] Perhaps this reflects the fact that the economics literature does not provide clear guidance on this issue. *See, e.g.*, Adams and Yellen, "Commodity Bundling and the Burden of Monopoly," 90 Q.J. Econ. 475 (1976). Adams and Yellen explain how a monopolist might use bundling as a method of price discrimination. (This also was Stigler's explanation, *supra* n.8.) As Adams and Yellen note, "public policy must take account of the fact that prohibition of commodity bundling without more may increase the burden of monopoly . . . [M]onopoly itself must be eliminated to achieve high levels of social welfare." 90 Q.J. Econ. at 498. Adams and Yellen's conclusion is apposite here: if the combination of TW and TBS creates (or enhances) market power, then the solution is to enjoin the transaction rather than to proscribe certain types of bundling, since the latter "remedy" may actually make things worse. And if the acquisition does not create or enhance market power, the basis for the bundling proscription is even harder to discern.

distributors brought about by this transaction.[12] I have previously expressed my skepticism about enforcement actions predicated on theories of harm from vertical relationships.[13] The current complaint and order only serve to reinforce my doubts about such enforcement actions and about remedies ostensibly designed to address the alleged competitive harms.

The vertical theories of competitive harm posited in this matter, and the associated remedies, are strikingly similar to those to which I objected in Silicon Graphics, Inc. ("SGI"), and the same essential criticisms apply. In SGI, the Commission's complaint alleged anticompetitive effects arising from the vertical integration of SGI -- the leading manufacturer of entertainment graphics workstations -- with Alias Research, Inc., and Wavefront Technologies, Inc. -- two leading suppliers of entertainment graphics software. Although the acquisition seemingly raised straightforward horizontal competitive problems arising from the combination of Alias and Wavefront, the Commission inexplicably found that the horizontal consolidation was not anticompetitive on net.[14] Instead, the order addressed only the alleged vertical problems arising from the transaction. The Commission alleged, *inter alia*, that the acquisitions in SGI would reduce competition through two types of foreclosure: (1) nonintegrated software vendors would be excluded from the SGI platform, thereby inducing their exit (or deterring their entry); and (2) rival hardware manufacturers would be denied access to Alias and Wavefront software, without which they could not effectively compete against SGI. Similarly, in this case the Commission alleges (1) that nonintegrated program vendors will be excluded from TW

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[12] Among other things, the order (1) constrains the ability of TW and TCI to enter into long-term carriage agreements (¶ IV); (2) compels TW to sell Turner programming to downstream MVPD entrants at regulated prices (¶ VI); (3) prohibits TW from unreasonably discriminating against non-TW programmers seeking carriage on TW cable systems (¶ VII(C)); and (4) compels TW to carry a second 24-hour news service (*i.e.*, in addition to CNN) (¶ IX).

[13] Dissenting Statement of Commissioner Roscoe B. Starek, III, in *Waterous Company, Inc./Hale Products, Inc.*, Docket Nos. C-3693 & C-3694 (Nov. 22, 1996), 5 Trade Reg. Rep. (CCH) ¶ 24,076 at 23,888-90; Dissenting Statement of Commissioner Roscoe B. Starek, III, in *Silicon Graphics, Inc. (Alias Research, Inc., and Wavefront Technologies, Inc.)*, Docket No. C-3626 (Nov. 14, 1995), 61 Fed. Reg. 16797 (Apr. 17, 1996); Remarks of Commissioner Roscoe B. Starek, III, "Reinventing Antitrust Enforcement? Antitrust at the FTC in 1995 and Beyond," remarks before a conference on "A New Age of Antitrust Enforcement: Antitrust in 1995" (Marina Del Rey, California, Feb. 24, 1995) [available on the Commission's World Wide Web site at http://www.ftc.gov].

[14] I say "inexplicably" not because I necessarily believed this horizontal combination should have been enjoined, but because the horizontal aspect of the transaction would have exacerbated the upstream market power that would have had to exist for the vertical theories to have had any possible relevance.

and TCI cable systems and (2) that potential MVPD entrants into TW's cable markets will be denied access to (or face supracompetitive prices for) TW and TBS programming -- thus lessening their ability to effectively compete against TW's cable operations. The complaint further charges that the exclusion of nonintegrated program vendors from TW's and TCI's cable systems will deprive those vendors of scale economies, render them ineffective competitors *vis-à-vis* the TW/Turner programming services, and thus confer market power on TW as a seller of programs to MVPDs in non-TW/non-TCI markets.

My dissenting statement in SGI identified the problems with this kind of analysis. For one thing, these two types of foreclosure -- foreclosure of independent program vendors from the TW and TCI cable systems, and foreclosure of independent MVPD firms from TW and TBS programming -- tend to be mutually exclusive. The very possibility of excluding independent program vendors from TW and TCI cable systems suggests the means by which MVPDs other than TW and TCI can avoid foreclosure. The nonintegrated program vendors surely have incentives to supply the "foreclosed" MVPDs,[15] and each MVPD has incentives to induce nonintegrated program suppliers to produce programming for it.[16]

In response to this criticism, one might argue -- and the complaint alleges[17] -- that pervasive scale economies in programming, combined with a failure to obtain carriage on the TW and TCI systems, would doom potential programming entrants (and "foreclosed" incumbent programmers) because, without TW and/or TCI carriage, they would be deprived of the scale economies essential to their survival. In other words, the argument goes, the competitive responses of "foreclosed" programmers and "foreclosed" distributors identified in the preceding

[15] These MVPDs would include vendors of direct broadcast satellite ("DBS") systems, which are rapidly becoming an important competitive alternative to cable. According to Multichannel News (Jan. 13, 1997), "strong Christmas sales for the satellite dishes have shattered any hope [on the part of cable systems] that the primary competitive threat to cable TV is abating . . . [T]he number of DBS subscribers [has] doubled, rising from approximately 2.18 million in 1995 to 4.25 million in 1996."

[16] Moreover, as was also true in SGI, the complaint in the present case characterizes premerger entry conditions in a way that appears to rule out significant anticompetitive foreclosure of nonintegrated upstream producers as a consequence of the transaction. Paragraphs 33, 34, and 36 of the complaint allege in essence that there are few producers of "marquee" programming before the merger (other than TW and TBS), in large part because entry into "marquee" programming is so very difficult (stemming from, *e.g.*, the substantial irreversible investments that are required). If that is true -- *i.e.*, if the posited programming market already was effectively foreclosed before the merger -- then, as in SGI, TW's acquisition of TBS could not cause substantial postmerger foreclosure of competitively significant alternatives to TW/TBS programming

[17] *See* paragraph 38.b of the complaint.

paragraph never will materialize. There are, however, substantial conceptual and empirical problems with this argument, and its implications for competition policy have not been fully explored.

First, if one believes that programming is characterized by such substantial scale economies that the loss of one large customer results in the affected programmer's severely diminished competitive effectiveness (in the limit, that programmer's exit), then this essentially is an argument that the number of program producers that can survive in equilibrium (or, perhaps more accurately, the number of program producers in a particular program "niche") will be small -- with perhaps only one survivor. Under the theory of the current case, this will result in a supracompetitive price for that program. Further, this will occur irrespective of the degree of vertical integration between programmers and distributors. Indeed, under these circumstances, there is a straightforward reason why vertical integration between a program distributor and a program producer would be both profitable and procompetitive (*i.e.*, likely to result in lower prices to consumers): instead of monopoly markups by both the program producer and the MVPD, there would be only one markup by the vertically integrated firm.[18]

Second, and perhaps more important, if the reasoning of the complaint is carried to its logical conclusion, it constitutes a basis for challenging any vertical integration by large cable operators or large programmers -- even if that vertical integration were to occur via *de novo* entry by an operator into the programming market, or by *de novo* entry by a programmer into distribution. Consider the following hypothetical: A large MVPD announces both that it intends to enter a particular program niche and that it plans to drop the incumbent supplier of that type of programming. According to the theory underlying the complaint, the dropped program would suffer substantially from lost scale economies, severely diminishing its competitive effectiveness, which in turn would confer market power on the vertically integrated entrant in its program sales to other MVPDs. Were the Commission to apply its current theory of

[18] *See, e.g.*, Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 174-76 (1988). The program price reductions would be observed only in those geographic markets where TW owned cable systems. Thus, the greater the number of cable subscribers served by TW, the more widespread would be the efficiencies. According to the complaint (¶ 32), TW cable systems serve only 17 percent of cable subscribers nationwide, so one might argue that the efficiencies are accordingly limited. But this, of course, leaves the Commission in the uncomfortable position of arguing that TW's share of total cable subscribership is too small to yield significant efficiencies, yet easily large enough to generate substantial "foreclosure" effects.

competitive harm consistently, it evidently would have to find this *de novo* entry into programming by this large MVPD competitively objectionable.

I suspect, of course, that virtually no one would be comfortable challenging such integration, since there is a general predisposition to regard expansions of capacity as procompetitive.[19] Consequently, one might attempt to reconcile the differential treatment of the two forms of vertical integration by somehow distinguishing them from each other.[20] But in truth, the situations actually merit similar treatment -- albeit not the treatment prescribed by the order. In neither case should an enforcement action be brought, because any welfare loss flowing from either scenario derives from the structure of the upstream market, which in turn is determined primarily by the size of the market and by technology, not by the degree of vertical integration between different stages of production.

Third, it is far from clear that TCI's incentives to preclude entry into programming are the same as TW's.[21] As an MVPD, TCI is harmed by the creation of entry barriers to new programming. Even if TW supplies it with TW programming at a competitive price, TCI is still harmed if program variety or innovation is diminished. On the other hand, as a part owner of TW, TCI benefits if TW's programming earns supracompetitive returns on sales to other MVPDs. TCI's net incentive to sponsor new programming depends on which factor dominates -- its interest in program quality and innovation, or its interest in supracompetitive returns on TW programming. All of the analyses of which I am aware concerning

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[19] This would appear true especially when, as posited here, there is substantial premerger market power upstream because, under such circumstances, vertical integration is a means by which a downstream firm can obtain lower input prices. As noted earlier (*supra* n.18 and accompanying text), this integration can be procompetitive whether it occurs via merger or internal expansion.

[20] One might attempt to differentiate my hypothetical from a situation involving an MVPD's acquisition of a program supplier by arguing that the former would yield two suppliers of the relevant type of programming, but the latter only one. But this conclusion would be incorrect. If we assume that the number of suppliers that can survive in equilibrium is determined by the magnitude of scale economies relative to the size of the market, and that the pre-entry market structure represented an equilibrium, then the existence of two program suppliers will be only a transitory phenomenon, and the market will revert to the equilibrium structure dictated by these technological considerations -- that is, one supplier. Upstream integration by the MVPD merely replaces one program monopolist with another; but as noted above, under these circumstances vertical integration can yield substantial efficiencies.

[21] Even TW has mixed incentives to preclude programming entry. As a programmer allegedly in possession of market power, TW would wish to deter programming entry to protect this market power. But as an MVPD, TW -- like any other MVPD -- benefits from the creation of valuable new programming services that it can sell to its subscribers. On net, however, it appears true that TW's incentives balance in favor of wishing to prevent entry.

this tradeoff show that TCI's ownership interest in TW would have to increase substantially -- far beyond what the current transaction contemplates, or what would be possible without a significant modification of TW's internal governance structure[22] -- for TCI to have an incentive to deter entry by independent programmers. TCI's incentive to encourage programming entry is intensified, moreover, by the fact that it has undertaken an ambitious expansion program to digitize its system and increase capacity to 200 channels. Because this appears to be a costly process, and because not all cable customers can be expected to purchase digital service, the cost per buyer -- and thus the price -- of digital services will be fairly high. How can TCI expect to induce subscribers to buy this expensive service if, through programming foreclosure, it has restricted the quantity and quality of programming that would be available on this service tier?[23]

The foregoing illustrates why foreclosure theories fell into intellectual disrepute: because of their inability to articulate how vertical integration harms competition and not merely competitors. The majority's analysis of the Program Service Agreement ("PSA") illustrates this perfectly. The PSA must be condemned, we are told, because a TCI channel slot occupied by a TW program is a channel slot that cannot be occupied by a rival programmer. As Bork noted, this is a tautology, not a theory of competitive harm.[24] It is a theory of harm to competitors -- competitors that cannot offer TCI inducements (such as low prices) sufficient to cause TCI to patronize them rather than TW.

All of the majority's vertical theories in this case ultimately can be shown to be theories of harm to competitors, not to competition.

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[22] TW has a "poison pill" provision that would make it costly for TCI to increase its ownership of TW above 18 percent.

[23] Note too that there is an inverse relationship between TCI's ability to prevent programming entry and its incentives to do so. Much of the analysis in this case has emphasized that TCI's size (27 percent of cable households) gives it considerable ability to determine which programs succeed and which fail, and the logic of the complaint is that TCI will exercise this ability so as to protect TW's market power in program sales to non-TW/non-TCI MVPDs. But although increases in TCI's size may increase its ability to preclude entry into programming, at the same time such increases reduce TCI's incentives to do so. The reasoning is simple: as the size of the non-TW/non-TCI cable market shrinks, the supracompetitive profits obtained from sales of programming to this sector also shrink. Simultaneously, the harm from TCI (as a MVPD) from precluding the entry of new programmers increases with TCI's subscriber share. (In the limit -- *i.e.*, if TCI and TW controlled all cable households -- there would be no non-TW/non-TCI MVPDs, no sales of programming to such MVPDs, and thus no profits to be obtained from such sales.) Any future increases in TCI's subscriber share would, other things held constant, reduce its incentives to "foreclose" entry by independent programmers.

[24] Bork, THE ANTITRUST PARADOX, *supra* n.9, at 304.

Thus, I have not been persuaded that the vertical aspects of this transaction are likely to diminish competition substantially. Even were I to conclude otherwise, however, I could not support the extraordinarily regulatory remedy contained in the order, two of whose provisions merit special attention: (1) the requirement that TW sell programming to MVPDs seeking to compete with TW cable systems at a price determined by a formula contained in the order; and (2) the requirement that TW carry at least one "Independent Advertising-Supported News and Information National Video Programming Service."

Under paragraph VI of the order, TW must sell Turner programming to potential entrants into TW cable markets at prices determined by a "most favored nation" clause that gives the entrant the same price -- or, more precisely, the same "carriage terms" -- that TW charges the three largest MVPDs currently carrying this programming. As is well known, most favored nation clauses have the capacity to cause all prices to rise rather than to fall.[25] But even putting this possibility aside, this provision of the order converts the Commission into a *de facto* price regulator -- a task, as I have noted on several previous occasions, to which we are ill-suited.[26] During the investigation third parties repeatedly informed me of the difficulty that the Federal Communications Commission has encountered in attempting to enforce its nondiscrimination regulations. The FTC's regulatory burden would be lighter only because, perversely, our pricing formula would disallow any of the efficiency-based rationales for differential pricing recognized by the Congress and the FCC.[27]

Most objectionable is paragraph IX of the order, the "must carry" provision that compels TW to carry an additional 24-hour news service. I am baffled how the Commission has divined that consumers

[25] *See, e.g., RxCare of Tennessee, Inc., et al.*, Docket No. C-3664, 5 Trade Reg. Rep. (CCH) ¶ 23,957 (June 10, 1996); *see also* Cooper and Fries, "The most-favored-nation pricing policy and negotiated prices," 9 Int'l J. Ind. Org. 209 (1991). The logic is straightforward: if by cutting price to another (noncompeting) MVPD TW is compelled also to cut price to downstream competitors, the incentive to make this price cut is diminished. Although this effect might be small in the early years of the order (when the gains to TW from cutting price to a large, independent MVPD might swamp the losses from cutting price to its downstream competitors), its magnitude will grow over the order's 10-year duration, as TW cable systems confront greater competition.

[26] *See* my dissenting statements in Silicon Graphics and Waterous/Hale, *supra* n.13.

[27] Mirroring the applicable statute, the FCC rules governing the sale of cable programming by vertically integrated programmers to nonaffiliated MVPDs allow for price differentials reflecting, *inter alia*, "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." 47 U.S.C. 548(c)(2)(B)(iii); 47 CFR 76.1002(b)(3).

would prefer that a channel of supposedly scarce cable capacity be used for a second news service, instead of for something else.[28] More generally, although remedies in horizontal merger cases sometimes involve the creation of a new competitor to replace the competition eliminated by the transaction, no competitor has been lost in the present case. Indeed, substantial entry already has occurred in this segment of the programming market (*e.g.*, Fox and MSNBC), notwithstanding the severe "difficulty" of entering the markets alleged in the complaint.[29] Obviously, the incentives to buy programming from an independent vendor are diminished (all else held constant) when a distributor integrates vertically into programming. This is true whether the integration is procompetitive or anticompetitive on net, and whether the integration occurs via merger or via *de novo* entry.[30] I could no more support a must-carry provision for TW as a result of its acquisition of CNN than I could endorse a similar requirement to remedy the "anticompetitive consequences" of *de novo* integration by TW into the news business.

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[28] The order (¶ IX(A)) requires that TW execute a program service agreement with at least one "Independent Advertising-Supported News and Information National Video Programming Service," which in turn is defined (¶ I(Q)) as a service that offers "24-hour per day service consisting of current national, international, sports, financial and weather news and/or information . . ." This definition is inherently arbitrary: why does the service have to be "advertising-supported," and why does it have to offer "weather news"? Moreover, the provision has the effect (perhaps intentional) of excluding program services such as C-SPAN and C-SPAN2 -- programming services that are devoted entirely to covering "national and international news" but are not advertising-supported and do not tell their viewers whether it is going to rain tomorrow.

[29] Moreover, according to the logic of the complaint, Fox's inability to obtain carriage on TW's systems -- TW apparently intends to carry MSNBC instead, at least on its Manhattan cable system -- should induce Fox to cease or curtail operations, as it seemingly would have few prospects for long-term survival absent carriage on TW's systems. That Fox apparently has not withered according to the complaint's logic suggests either (1) that Fox irrationally continues to spend money on a lost cause or (2) that carriage on TW's systems -- although obviously highly desirable for a new programming service -- is not essential to its survival. (A third alternative is that Fox expects to prevail in its litigation with TW, in which Fox contends that TW had made a premerger contractual commitment to provide Fox with carriage on TW's systems. Such a commitment, if established, would render paragraph IX of the Commission's order unnecessary.)

[30] The premise inherent in this provision of the order is that TW can "foreclose" independent programming entry independently (*i.e.*, without the cooperation of TCI, whose incentives to sponsor independent programming are ostensibly preserved by the stock ownership cap contained in paragraphs II and III of the order). Given that TW has only 17 percent of total cable subscribership, I find this proposition fanciful.

IN THE MATTER OF

GENERAL MOTORS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3710. Complaint, Feb. 6, 1997--Decision, Feb. 6, 1997

This consent order prohibits, among other things, a Michigan-based automobile manufacturer from misrepresenting the total amount due at lease inception, requires the manufacturer to provide consumers with clear, readable, and understandable cost information in their car lease and financed purchase advertising, requires advertisements, that reference an initial payment or state that no initial payment is due, to clearly and conspicuously disclose, as applicable, that the deal is a lease, and to disclose the fact that an extra charge may be imposed at the end of the lease based on the residual value of the car. The consent order also prohibits the respondent from misrepresenting the existence or amount of any balloon payment or the annual percentage rate for advertised loans.

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky* and *Lauren Steinfeld.*

For the respondent: *Catherine Karol,* in-house counsel, Detroit, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Motors Corporation, a corporation ("respondent" or "General Motors"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and the Truth in Lending Act, 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent General Motors Corporation is a Delaware corporation with its principal office or place of business at 3044 West Grand Boulevard, Detroit, Michigan. Respondent manufactures vehicles and offers such vehicles for sale or lease to consumers.

2. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

3. Respondent has disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 CFR 226.2, as amended.

4. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

LEASE ADVERTISING

5. Respondent has disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for General Motors vehicles, including but not necessarily limited to the attached General Motors Exhibits A through D. General Motors Exhibits A, B, and C are television lease advertisements (attached in video and storyboard format). General Motors Exhibit D is a print lease advertisement. These advertisements contain the following statements:

A. [Audio:] "All this, just $299 a month. The S-Blazer 2 year lease." [Video:] "2 Years. $299 a Month. $1,260 Down." [The advertisement contains the following lease disclosure at the bottom of the screen in light-colored fine print superimposed on gray, moving water background, and accompanied by background sound and images: "SEE YOUR PARTICIPATING DEALER FOR QUALIFICATION DETAILS. Example based on $22,847 MSRP incl. destination charge, 1st month & lease payment $298.63, $1260 down payment plus $325 refundable security deposit for a total of $1883.63 due at lease signing (incl. capitalized cost reduction). Tax, license, title fees and insurance extra. Mileage charge of 10 [cents] mile over 30,000. GMAC must approve lease. SEE YOUR PARTICIPATING DEALER FOR QUALIFICATION DETAILS. Total of monthly payments is $7,167.12. Payments may be higher in AL, AR, CA, NY, TX, and VA. Option to purchase at lease end for $16,022.82 is fixed at lease signing and varies by model, equip., level, usage and length of lease. Lessee pays for excessive wear and use." The fine print is displayed

on two screens in blocks of at least five lines, each appearing for approximately 5 seconds.] (General Motors Exhibit A). B. [Audio:] ". . . by leasing an Oldsmobile Achieva with air, anti-lock brakes and more for just $209 a month." [Video:] "$209 per month/$1075 Down."

[The advertisement contains the following lease disclosure at the bottom of the screen in white print superimposed over a light-colored moving background, and accompanied by background sound and images: "FIRST MONTH'S LEASE PAYMENT OF $208.72, REFUNDABLE SECURITY DEPOSIT OF $225 AND A $1,075 CAPITALIZED COST REDUCTION FOR A TOTAL OF $1,508.72 DUE AT LEASE SIGNING. TAX, LICENSE, TITLE, FEES, AND INSURANCE ARE EXTRA. GMAC MUST APPROVE LEASE. EXAMPLE BASED ON ACHIEVA S SEDAN: $15,164 M.S.R.P., INCLUDING DESTINATION CHARGE. MONTHLY PAYMENTS BASED ON CAPITALIZED COST OF $13,225.88 INCLUDING CAPITALIZED COST REDUCTION. TOTAL OF 48 MONTHLY PAYMENTS IS $10,018.56. AMOUNT OF CAPITALIZED COST REDUCTION MAY BE SLIGHTLY HIGHER IN AL, AR, CA, NY, TX, AND VA. OPTION TO PURCHASE AT LEASE END FOR $6,030.64. MILEAGE CHARGE OF 10 [CENTS] PER MILE OVER MILEAGE LIMIT. LESSEE PAYS FOR EXCESSIVE WEAR AND USE. PAYMENT BASED ON RESIDUALS IN EFFECT THROUGH MARCH 31, 1993. SEE YOUR PARTICIPATING DEALER FOR QUALIFICATION DETAILS." The fine print is displayed on two screens in blocks of at least 6 lines, each block appearing for approximately 4 seconds. The two screens containing this information are interrupted by two other screens that do not contain lease information.] (General Motors Exhibit B).

C. [Audio:] "And, it's all only $289 a month."

[Video:] "$289 36 MONTH GMAC SMARTLEASE"

[The advertisement contains a lease disclosure that describes additional lease costs and terms, including but not limited to a downpayment, a security deposit, a purchase option amount and other lease-end fees in an extremely small, blurred, dark blue print, superimposed over the dark-colored front of the advertised vehicle. The fine print is displayed in a block of approximately 13 lines for approximately 2.5 seconds.] (General Motors Exhibit C).

D. "Two Summers, Two Winters, Two Springs, Two Falls. $299 A Month." [Bold but smaller]: "The S-Blazer 2-Year Lease. $299 A Month. $1350 Down."[The advertisement contains the following lease disclosure below a picture of the vehicle in white fine print superimposed over a black background: "$299/month 24-month lease at participating dealers. Tax, license, title fees and insurance extra. Mileage charge of 10 cents per mile over 30,000. . . . $23,075 M.S.R.P., including destination charge. First month's lease payment of $298.45, $1350 down payment, plus $325 refundable security deposit for a total of $1973.45 due at lease signing (includes capitalized cost reduction). Total of monthly payments is $7162.80. . . . Option to purchase at lease end for $16,173.30. . . . Lessee pays for excessive wear and use. . . ." (General Motors Exhibit D).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: MISREPRESENTATION IN LEASE ADVERTISING

6. Through the means described in paragraph five, respondent has represented, expressly or by implication, that the amount stated as

"down" in respondent's lease advertisements is the total amount consumers must pay at lease inception to lease the advertised vehicles.

7. In truth and in fact, the amount stated as "down" in respondent's lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers must also pay additional fees beyond the amount stated as "down," such as the first month's payment and security deposit, at lease inception. Therefore, respondent's representation as alleged in paragraph six was, and is, false or misleading.

8. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: FAILURE TO DISCLOSE ADEQUATELY IN LEASE ADVERTISING

9. In its lease advertisements, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the lease offer, including but not necessarily limited to a required security deposit and first month's payment due at lease inception. The existence of these additional terms would be material to consumers in deciding whether to lease a General Motors vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

10. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: CONSUMER LEASING ACT AND REGULATION M VIOLATIONS

11. Respondent's lease advertisements, including but not necessarily limited to General Motors Exhibits A through D, state a monthly payment amount, the number of required payments, and/or an amount "down." The lease disclosures in these advertisements

contain one or more of the following terms required by Regulation M: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the total of periodic payments due under the lease; a statement of whether or not the lessee has the option to purchase the leased property and at what price and time or the method of determining the purchase-option price; and a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

12. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to General Motors Exhibits A, B, and C, are not clear and conspicuous because they appear on the screen in small type, against a background of similar shade, for a very short duration, with background sounds and images, and/or over a moving background. The lease disclosures in respondent's print lease advertisements, including but not necessarily limited to General Motors Exhibit D, are also not clear and conspicuous because they appear in small type.

13. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended.

CREDIT ADVERTISING

14. Respondent has disseminated or has caused to be disseminated credit sale advertisements ("credit advertisements") for General Motors vehicles, including but not necessarily limited to General Motors Exhibits E and F. General Motors Exhibits E and F are television credit advertisements (attached in video and storyboard format). These advertisements contain the following statements:

A. [Audio:] "Then we told them that Jimmy was only $299 a month with a GMAC SmartBuy. [Consumer #6:] $299 a month? [Consumer #7:] $299 a month -- that's great. [Consumer #8:] A Jimmy like this for $299 a month would be fantastic."

[Video:] "$299 a month 36-Month GMAC SmartBuy."

[The advertisement contains the following credit disclosure in white print superimposed on a light-colored background, and accompanied by background sound and images: "Example based on Jimmy MSRP of $20,498. 6.9% APR GMAC SMARTBUY FINANCING. For 36 months, 35 months at $299.38 per month and final payment of $9441.94. $3350 down, actual down payment may

vary. Tax, license, title fees and insurance extra. Purchaser may refinance the final payment, or with 30 days advance written notice sell the vehicle to GMAC at end of term and pay $250 disposal fee plus any excess mileage and wear charges. Dealer financial participation may affect consumer cost. See your participating dealer for qualification details. You must take retail delivery out of dealer stock by 9/22/93." The fine print is displayed in a scrolling format of 11 lines for approximately 4 seconds.] (General Motors Exhibit E).

B. [Audio:] "Still waiting to buy a new Buick? Well don't. Buick's Model Year Close-Out is on. . . . Or get this great SmartBuy payment."
[Video:] "Still waiting to buy a new Buick? Well Don't. Buick's 1995 Model Year Close-Out. . . . Buick Regal SmartBuy $249 per month 30 months/$2000 down." [The advertisement contains the following credit disclosure at the bottom of the screen in white print superimposed on a black background with a moving vehicle above the disclosure block and accompanied by background sound: "For cash back, you must take retail delivery from dealer stock by 11/30/95. SmartBuy on 1995 Regal Custom SE with 3800 engine. $20,853 MSRP incl. destination charge for a monthly payment of $248.67/mo. 30 mo. $2000 cash down or trade-in value ($3500 down payment less $1500 customer cash back). First month's payment plus down payment trade-in value for total of $3746.67 due at lease signing. Payment based on capitalized cost of ____. Tax, title, license, doc. fee extra. Must take retail delivery from dealer stock by October 4, 1995. GMAC must approve the SmartBuy. Options at contract maturity: pay the final payment of $11,677.68, refinance the final payment with GMAC, sell the vehicle to GMAC and remit $250 disposal fee plus 15 cents/mile for mileage exceeding 30,000 miles for excessive wear and use. See participating Buick dealers for qualification details." The fine print is displayed in a scrolling format of 11 lines for approximately 4 seconds.] (General Motors Exhibit F).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT IV: MISREPRESENTATION IN CREDIT ADVERTISING

15. Through the means described in paragraph fourteen, respondent has represented, expressly or by implication, that consumers can buy the advertised General Motors vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down."

16. In truth and in fact, consumers cannot buy the advertised General Motors vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." Consumers are also responsible for a final balloon payment of several thousand dollars to purchase the advertised vehicles. Therefore, respondent's representation as alleged in paragraph fifteen was, and is, false or misleading.

17. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT V: FAILURE TO DISCLOSE ADEQUATELY IN CREDIT ADVERTISING

18. In its credit advertisements, respondent has represented, expressly or by implication, that consumers can buy the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the credit offer, including but not necessarily limited to a final balloon payment of several thousand dollars and the annual percentage rate. The existence of these additional terms would be material to consumers in deciding whether to buy a General Motors vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

19. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT VI: TRUTH IN LENDING ACT AND REGULATION Z VIOLATIONS

20. Respondent's credit advertisements, including but not necessarily limited to General Motors Exhibits E and F, state a monthly payment amount and/or an amount "down." The credit disclosures in these advertisements contain the following terms required by Regulation Z: the annual percentage rate and the terms of repayment.

21. The credit disclosures in respondent's television credit advertisements, including but not necessarily limited to General Motors Exhibits E and F, are not clear and conspicuous because they appear on the screen in small type, against a background of similar shade, for a very short duration, in a rapid scrolling format, and/or with background sounds.

22. Respondent's practices violate Section 144 of the Truth in Lending Act, 15 U.S.C. 1664, as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as amended.

EXHIBIT A

General Motors Exhibit A

VIDEO	AUDIO
(Black and white scene of man fishing. Red Blazer on rocks.) [Super]: Two Summers Two Winters Two Springs Two Falls [Super]: All This [Super]: 2 Years. $299 a Month. $1,260 Down. [Disclosure*]	(Background sound throughout) Two Summers Two Winters Two Springs Two Falls All this, just $299 a month. The S-Blazer 2 year lease. Why drive an imitation when you can drive the vehicle that originated the species? Chevy S-Blazer

*[First Screen]:
SEE YOUR PARTICIPATING DEALER FOR QUALIFICATION DETAILS. Example based on $22,847 MSRP incl. destination charge, 1st month & lease payment $298.63, $1260 down payment plus $325 refundable security deposit for a total of $1883.63 due at lease signing (incl. capitalized cost reduction). Tax, license, title fees and insurance extra. Mileage charge of 10 [cents] mile over 30,000. GMAC must approve lease.
[Second Screen]:
SEE YOUR PARTICIPATING DEALER FOR QUALIFICATION DETAILS. Total of monthly payments is $7,167.12. Payments may be higher in AL, AR, CA, NY, TX, and VA. Option to purchase at lease end for $16,022.82 is fixed at lease signing and varies by model, equip., level, usage, and length of lease. Lessee pays for excessive wear and use.

EXHIBIT B

General Motors Exhibit B

VIDEO	AUDIO
	(Background music throughout)
[Title Card]: Party On, Dude	[Announcer]: If your team wins tonight, you'll wanna celebrate.
(Running shot of Achieva S Sedan) [Super]: $209 per month/$1075 Down	Like by leasing an Oldsmobile Achieva with air, anti-lock brakes and more for just $209 a month.
[Disclosure*]	
[Title Card]: Excellent	
[Title Card]: Major Bummer	Of course, if your team loses, you'll probably be depressed, in which case you'll want to console yourself.
(Running shot of Achieva S Sedan) [Super]: $209 a month/$1075 Down.	Like by leasing an Oldsmobile Achieva for just $209 a month.
[Disclosure**]	
[Title Card]: Most Excellent	It's your choice.
[Title Card]: Demand Better	
[Title Card]: Achieva by Oldsmobile	
* FIRST MONTH'S LEASE PAYMENT OF $208.72, REFUNDABLE SECURITY DEPOSIT OF $225 AND A $1,075 CAPITALIZED COST REDUCTION FOR A TOTAL OF $1,508.72 DUE AT LEASE SIGNING. TAX, LICENSE, TLTLE, FEES, AND INSURANCE ARE EXTRA. GMAC MUST APPROVE LEASE. EXAMPLE BASED ON ACHIEVA S SEDAN: $15,164 M.S.R.P., INCLUDING DESTINATION CHARGE. MONTHLY PAYMENTS BASED ON CAPITALIZED COST OF $13,225.88 INCLUDING	
** CAPITALIZED COST REDUCTION TOTAL OF 48 MONTHLY PAYMENTS IS	

$10,018.56. AMOUNT OF CAPITALIZED COST REDUCTION MAY BE SLIGHTLY HIGHER IN AL, AR, CA, NY, TX, AND VA. OPTION TO PURCHASE AT LEASE END FOR $6,030.64. MILEAGE CHARGE OF 10 [CENTS] PER MILE OVER MILEAGE LIMIT. LESSEE PAYS FOR EXCESSIVE WEAR AND USE. PAYMENT BASED ON RESIDUALS IN EFFECT THROUGH MARCH 31, 1993.

See your participating dealer for qualification details.

EXHIBIT C

General Motors Exhibit C

VIDEO	AUDIO
	(Background music throughout)
(Consumer standing in front of Jimmy)	[Announcer]: What would it take to get you to look at a GMC Jimmy?
	[Consumer]: Compared to what?
	[Announcer]: Ford Explorer.
	[Consumer]: Okay Shoot.
[Super and scrolling]: 1993 GMC Jimmy 4-Wheel Drive Air Conditioning Automatic Transmission AM/FM Stereo Cassette Power Steering Power Windows Power Door Locks	This GMC Jimmy comes with 4-wheel drive, air, automatic transmission, AM/FM cassette, power steering, power windows and locks.
	[Consumer]: Gimme more.
[Super]: 4 Wheel Anti-Lock Brakes	[Announcer]: The GMC Jimmy has 4 wheel anti-lock brakes, also standard.
	[Consumer]: No kidding?
[Super and scrolling]: 4.3 Liter V6 Engine Fully Independent Front Suspension	[Announcer]: And this GMC Jimmy comes with standard with a 4.3 Liter V6 and an independent suspension. Explorer? doesn't have it.

[Super]:
$289 for 36 Month GMAC SmartLease

[Disclosure*]

* A down payment of $1,562.90, plus first month's lease payment of $289.00 and $300 refundable security deposit for a total of $2,151.90 due at lease signing. Tax, license, title fees and insurance extra. You must take retail delivery out of dealer stock by 12/31/92. GMAC must approve lease. Example based on 1993 Jimmy with an MSRP of $23,661 including destination charge. Total of 36 monthly payments is $10,404. Option to purchase at lease for $13,274. Mileage charge of 10 cents per mile over 45,000 miles. Lessee pays for excessive wear and use. See your participating dealer for qualification details. Manufacturer's rebate not avilable under this program.

[Note: GM did not provide a storyboard for this advertisement and the disclosure in this ad were indecipherable when viewed on television. Therefore, staff used a storyboard from a virtually identical advertisement to fill in some of the indecipherable terms.]

[Announcer]:
And it's all only $289 a month.

[Consumer]:
Forget Ford, GMC Jimmy is the only way to go.

[Announcer]:
See your GMC truck dealer today.

EXHIBIT D

EXHIBIT E

General Motors Exhibit E

VIDEO	AUDIO
	(Backgroung music throughout)
(Potential consumers standing in front of Jimmy at shopping mall) [Super]: GMC Jimmy	[Announcer]: We asked folks why they liked the 1993 GMC Jimmy. [Consumer #1]: This is a quality truck. [Consumer #2]: Jimmy's very comfortable. [Consumer #3]: Jimmy has a real sporty look.
[Super]: 3-Year 36,000 Mile No Deductible Warranty [smaller type]: See your GMC Truck dealer for terms of this limited warranty	[Announcer]: We told them about the Jimmy 3-year no deductible warranty. [Consumer #4]: No deductible warranty? [Consumer #5]: No deductible warranty -- you can't beat that.
[Super]: $299 a month 36-month GMAC SmartBuy [Disclosure, scrolling*] * Example based on Jimmy MSRP of $20,498. 6.9% APR GMAC SMARTBUY FINANCING. For 36 months, 35 months at $299.38 per month and final payment of $9221.94. $3350 down, actual down payment may vary. Tax, license, title fees and insurance extra. Purchaser may refinance the final payment, or with 30 days advance written notice sell the vehicle to GMAC at end of term and pay $250 disposal fee plus any excess mileage and wear charges. Dealer financial participation may affect consumer cost. See your	[Announcer]: Then we told them that Jimmy was only $299 a month with a GMAC Smartbuy. [Consumer #6]: $299 a month? [Consumer #7]: $299 month that's great. [Consumer #8]: A Jimmy like this for $299 a month would be fantastic.

participating dealer for qualification details. You must take retail delivery out of dealer stock by 9/22/93.

EXHIBIT F

General Motors Exhibit F

VIDEO	AUDIO
	(Background music throughout -- "I can't wait forever. . .")
(Moving footage of Buick) [Consumer pointing at title card reading, Super]: Still waiting to buy a new Buick?	Still waiting to buy a new Buick?
[Consumer pointing at title card reading, Super]: Well Don't.	Well don't.
(Moving footage of Buick) [Consumer sitting on title card letters reading, Super]: Buick 1995 Model Year Close-Out	Buick Model Year Close-Out is on.
(Moving footage of Buick) [Woman sitting near title card letters reading, Super]: $1500 Cash Back. Buick LeSabre, Roadmaster, Regal, Century, and Skylark.	Get $1500 cash back on all these new Buicks.
[Woman sitting near title card letters reading, Super]: Buick Regal SmartBuy $249 per month 30 months/$2000 down.	Or get this great SmartBuy payment.
(Moving footage of Buick) [Disclosure*]	For the biggest savings of the year.
[Consumer walking by title card letters reading, Super]: You're just in time. * For cash back, you must take retail delivery from dealer stock by 11/30/95. SmartBuy on 1995 Regal Custom SE with 3800 engine $20,853 MSRP incl. destination charge for a monthly payment of $248.67/mo. 30 mo. $2000 cash down or trade-in value ($3500 down payment less $1500 customer cash	You're just in time. Now wouldn't you really rather have a Buick?

back). First month's payment plus down payment trade-in value for total of $3746.67 due at lease signing. Payment based on capitalized cost of ____. Tax, title, license, doc. fee extra. Must take retail delivery from dealer stock by October 4, 1995. GMAC must approve the SmartBuy. Options at contract maturity pay the final payment of $11,677.68, refinance the final payment with GMAC, sell the vehicle to GMAC and remit $250 disposal fee plus 15 cents/mile for mileage exceeding 30,000 miles for excessive wear and use. See participating Buick dealers for qualification details.

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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent General Motors Corp. is a Delaware corporation with its principal office or place of business at 3044 West Grand Boulevard, Detroit, Michigan.

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

DEFINITIONS

1. *"Clearly and conspicuously"* as used herein shall mean:

1) Video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. *"Total amount due at lease inception"* as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, excluding dealer and government mandated fees and charges (if any).

3. *"Balloon payment"* as used herein shall mean any scheduled payment with respect to a consumer credit transaction that is at least twice as large as the average of earlier scheduled payments.

4. Unless otherwise specified, *"respondent"* as used herein shall mean General Motors Corp., its successors and assigns, and its officers, agents, representatives, and employees.

5. *"In or affecting commerce"* as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of revised Regulation M, 61 Fed. Reg. 52,246, 52,258 (Oct. 7, 1996)(to be codified at 12 CFR 213.2) ("revised Regulation M"), as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the total amount due at lease inception, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required).

B. Make any reference to any charge that is part of the total amount due at lease inception or that no such charge is required, not

including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease inception.

C. State the amount of any payment or that any or no initial payment is required at lease inception unless all of the following items are disclosed clearly and conspicuously, as applicable:

1. That the transaction advertised is a lease;
2. The total amount due at lease inception;
3. That a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

II.

It is further ordered, That an advertisement that complies with subparagraph I.C shall be deemed to satisfy the requirements of Section 184(a) of the Consumer Leasing Act, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 (to be codified at 12 CFR 213.7(d)(2)), as amended.

III.

It is further ordered, That if the revised CLA, as amended, or revised Regulation M, as amended, are amended in the future to alter definition 2 of this order ("total amount due at lease inception") or to require or permit advertising disclosures that are different from those set forth in subparagraphs I.B or I.C of this order, then the change or changes shall be incorporated in subparagraph I.B, subparagraph I.C, and/or definition 2 for the purpose of complying with subparagraphs I.B and I.C only, as appropriate; provided however, that all other requirements of this order, including definition 1 ("clearly and conspicuously"), will survive any such revisions.

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of consumer credit in or affecting commerce, as "advertisement" and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 CFR 226.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the existence and amount of any balloon payment or the annual percentage rate.

B. State the amount of any payment, including but not limited to any monthly payment, in any advertisement unless the amount of any balloon payment is disclosed prominently and in close proximity to the most prominent of the above statements.

C. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any periodic payment, including but not limited to any monthly payment, or the amount of any finance charge, without disclosing clearly and conspicuously:

1. The amount or percentage of the downpayment;

2. The terms of repayment, including but not limited to the amount of any balloon payment; and

3. The correct annual percentage rate, using that term or the abbreviation "APR," as defined in Regulation Z and the Official Staff Commentary to Regulation Z. If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

V.

It is further ordered, That respondent General Motors Corp., and its successors and assigns, shall, for five (5) years after the date of service of this order, maintain and upon request make available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

VI.

It is further ordered, That respondent General Motors Corp., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order and to all advertising agencies; and shall secure from each such person or entity a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel or entities within thirty (30) days after the date of service of this order, and to such future personnel or entities within thirty (30) days after the person or entity assumes such position or responsibilities.

VII.

It is further ordered, That respondent General Motors Corp., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily limited to dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondent General Motors Corp., and its successors and assigns, shall within one hundred and twenty (120) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IX.

This order will terminate on February 6, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

AMERICAN HONDA MOTOR CO., INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3711. Complaint, Feb. 6, 1997--Decision, Feb. 6, 1997

This consent order prohibits, among other things, a California-based automobile manufacturer from misrepresenting the total amount due at lease inception, requires the manufacturer to provide consumers with clear, readable, and understandable cost information in their car lease and financed purchase advertising, requires advertisements, that reference an initial payment or state that no initial payment is due, to clearly and conspicuously disclose, as applicable, that the deal is a lease, and to disclose the fact that an extra charge may be imposed at the end of the lease based on the residual value of the car.

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky* and *Lauren Steinfeld.*

For the respondent: *Richard Feinstein, McKenna & Cuneo*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Honda Motor Co., Inc., a corporation ("respondent" or "Honda"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, and the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent American Honda Motor Co., Inc. is a California corporation with its principal office or place of business at 1919 Torrance Boulevard, Torrance, California. Respondent manufactures and distributes vehicles and offers such vehicles for sale or lease to consumers.

2. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. Respondent has disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for Honda vehicles, including but not necessarily limited to the attached Honda Exhibits A through C. Honda Exhibits A and B are television lease advertisements (attached hereto in video and storyboard format). Honda Exhibit C is a print lease advertisement. These advertisements contain the following statements:

A. [Audio:] "Here's what you might put down on a typical car lease [$1750]. At Honda, however, we had a different idea. We took our fully equipped 1995 Accord LX and lowered the downpayment to some rather nice round numbers. [pause] The zero down, short-term lease from your Honda dealer. Zero down and $289 a month for 30 months."
[Video:] [View of an odometer set on $1750 that rolls down to $0000] "The $0 Down Lease. The Accord LX $0 Down $289/30 months" [The advertisement contains the following lease disclosure in white print superimposed on a black background and accompanied by background sound: ". . . Advertised rate based on 30-mo. closed-end lease for 1995 Honda Accord 4-Door LX w/Automatic Trans.(Model CD583S). MSRP $18,880 (includes destination) with dealer cap. cost reduction of $620.50. DEALER PARTICIPATION MAY AFFECT ACTUAL PAYMENT. Taxes, title, lic. & reg., ins., opt. equip. & services not included. Due at lease signing are 1st mo.'s lease payment, refundable security dep. equal to 1 mo.'s payment rounded to the next highest $25 increment & applicable title, lic., reg. fee & tax. Total monthly payments $8,670 + applicable tax. Opt. to purchase at lease end for $12,548.50 + tax + official fees, except in NY & SD where no purchase opt. avail. If not purchased at lease end, customer returns vehicle & pays a disp. fee of no more than $400. Lessee pays maint., ins., repairs, service, all related taxes, reg. renewals, excessive wear and use. Mi. charge of $.15 [cents]/mi. over 12,000 mi./year. MSRP, dealer cap. cost reduction & opt. to purchase differ slightly in CA. . . ." The fine print is displayed on two screens, each containing a block of ten lines, each block appearing for approximately three seconds.] (Honda Exhibit A).

B. [Audio:] "Now we've made the process of driving your own Accord just as streamlined. Lease an Accord LX for just $239 a month."
[Video:] "$239 a Month, 36 Months, $1500 Down." [The advertisement contains the following lease disclosure at the top of the screen in white print superimposed on a black background and accompanied by background sound: ". . . Advertised rate based on 36-month closed-end lease for the 1994 Accord LX Sedan with MSRP of

$18,330.00 with a dealer capitalized cost reduction of $795.35 ($965.35 in IL, IN, KS, ME, NY, OK, and UT where no security deposit is required); condition of dealer participation may affect actual rate. Taxes, title, license, and registration, insurance and optional equipment, and services not included. Due at lease signing are $1,500.00 down-payment, first lease payment, refundable deposit equal to one payment rounded to the next highest $25.00 increment where applicable, title, license and registration fee, and tax as applicable. Total monthly payment is $8,604.00 (plus tax, as applicable). Option to purchase at end of lease for $10,061.50 plus tax and official fees, except in MS, NY, and SD where no option available. Lessee pays maintenance, insurance, repairs, service, any and all related taxes, registration renewals, and excessive wear and use. Mileage charge of $.15/mile over 15,000 miles per year. A disposition fee up to $400.00 is due if vehicle not purchased at end of lease term. . . ." The fine print is displayed on three screens, each containing a block of eight lines, each block appearing for approximately three seconds.] (Honda Exhibit B).

C. "INTRODUCING ZIP, ZERO, NADA.
Civic LX $229 per month/30 months
Accord LX $289 per month/30 months
Passport 4WDLX $389 per month/30 months
The $0 down lease. Now, for a limited time, you can get an affordable, short-term lease on a fully equipped Honda for zero (as in zip, as in nada) dollars down . . . ."
[The advertisement contains the following lease disclosure at the bottom of the page in small print:
". . . Taxes, title, lic. & reg., ins., opt. equip. & services not included. Due at lease signing are 1st mo.'s lease payment, refundable security dep. equal to 1 mo.'s payment rounded to the next highest $25 increment (except where no security dep. is collected) & applicable title, lic., reg. fee & tax. Total monthly payments $6,870 for the Civic LX Sedan, $8,670 for the Accord LX Sedan and $11,670 for the Passport 4WD LX + applicable tax. Opt. to purchase at lease end for $9,681.50 for the Civic LX Sedan, $12,649.60 for the Accord LX Sedan and $15,879.50 for the Passport 4WD LX + tax + official fees, except in MS, NY & SD where no purchase opt. avail. If not purchased at lease end, customer returns vehicle & pays a disp. fee of no more than $400. Lessee pays maint., ins., repairs, service, all related taxes, reg. renewals, excessive wear & use. Mi. Charge of 15[cents]/mi. over 12,000 mi/yr. . . ."] (Honda Exhibit C).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: MISREPRESENTATION IN LEASE ADVERTISING

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that the amount stated as "down" in respondent's lease advertisements, including but not necessarily limited to "$0 down," is the total amount consumers must pay at lease inception to lease the advertised vehicles.

6. In truth and in fact, the amount stated as "down" in respondent's lease advertisements is not the total amount consumers must pay at

lease inception to lease the advertised vehicles. Consumers must also pay additional fees beyond the amount stated as "down," such as the first month's payment and security deposit, at lease inception. Therefore, respondent's representation as alleged in paragraph five was, and is, false or misleading.

7. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: FAILURE TO DISCLOSE ADEQUATELY IN LEASE ADVERTISING

8. In its lease advertisements, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or the amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the lease offer, including but not necessarily limited to a required security deposit and first month's payment due at lease inception. The existence of these additional terms would be material to consumers in deciding whether to lease a Honda vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

9. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: CONSUMER LEASING ACT AND REGULATION M VIOLATIONS

10. Respondent's lease advertisements, including but not necessarily limited to Honda Exhibits A through C, state a monthly payment amount, the number of required payments, and/or an amount "down." The lease disclosures in these advertisements contain one or more of the following terms required by Regulation M: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the total of periodic payments due under the lease; a statement of whether or not the lessee has the option to purchase the leased property and at what price and time or the method of determining the purchase-option

price; and a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

11. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Honda Exhibits A and B, are not clear and conspicuous because they appear on the screen in small type for a very short duration. The lease disclosures in respondent's print lease advertisements, including but not necessarily limited to Honda Exhibit C, are not clear and conspicuous because they appear in small type.

12. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended.

EXHIBIT A

Honda Exhibit A

VIDEO	AUDIO
(Open with view of odometer and Accord LX Sedan) (Odometer reads $1750)	(Background music throughout)
(Engine starts revving) (Odometer starts to scroll down) [Super]: The $0 Down Lease. From your Honda dealer.	Here's what you might put down on a typical car lease.
(Odometer reads $0000) [Super]: The Accord LX $0 Down $285/30 months (View Disclosure*) Leadership Leasing * [First screen]: SUBJECT TO LIMITED AVAILABILITY. Avail. thru January 5, 1995 at participating Honda dealers to approved lessees by American Honda Finance Corp. Advertised rate based on 30-mo. closed-end lease for 1995 Honda Accord 4-Door LX w/Automatic Trans. (Model CD5838.) MSRP $18,880 (includes	At Honda, however, we had a different idea. We took our fully equipped 1995 Accord LX and lowered the downpayment to some rather nice round numbers. The zero down short-term lease from your Honda dealer. $0 down and $289 a month for 30 months.

destination) with dealer cap. cost reduction of $620.50 DEALER PARTICIPATION MAY AFFECT ACTUAL PAYMENT. Taxes, title, lic. & reg., ins., opt. equip. & services not included. Due at lease signing are 1st mo.'s lease payment, refundable security dep. equal to 1 mo.'s payment rounded to the next highest $25 increment & applicable title, lic., [Second screen]:
reg. fee & tax. Total monthly payments $8,670 + applicable tax. Opt. to purchase at lease end for $12,548.50 + tax & official fees, except in NY & SD where no purchase opt. avail. If not purchased at lease end, customer returns vehicle & pays a disp. fee of no more than $400. Lessee pays maint., ins., repairs, service, all related taxes, reg. renewals, excessive wear and use. Mi. charge of $.15 [cents] /mi. over 12,000 mi./year. MSRP, dealer cap. cost reduction & opt. to purchase differ slightly in CA. This offer may not be available in conjunction with any other advertised offer. See your participating Honda dealer for details.

EXHIBIT B

Honda Exhibit B

VIDEO	AUDIO
(Open with view of white stream and view of Accord LX)	(Background music throughout) Motor Trend calls it the most fuel-efficient, the best performing, the quietest, the strongest, and the safest Accord we've ever built. And they named us Motor Trend Import Car of the Year.
[Super]: $239 a Month, 36 Months, $1500 Down.	Now we've made the process of driving your own Accord just as streamlined.
(View Disclosure*)	

We Won. You Win. A Car Ahead.
*[First screen]:
Available through 2/28/94, at participating Honda dealers to qualified lessees approved by American Honda Fin. Corp. Subject to availability. Advertised rate based on 36-month closed-end lease for the 1994 Accord LX Sedan with MSRP of $18,330.00 with a dealer capitalized cost reduction of $795.35 ($965.35 in IL, IN, KS, ME, NY, OK and UT where no security deposit is required); condition of dealer participation may affect actual rate. Taxes, title, license, and
[Second screen]:
registration, insurance and optional equipment, and services not included. Due at lease signing are $1,500.00 down-payment, first lease payment, refundable deposit equal to one payment rounded to the next highest $25.00 increment where applicable, title, license and registration fee, and tax as applicable. Total monthly payment is $8,604.00 (plus tax, as applicable). Option to purchase at end of lease for $10,061.50 plus tax and official fees, except in MS, NY, and
[Third screen]:
SD where no option available. Lessee pays maintenance, insurance, repairs, service, any and all related taxes, registration renewals, and excessive wear and use. Mileage charge of $.15/mile over 15,000 miles per year. A disposition fee up to $400.00 is due if vehicle not purchased at end of lease term. MSRP, dealer capital cost reduction, and option-to-purchase price differ in AK, CA and HI. See participating Honda dealers for details.

Lease an Accord LX for just $239 a month. Leadership leasing from Honda.
We Won. You Win.

EXHIBIT C

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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Honda Motor Co., Inc. is a California corporation with its principal office or place of business located at 1919 Torrance Boulevard, Torrance, California.

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

DEFINITIONS

1. *"Clearly and conspicuously"* as used herein shall mean: 1) video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. *"Total amount due at lease inception"* as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, excluding dealer and government mandated fees and charges (if any).

3. Unless otherwise specified, *"respondent"* as used herein shall mean American Honda Motor Co., Inc., its successors and assigns, and its officers, agents, representatives, and employees.

4. *"In or affecting commerce"* as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of revised Regulation M, 61 Fed. Reg. 52,246, 52,258 (Oct. 7, 1996)(to be codified at 12 CFR 213.2) ("revised Regulation M"), as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the total amount due at lease inception, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required).

B. Make any reference to any charge that is part of the total amount due at lease inception or that no such charge is required, not including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease inception.

C. State the amount of any payment or that any or no initial payment is required at lease inception unless all of the following items are disclosed clearly and conspicuously, as applicable:

1. That the transaction advertised is a lease;
2. The total amount due at lease inception;
3. That a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

II.

It is further ordered, That an advertisement that complies with subparagraph I.C shall be deemed to satisfy the requirements of Section 184(a) of the Consumer Leasing Act, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, _____ (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 (to be codified at 12 CFR 213.7(d)(2)), as amended.

III.

It is further ordered, That if the revised CLA, as amended, or revised Regulation M, as amended, are amended in the future to alter definition 2 of this order ("total amount due at lease inception") or to require or permit advertising disclosures that are different from those set forth in subparagraphs I.B or I.C of this order, then the change or changes shall be incorporated in subparagraph I.B, subparagraph I.C, and/or definition 2 for the purpose of complying with subparagraphs I.B and I.C only, as appropriate; provided however, that all other requirements of this order, including definition 1 ("clearly and conspicuously"), will survive any such revisions.

IV.

It is further ordered, That respondent American Honda Motor Co., Inc., and its successors and assigns, shall, for five (5) years after

the date of service of this order, maintain and upon request make available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

V.

It is further ordered, That respondent American Honda Motor Co., Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order and to all advertising agencies; and shall secure from each such person or entity a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel or entities within thirty (30) days after the date of service of this order, and to such future personnel or entities within thirty (30) days after the person or entity assumes such position or responsibilities.

VI.

It is further ordered, That respondent American Honda Motor Co., Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily limited to dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VII.

It is further ordered, That respondent American Honda Motor Co., Inc., and its successors and assigns, shall within one hundred and twenty (120) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on February 6, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

AMERICAN ISUZU MOTORS INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3712. Complaint, Feb. 6, 1997--Decision, Feb. 6, 1997

This consent order prohibits, among other things, a California-based automobile manufacturer from misrepresenting the total amount due at lease inception, requires the manufacturer to provide consumers with clear, readable, and understandable cost information in their car lease and financed purchase advertising, requires advertisements, that reference an initial payment or state that no initial payment is due, to clearly and conspicuously disclose, as applicable, that the deal is a lease, and to disclose the fact that an extra charge may be imposed at the end of the lease based on the residual value of the car.

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky* and *Lauren Steinfeld.*

For the respondent: *Randy Reiser, David & Gilbert,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Isuzu Motors Inc., a corporation ("respondent" or "Isuzu"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent American Isuzu Motors Inc. is a California corporation with its principal office or place of business at 2300 Pellissier Place, Whittier, California. Respondent distributes Isuzu vehicles.

2. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and

"consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. Respondent has disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for Isuzu vehicles, including but not necessarily limited to the attached Isuzu Exhibits A through C. Isuzu Exhibits A through C are television lease advertisements (attached in video and storyboard format). These advertisements contain the following statements:

A. [Audio:] "Hey, hey, hey, hey. What the heck does this mean? Very simply, it means for $999 down, you can lease a brand new Trooper for only $319 a month."
[Video:] "THE TROOPER LEASE EXPLAINED. [highlighted in yellow]. $319 MONTH FOR 24 MONTHS. $999 CUSTOMER CAPITALIZED COST REDUCTION. [highlighted in yellow]."
[The advertisement contains the following lease disclosure which appears on the screen for a brief duration, in a scrolling format, interrupted or obscured by other images, and accompanied by background sound: "*ADVERTISED PAYMENT APPLICABLE TO 4WD TROOPER S MODEL MANUAL TRANSMISSION ONLY. First month's payment of $319 plus a refundable Security Deposit of $350 (or a non-refundable last month's payment in IL, IN, KS, ME, and NY) plus a customer down payment of $999 for a total of $1,668 due at lease signing. Based on a 24 month low mileage closed-end lease offered to qualified customers by GE Capital Auto Lease through participating dealers through June 30, 1994 -- Subject to availability. Prices based on $23,000 MSRP and capitalized cost of $20,075 for a 1994 model Isuzu Trooper S with manual transmission including destination charges and a dealer capitalized cost reduction of $2,376, excluding taxes, registration, title, license, dealer prep, options and other charges. Prices/monthly payments may vary. 24 monthly payments total $7,660 plus tax as applicable. Option to purchase at lease end for $14,030 plus a $250 purchase option fee. Lessee pays for maintenance, insurance, repairs, excessive wear and tear and mileage charges of up to .15 cents per mile over 24,000 miles at lease end. Program not available in Alaska. 800-726-9200. See your participating Isuzu dealer for details."] (Isuzu Exhibit A).

B. [Audio:] "Okay. It says here for $1,999 down you can lease a Trooper LS with standard dual airbags for just $339 a month."
[Video:] "THE TROOPER LEASE . . . $1,999 CUSTOMER CAPITALIZED COST REDUCTION. $339/MONTH FOR 30 MONTHS." [Index finger points to bolded text while hand moves across remaining text on screen].
[The advertisement contains the following lease disclosure which appears on the screen for a brief duration, in a scrolling format, interrupted or obscured by other images, and accompanied by background sound: "First month's payment of $339,

a refundable Security Deposit of $350 (or a non-refundable last month's payment of $339, in IL, IN, KS, ME, and NY) and a customer capitalized cost reduction of $1,999 for a total of $2,688 due at lease signing. Total monthly payments: $10,170. Taxes, license, title fees, options and insurance are extra. 30 month, closed-end lease example based on $30,425 MSRP (includes destination charge), a dealer capitalized cost reduction of $2,995 and a total capitalized cost of $25,926. Your payments may be higher or lower. Option to purchase at lease end for $19,472 plus $250 purchase option fee. Mileage charge of $.15 per mile over 30,000 miles. Lessee pays excessive wear and use. You must take retail delivery out of dealer stock by July 10, 1995. Program not available in Alaska. 800-726-9200. See your participating dealer for details."] (Isuzu Exhibit B).

C. [Audio:] "Now you can drive off-road without getting soaked. The Rodeo Lease. See your dealer for details."
[Video:] "$249/MO. The 1993 Rodeo Lease."
[The advertisement contains the following lease disclosure in white fine print superimposed over a black background and accompanied by background sound: "ADVERTISED PAYMENT APPLICABLE TO THE RODEO S MODEL ONLY. OPTIONAL EQUIPMENT SHOWN. First month's payment of $249 plus refundable security deposit of $249 (or non-refundable last month's payment in IL, IN, KS, ME and NY), plus a customer capitalized cost reduction of $1,000 for a total of $1,498 due at lease signing. Based on a 36-month closed-end lease offered to qualified consumers by GE Capital Auto Lease through participating dealers through 3/31/93. Subject to availability. Prices based on $____ MSRP and a capitalized cost of $____ for a 1993 Isuzu Rodeo ____ with manual transmission, including destination charges, excluding taxes, registration, title, license, dealer prep., options and charges. Dealer ____ monthly payments may vary. 36 monthly payments total $____ plus tax as applicable. Option to purchase at lease end for $_____ plus a $250 disposition fee. Lessee pays for maintenance, insurance, repairs, excessive wear and tear, and mileage charges of up to .15 cents/mile over 45,000 miles at lease end. Lease program not available in Alaska and Hawaii. See your participating Isuzu dealer for details." The fine print is displayed on the screen in a block of print containing 11 lines and appearing on the screen for approximately three seconds.] (Isuzu Exhibit C).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: MISREPRESENTATION IN LEASE ADVERTISING

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that the amount stated as "down" in respondent's lease advertisements is the total amount consumers must pay at lease inception to lease the advertised vehicles.

6. In truth and in fact, the amount stated as "down" in respondent's lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers must also pay additional fees beyond the amount stated as "down," such as the

first month's payment and security deposit, at lease inception. Therefore, respondent's representation as alleged in paragraph five was, and is, false or misleading.

7. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: FAILURE TO DISCLOSE ADEQUATELY IN LEASE ADVERTISING

8. In its lease advertisements, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the lease offer, including but not necessarily limited to a required security deposit and first month's payment due at lease inception. The existence of additional terms would be material to consumers in deciding whether to lease an Isuzu vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

9. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: CONSUMER LEASING ACT AND REGULATION M VIOLATIONS

10. Respondent's lease advertisements, including but not necessarily limited to Isuzu Exhibits A through C, state a monthly payment amount, the number of required payments, and/or an amount "down." The lease disclosures in these advertisements contain one or more of the following terms required by Regulation M: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the total of periodic payments due under the lease; a statement of whether or not the lessee has the option to purchase the leased property and at what price and time or the method of determining the purchase-option

price; and a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

11. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Isuzu Exhibits A and B, are not clear and conspicuous because they appear on the screen for a brief duration, in a scrolling format, accompanied by background sound, and interrupted or obscured by other images. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Isuzu Exhibit C, are not clear and conspicuous because they appear on the screen in small type for a very short duration.

12. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended.

EXHIBIT A

Isuzu Exhibit A

Video	Audio
(Open with full-screen text) [Super]: THE TROOPER LEASE EXPLAINED (highlighted in yellow) $319 Month for 24 months $999 CUSTOMER CAPITALIZED COST REDUCTION (highlighted in yellow) (Switch to Trooper) [Super]: $319 MONTH FOR 24 MONTHS (Switch to full-screen text) Closed-end Lease (highlighted in yellow) (Switch to Trooper) (Switch to full-screen text) 800-726-9200 (highlighted in yellow) ISUZU Practically/Amazing *ADVERTISED PAYMENT APPLICABLE TO 4WD TROOPER S MODEL MANUAL TRANSMISSION ONLY. First month's	(Background music throughout) Hey, hey, hey, hey. What the heck does this mean? Very simply, it means for $999 down, you can lease a brand new Trooper for only $319 a month. And what about this convoluted muck? It means at the end of the lease, you can either buy your Trooper at a great price or walk away. And this? It's an 800 number. Don't tell me you're watching TV without a pencil and paper. Hey, life's an adventure. Be prepared.

payment of $319 plus a refundable Security Deposit of $350 (or a non-refundable last month's payment in IL, IN, KS, ME, and NY) plus a customer down payment of $999 for a total of $1,658 due at lease signing. Based on a 24 month low mileage closed-end lease offered to qualified customers by GE Capital Auto Lease through participating dealers through June 30, 1994 -- Subject to availability. Prices based on $23,000 MSRP and a capitalized cost of $20,075 for a 1994 model Isuzu Trooper S with manual transmission including destination charges and a dealer capitalized cost reduction of $2,376, excluding taxes, registration, title, license, dealer prep, options and other charges. Prices/monthly payments may vary. 24 monthly payments total $7,660 plus tax as applicable. Option to purchase at lease end for $14,030 plus a $250 purchase option fee. Lessee pays for maintenance, insurance, repairs, excessive wear and tear and mileage charges of up to .15 cents per mile over 24,000 miles at lease end. Program not available in Alaska. 800-726-9200. See your participating Isuzu dealer for details.

EXHIBIT B

Isuzu Exhibit B

Video	Audio
(Open with Trooper driving on desolate stretch of road)	(Background music throughtout)
(Switch to full-screen text rapidly scrolling upward while index finger moves rapidly downward)	You know, the hardest part about leasing a vehicle these days is reading the conditions of the lease, I mean, you have to be a speed reader. Whoa. Let's see what we missed.
(Rapid scroll to beginning of text) [Super]:	

THE TROOPER LEASE 1995 4WD Trooper LS Model with automatic transmission.
[Super]:
$1,999 CUSTOMER CAPITALIZED COST REDUCTION $339/MONTH FOR 30 MONTHS (Index finger points to bolded text while full text scrolls upward)
(Switch to Trooper)
(Switch to full-screen text)
Option to purchase at lease end for $19,472 (Index finger points to text)
800-726-9200 (Index finger points to 800 number)
(Switch to view of Trooper)
ISUZU
Practically/Amazing
*First month's payment of $339, a refundable Security Deposit of $350 (or a non-refundable last month's payment of $339, in IL, IN, KS, ME, and NY) and a customer capitalized cost reduction of $1,999 for a total of $2,688 due at lease signing. Total monthly payments: $10,170. Taxes, license, title fees, options and insurance are extra. 30 month, close-end lease example based on 430,425 MSRP (includes destination charge), a dealer capitalized cost reduction of $2,995 and a total capitalized cost of $25,926. Your payments may be higher or lower. Option to purchase at lease end for $19,472 plus $250 purchase option fee. Mileage charge of $.15 per mile over 30,000 miles. Lessee pays excessive wear and use. You must take retail delivery out of dealer stock by July 10, 1995. Program not available in Alaska. 800-726-9200. See your participating dealer for details.

Okay. It says here for $1,999 down you can lease a Trooper LS with standard dual airgbags for just $339 a month

and when the lease is up you can bring the Trooper back or buy it at a really good price.

And this is the all important 800 number. So even if you're not a speed reader, you can always be a speed dialer.

EXHIBIT C

Isuzu Exhibit C

Video	Audio
(Open with Rodeo off-road) [Super]: Authorized 4-wheel drive area [Super]: $249/MO. The 1993 Rodeo Lease (View disclosure*) (View of Rodeo off-road)	(Background music throughout) Now you can drive off-road without getting soaked. The Rodeo Lease. See your dealer for details.

ISUZU
Practically/Amazing
* ADVERTISED PAYMENT APPLICABLE TO THE RODEO S MODEL ONLY. OPTIONAL EQUIPMENT SHOWN. First month's payment of $249 plus refundable security deposit of $249 (or non-refundable last month's payment in IL, IN, KS, ME and NY), plus a customer capitalized cost reduction of $1,000 for a total of $1,498 due at lease signing. Based on a 36-month closed-end lease offered to qualified consumers by GE Capital Auto Lease through participating dealers through 3/31/93. Subject to availability. Prices based on $____ MSRP and a capitalized cost of $____ for a 1993 Isuzu Rodeo ___ with manual transmission, including destination charges, excluding taxes, registration, title, license, dealer prep., options and charges. Dealer ___ monthly payments may vary. 36 monthly payments total $____ plus tax as applicable. Option to purchase at lease end for $___ plus a $250 disposition fee. Lessee pays for maintenance, insurance, repairs, excessive wear and tear, and mileage charges of up to .15 cents/mile over 45,000 miles at lease end. Lease program not available in Alaska and Hawaii. See your participating Isuzu dealer for details.

2755 Complaint

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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Isuzu Motors Inc. is a California corporation with its principal office or place of business located at 2300 Pellissier Place, Whittier, California.

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

DEFINITIONS

1. *"Clearly and conspicuously"* as used herein shall mean: 1) video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. *"Total amount due at lease inception"* as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, excluding dealer and government mandated fees and charges (if any).

3. Unless otherwise specified, *"respondent"* as used herein shall mean American Isuzu Motors Inc., its successors and assigns, and its officers, agents, representatives, and employees.

4. *"In or affecting commerce"* as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of revised Regulation M, 61 Fed. Reg. 52,246, 52,258 (Oct. 7, 1996)(to be codified at 12 CFR 213.2) ("revised Regulation M"), as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the total amount due at lease inception, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required).

B. Make any reference to any charge that is part of the total amount due at lease inception or that no such charge is required, not including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease inception.

C. State the amount of any payment or that any or no initial payment is required at lease inception unless all of the following items are disclosed clearly and conspicuously, as applicable:

1. That the transaction advertised is a lease;
2. The total amount due at lease inception;
3. That a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

II.

It is further ordered, That an advertisement that complies with subparagraph I.C shall be deemed to satisfy the requirements of Section 184(a) of the Consumer Leasing Act, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 (to be codified at 12 CFR 213.7(d)(2)), as amended.

III.

It is further ordered, That if the revised CLA, as amended, or revised Regulation M, as amended, are amended in the future to alter definition 2 of this order ("total amount due at lease inception") or to require or permit advertising disclosures that are different from those set forth in subparagraphs I.B or I.C of this order, then the change or changes shall be incorporated in subparagraph I.B, subparagraph I.C, and/or definition 2 for the purpose of complying with subparagraphs I.B and I.C only, as appropriate; provided however, that all other requirements of this order, including definition 1 ("clearly and conspicuously"), will survive any such revisions.

IV.

It is further ordered, That respondent American Isuzu Motors Inc., and its successors and assigns, shall, for five (5) years after the

date of service of this order, maintain and upon request make available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

V.

It is further ordered, That respondent American Isuzu Motors Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order and to all advertising agencies; and shall secure from each such person or entity a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel or entities within thirty (30) days after the date of service of this order, and to such future personnel or entities within thirty (30) days after the person or entity assumes such position or responsibilities.

VI.

It is further ordered, That respondent American Isuzu Motors Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily limited to dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VII.

It is further ordered, That respondent American Isuzu Motors Inc., and its successors and assigns, shall within one hundred and twenty (120) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on February 6, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

2755 Decision and Order

IN THE MATTER OF

MITSUBISHI MOTOR SALES OF AMERICA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3713. Complaint, Feb. 6, 1997--Decision, Feb. 6, 1997

This consent order prohibits, among other things, a California-based automobile manufacturer from misrepresenting the total amount due at lease inception, requires the manufacturer to provide consumers with clear, readable, and understandable cost information in their car lease and financed purchase advertising, requires advertisements, that reference an initial payment or state that no initial payment is due, to clearly and conspicuously disclose, as applicable, that the deal is a lease, and to disclose the fact that an extra charge may be imposed at the end of the lease based on the residual value of the car. The consent order also prohibits the respondent from misrepresenting the existence or amount of any balloon payment or the annual percentage rate for advertised loans.

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky* and *Lauren Steinfeld.*

For the respondent: *Kristi Fischer*, in-house counsel, Cypress, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Mitsubishi Motor Sales of America, Inc., a corporation ("respondent" or "Mitsubishi"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and the Truth in Lending Act, 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Mitsubishi Motor Sales of America, Inc. is a California corporation with its principal office or place of business at 6400 Katella Avenue, Cypress, California. Respondent distributes Mitsubishi vehicles and offers such vehicles for sale or lease to consumers.

2. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

3. Respondent has disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 CFR 226.2, as amended.

4. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

LEASE ADVERTISING

5. Respondent has disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for Mitsubishi vehicles, including but not necessarily limited to the attached Mitsubishi Exhibits A through C. Mitsubishi Exhibits A and B are television lease advertisements (attached in video and storyboard format). Mitsubishi Exhibit C is a print lease advertisement. These advertisements contain the following statements:

A. [Audio:] "Lease for zero down and just two forty-nine a month for thirty-six months."
[Video:]
"MITSUBISHI GALLANT S $0 DOWN $249 A MONTH, 36 MONTHS"
[The advertisement contains the following lease disclosure at the bottom of the screen in dark-colored fine print superimposed on a background of similar shade: "First payment, plus a $0 down payment and a refundable security deposit of $250 (in NY, final monthly payment of $249 in lieu of security deposit) due upon delivery. 36 monthly payments based on MSRP of $18,043 . . . with a dealer capitalized cost reduction of $922, excluding tax, title, license, registration, regionally required equipment, dealer options, and charges for a 36-closed month closed-end lease. . . . Total payments: $8964 Lessee liable for maintenance, non-warrantable repairs, excess wear and tear, and up to 15[cents]/mile over 36,000

miles and $350 disposition fee and applicable taxes at lease end. Option to purchase at lease end for residual value of $10,068, plus applicable fees and taxes and purchase option fee of $150. . . ." The fine print is displayed on three screens, each containing a block of at least seven lines, and each block appearing for approximately three seconds.] (Mitsubishi Exhibit A).

B. [Audio:] "Lease for just two forty-nine a month for forty-eight months with a thousand dollars down."
[Video:]
"$1000 DOWN $249 A MONTH 48 MONTHS"
[The advertisement contains the following lease disclosure at the bottom of the screen in white fine print superimposed on a dark-colored, moving background and accompanied by background sound and other moving images: "First payment, plus a $1000 down payment and a refundable security deposit of $250 (in NY, final monthly payment of $249 in lieu of security deposit) due upon delivery. 48 monthly payments based on MSRP of $18,747 . . . with a dealer capitalized cost reduction of $1,289, excluding tax, title, license, registration, regionally required equipment, dealer options, and charges for a 48-month closed-end lease. . . . Total payments: $11,952 Lessee liable for maintenance, non-warrantable repairs, excess wear and tear, and up to 15[cents]/mile over 60,000 miles and $350 disposition fee and applicable taxes at lease end. Option to purchase at lease end for residual value of $8,436, plus applicable fees, taxes and purchase option fee of $150. . . ." The fine print is displayed on three screens, each containing a block of seven lines, and each block appearing for approximately three seconds.] (Mitsubishi Exhibit B).

C. "$0 Down Plus $500 CASH BACK* Now, Lease for 36 Months or Buy a Galant S* LEASE OR BUY $0 DOWN $249 A MONTH"
[The advertisement contains the following lease disclosure at the bottom of the page in small print:
" . . . **First payment, plus a $0 down payment and a refundable security deposit of $250 (in NY, final monthly payment of $249 in lieu of security deposit) due upon delivery. 36 monthly payments based on MSRP of $18,043 for a Galant S with automatic transmission (FOG A88), with a dealer capitalized cost reduction of $922, excluding tax, title, license, registration, regionally required equipment, dealer options, and charges for a 36-month closed-end lease rounded to the nearest dollar. Total payments: $8,964. Lessee liable for maintenance, non-warrantable repairs, excess wear and tear, and up to 15 [cents]/mile over 36,000 miles and $350 disposition fee and applicable taxes at lease end. Option to purchase at lease end for residual value of $10,068, plus applicable fees and taxes and purchase option fee of $150. . . ."] (Mitsubishi Exhibit C).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: MISREPRESENTATION IN LEASE ADVERTISING

6. Through the means described in paragraph five, respondent has represented, expressly or by implication, that the amount stated as "down" in respondent's lease advertisements is the total amount

consumers must pay at lease inception to lease the advertised vehicles.

7. In truth and in fact, the amount stated as "down" in respondent's lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers must also pay additional fees beyond the amount stated as "down," such as the first month's payment and security deposit, at lease inception. Therefore, respondent's representation as alleged in paragraph six was, and is, false or misleading.

8. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: FAILURE TO DISCLOSE ADEQUATELY IN LEASE ADVERTISING

9. In its lease advertisements, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These lease advertisements do not adequately disclose additional terms pertaining to the lease offer, including but not necessarily limited to a required security deposit and first month's payment due at lease inception. The existence of additional terms would be material to consumers in deciding whether to lease a Mitsubishi vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

10. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: CONSUMER LEASING ACT AND REGULATION M VIOLATIONS

11. Respondent's lease advertisements, including but not necessarily limited to Mitsubishi Exhibits A through C, state a monthly payment amount, the number of required payments, and/or an amount "down." The lease disclosures in these advertisements contain one or more of the following terms required by Regulation M: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction

required at the consummation of the lease or that no such payments are required; the total of periodic payments due under the lease; a statement of whether or not the lessee has the option to purchase the leased property and at what price and time or the method of determining the purchase-option price; and a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

12. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Mitsubishi Exhibits A and B, are not clear and conspicuous because they appear on the screen in small type, against a background of similar shade, for a very short duration, with background sounds or images, and/or over a moving background. The lease disclosures in respondent's print lease advertisements, including but not necessarily limited to Mitsubishi Exhibit C, are not clear and conspicuous because they appear in small type.

13. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended.

CREDIT ADVERTISING

14. Respondent has disseminated or has caused to be disseminated credit sale advertisements ("credit advertisements") for Mitsubishi vehicles, including but not necessarily limited to the attached Mitsubishi Exhibits C, D, and E. Mitsubishi Exhibits D and E are television credit advertisements (attached in video and storyboard format). Mitsubishi Exhibit C, described above, is also a print credit advertisement. These advertisements contain the following statements:

A. [Audio:] "Buy a new Galant ES with automatic transmission and air conditioning for seven hundred fifty dollars down and one ninety-nine a month." [Video:] "$199 a mo. $750 down/Auto. Transmission Air conditioning.
[The advertisement contains the following credit disclosure at the bottom of the screen in light-colored fine print superimposed on a light-colored, moving background with background sounds and images: "Example based on MSRP of $18,300 and a selling price of $16,764 for a Galant ES (FOG A83). $750 down. 5.15% APR Diamond Advantage Plan financing for 60 months: 59 months at $199 per month and a FINAL PAYMENT OF $7,320. Tax, title, license, registration, regionally required equipment, dealer options, and charges extra. Under certain conditions you may refinance the final payment or sell the vehicle to Mitsubishi

Motors Credit of America, Inc. at end of term . . ." The fine print is displayed on two screens, each containing a block of five lines, and each block appearing for approximately three seconds.] (Mitsubishi Exhibit D).

B. [Audio:] "Now you can buy a ninety-four Eclipse for one fifty-nine a month with five hundred down."
[Video:] "BUY: $159 a month/$500 DOWN"
[The advertisement contains the following credit disclosure at the bottom of the screen in white fine print superimposed on a multi-colored, moving background and accompanied by background sound: "Example based on MSRP of $12,519 and a selling price of $11,827 for an Eclipse STD M/T (FOG A01). $500 down. 5.06% APR Diamond Advantage Plan financing for 54 mos.: 53 months at $159/mo. and a FINAL PAYMENT OF $4,757. Tax, title, lic., registration, regionally required equipment, dealer options, and charges extra. Under certain conditions you may refinance the final payment or sell the vehicle to Mitsubishi Motors Credit of America, Inc. at end of term. . . ." The fine print is displayed on two screens, each containing a block of five lines, and each block appearing for approximately three seconds.] (Mitsubishi Exhibit E).

C. [Along with the statements described in paragraph five, Exhibit C contains the following credit disclosure at the bottom of the page in small print: " . . . For example: 2.9% APR Diamond Retail Plan financing available for 24 months at $801 per month for a Galant S with automatic transmission (FOG A88), with a selling price of $18,043. $0 down. Tax, title, license, registration, regionally required equipment, dealer options, and charges extra . . . Example based on MSRP of $18,043 and a selling price of $17,121 for a Galant S with automatic transmission (FOG A88). $0 down. 5.53% APR Diamond Advantage Plan financing for 42 months: 41 months at $249 per month and a FINAL PAYMENT OF $9,509. Tax, title, license, registration, regionally required equipment, dealer options, and charges extra. Under certain conditions, you may refinance the final payment or sell the vehicle to Mitsubishi Motors Credit of America, Inc. at end of term. . . ."] (Mitsubishi Exhibit C).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT IV: MISREPRESENTATION IN CREDIT ADVERTISING

15. Through the means described in paragraphs five and fourteen, respondent has represented, expressly or by implication, that consumers can buy the advertised Mitsubishi vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down."

16. In truth and in fact, consumers cannot buy the advertised Mitsubishi vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." Consumers are also responsible for a final balloon payment of several thousand dollars to

purchase the advertised vehicles. Therefore, respondent's representation as alleged in paragraph fifteen was, and is, false or misleading.

17. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT V: FAILURE TO DISCLOSE ADEQUATELY IN CREDIT ADVERTISING

18. In its credit advertisements, respondent has represented, expressly or by implication, that consumers can buy the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the credit offer, including but not necessarily limited to a final balloon payment of several thousand dollars and the annual percentage rate. The existence of these additional terms would be material to consumers in deciding whether to buy a Mitsubishi vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

19. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT VI: TRUTH IN LENDING ACT AND REGULATION Z VIOLATIONS

20. Respondent's credit advertisements, including but not necessarily limited to Mitsubishi Exhibits C, D, and E, state a monthly payment amount and/or an amount "down." The credit disclosures in these advertisements contain the following terms required by Regulation Z: the annual percentage rate and the terms of repayment.

21. The credit disclosures in respondent's television credit advertisements, including but not necessarily limited to Mitsubishi Exhibits D and E, are not clear and conspicuous because they appear on the screen in small type, against a background of similar shade, for a very short duration, with background sounds and images, and/or over a moving background. The credit disclosures in respondent's

print credit advertisements, including but not necessarily limited to Mitsubishi Exhibit C, are not clear and conspicuous because they appear in small print.

22. Respondent's practices violate Section 144 of the Truth in Lending Act, 15 U.S.C. 1664, as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as amended.

EXHIBIT A

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT B

2888 Complaint

EXHIBIT C

EXHIBIT D

2888 Complaint

EXHIBIT D

EXHIBIT E

2888 Complaint

EXHIBIT E

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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Mitsubishi Motor Sales of America, Inc., is a California corporation with its principal office or place of business at 6400 Katella Avenue, Cypress, California.

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

DEFINITIONS

1. *"Clearly and conspicuously"* as used herein shall mean: 1) video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. *"Total amount due at lease inception"* as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, excluding dealer and government mandated fees and charges (if any).

3. *"Balloon payment"* as used herein shall mean any scheduled payment with respect to a consumer credit transaction that is at least twice as large as the average of earlier scheduled payments.

4. Unless otherwise specified, *"respondent"* as used herein shall mean Mitsubishi Motor Sales of America, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

5. *"In or affecting commerce"* as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of revised Regulation M, 61 Fed. Reg. 52,246, 52,258 (Oct. 7, 1996)(to be codified at 12 CFR 213.2) ("revised Regulation M"), as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the total amount due at lease inception, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required).

B. Make any reference to any charge that is part of the total amount due at lease inception or that no such charge is required, not including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease inception.

C. State the amount of any payment or that any or no initial payment is required at lease inception unless all of the following items are disclosed clearly and conspicuously, as applicable:

1. That the transaction advertised is a lease;
2. The total amount due at lease inception;
3. That a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

II.

It is further ordered, That an advertisement that complies with subparagraph I.C shall be deemed to satisfy the requirements of Section 184(a) of the Consumer Leasing Act, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 (to be codified at 12 CFR 213.7(d)(2)), as amended.

III.

It is further ordered, That if the revised CLA, as amended, or revised Regulation M, as amended, are amended in the future to alter definition 2 of this order ("total amount due at lease inception") or to require or permit advertising disclosures that are different from those set forth in subparagraphs I.B or I.C of this order, then the change or changes shall be incorporated in subparagraph I.B, subparagraph I.C, and/or definition 2 for the purpose of complying with subparagraphs I.B and I.C only, as appropriate; provided however, that all other requirements of this order, including definition 1 ("clearly and conspicuously"), will survive any such revisions.

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of consumer credit in or affecting commerce, as "advertisement" and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 CFR 226.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the existence and amount of any balloon payment or the annual percentage rate.

B. State the amount of any payment, including but not limited to any monthly payment, in any advertisement unless the amount of any balloon payment is disclosed prominently and in close proximity to the most prominent of the above statements.

C. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any periodic payment, including but not limited to any monthly payment, or the amount of any finance charge, without disclosing clearly and conspicuously:

1. The amount or percentage of the downpayment;

2. The terms of repayment, including but not limited to the amount of any balloon payment; and

3. The correct annual percentage rate, using that term or the abbreviation "APR," as defined in Regulation Z and the Official Staff Commentary to Regulation Z. If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

V.

It is further ordered, That respondent Mitsubishi Motor Sales of America, Inc., and its successors and assigns, shall, for five (5) years after the date of service of this order, maintain and upon request make available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

VI.

It is further ordered, That respondent Mitsubishi Motor Sales of America, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order and to all advertising agencies; and shall secure from each such person or entity a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel or entities within thirty (30) days after the date of service of this order, and to such future personnel or entities within thirty (30) days after the person or entity assumes such position or responsibilities.

VII.

It is further ordered, That respondent Mitsubishi Motor Sales of America, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily limited to dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondent Mitsubishi Motor Sales of America, Inc., and its successors and assigns, shall within one hundred and twenty (120) days after the date of service of this order, and at such other times as the Federal Trade Commission may

require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IX.

This order will terminate on February 6, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

MAZDA MOTOR OF AMERICA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3714. Complaint, Feb. 6, 1997--Decision, Feb. 6, 1997

This consent order prohibits, among other things, a California-based automobile manufacturer from misrepresenting the total amount due at lease inception, requires the manufacturer to provide consumers with clear, readable, and understandable cost information in their car lease and financed purchase advertising, requires advertisements, that reference an initial payment or state that no initial payment is due, to clearly and conspicuously disclose, as applicable, that the deal is a lease, and to disclose the fact that an extra charge may be imposed at the end of the lease based on the residual value of the car.

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky* and *Lauren Steinfeld.*

For the respondent: *Elroy H. Wolff, Sidley & Austin*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Mazda Motor of America, Inc., a corporation ("respondent" or "Mazda"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Mazda Motor of America, Inc. is a California corporation with its principal office or place of business at 7755 Irvine Center Drive, Irvine, California. Respondent distributes Mazda vehicles.

2. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. Respondent has disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for Mazda vehicles, including but not necessarily limited to the attached Mazda Exhibits A through D. Mazda Exhibits A through C are television lease advertisements (attached hereto in video and storyboard format) and Exhibit D is a print lease advertisement. These advertisements contain the following statements:

A. [Audio:] "One penny down. Great leases. Very little time. On Protegé. A penny (down). And one eighty-nine. The B2300 SE. A penny down. And one ninety-nine. 626. A penny and two-o-nine. Miata. . . . A penny and two nineteen. Passion for the road. Put your penny down."
[Video:] [open on a man jumping through a rain of pennies.]
"MAZDA ONE PENNY DOWN 36 MO. LEASES [running footage of Protege] $189 A MO. [over graphic of a penny spinning] [running footage of B2300] $199 A MO. [over graphic of a penny spinning] [running footage of 626] $209 A MO. [over graphic of a penny spinning] [running footage of Miata] $219 A MO."
[over graphic of a penny spinning] [The advertisement contains the following lease disclosure at the bottom of the screen in white colored fine print superimposed on a black background and accompanied by background sounds and images: ". . . Offer on '96 Protegé DX w/Conv. Pkg., MSRP $14,720. Assumes $1325 dealer contribution. 36 mo. payments = $6,809.04. Initial fees = $439.15. Purchase option at lease end = $7,654.40 Offer on '96 B2300 SE . . . MSRP $14,605. Assumes $859 dealer contribution. 36 mo. payments = $7,198.92. Initial fees = $449.98. Purchase option at lease end = $7,594.60. Offer on '96 626 DX w/Conv. Pkg., MSRP $17,540. Assumes $1,241 dealer contribution. 36 mo. payments = $7,532.64. Initial fees = $459.25. Purchase option at lease end = $9,471.60. Offer on '96 Miata . . . MSRP $19,280. Assumes $1,198 dealer contribution. 36 monthly payments = $7,908.84. Initial fees = $469.70. Purchase option at lease end = $10,796.80. . . . $450 Acq. fee plus taxes, title, license, & registration also due at lease signing. Early termination = $200. Lessee liable for $.10/mile over 36,000, maintenance, repairs & excess wear/tear. . . ." The fine print is displayed on four screens, each containing a block of at least five lines, and each block appearing for approximately three seconds.](Mazda Exhibit A).

B. [Audio:] "Lease a 626. Zero down, two-o-nine a month."
[Video:] "From $0 DOWN $209 A MO. 36 MONTHS."
[The advertisement contains the following lease disclosure at the bottom of the screen in white colored fine print superimposed on a black background and

accompanied by background sounds and images: ". . . 36 mo. payments = $7,551. Initial fees = $459.75 plus $450 acq. fee, taxes, title, license & registration. Early termination fee = $200. Lessee liable for $.10/mile over 36,000, maintenance, repairs & excess wear/tear. Purchase option at lease end = $9471.60. . . ." The fine print is displayed on three screens, each containing a block of at least three lines, and each block appearing for approximately two seconds.](Mazda Exhibit B).

C. [Audio:] "Its Mazda Jump . . . on Summer."
[Video:] "ZERO DOWN LEASES 36 MONTHS"
[cut to Protege badge. Mazda Protege running footage]
[Audio:] "On Protegé. Zero and one eighty-nine." [Video:] "$0 DOWN PYMT. $189 A MONTH WELL-EQUIPPED" [cut to B2300 badge. Mazda B2300 running footage] [Audio:] "B2300 SE-5. Zero and one ninety-nine." [Video:] "$0 DOWN PYMT. $199 A MONTH FULLY LOADED SE-5." [cut to 626 badge. . . 626 running footage] [Audio:] "Six-two-six. . . Zero and two-o-nine." [Video:] "$0 DOWN PYMT. $209 A MONTH WELL-EQUIPPED" [The advertisement contains the following lease disclosure at the bottom of the screen in white colored fine print superimposed on a black background and accompanied by background sounds and images: "Closed-end leases to qualified lessees. Approval of Mazda American Credit & insurance required. Offer on '96 Protegé DX w/ Conv. Pkg., MSRP $14,720. Assumes $1,325 dealer contribution. 36 mo. pymts = $6,836.04. Initial fees = $439.89. Purchase option at lease end = $7,507.20. Offer on '96 B2300 SE Reg Cab w/ A/C & Pref. Equip. Grp., MSRP $14,605. Assumes $1,888 dealer contribution. 36 mo. pymts = $7,193.16. Initial fees = $449.81. Purchase option at lease end = $7,740.65. Offer on '96 626 DX w/ Conv. Pkg., MSRP $17,540. Assumes $1,241 dealer contribution. 36 mo. pymts = $7,558.20. Initial fees = $459.95. Purchase option at lease end = $9,647. All leases incl. freight, excl. CA/MA/NY emissions. $450 Acq. Fee plus taxes, title, license & registration also due at lease signing. Early termination = $200. Lessee liable for $.10/mile over 36,000, maintenance, repairs & excess wear/tear. Must take retail delivery by 6/3/96. SEE PARTICIPATING DEALERS FOR DETAILS AND ACTUAL TERMS." The fine print is displayed on three screens, each containing a block of at least four lines, and each block appearing for approximately three seconds.](Mazda Exhibit C).

D. "MAZDA PENNY DOWN GREAT LEASES OR BUY"
[The advertisement contains lease offers for four vehicles:]
"MAZDA PROTEGÉ. . .LEASE 1¢ DOWN $189 MO. 36 MOS. . . .B2300SE SPORT TRUCK. . .LEASE 1¢ DOWN $199 MO. 36 MOS. . . .626 SPORT SEDAN. . .LEASE 1¢ DOWN $209 MO. 36 MOS. . . .MAZDA MIATA. . . LEASE 1¢ DOWN $219 MO. 36 MOS."
[The advertisement contains the following lease disclosure at the bottom of the page in small print: "Offer on '96 Protegé DX (LX shown) w/Conv. Pkg., MSRP $14,720. Assumes $1,325 dealer contribution. 36 mo. payments = $6,809.04. Initial fees = $439.15. Purchase option at lease end = $7,654.40. Offer on '96 B2300 SE Reg. Cab (Cab Plus shown) w/ A/C & Pref. Equip. Grp., MSRP $14,605. Assumes $859 dealer contribution. 36 mo. payments = $7,198.92. Initial fees = $449.98. Purchase option at lease end = $7,594.60. Offer on '96 626 DX w/ Conv. Pkg., MSRP $17,540. Assumes $1,241 dealer contribution. 36 mo. payments = $7,532.64. Initial fees = $459.25. Purchase option at lease end = $9,471.60. Offer

on '96 Miata w/ pwr. steering & mats, MSRP $19,280. Assumes $1,198 dealer contribution. 36 mo. payments = $7,908.84. Initial fees = $469.70. Purchase option at lease end = $10,796.80. All leases incl. freight. Protegé/626/B2300 SE excl. CA/MA/NY emissions. $450 Acq. fee + taxes, title, license, & registration also due at lease signing. Early termination = $200. Lessee liable for $.10/mile over 36,000, maintenance, repairs & excess wear/tear. Must take retail delivery by 4/1/96. See participating dealer for details & actual terms."](Mazda Exhibit D)

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: MISREPRESENTATION IN LEASE ADVERTISING

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that the amount stated as "down" in respondent's lease advertisements is the total amount consumers must pay at lease inception to lease the advertised vehicles.

6. In truth and in fact, the amount stated as "down" in respondent's lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers must also pay additional fees beyond the amount stated as "down," such as the first month's payment, a security deposit, and/or an acquisition fee, at lease inception. Therefore, the representation as alleged in paragraph five was, and is, false or misleading.

7. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: FAILURE TO DISCLOSE ADEQUATELY IN LEASE ADVERTISING

8. In its lease advertisements, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the lease offer, including but not necessarily limited to a required security deposit, an acquisition fee, and/or the first month's payment due at lease inception. The existence of additional terms would be material to consumers in deciding whether to lease a Mazda vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

9. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: CONSUMER LEASING ACT AND REGULATION M VIOLATIONS

10. Respondent's lease advertisements, including but not necessarily limited to Mazda Exhibits A through D, state a monthly payment amount, the number of required payments, and/or an amount "down." The lease disclosures in these advertisements contain one or more of the following terms required by Regulation M: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the total of periodic payments due under the lease; a statement of whether or not the lessee has the option to purchase the leased property and at what price and time or the method of determining the purchase-option price; and a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

11. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Mazda Exhibits A through C, are not clear and conspicuous because they appear on the screen in small type for a very short duration, accompanied by background sounds or images. The lease disclosures in respondent's print lease advertisements, including but not necessarily limited to Mazda Exhibit D, are not clear and conspicuous because they appear in small type.

12. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended.

EXHIBIT A

EXHIBIT A

EXHIBIT A

3122 Complaint

EXHIBIT B

EXHIBIT B

3122 Complaint

EXHIBIT C

EXHIBIT C

EXHIBIT C

EXHIBIT C

3122 Complaint

EXHIBIT D

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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Mazda Motor of America, Inc. is a California corporation with its principal office or place of business located at 7755 Irvine Center Drive, Irvine, California.

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

DEFINITIONS

1. *"Clearly and conspicuously"* as used herein shall mean: 1) video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. *"Total amount due at lease inception"* as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, excluding dealer and government mandated fees and charges (if any).

3. Unless otherwise specified, *"respondent"* as used herein shall mean Mazda Motor of America, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

4. *"In or affecting commerce"* as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of revised Regulation M, 61 Fed. Reg. 52,246, 52,258 (Oct. 7, 1996)(to be codified at 12 CFR 213.2) ("revised Regulation M"), as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the total amount due at lease inception, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required).

B. Make any reference to any charge that is part of the total amount due at lease inception or that no such charge is required, not including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease inception.

C. State the amount of any payment or that any or no initial payment is required at lease inception unless all of the following items are disclosed clearly and conspicuously, as applicable:

1. That the transaction advertised is a lease;
2. The total amount due at lease inception;
3. That a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

II.

It is further ordered, That an advertisement that complies with subparagraph I.C shall be deemed to satisfy the requirements of Section 184(a) of the Consumer Leasing Act, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, _____ (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 (to be codified at 12 CFR 213.7(d)(2)), as amended.

III.

It is further ordered, That if the revised CLA, as amended, or revised Regulation M, as amended, are amended in the future to alter definition 2 of this order ("total amount due at lease inception") or to require or permit advertising disclosures that are different from those set forth in subparagraphs I.B or I.C of this order, then the change or changes shall be incorporated in subparagraph I.B, subparagraph I.C, and/or definition 2 for the purpose of complying with subparagraphs I.B and I.C only, as appropriate; provided however, that all other requirements of this order, including definition 1 ("clearly and conspicuously"), will survive any such revisions.

IV.

It is further ordered, That respondent Mazda Motor of America, Inc., and its successors and assigns, shall, for five (5) years after the

date of service of this order, maintain and upon request make available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

V.

It is further ordered, That respondent Mazda Motor of America, Inc. and its successors and assigns, shall distribute a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order and to all advertising agencies; and shall secure from each such person or entity a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel or entities within thirty (30) days after the date of service of this order, and to such future personnel or entities within thirty (30) days after the person or entity assumes such position or responsibilities.

VI.

It is further ordered, That respondent Mazda Motor of America, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VII.

It is further ordered, That respondent Mazda Motor of America, Inc. and its successors and assigns shall, within one hundred and twenty (120) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on February 6, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

3122 Decision and Order

IN THE MATTER OF

CALIFORNIA SUNCARE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3715. Complaint, Feb.11, 1997--Decision, Feb. 11, 1997

This consent order prohibits, among other things, a California-based company and its president from misrepresenting the safety, benefits, performance or efficacy of tanning products and UV exposure, or any tests, studies or endorsements of their tanning products. The consent order requires the respondents to possess scientific evidence to substantiate such claims, and to send letters to distributors and retailers summarizing the Commission's action.

Appearances

For the Commission: *Joel Winston, Nancy Warder, Laura Fremont* and *Toby M. Levin.*

For the respondents: *Andrew J. Strenio, Jr., Hunton & Williams,* Washington, D.C. and *Norm D. St. Landau, Tucker, Flyer & Lewis,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that California SunCare, Inc., a corporation, and Donald J. Christal, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent California SunCare, Inc., is a California corporation, with its principal office or place of business at 1100 Glendon Avenue, Suite 1250, Los Angeles, California.

Respondent Donald J. Christal is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed skin care products for use in connection with tanning in sunlight or indoor UV radiation emitted by tanning beds and artificial sunlamps, and other products. These skin care products are sold under the trade name Heliotherapy™ and the brand name California Tan® (hereinafter referred to as "California Tan Heliotherapy products"). California Tan Heliotherapy products are "drugs" or "cosmetics" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for California Tan Heliotherapy products, including but not necessarily limited to the attached Exhibits A-J. These advertisements and promotional materials contain the following statements and depictions:

A. "I love the sun, but how can I feel good about tanning?"
Heliotherapy™ . . . The Positive Effects of The Sun™
While overexposure to the sun and burning are bad for you, medical studies demonstrate that, in moderation, exposure to sunlight is crucial for the maintenance of good physical and psychological health. Besides making you feel good about how you look, numerous studies indicate that little to no exposure to the sun may be equally as bad, if not worse, to your overall health as too much sun.
Did You Know?
. . . .
*Exposure to sunlight increases the body's ability to metabolize cholesterol, leading to a 13% decrease in blood cholesterol levels. (New England Medical Journal, 1953)
* Studies indicate that exposure to UV light may have similar effects as exercise: a decrease in blood pressure, a lower resting heart rate and a 39% increase in the heart's output of blood. (University of Frankfurt, Germany, 1992)
* Seasonal Affective Disorder (SAD), with symptoms such as as [sic] sadness, insomnia and carbohydrate cravings, is common in northern areas where exposure to sunlight in winter months is significantly decreased. (National Institute of Mental Health, 1985)
* Of course, no single study or studies may prove scientific fact. As further studies are done, science will tell us more about the effects of sun exposure. However, as these studies emphasize, the sun may have positive as well as negative effects.
REMEMBER! The key to maximizing the positive effects of the sun is to achieve the perfect balance. Take care to get just the right amount of sun to maintain your health, but don't ever allow yourself to burn. REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PREMATURE AGING, WRINKLING AND SKIN CANCER.

Moderate exposure, however, in combination with the use of California Tan's exclusive Heliotherapy™ formulas can help you to optimize a proven positive effect of the sun - your tan.

CAUTION: California Tan® products are intended to be used for tanning and moisturization only. They ARE NOT intended to produce any of the reported physiological and psychological benefits of the sun that are described above.

Studies provided by California Tan's Scientific Research Center (Exhibit A, brochure)

B. VITATAN™ The Tanning Technology of the Future . . . .

* VITATAN™ delivers an additional molecule of oxygen to the surface of the skin which significantly enhances the oxidation of melanin for faster tanning results.

When compared to Unipertan, products containing 2% VITATAN™ help improve your natural ability to develop a golden brown base tan by up to 67%.

Heliotherapy™ Maximizer - VT™ . . . .

[new page]

Heliotherapy™ . . . The Positive Effects of The Sun™

California Tan's Scientific Research Center, a panel of renowned scientists and researchers, reviews thousands of studies on the effects of sunlight. Inspired by Heliotherapy™ . . .The Positive Effects of the Sun™, California Tan® created the complete Heliotherapy™ three step system to help you maximize a proven positive effect of the sun - your tan.

CONDITION	MEDICAL EFFECT
AIDS AIDS is a fatal and uncurable epidemic	Preliminary studies indicate that phototherapy may be beneficial in treating patients with AIDS-related complex.
Cancer Prevention Breast and colon cancer can be fatal if not detected early.	Sunlight exposure may prevent certain types of cancer: colon and breast cancer rates are three times higher in northern states like New Hampshire and Vermont compared to sunny states like New Mexico and Arizona.
Fitness Fitness increases energy and reduces risk of heart disease.	Exposure to sunlight may have similar effects to exercise: decreased blood pressure, lower resting heart disease and a 39% increase in the output of blood.

[each "MEDICAL EFFECT" accompanied by citation]

Studies provided by California Tan's Scientific Research Center

While these studies indicate a wealth of benefits may result from sun exposure, no single study or studies may prove scientific fact. As research continues, science will reveal more about the effects of the sun. These studies emphasize that the sun may have positive as well as negative effects.

Remember!

To maximize the benefits of sun exposure you must achieve balance. . . .
REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PRE-MATURE AGING, WRINKLING AND SKIN CANCER.
However, moderate exposure in combination with California Tan's exclusive Heliotherapy™ formulas can help you optimize the beneficial aspects of having a spectacular, golden brown tan while minimizing the negative effects of skin dehydration.

Caution:

California Tan® products are intended to be used for tanning and moisturization only. They ARE NOT intended to produce any of the reported possible physiological and psychological benefits of the sun that are described above and California Tan® does not represent that such benefits result from the use of its products.

HELIOTHERAPY (Exhibit B, brochure)(sources for each medical effect omitted)

C. Heliotherapy™. . .The Positive Effects of The Sun™

2 * What is Heliotherapy?

he-li-o-ther-a-py. . .[HELIO- + THERAPY] the treatment of disease by exposing the body to sunlight Heliotherapy is a science, documented by thousands of scientific studies which have been conducted on the benefits of sun exposure. Acknowledged and practiced by the American Medical Association, heliotherapy is the treatment of disease by means of the sun's electromagnetic waves. Red, orange, yellow, green, blue, indigo, violet, and mid and near ultraviolet waves are used whether collectively or independently to treat and cure everything from acne to jaundice.

Did you know that? . . . .

*Heliotherapy is the only known cure for Seasonal Effective [sic] Disorder, a cyclic mood disorder caused by sunlight deprivation during fall and winter months.

*Currently, AIDS research clinics use heliotherapy as an effective tool for boosting the body's immune system.

. . . .

*Scientists at the Baylor University Medical Center have successfully used heliotherapy to destroy the AIDS virus and other infectious diseases and are developing heliotherapy to decontaminate blood for transfusions. . . . .

While fully recognizing that long term overexposure to the sun and burning can result in skin cancer, premature aging and wrinkling in some cases, the science of heliotherapy supports that the sun also offers many benefits. In the months to come, California Tan's Scientific Research Center will uncover the FACTS about Heliotherapy™ ...The Positive Effects of The Sun™.

Studies provided by California Tan's Scientific Research Center

. . . .

1-800-SUN-CARE

CALIFORNIA

TAN®

The science of heliotherapy has inspired the California Tan® Heliotherapy™ line of products. These products are intended to be used for tanning and moisturization only and not for any of the psychological or physiological benefits described in this advertisement.

SOLD IN SALONS

(Exhibit C, magazine ad)

D. Is Sunlight the Answer for cancer prevention?

New studies from the University of California, San Diego indicate that exposure to sunlight may play an important role in the prevention of certain types of cancer. While long-term overexposure to the sun and burning can be harmful, this research shows that the sun may have many properties that help prevent breast, colon and ovarian cancer.

As a leader in the study of Heliotherapy, California Tan's Scientific Research Center has uncovered thousands of studies demonstrating the benefits of UV-exposure.

Studies by Dr. Edward Gorham at the University of California, San Diego, show that the incidence of breast cancer is lowest in countries nearest the equator where the opportunity for sunlight exposure is highest. Vitamin D produced by exposure to sunlight is associated with a lower rate of fatal breast cancer.

Vitamin D produced by exposure to sunlight is associated with a lower risk of fatal breast cancer. [banner]

It's not surprising that within the U.S., colon and breast cancer rates are three times higher in northern states like New Hampshire and Vermont compared to sunny states like New Mexico and Arizona, according to research conducted by Dr. Frank Garland at the University of California, San Diego.

In addition, the Melanoma Clinic at the University of Sydney, Australia released new research showing that the lowest incidence of skin cancer occurs in those people whose main occupation is outdoors.

While the jury is still out on the true effects of sun exposure, the science of Heliotherapy indicates that the sun is necessary for our health and well being. Experts agree that overexposure and burning can lead to skin cancer in some cases. However, with moderation, exposure to sunlight may bring us many benefits.

. . . .

CALIFORNIA TAN® Heliotherapy™. . .The Positive Effect of The Sun™

(Exhibit D, magazine ad)

E. From high blood pressure to AIDS . . . Is Sunlight the Cure of the '90's?

Although the experts warn against long-term overexposure to the sun and burning, new research points to the healing powers of the sun....

Today, people are looking for more natural cures for everything from common ailments to serious diseases. As a major contributor to the science of Heliotherapy™, California Tan's Research Center has uncovered hundreds of studies demonstrating the positive effects of sun exposure.

*In a recent study by Dr. Zane Kime, patients with high blood pressure experienced a dramatic decrease in blood pressure lasting five to six days after just one treatment of UV- light. . . .

*According to studies conducted by Dr. Norman Rosenthal at the National Institute of Mental Health, light treatment is the most effective cure for Seasonal Affective Disorder (SAD), or the winter blues.

*UV-light treatment is on the forefront of the search for an AIDS cure. Scientists at Baylor University Medical Center have used light to destroy the AIDS virus and other infectious diseases.

Even though the jury is still out on the true effects of sun exposure, we are now discovering that the sun plays an important role in the maintenance of good health. Through the science of Heliotherapy™, we are learning that balance is most

important. Overexposure and burning can lead to skin cancer in some cases. However, in the right amounts, we can benefit from the sun's healing powers.

. . . .

CALIFORNIA TAN®

Heliotherapy™ . . . The Positive Effects of The Sun™

(Exhibit E, magazine ad)

G F. Heliotherapy™ The Positive Effects of The Sun™

CALIFORNIA TAN®

California Tan's Scientific Research Center, a panel of renowned doctors, researchers and dermatologists, reviews thousands of studies each year about the positive and negative effects of UV-light. Overexposure and burning are bad for you and may lead to premature aging and skin cancer. However, medical evidence shows that sunlight is connected to everything from osteoporosis prevention to vitamin D synthesis.

[picture of California Tan Heliotherapy products]

Inspired by the science of Heliotherapy, California Tan® has created scientifically proven formulations to help you maximize a proven positive effect of the sun - your tan. [caption]

CANCER PREVENTION: Research from Dr. Cedric Garland at the University of California, San Diego suggests that sunlight may prevent certain types of cancer: colon and breast cancer rates are three times higher in northern states compared to sunny southern states. OSTEOPOROSIS: A new study by Dr. J. Rosen demonstrates that reduced winter sunlight can lead to osteoporosis and the vitamin D deficient bone disease osteomalacia (adult rickets). SEASONAL AFFECTIVE DISORDER (SAD): A 1993 study by Dr. A. Wirz-Justice shows that 70% of SAD patients show improvement after light treatment, the only known cure for the "winter blues." SKIN CANCER: Skin cancer has been linked to non-UV causes: diet, genetics, and alcohol, according to a 1992 study by Dr. L. Marchand. VITAMIN D: A 1990 study by Dr. Matsuoka shows that vitamin D, which regulates calcium and phosphorus absorption and is needed to maintain a healthy skeleton, is produced during the tanning process.

California Tan products are intended to be used for tanning and moisturization only. They ARE NOT intended to produce any of the reported possible physiological and psychological benefits of the sun that are described above.

(Exhibit F, magazine ad)

G. CALIFORNIA TAN® TROPICAL FURY™

Heliotherapy™ MAXIMIZER™ Maximize The Positive Effects of the Sun™

. . . .

A unique, scientifically proven blend of California Tan's Heliotherapy™ MAXIMIZER Complex provides the most effective moisturization to help you achieve up to 42% better tanning results and counteract the drying effects of the sun for a spectacular, golden brown tan.

. . . .

CALIFORNIA TAN®

Heliotherapy™. . . The Positive Effects of The Sun™

California Tan's exclusive Heliotherapy™ formulas are a precise, scientifically proven combination of state-of-the-art skin care and tanning ingredients that help you maximize a proven positive effect of the sun - your tan!

While it's true that over exposure to the sun and burning are bad for you, medical science has also discovered that, in moderation, exposure to the sun is crucial to the maintenance of good physical and psychological health.

In addition to the fact that a tan makes you feel good about how you look, a number of studies have noted that little to no sun exposure may be equally as bad, if not worse, to your overall health as too much sun.

DID YOU KNOW THAT?

*According to a study conducted by the University of Sydney and Melanoma Clinic in 1982, the people with the lowest risk of skin cancer were those whose main outdoor activity was sunbathing.(see note 1)

*The same study also found that the highest incidence of skin cancer occurred in those who spent most of their time indoors under fluorescent lighting which is deficient of the ultraviolet portion of the sun spectrum.(see note 2)

. . . .

*In a 1980 study, it was concluded that exposure to sunlight produces the same benefits as exercise: increases in strength, energy, endurance, tolerance to stress, and the ability of the blood to absorb and carry oxygen; and decreasing the resting heart rate, blood pressure, respiratory rate, blood sugar and lactic acid.(see note 6)

. . . .

*Researchers also found that the dietary vitamin D found in milk and vitamin supplements is not a sufficient replacement to the vitamin D that is produced by exposure to the sun for the maintenance of healthy bones and teeth and at high levels, dietary vitamin D has been found to be very toxic.(see note 8)

*Studies indicate that exposure to ultra-violet light is an effective tool for lowering elevated blood pressure.(see note 9)

*According to a recent study conducted at the Tulane University, the heart became stronger and pumped more blood when the subjects were exposed to ultra-violet light.(see note 10)

. . . .

*Sunlight has been scientifically proven in numerous studies to reduce serum cholesterol levels.(see note 12)

*In a study conducted by The American Society for the Study of Arteriosclerosis, 97% of the subjects had a 13% decrease in the level of cholesterol within two hours after the first exposure.(see note 13)

. . . .

*In 1987, the Wall Street Journal reported that chickens raised under full-spectrum lighting, the closest match to natural sunlight, lived twice as long, laid more eggs, were less aggressive, and laid eggs that were 25% lower in cholesterol than chickens raised under fluorescent lighting.(see note 15)

. . . .

Of course, no single study or studies may prove scientific fact. And as further studies are done, science will tell us more about the effects of sun exposure. But these studies emphasize that the sun may have positive as well as negative effects.

REMEMBER!

The key to maximizing the positive effects of the sun is to achieve the perfect balance. Take care to get just the right amount of sun to maintain your health, but don't ever allow yourself to burn. REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PRE-MATURE AGING, WRINKLING AND SKIN CANCER. Moderate exposure, however, in combination with the use of California Tan's exclusive Heliotherapy™ formulas can help you optimize the beneficial aspects of having a spectacular, golden brown tan while minimizing the negative effects of over exposure and skin dehydration.

CALIFORNIA TAN®

Heliotherapy™

ACHIEVE A SPECTACULAR DEEP DARK, TAN
AND FEEL GOOD ABOUT IT

CAUTION

California Tan products are intended TO BE USED FOR TANNING AND MOISTURIZATION ONLY. They ARE NOT intended to produce any of the physiological and psychological benefits of the sun that the studies describe.

Studies provided by California Tan's Scientific Research Center

(Exhibit G, Tropical Fury Heliotherapy™ Maximizer label)(references omitted)

H. Heliotherapy™ Update

CALIFORNIA TAN®

Heliotherapy™ The Positive Effects of the Sun™

Only California Tan's exclusive Heliotherapy™ formulas are the precise scientifically proven combination of extraordinary skin care and tanning ingredients to help you maximize a proven positive effects of the sun ... your tan.

While overexposure to the sun and burning are bad for you, medical studies demonstrate that, in moderation, exposure to sunlight is crucial for the maintenance of good physical and psychological health.

Besides making you feel good about how you look, numerous studies demonstrate that little to no exposure to the sun may be equally as bad, if not worse, to your overall health as too much sun.

Did You Know That?

*Sunlight is the only reliable source of vitamin D and provides the vitamin D requirement for most of the world's population. (Boston University, 1989)

. . . .

*Exposure to sunlight increases the body's ability to metabolize cholesterol, leading to a 13% decrease in blood cholesterol levels. (New England Medial Journal, 1953)[4]

*Studies indicate that exposure to UV light may have similar affects [sic] as exercise: decreased blood pressure, lower resting heart rate and a 39% increase in output of blood. (University of Frankfurt, Germany, 1992)[5]

*Seasonal Affective Disorder (SAD), with symptoms such as as [sic] sadness, insomnia, carbohydrate cravings, anxiety and irritability, is commonly found in northern areas where exposure to sunlight in winter months is significantly decreased. (National Institute of Mental Health, 1985)[6]

. . . .

*Studies indicate that people with the lowest risk of skin cancer are those whose main occupation is outdoors. (Lancet, 1982)[9]

*Significant seasonal bone loss, as a result of inadequate vitamin D formation, occurs in people who live in areas with reduced winter sunlight. Bone loss can lead to Osteoporosis and Osteomalacia, a softening of the bones. (University of Maine, 1993)[11]

*Colon and breast cancer deaths are three times higher in northern states like New Hampshire and Vermont compared to sunny states like New Mexico and Arizona. (University of California, San Diego, 1986)[12]

. . . .

Of course, no single study or studies may prove scientific fact. As further studies are done, science will tell us more about the effects of sun exposure. However, as

these studies emphasize, the sun may have positive effects as well as negative effects.

Remember!!

The key to maximizing the positive effects of the sun is to achieve the perfect balance. Take care to get just the right amount of sun to maintain your health, but don't ever allow yourself to burn. REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PRE-MATURE AGING, WRINKLING AND SKIN CANCER. However, moderate exposure in combination with the use of California Tan's exclusive Heliotherapy™ formulas can help you optimize the beneficial aspects of having a spectacular, golden brown tan while minimizing the negative effects of overexposure and dehydration.

. . . . .

CAUTION:

California Tan® products are intended to be used for tanning and moisturization only. They ARE NOT intended to promote any of the reported physiological and psychological benefits of the sun that are described above.

Studies provided by California Tan's
Scientific Research Center

(Exhibit H, Tropical Sizzle Heliotherapy™ Maximum Strength Intensifier label)(citations omitted)

I. Heliotherapy™ . . . The Positive Effects of the Sun™

California Tan's Scientific Research Center, a panel of the world's most renowned scientists, reviews thousands of studies relating to light and health which inspired California Tan to create its exclusive Heliotherapy™ three step system that contains the precise combination of proven tanning and skin care ingredients to help you maximize a positive effect of the sun - your tan. Burning and overexposure are bad for you. But sunlight is essential for your psychological and physiological good health.

HELIOTHERAPY™ REFERENCE CHART

CONDITION	MEDICAL EFFECT
AIDS AIDS is a fatal and incurable epidemic.	Preliminary studies indicate that phototherapy may be beneficial in treating patients with AIDS-related complex.
Cancer Prevention Breast and colon cancer can be fatal if not detected early.	Sunlight exposure may prevent certain types of cancer: colon and breast cancer rates are three times higher in northern states like New Hampshire and Vermont compared to sunny states like New Mexico and Arizona.
Fitness Fitness increases energy and reduces risk of heart disease.	Exposure to sunlight may have similar effects as exercise: decreased blood pressure, lower

	resting heart rate, a 39% increase in the output of blood.
Osteoporosis Osteoporosis is a growing epidemic of weak bones in the U.S.	Significant seasonal bone loss due to lack of sunlight produced vitamin D is prominent in areas with reduced winter sunlight and can lead to Osteoporosis.
CONDITION	MEDICAL FACT/BENEFIT
Seasonal Affective Disorder (SAD) More than 25 million Americans suffer from SAD each year.	A 1993 study shows that 70% of patients with SAD show improvement after light treatment, the only known cure for the "winter blues."
Skin Cancer	Skin cancer has been linked to non-UV causes: diet, genetics and alcohol.

[each "EFFECT" or "BENEFIT" accompanied by citation]

Studies provided by California Tan's Scientific Research Center

While these studies indicate a wealth of benefits may result from sun exposure, no single study or studies may prove scientific fact. As research continues, science will reveal more about the effects of the sun. These studies emphasize that the sun may have positive as well as negative effects.

Remember!

To maximize the benefits of sun exposure you must achieve balance and determine the best amount of sun exposure for you based on your skin type and how easily you burn. Consult your physician if you have any doubt and don't ever allow yourself to burn.

REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PRE-MATURE AGING, WRINKLING AND SKIN CANCER.

However, moderate exposure in combination with the use of California Tan's exclusive Heliotherapy™ formulas can help you optimize the beneficial aspects of having a spectacular, golden brown tan while minimizing the negative effects of skin dehydration.

Caution:

California Tan® products are intended to be used for tanning and moisturization only. They ARE NOT intended to produce any of the reported possible physiological and psychological benefits of the sun that are described above and California Tan® does not represent that such benefits result from use of its products. (Exhibit I, Tan & Tone Legs Maximum Strength Heliotherapy™ Maximizer- VT Contouring Cream label)(sources for each medical benefit omitted)

J. MORE ABOUT HELIOTHERAPY™

Promoting Heliotherapy™

CAN INCREASE YOUR LOTION SALES

Let your customers know that.... FAST FACTS ON HELIOTHERAPY™

*Let your clients know that lotions can help them reap the positive effects of the sun and UV-light (a tan, increased immunity, lower cholesterol, etc.) while protecting themselves from and/or preventing the negative effects.

*Say to clients when they're signing in -- "Did you know that the sun has some of the same effects on your body as exercise, like lower cholesterol and and more oxygen going into your cells?"

*Put up a Heliotherapy™ poster at eye-level in each changing room.

*Make it a point to post one new positive effect of UV-light exposure per week in an area where salon employees will be most likely to read it. (See box-right).

Did you know that the sun produces many of the same benefits as exercise?

Such as:

*Lowering blood cholesterol levels

*Lowering your resting heart rate

*Increasing your oxygen intake into cells

*Increasing your energy level

From Dr. Zane Kime's book; Sunlight

Tape this on the outside of your cash register where all your clients will see it and watch your membership sales soar!

(Exhibit J, salon owner newsletter)

PAR. 5. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-J, respondents have represented, directly or by implication, that:

A. The negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging, are caused only by overexposure or burning and not by moderate exposure, over a period of years, including exposure sufficient to cause tanning.

B. Tanning as a result of exposure to sunlight or indoor UV radiation is not harmful to the skin.

C. Use of California Tan Heliotherapy products prevents or minimizes the negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging.

D. Exposure to sunlight or indoor UV radiation reduces the risk of skin cancer.

PAR. 6. In truth and in fact:

A. The negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging, are not caused only by overexposure or burning, but also can be caused by cumulative moderate exposure, over a period of years, including exposure sufficient to cause tanning.

B. Tanning as a result of exposure to sunlight or indoor UV radiation is harmful to the skin.

C. Use of most California Tan Heliotherapy products in conjunction with exposure to sunlight or indoor UV radiation does not reduce the risk of skin cancer or premature skin aging, because most California Tan Heliotherapy products do not contain sunscreen.

D. Exposure to sunlight or indoor UV radiation does not reduce the risk of skin cancer.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-J, respondents have represented, directly or by implication, that:

A. Exposure to sunlight or indoor UV radiation prevents or reduces the risk of colon and breast cancer.

B. Exposure to sunlight or indoor UV radiation lowers elevated blood pressure.

C. Exposure to sunlight or indoor UV radiation has benefits similar to those of exercise, including decreased blood pressure and lower heart rate.

D. Exposure to sunlight or indoor UV radiation significantly reduces serum cholesterol.

E. Exposure to indoor UV radiation is an effective treatment for Seasonal Affective Disorder.

F. Exposure to sunlight or indoor UV radiation is an effective treatment for AIDS.

G. Exposure to sunlight or indoor UV radiation enhances the immune system.

H. For the general population, reduced winter sunlight can lead to bone disorders such as osteoporosis and osteomalacia, and increased exposure to sunlight or indoor UV radiation is necessary to reduce the risk of such disorders.

I. California Tan Heliotherapy MAXIMIZERS help users achieve up to 42% better tanning results.

J. California Tan Heliotherapy products that contain 2% VITATAN improve users' ability to tan by up to 67%.

PAR. 8. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-J, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five and seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time they made the representations set forth in paragraphs five and seven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-J, respondents have represented, directly or by implication, that:

A. Scientific studies demonstrate that exposure to sunlight or indoor UV radiation provides the health benefits set forth in paragraphs five and seven.

B. The American Medical Association has endorsed exposure to sunlight or indoor UV radiation as an effective medical treatment.

PAR. 7. In truth and in fact,

A. Scientific studies do not demonstrate that exposure to sunlight or indoor UV radiation provides the health benefits set forth in paragraphs five and seven.

B. The American Medical Association has not endorsed exposure to sunlight or indoor UV radiation as an effective medical treatment.

Therefore, the representations set forth in paragraph ten were, and are, false and misleading.

PAR. 12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

EXHIBIT F

EXHIBIT G

EXHIBIT G

EXHIBIT G

EXHIBIT G

EXHIBIT G

EXHIBIT G

3322 Complaint

EXHIBIT G

EXHIBIT H

EXHIBIT H

EXHIBIT H

EXHIBIT H

EXHIBIT H

EXHIBIT I

EXHIBIT I

EXHIBIT I

EXHIBIT I

EXHIBIT I

EXHIBIT J

3322 Complaint

EXHIBIT J

EXHIBIT J

3322 Complaint

EXHIBIT J

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent California Suncare, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1100 Glendon Avenue in the City of Los Angeles, State of California.

Respondent Donald J. Christal is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

ORDER

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

1. *"California Tan Heliotherapy products"* shall mean the Heliotherapy™ line of skin care products for use in connection with tanning as a result of exposure to sunlight or indoor UV radiation sold under the brand name California Tan®.

2. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

3. *"Purchaser for resale"* shall mean any person that has bought any California Tan Heliotherapy products to sell to another business or members of the public including, but not limited to, wholesalers, distributors, tanning salons, beauty parlors, health spas, and gyms.

I.

It is ordered, That respondents, California SunCare, Inc., a corporation, its successors and assigns, and its officers, and Donald J. Christal, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any California Tan Heliotherapy product or any other product or service for use in connection with tanning, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, in any manner, directly or by implication, that the negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging, are caused only by overexposure and burning or are not caused by cumulative moderate exposure, over a period of years, including exposure sufficient to cause tanning;

B. Representing, in any manner, directly or by implication, that tanning as a result of exposure to sunlight or indoor UV radiation is not harmful to the skin;

C. Misrepresenting, in any manner, directly or by implication, that the use of such product or service prevents or minimizes the negative effects of exposure to sunlight or indoor UV; or

D. Representing, in any manner, directly or by implication, that exposure to sunlight or indoor UV radiation reduces the risk of skin cancer.

II.

It is further ordered, That respondents, California SunCare, Inc., a corporation, its successors and assigns, and its officers, and Donald J. Christal, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any California Tan Heliotherapy product or any other product or service for use in connection with tanning, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Exposure to sunlight or indoor UV radiation prevents or reduces the risk of cancer, including but not limited to colon or breast cancer;

B. Exposure to sunlight or indoor UV radiation lowers blood pressure;

C. Exposure to sunlight or indoor UV radiation has benefits similar to those of exercise, including but not limited to decreased blood pressure or lower heart rate;

D. Exposure to sunlight or indoor UV radiation reduces serum cholesterol;

E. Exposure to indoor UV radiation is an effective treatment for Seasonal Affective Disorder;

F. Exposure to sunlight or indoor UV radiation is an effective treatment for AIDS;

G. Exposure to sunlight or indoor UV radiation enhances the immune system;

H. For the general population, reduced winter sunlight leads to bone disorders such as osteoporosis and osteomalacia and increased exposure to sunlight or indoor UV radiation is necessary to reduce the risk of such disorders; or

I. Exposure to sunlight or indoor UV radiation has any health benefit,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, California SunCare, Inc., a corporation, its successors and assigns, and its officers, and Donald J. Christal, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any California Tan Heliotherapy product or any other product or service for use in connection with tanning, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That the use of such product or service prevents or minimizes the negative effects of exposure to sunlight or indoor UV radiation, including but not limited to skin cancer or premature aging;

B. That the use of such product or service will improve users' ability to tan; or

C. Regarding the performance, safety, benefits, or efficacy of such product or service,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondents, California SunCare, Inc., a corporation, its successors and assigns, and its officers, and Donald J. Christal, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication:

A. The existence, contents, validity, results, conclusions, or interpretations of any test or study; or

B. That any person, firm, organization, or government agency approves or endorses any such product or service or exposure to sunlight or indoor UV radiation.

V.

It is further ordered, That respondents, California SunCare, Inc., a corporation, its successors and assigns, and its officers, and Donald J. Christal, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any California Tan Heliotherapy product or any other product or service for use in connection with tanning, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to display, clearly and prominently, in any advertising or promotional material for any such product(s), one or more of which does not contain a sunscreen ingredient providing a minimum of SPF 2, the following disclosure:

CAUTION: Tanning in sunlight or under tanning lamps can cause skin cancer and premature skin aging -- even if you don't burn.

The disclosure requirements set forth in this subparagraph shall terminate at such time as respondents have expended at least one million, five hundred thousand dollars ($1,500,000) on the dissemination to consumers of advertising and promotional material for the product(s) specified above.

For purposes of this subparagraph "advertising or promotional material" shall include such material that is disseminated to consumers either directly, or indirectly through any purchaser for resale, but shall not include television advertising, billboards, or advertising appearing in any periodical sold only by subscription for which fifty percent (50%) or more of the readership is comprised of tanning or beauty salon professionals. Provided, however, that in the event that respondents have not expended at least one million, five hundred dollars ($1,500,000) on the dissemination of the advertising and promotional material defined above within two (2) years and six (6) months after the date of service of this order, the exclusions contained in that definition shall terminate and all advertising and promotional material for any such product(s) shall be subject to the disclosure requirements of this subparagraph.

In calculating the amount of expenditures on the dissemination to consumers of the advertising and promotional materials specified above, the costs of distributing, publishing, or broadcasting the advertising and promotional material shall be included, but the costs of developing, designing, creating, or producing the advertising or promotional material (other than printing) shall not be included.

B. Making any representation in any advertising or promotional material for any such product(s), in any manner, directly or by implication, about the safety or any health benefits of exposure to sunlight or indoor UV radiation unless respondents disclose, clearly and prominently, the following:

CAUTION: Tanning in sunlight or under tanning lamps can cause skin cancer and premature skin aging.

For purposes of this subparagraph, "advertising or promotional material" shall include television advertising, billboards, or advertising appearing in any periodical sold only by subscription for which fifty percent (50%) or more of the readership is comprised of tanning or beauty salon professionals, and, once the requirements of

subparagraph A above have been satisfied, all other advertising and promotional material.

C. Making any representation on the labeling or package of any such product that does not contain a sunscreen ingredient providing a minimum of SPF 2, in any manner, directly or by implication, about the safety or any health benefits of exposure to sunlight or indoor UV radiation unless respondents disclose, clearly and prominently, the following:

CAUTION: Tanning in sunlight or under tanning lamps can cause skin cancer and premature skin aging.
This product does not contain a sunscreen and does not protect against sunburn.

For purposes of the display of the disclosure or the corrective statement required by this part ("required information"), "clearly and prominently" shall mean as follows:

1. In a television, broadcast, or video advertisement, the required information shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

2. In a radio advertisement, the required information shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

3. In a print advertisement or other printed promotional material, the disclosure shall be displayed in a manner sufficient for an ordinary consumer to see and read it, considering factors including but not necessarily limited to type size and style, location, layout, and contrast with the background against which it appears. No other elements in the advertisement including but not necessarily limited to the layout, graphics, other copy, or depictions, shall detract from or obscure the prominence of the disclosure. In multipage documents, the disclosure shall appear on the cover or first page.

4. On product labeling, the required information shall be set out in the same format in which it appears in subparagraph C above, in at least ten (10) point Times New Roman Bold, in a location on the principal display panel that is sufficiently noticeable for an ordinary

consumer to read and comprehend it, and in a print that contrasts sharply with the background against which it appears.

5. On a product package, the required information shall be set out in the same format in which it appears in subparagraph C above, in at least twelve (12) point Times New Roman Bold, in a location on the principal display panel that is sufficiently noticeable for an ordinary consumer to read and comprehend it, and in a print that contrasts sharply with the background against which it appears.

Nothing contrary to, inconsistent with, or in mitigation of the required information shall be used in any advertising, promotional material, labeling, or packaging.

VI.

It is further ordered, That respondents, California SunCare, Inc., its successors and assigns, and Donald J. Christal shall:

A. Within thirty (30) days after the date of service of this order, send by first class certified mail, return receipt requested, to each purchaser for resale of any California Tan Heliotherapy product with whom respondents have done business since January 1, 1993, an exact copy of the notice attached hereto as Attachment A. The mailing shall include no other document;

B. In the event that respondents receive any information that subsequent to receipt of Attachment A any purchaser for resale is using or disseminating any advertisement or promotional material that contains any representation prohibited by this order, respondents shall immediately notify the purchaser for resale that respondents will terminate the use of said purchaser for resale if it continues to use such advertisements and promotional materials; and

C. Terminate any purchaser for resale about whom respondents receive any information that such purchaser for resale has continued to use advertisements or promotional materials that contain any representation prohibited by this order after receipt of the notice required by subpart B of this part.

VII.

It is further ordered, That the provisions of this order shall not apply to any label or labeling printed prior to the date of service of this order and shipped by respondents to purchasers for resale prior to one hundred (100) days after service of this order; provided, however, that any multipage fold-out labels that contain claims that violate Parts I through IV of this order shall be removed from all products in respondents' inventory prior to shipping after the date of service of this order.

VIII.

It is further ordered, That respondents, California SunCare, Inc., its successors and assigns, and Donald J. Christal shall for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. Copies of all notification letters sent to purchasers for resale pursuant to subparagraph A of part VI of this order; and

B. Copies of all communications with purchasers for resale pursuant to subparagraphs B and C of part VI of this order.

IX.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

X.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers or government organizations.

XI.

It is further ordered, That respondent California SunCare, Inc., its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, provide a copy of this order to each of respondent's current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of ten (10) years from the date of service of this order, provide a copy of this order to each of respondent's future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order within three (3) days after the person assumes his or her position.

XII.

It is further ordered, That respondent Donald J. Christal shall for a period of ten (10) years from the date of service of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and his affiliation with any new business or employment. Each such notice of affiliation with any new business or employment shall include respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XIII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the 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 which may affect compliance obligations arising under this order.

XIV.

This order will terminate on February 11, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph of this order that terminates in less than twenty (20) years;

B. The order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XV.

It is further ordered, That respondents shall, within sixty (60) days after service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

ATTACHMENT A

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED
[To be printed on California SunCare, Inc., letterhead]

[date]

Dear [purchaser for resale]:

This letter is to inform you that California SunCare, Inc. ("California Tan"), recently settled a civil dispute with the Federal Trade Commission ("FTC") regarding certain alleged claims for our Heliotherapy™ line of skin care products. As part of that settlement, we are required to notify our distributors and others who sell our products to consumers to stop using or distributing any advertisements or promotional materials containing any such claims.

Allegations of the FTC complaint.

The FTC alleged that certain advertisements and promotional materials for California Tan Heliotherapy products made false and/or unsubstantiated claims, expressly or by implication, that tanning as a result of exposure to sunlight or indoor UV radiation:

* reduces the risk of certain cancers;
* has cardiovascular benefits, such as lowering blood pressure and serum cholesterol or providing the benefits of exercise;
* is an effective treatment for Seasonal Affective Disorder and AIDS;
* enhances the immune system; and
* reduces the risk of bone disorders for members of the general population.

In addition, according to the FTC's complaint, the advertising and promotional materials made false and/or unsubstantiated claims, expressly or by implication, that:

* the negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging, are caused only by burning and overexposure and not moderate exposure and tanning;
* tanning as a result of exposure to sunlight or indoor UV radiation is not harmful to the skin;
* use of the products prevents or minimizes the negative effects of exposure to sunlight and UV radiation, including skin cancer and premature skin aging;
* the MAXIMIZER products help users achieve up to 42% better tanning results; and
* the products that contain VITATAN improve users' ability to tan by up to 67%.

Finally, the complaint charges that advertising and promotional materials falsely represented, expressly or by implication, that scientific studies demonstrate that exposure to sunlight or indoor UV radiation provides the health benefits stated above and that the American Medical Association endorses exposure to sunlight or indoor UV as a medical treatment.

Our settlement with the FTC.

Our settlement with the FTC prohibits us from making the above listed claims for California Tan Heliotherapy products or any other product for use in connection with tanning, unless the claims are supported by competent and reliable evidence. The settlement also requires us to substantiate any claims about the health benefits of exposure to sunlight or indoor UV radiation and the performance and safety of our skin care products for use in connection with tanning. The settlement also

precludes us from making misrepresentations about scientific studies or endorsements.

Under the terms of our settlement with the FTC, all of our advertising for tanning products, with the exception of billboards, television advertising, and advertisements in magazines for salon professionals, for a period of time, must contain a disclosure to the effect that tanning without burning, either with tanning lamps or in sunlight, can cause skin injury. Even after that period ends, if in the future we make any claim about the safety or health benefits of exposure to sunlight or indoor UV radiation in our advertising, labeling or packaging, we must disclose that tanning is associated with skin damage.

We deny the FTC's allegations, but in order to avoid protracted litigation we have entered into a settlement agreement with the FTC. As part of that settlement, we have agreed to send this letter. We request your assistance by asking you to discontinue using, relying on or distributing any California Tan advertising or promotional material currently in your possession that makes any of the claims the FTC challenged as listed above. More specifically, we are asking you not to display any California Tan posters, cash register notices, or other materials that contain any of the claims challenged by the FTC and to remove magazines that contain California Tan advertisements that make the challenged claims from places where they may be seen by any of your customers. We are also asking our distributors to notify their retail or wholesale customers who have any California Tan materials that contain any of the challenged claims to discontinue using them as described above. If you continue to use materials that contain any of the challenged claims, we are required by the FTC settlement to stop doing business with you.

Thank you for your assistance. If you have any questions about this letter, please call 1 800 ____.

Sincerely,

Donald J. Christal
President
California SunCare, Inc.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III, CONCURRING IN PART AND DISSENTING IN PART

I have voted to issue the complaint and final consent order against California Suncare, Inc. (CSI) because, for the most part, it provides appropriate relief for the extremely serious misrepresentations alleged in the complaint about the health and safety effects of ultraviolet radiation (UVR) exposure and the benefits and efficacy of the company's tanning products. However, I do not support including the "untriggered" disclosure in Part V.A of the consent order.[1] In my view

[1] Part V.A requires CSI to include the following statement in any advertising and promotional materials disseminated directly to consumers or through purchasers for resale (except television advertising, billboards and advertising in magazines sold only by subscription for which half or more of the readership is comprised of tanning or beauty salon professionals): "CAUTION: Tanning in sunlight or under tanning lamps can cause skin cancer and premature aging -- even if you don't burn."

this remedy constitutes corrective advertising, and I am not convinced that the evidence here meets the standard for imposing corrective advertising set forth in *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

Both the characteristics and the scope of the untriggered disclosure lead me to conclude that it is actually corrective advertising in disguise. The disclosure requirement has certain characteristics usually associated with corrective advertising: it runs until a specific time period expires and a specific sum of money is exhausted, and it must be made regardless of the representations CSI makes about its products. *See, e.g., American Home Products Corp. v. FTC*, 695 F.2d 681, 700 (3d Cir. 1982) ("[A] genuine corrective advertising requirement . . . demand[s] disclosure in future advertisements regardless of the content of those advertisements."). Most significant, however, the scope of the untriggered disclosure far exceeds its rationale. The disclosure must appear in CSI's general advertising as well as in all promotional materials distributed directly to consumers for any tanning product that does not contain a sunscreen with a minimum SPF of 2. Yet the rationale advanced for this untriggered disclosure is that it is necessary to protect prospective purchasers from being misled by future misrepresentations about the effects of UVR exposure, particularly misrepresentations that might occur at "the point of sale" -- the tanning salons where consumers purchase CSI products. I see no reason for the untriggered disclosure to appear in general advertising if the disclosure's true intent is to prevent possible future deception of consumers at the point of sale.

The disparity between the scope of the disclosure and its rationale suggests that its primary purpose is more consistent with corrective advertising than with an affirmative disclosure. The purpose of corrective advertising is to dispel false beliefs in the public mind created or reinforced by a challenged ad that are likely to endure (and thus to influence purchase decisions) even after the ad stops running. In contrast, the purpose of an affirmative disclosure remedy is to prevent deception from future claims like or related to those

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This disclosure is applicable to all of respondent's products that contain a sunscreen ingredient providing a sun protection factor (SPF) of less than 2 and must be made until CSI spends $1.5 million on dissemination. If CSI does not expend this amount within 2½ years after the service of the order, the untriggered disclosure then becomes applicable to all forms of advertising until the required amount is spent.

challenged.[2] I recognize that the untriggered disclosure might have some impact on potential future deceptive claims about UVR exposure at the point of sale, but it is overbroad for this particular purpose, and the need for it seems minimal in light of the extensive other relief provided by the final order.[3] Thus, the main purpose of this untriggered disclosure seems to be to ameliorate lingering false beliefs that may have been created or reinforced by CSI's past claims that UVR exposure not only is not harmful but is positively beneficial.

Although both corrective advertising and affirmative disclosures are forms of fencing-in relief that are well within the Commission's remedial authority, the standard for imposing corrective advertising is significantly more stringent than that for an affirmative disclosure. In imposing corrective advertising, the Commission normally relies on extrinsic evidence of the existence of lingering false beliefs created by past advertising. In certain cases, however, it may be possible to presume the existence of such false beliefs based on the nature and extent of the advertising campaign. *Warner-Lambert*, 562 F.2d at 762-63.[4] An affirmative disclosure remedy, on the other hand, requires only that the disclosure be "reasonably related" to the alleged violations. In my view, it is important to distinguish between corrective advertising and affirmative disclosures because the Commission should not evade the more demanding standard for corrective advertising where it is clearly applicable.

There appears to be little basis for Part V.A of the order when it is viewed as corrective advertising. There is no direct evidence that

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[2] It is difficult to draw bright lines between these possible forms of fencing-in relief, and I am not suggesting that the Commission forgo ordering affirmative disclosures in all circumstances in which the disclosures, while targeted primarily at the prevention of deception from future claims, may also incidentally affect a possible lingering public misimpression created by past advertising. This situation is not the case presented here.

[3] In addition to prohibiting misrepresentations about the effects of UVR exposure and tanning and unsubstantiated claims about the performance, safety, benefits, or efficacy of products or services used in connection with tanning, the consent order requires two additional affirmative disclosures (Parts V.B and V.C) that are triggered by claims about the safety or health benefits of exposure to sunlight or indoor UVR. The language of these triggered disclosures is similar to that of the untriggered disclosure. The triggered disclosures apply to labeling and packaging --forms of advertising exempted from the untriggered disclosure -- and, after the untriggered disclosure requirement runs out, to all other advertising and promotional material. The order (Part VI) also requires CSI to send a letter to distributors and retailers of the company's tanning products that describes the Commission's enforcement action and advises them to stop using ads and promotional materials that contain any of the representations prohibited by the order or face losing CSI's business.

[4] *See, e.g.*, Eggland's Best, Inc., Docket No. C-3520 (Aug. 15, 1994) (Statement of Roscoe B. Starek, III).

CSI's ads and sales materials created or contributed to a lingering false impression that UVR exposure through sunlight and tanning has the health and safety benefits represented by the company. Moreover, I am not persuaded that it would be appropriate to presume that the company's message -- that UVR exposure is beneficial -- would endure in light of pervasive messages to the contrary.

By issuing this consent order against CSI, the Commission comes perilously close to lowering its standard for imposing corrective advertising by erasing the already blurred dividing line between that form of fencing-in relief and affirmative disclosures. Such a change is one that I cannot endorse.

IN THE MATTER OF

TRANS UNION CORPORATION

Docket 9255. Interlocutory Order, Feb. 11, 1997

ORDER DIRECTING GENERAL COUNSEL TO ENFORCE THIRD-PARTY SUBPOENA

On February 5, 1997, pursuant to Section 3.38(c) of the Commission's Rules of Practice, 16 CFR 3.38(c) (1996), Administrative Law Judge Lewis F. Parker certified to the Commission a motion by Trans Union Corporation ("Trans Union") for enforcement of a third-party subpoena to First National Bank of Omaha ("FNBO"). Judge Parker's certification included a recommendation that the Commission grant the motion. Also before the Commission were the subpoena, the motion to quash, Trans Union's response thereto and the Judge's order denying the motion to quash.

On October 29, 1996, the respondent Trans Union served on FNBO a *subpoena duces tecum* seeking deposition testimony of "a person or persons with knowledge to respond to questions regarding . . . (1) the factors that influence [the bank's] decisions regarding a consumer's eligibility for credit;" and "(2) if and how [the bank] use[s] credit scorer data in [its] decisions regarding credit eligibility." The subpoena directed that documents pertaining to those topics be made available at the deposition.[1]

On December 16, 1996, FNBO filed a motion to quash the subpoena, stating that Trans Union "is attempting to use the Subpoena as a means for gaining an advantage in an unrelated multi-million dollar litigation brought by FNBO against Trans Union in the State of Nebraska ('Nebraska Litigation')." Motion at 1. The bank also argued that the subpoena should be quashed because "the discovery sought is obtainable from other sources that are less burdensome and is otherwise overly broad." *Id.* at 5. FNBO contended further that "the information sought by Trans Union is oppressive to FNBO in that it will permit Trans Union to evade a discovery order in the Nebraska Litigation" (*Id.* at 7) and that the subpoena "unnecessarily commands

[1] Trans Union also served subpoenas seeking similar or identical information from nine other banks. Order Denying Motin To Quash at 1.

disclosure of confidential information at the heart of FNBO's business." *Id.* at 9. The bank urged the Administrative Law Judge to "enter an appropriate order allowing Trans Union to select another bank from whom to take the discovery it seeks from FNBO." *Id.* at 10.

Trans Union supported its subpoena to FNBO arguing that the information sought is relevant to Trans Union's defenses in the instant proceeding (Response at 2-4), that negotiations between Trans Union and FNBO have limited the scope of the request and irrelevance are vastly overblown." *Id.* at 6. Trans Union also noted its willingness to negotiate "a protective order to guard against unnecessary disclosure of [the bank's] proprietary information" (*Id.* at n.2). Finally, Trans Union argued that the motion to quash should be denied because even if the subpoena "seeks out-of-time-discovery in connection with the Nebraska litigation[,] . . . this should not serve as a basis for quashing the Subpoena" because "federal courts as a general matter will not limit the use of discovery obtained in one forum from use in another forum, or proceeding, provided the discovery being sought is relevant." *Id.* at 7.

Citing Section 3.31(c) of the Commission's Rules, the Administrative Law Judge denied the motion to quash. He stated that FNBO's motion "does not establish that respondent has fashioned its discovery request in this proceeding solely to gain an advantage in the Nebraska litigation." Order at 1. Judge Parker concluded that FNBO had not shown that Trans Union "should be forced to withdraw the subpoena and issue one to another bank, simply to avoid inconvenience to FNBO," that the subpoena "seeks relevant information, is not too broad or excessively burdensome, and was not designed to harm FNBO or to gain an unfair advantage in the Nebraska litigation." *Id.* at 2. He, therefore, recommends that the Commission direct enforcement of the subpoena.

The Commission has a strong interest in ensuring the integrity of its adjudicative process. In addition, the Commission is satisfied that the information and documentation specified in the subpoena are relevant for discovery purposes in the current proceeding, and that the burden on FNBO is not unreasonable. That the respondent might have obtained, or be able to obtain, from another banking institution the same or similar information to that which it seeks from FNBO is not reason to deny the respondent the right to conduct its defense in this matter as it deems best. Accordingly,

It is ordered, That, the General Counsel promptly take appropriate action to enforce Trans Union's subpoena to FNBO.

IN THE MATTER OF

PHASEOUT OF AMERICA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3716. Complaint, Feb. 12, 1997--Decision, Feb. 12, 1997

This consent order requires, among other things, the New York-based firms to send a postcard to identifiable past purchasers of PhaseOut, a purported stop-smoking device, notifying them of the Commission's action. The order also requires the respondents to have scientific substantiation for claims that PhaseOut or any other smoking-cessation product reduces the amount of nicotine, tar, and carbon monoxide smokers receive. In addition, the consent order prohibits the respondents' misrepresentations concerning any test, study or endorsement.

Appearances

For the Commission: *Shira D. Modell, Lesley Anne Fair* and *Michael Ostheimer.*

For the respondents: *David Clanton, Baker & McKenzie,* Washington, D.C. and *David Levy, Kraver & Levy*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Phaseout of America, Inc. and Products & Patents, Ltd., corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Phaseout of America, Inc. is a Delaware corporation with its principal office or place of business at 140 Broadway, Lynbrook, New York.

2. Respondent Products & Patents, Ltd., is a Delaware corporation with its principal office or place of business at 140 Broadway, Lynbrook, New York.

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including the PhaseOut device ("PhaseOut"), which punches one or more small

holes in cigarettes and is intended to reduce the amount of tar, nicotine, and carbon monoxide smokers get from their cigarettes and aid in smoking cessation. PhaseOut is a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. At the time the acts and practiced alleged in this complaint occurred, respondents were under common management and control. Respondent Phaseout of America, Inc. advertised and sold PhaseOut. Respondent Products & Patents, Ltd. owned the patents to PhaseOut, licensed and sold the device to Phaseout of America, Inc., and was a substantial shareholder of Phaseout of America, Inc.

6. Respondents have disseminated or caused to be disseminated advertisements for PhaseOut, including but not necessarily limited to the attached Exhibits A through J. These advertisements contain the following statements and depictions:

INFOMERCIAL #1

A. MASON ADAMS: You're going to see some unprecedented findings and hear some remarkable stories about a breakthrough device that can help you phase cigarettes out of your life without expensive therapies, patches or drugs. . . . . Its name is PhaseOut and its effectiveness in reducing the most harmful components of cigarette smoke has been scientifically confirmed in research conducted at such prestigious institutions as the Johns Hopkins University School of Medicine. . . . It creates an additional filter within the existing filter but it doesn't change the taste or the draw of your cigarette. (Exhibit A, p. 1).

B. CONSUMER ENDORSER: There's no point not to use it if you're a smoker. It's not as if you can tell a difference in your cigarette. It's not as if you have to switch to a disgusting tasting cigarette with lower nicotine. It's the same thing that you've always done, only it's less harmful. (Exhibit A, pp. 2 and 18).

C. CONSUMER ENDORSER: PhaseOut is good, it's gradual, you're not even aware that it's working. Then all of a sudden, you realize you're smoking a lot less. (Exhibit A, pp. 2 and 18).

D. MASON ADAMS: If you're like most people, you'll start feeling better right away, while you're preparing to quit. Indeed, PhaseOut's impact is so definite, that even if you don't quit, you'll be significantly reducing the harmful effects of every cigarette. (Exhibit A, p. 2).

E. FIRST CONSUMER ENDORSER: At least you're eliminating a lot of the irritants that are caused by the tars and nicotines. And you start feeling better, I think, almost from the beginning.

SECOND CONSUMER ENDORSER: I'm not as winded. I just feel, even though I'm still smoking, yes, I feel a little bit healthier. (Exhibit A, p. 2).

F. MASON ADAMS: Now, were you a very heavy smoker?
DR. ARNOLD BENSON: I was a heavy smoker. I smoked for forty years exactly, and smoked not less than two packages of cigarettes a day.
ADAMS: And you attribute your quitting to PhaseOut?
BENSON: I stopped smoking because of PhaseOut. PhaseOut did it gradually for me.
ADAMS: And you're still not smoking today?
BENSON: Well, it's two-and-a-half years since I quit. Forty years of smoking and I have gone two-and-a-half-years without smoking and I don't miss it. (Exhibit A, p. 3).

G. MASON ADAMS: Doctor, I understand that there's a medical study which confirms that PhaseOut reduces the amount of nicotine in a regular cigarette.
DR. ROBERT BRANDSTETTER: At Johns Hopkins University, volunteers who smoked for a considerable period of time were enrolled in a study which demonstrated that PhaseOut actually reduced the amount of nicotine in their blood over the period of time of the study.
Depiction: Front cover of journal Pharmacology, Biochemistry and Behavior
Graphic: The Johns Hopkins University School of Medicine
"Smoking exposure reductions of 30% to 80% were obtained for both nicotine and carbon monoxide."
ADAMS: So, the idea is then that if you reduce the amount of addictive nicotine, you'll thereby be reducing the addiction. Is that correct?
BRANDSTETTER: Exactly. And at the same time, you'll be actually reducing the possibility of withdrawal symptoms. And it is these withdrawal symptoms which cause people not to be able to stop smoking. (Exhibit A, pp. 3-4).

H. VOICE-OVER: It works without having to change your cigarette brand, without changing the taste or enjoyment, and, best of all, it works without patches, painful clips or expensive counseling. (Exhibit A, p. 5).

I. CONSUMER ENDORSER: I've been smoking these for about two or three years, it tastes like the same thing. (Exhibit A, p. 5).

J. VOICE-OVER: There is medical evidence that PhaseOut lets you do something good for yourself. The April 1992 issue of Pharmacology, Biochemistry and Behavior published results of a research study conducted at the Johns Hopkins University School of Medicine. This prestigious journal reports that PhaseOut significantly reduced human exposure to tobacco smoke constituents. Reductions of 30% to 80% were observed for both nicotine and carbon monoxide. The report concluded that the use of the PhaseOut device could be particularly useful as a weaning method prior to smoking cessation. (Exhibit A, p. 6).

K. MASON ADAMS: If you follow the PhaseOut plan, over a period of several weeks you will gradually reduce the levels of damaging substances in every cigarette you smoke.
Graphic: Three cigarettes, labeled 'Nicotine,' 'Tar' and 'Carbon Monoxide,' each shrinking in size PhaseOut is a four-step program where you control your progress.
Graphic: Three cigarettes shown shrinking and labeled as follows:

Results after Phase four	
Nicotine	81%
Tar	92%
Carbon Monoxide	89%

Here's how it works. Take any standard size pack of cigarettes, hard or soft, kings or 100's, put it into the PhaseOut device and press down. Microfine, almost invisible perforations now create a condensation screen that cuts nicotine levels by 26%, the levels of tar by almost 41%, and the levels of toxic gasses like carbon monoxide by 58%.

Graphic: Three cigarettes shown shrinking and labeled as follows:

Results after Phase one

Nicotine	26%
Tar	41%
Carbon Monoxide	58%

Phase two reduces nicotine nearly in half and further reduces the levels of tar and toxic gasses.

Graphic: Three cigarettes shown shrinking and labeled as follows:

Results after Phase two

Nicotine	47%
Tar	66%
Carbon Monoxide	73%

Phase three cuts levels of nicotine by nearly 64%, tar by 80%, and carbon monoxide by 83%.

Graphic: Three cigarettes shown shrinking and labeled as follows:

Results after Phase three

Nicotine	64%
Tar	80%
Carbon Monoxide	83%

By the time you reach phase four, your nicotine consumption is reduced by nearly 81%. You're also taking in 92% less tar and 89% less toxic gasses.

Graphic: Three cigarettes shown shrinking and labeled as follows:

Results after Phase four

Nicotine	81%
Tar	92%
Carbon Monoxide	89%

(Exhibit A, pp. 6-7).

L. MASON ADAMS: You can stay on each phase as long as you like until you're ready to move on. You're in control. You know that with each phase, you're doing more good for your health. And when you get to phase four, you can quit whenever you're ready. PhaseOut has helped many smokers quit cigarettes for good and thousands of others to smoke less damaging cigarettes. (Exhibit A, pp. 7-8).

M. CONSUMER ENDORSER: You wake up in the morning, you're not as congested, you don't have to wait for your chest to clear. I can run up and down the stairs and I can go to the park and I can play ball and I can, you know, run around with the kids and not be winded and not have to sit down and say "Mommy's tired. I can't do this." (Exhibit A, p. 8).

N. BOBBY RYDELL: I've gone from over two-and-a-half packs a day to a pack a day, and I know I'm on my way to quitting because PhaseOut makes it easy. (Exhibit A, p. 8).

O. VOICE-OVER: Nobody has to tell you the damage smoking causes. But many people still enjoy smoking. And even if you want to want to cut back or quit, most methods are annoying, painful, or expensive. But now, there's PhaseOut, a

breakthrough device that drastically reduces the harmful effects of cigarette smoking without changing the taste or the pleasure. You don't have to change brands to get all the benefits of reduced nicotine, tar, and other harmful substances. PhaseOut works on any standard pack. With a simple punch, it forms a condensation filter within your cigarette, which traps more harmful substances before they ever reach your body. By the end of the program, you're smoking 81% less nicotine, 92% less tar, and 89% less toxic gasses. (Exhibit A, pp. 9, 13 and 17).

P. VOICE-OVER: PhaseOut is a real smoker's solution. You keep smoking until you're ready to cut down or quit. And because it gradually reduces the nicotine you inhale, you don't suffer the painful withdrawal symptoms associated with going cold turkey.

Graphic: PHASEOUT

* Smoke less harmful cigarettes
* Cut down
* Quit for good
* No withdrawal symptoms

(Exhibit A, pp. 9, 13 and 17).

Q. CONSUMER ENDORSER: We, we asked her, we ultimatumed her, everything we could do, we couldn't get her to stop. But she found the PhaseOut program, luckily, and she stopped, and we're extremely happy about it. (Exhibit A, p. 10).

R. VOICE-OVER: With PhaseOut, you're not hit with agonizing withdrawal symptoms. The changes are so gradual, so subtle, you won't feel any negative physical effects. (Exhibit A, p. 10).

S. FIRST CONSUMER ENDORSER: With PhaseOut, you can cut back, you don't have to quit, and you're still a lot better off than before.

SECOND CONSUMER ENDORSER: With the use of PhaseOut, the system, I could only come out ahead. I would either stop, cut down, or whatever I smoked, I would have eliminated most of the poisons, tars, nicotines, carbon monoxides. So you couldn't lose. (Exhibit A, p. 12).

T. MASON ADAMS: We've been looking at a major development in the move to end smoking, called PhaseOut, which seems to be producing some remarkable results, by giving people the tool they need to cut down or eliminate their addiction to smoking. (Exhibit A, p. 14).

U. VOICE-OVER (quoting Dr. Robert Brandstetter): "In the late 1970's the Surgeon General acknowledged that one of the most difficult aspects in the cessation of smoking was avoiding withdrawal symptoms. And it is the withdrawal symptoms that discourage people from actually stopping smoking. A method had to be devised that would gradually reduce the amount of nicotine in the blood and therefore avoid withdrawal symptoms. By using PhaseOut appropriately you can avoid withdrawal symptoms." (Exhibit A, p. 15).

INFOMERCIAL #2

V. CONSUMER ENDORSER: When I got the, um, PhaseOut product I was concerned that because of the reduced nicotine and tar and all the other poisons that I would immediately increase my intake of cigarettes. However that wasn't the case, I went, I started on phase one, um, the first day I got it, I was all excited, and then

went immediately, within two days to phase two because I didn't notice a difference at all. (Exhibit B, p. 6).

W. CONSUMER ENDORSER: I thought that I would want to smoke more cigarettes but I didn't, in fact I smoked less cigarettes and I wasn't thinking about it. (Exhibit B, p. 6).

TELEVISION COMMERCIAL ("Stop Smoking Or Your Money Back")

X. VOICE-OVER: Introducing PhaseOut, the stop smoking system that actually lets you continue to smoke until you don't need to anymore.

Place your favorite brand of cigarettes inside the PhaseOut device and press down, that's all you have to do. PhaseOut actually eliminates up to 92% of tar and 89% of carbon monoxide. PhaseOut reduces up to 81% of nicotine to help break the cigarette addiction.

* * *

Yes with PhaseOut you can actually keep smoking, because smoking is less harmful until you're ready to quit. 100% guaranteed or your money back. (Exhibit C).

RADIO ADVERTISEMENT ("Advertorial")

Y. VOICE-OVER: Here's an announcement smokers everywhere have been waiting to hear: Tests at Johns Hopkins University prove a revolutionary new system called PHASEOUT eliminates up to 80% of the nicotine and carbon monoxide in any brand of cigarettes. It doesn't change the flavor or satisfaction of your favorite brand, doesn't require patches or prescriptions. . . . Smoke a pack a day? With PHASEOUT that's like cutting down to just 4 cigarettes. And as PHASEOUT gradually eliminates the nicotine it gradually eliminates your "need" for cigarettes. Now you can quit easily, without cold turkey, or continue smoking cigarettes that are far less dangerous to your health. (Exhibit D).

PRINT ADVERTISEMENT #1

Z. STOP SMOKING FOREVER -- WITH PHASEOUT® Guaranteed or your money back

NEW EASY WAY -- Clinically tested and validated by Johns Hopkins University School of Medicine to reduce up to 80% of nicotine and carbon monoxide in cigarette smoke.

* Works automatically -- no will power needed
* Virtually no change in taste or draw
* Ends nicotine craving forever
* No cravings or urges * 100% safe
* No side effects or unpleasant withdrawal symptoms
* Recommended by doctors and health organizations
* Eliminates up to 80% of the tars, nicotine and poison in cigarette smoke -- so even if you decide to keep smoking, you will no longer face the same danger of cancer and heart disease (Exhibit E).

PRINT ADVERTISEMENT #2

AA. PHASEOUT

NEW Proven new device shown to reduce the dangers of cigarettes while helping even hardcore smokers quit.

PhaseOut is a scientifically designed and patented mechanical device that eliminates toxins in cigarette smoke. Tests conducted at the U.S. Testing Company and confirmed in recent studies at the Johns Hopkins School of Medicine show that PhaseOut lets smokers gradually and easily withdraw form [sic] nicotine addiction without the stress and irritation of "cold turkey."

Simply place an unopened pack of cigarettes in PhaseOut and press. PhaseOut instantly puts tiny perforations into your filtered or unfiltered cigarette. This allows cool air to mix with the hot gases created when you smoke. The resulting condensation traps up to 90% of the tars, nicotine and other poisons, and keeps them from reaching your lungs.

Use the simple 8-week PhaseOut program (included) to stop smoking entirely, or just use PhaseOut to create safer cigarettes. Either way, your health will benefit. Try fast, simple and effective PhaseOut now. (Exhibit F).

PRINT ADVERTISEMENT #3

BB. Would you spend the price of two cartons of cigarettes to protect your unborn child?

Maternal smoking is one of the most significant causes of serious risk in pregnancy and is linked with complications including miscarriages, pre-term birth, low birth weight, and respiratory distress syndrome. If you're pregnant, you owe it yourself and your unborn child to stop smoking!

If you haven't been able to stop smoking before, the four-step PHASEOUT® SYSTEM will help win this important battle for you, your baby, and all your other family members who are affected by your second-hand smoke.

* * *

PHASEOUT prevents up to 80% of the deadly tar, nicotine, and other poisons from ever entering your body.

And the taste, flavor and draw of your cigarettes aren't changed!

* * *

With PHASEOUT you'll successfully wean yourself of smoking at your own pace, with your own timetable. (Emphasis in original) (Exhibit G).

PRINT ADVERTISEMENT #4

CC. PRACTICE SAFE SMOKING.

* * *

Clinical research by Johns Hopkins University and tests by US Testing Company prove PHASEOUT's patented microperforation system significantly reduces all harmful substances in the cigarette brand you're lighting up right now.

It won't noticeably affect the taste or draw and you will still enjoy the pleasure and satisfaction of smoking your favorite brand. But by gently and gradually eliminating up to 80% of your nicotine intake, PHASEOUT makes it easier to quit. Without cold turkey withdrawal symptoms or side effects.

* * *

Protect yourself with PHASEOUT. Because what you don't smoke can't harm you. (Exhibit H).

PROMOTIONAL FLYER

DD. PHASEOUT MAKES IT SAFER TO SMOKE, EASIER TO QUIT.
The amazing scientific breakthrough that makes cigarettes 80% less harmful.

* * *

PHASEOUT lets you smoke cigarettes that are over 80% less harmful. You still get the taste, pleasure and satisfaction without changing brands. You just don't get the nicotine, tars, carbon monoxide and other toxins. PHASEOUT's patented micro-perforations block them right out. So you should feel better almost immediately and you enjoy a healthier lifestyle, because what you don't smoke can't harm you!

* * *

Until today, the odds were against you: 9 out of 10 people who try to quit fail. No wonder. The withdrawal symptoms that come with the abrupt elimination of nicotine can be brutal.... PHASEOUT helps eliminate these withdrawal symptoms. PHASEOUT gently and gradually blocks out the nicotine, enabling your body to slowly detoxify. You're in total control. You set your own pace. For the first time, you can end your nicotine addiction completely without the symptoms of "cold turkey" withdrawal. So you will succeed . . . guaranteed!

PHASEOUT IS SCIENTIFICALLY AND CLINICALLY PROVEN

Research confirms the benefits of the PHASEOUT System. Tests conducted by Johns Hopkins University and U.S. Testing Laboratories confirm that PHASEOUT gradually eliminates over 80% of the nicotine, tars, carbon monoxide and all other tobacco toxins found in cigarette smoke. (Exhibit I).

WORLD WIDE WEB HOME PAGE

EE. PHASEOUT THE WEAN-MACHINE TO HELP YOU QUIT SMOKING
The amazing scientific breakthrough that gradually reduces NICOTINE and other unwanted substances from cigarette smoke

* * *

Depiction: Four bar graphs of shrinking cigarettes labeled "LEVELS OF TAR," "LEVELS OF NICOTINE," "LEVELS OF CARBON MONOXIDE," and "TOTAL PARTICULATE MATTER."

Illustrated are the reductions of nicotine and other toxins during each phase. (Exhibit J).

FF. STOP SMOKING THE SAME WAY YOU STARTED...GRADUALLY

***

Try PHASEOUT yourself, or share it with someone you love.

You may be surprised at just how easy it is to kick the habit for good.

PHASEOUT is a treatment for your cigarettes, not you. Its patented design allows you to punch tiny, undetectable holes in your cigarettes, causing condensation...a natural filtering process that traps over 80% of the toxins.

Each phase adds more perforations, further decreasing the levels of nicotine, tar and carbon monoxide. It's a safe, effective method approved by doctors and validated by Johns Hopkins University School of Medicine. (Exhibit J).

GG. PHASEOUT IS SCIENTIFICALLY PROVEN

Research confirms the effectiveness of PHASEOUT. Tests conducted by Johns Hopkins University and U.S. Testing Laboratories conclude that PHASEOUT gradually eliminates up to 80% of the nicotine, tar, carbon monoxide and total particulate matter found in cigarette smoke. (Exhibit J).

HH. "I've been a two pack a day (and more) smoker for twenty years. I have tried almost every way to quit over the past fifteen years. None of the programs could deal with my major challenge...staying quit. I am in the third phase of the (PHASEOUT) program which means I am reducing tar by 77% and the nicotine by 66% but miraculously I am smoking less than ever. To me it is a miracle because I am trying to cut down. I want to thank everyone involved."

Donna . . . .

Akron, Ohio (Exhibit J).

7. The Johns Hopkins University research to which the advertisements attached as Exhibits A through J refer is a study that has been reported as Stitzer, Brigham and Felch, Phase-Out Filter Perforation: Effects on Human Tobacco Smoke Exposure, 41 Pharmacology, Biochemistry and Behavior 748 (1992) (hereinafter, the "Johns Hopkins study").

8. Through the means described in paragraph six, respondents have represented, expressly or by implication, that:

A. The Johns Hopkins study proves that PhaseOut significantly reduces the amount of tar, nicotine, and carbon monoxide smokers get under normal smoking conditions.

B. The Johns Hopkins study proves that PhaseOut is effective in enabling smokers to quit smoking.

C. The Johns Hopkins study proves that smokers who use PhaseOut and continue to smoke significantly reduce their risk of smoking-related health problems.

9. In truth and in fact:

A. The Johns Hopkins study does not prove that PhaseOut significantly reduces the amount of tar, nicotine, and carbon monoxide smokers get under normal smoking conditions. Among other reasons, that study was conducted under carefully controlled conditions that did not reflect how smokers actually smoke, in part

because they did not take into account such behavior as compensatory smoking -- the tendency of some smokers who switch to lower yield cigarettes to smoke more cigarettes or smoke each one more intensively.

B. The Johns Hopkins study does not prove that PhaseOut is effective in enabling smokers to quit smoking.

C. The Johns Hopkins study does not prove that smokers who use PhaseOut and continue to smoke significantly reduce their risk of smoking-related health problems.

Therefore, the representations set forth in paragraph eight were, and are, false or misleading.

10. Through the means described in paragraph six, respondents have represented, expressly or by implication, that:

A. On Phase One of the PhaseOut program, smokers will reduce the amount of nicotine they get from smoking a cigarette by 26 percent, the amount of tar they get by 41 percent, and the amount of carbon monoxide they get by 58 percent.

B. On Phase Two of the PhaseOut program, smokers will reduce the amount of nicotine they get from smoking a cigarette by 47 percent, the amount of tar they get by 66 percent, and the amount of carbon monoxide they get by 73 percent.

C. On Phase Three of the PhaseOut program, smokers will reduce the amount of nicotine they get from smoking a cigarette by 64 percent, the amount of tar they get by 80 percent, and the amount of carbon monoxide they get by 83 percent.

D. On Phase Four of the PhaseOut program, smokers will reduce the amount of nicotine they get from smoking a cigarette by 81 percent, the amount of tar they get by 92 percent, and the amount of carbon monoxide they get by 89 percent.

E. PhaseOut is effective in enabling smokers to quit smoking.

F. PhaseOut significantly reduces the risk of smoking-related health problems, including lung cancer and heart disease, for smokers who continue to smoke.

G. PhaseOut significantly reduces the amount of tar, nicotine, and carbon monoxide that smokers get without changing a cigarette's taste or draw.

H. Smokers using PhaseOut will not compensate for the product's effects by increasing the number of cigarettes they smoke per day.

I. PhaseOut is effective in enabling smokers to quit smoking without withdrawal symptoms.

J. PhaseOut provides immediate health benefits, including reduced congestion, coughing, and windedness, for smokers who continue to smoke.

11. Through the means described in paragraph six, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph ten, at the time the representations were made.

12. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph ten, at the time the representations were made. Therefore, the representation set forth in paragraph eleven was, and is, false or misleading.

13. Through the means described in paragraph six, respondents have represented, expressly or by implication, that testimonials from consumers appearing in the advertisements for PhaseOut reflect the typical or ordinary experience of members of the public who use the product.

14. Through the means described in paragraph six, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph thirteen, at the time the representation was made.

15. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph thirteen, at the time the representation was made. Therefore, the representation set forth in paragraph fourteen was, and is, false or misleading.

16. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

PHASEOUT: THE SMOKER'S SOLUTION

EXHIBIT A

EXHIBIT A

EXHIBIT A

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EXHIBIT C

EXHIBIT D

PO-radio.djc

Client: PHASEOUT
Title: "Advertorial"
Code: Ad-A-J
Phone #: 1-800-982-6800

ANNCR: Here's an announcement smokers everywhere have been waiting to hear: Tests at Johns Hopkins University prove a revolutionary new system called PHASEOUT eliminates up to 80% of the nicotine and carbon monoxide in any brand of cigarettes. It doesn't change the flavor or satisfaction of your favorite brand, doesn't require patches or prescriptions. As a matterof fact, you can order PHASEOUT simply by calling 1-800-982-6800. This is the one you've seen on national TV... the only system sold with an unconditional money back guarantee. Smoke a pack a day? With PHASEOUT that's like cutting down to just 4 cigarettes. And as PHASEOUT gradually eliminates the nicotine it gradually eliminates your "need" for cigarettes. Now you can quit easily, without cold turkey, or continue smoking cigarettes that are far less dangerous to your health. More good news: during this special introduction, you can order PHASEOUT for just $39.95. But you must call now. 1-800-982-6800. You owe it to yourself and the people who love you. That's 1-800-982-6800. PHASEOUT makes it safer to smoke, easier to quit.

EXHIBIT E

EXHIBIT F

EXHIBIT G

EXHIBIT H

EXHIBIT I

EXHIBIT I

EXHIBIT I

EXHIBIT J

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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. Respondent Phaseout of America, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 140 Broadway, in the City of Lynbrook, State of New York.

Respondent Products & Patents, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 140 Broadway, in the City of Lynbrook, State of New York.

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

ORDER

DEFINITIONS

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

1. *"Johns Hopkins study"* shall mean the study that has been reported as Stitzer, Brigham and Felch, Phase-Out Filter Perforation: Effects on Human Tobacco Smoke Exposure, 41 Pharmacology, Biochemistry and Behavior 748 (1992).

2. *"Smoking-cessation product"* shall mean any product or program designed to aid or assist the user to stop or reduce the cigarette urge, break the cigarette habit, or stop or reduce smoking.

3. *"Cigarette-modification product"* shall mean any product or program designed to reduce the amount of tar, nicotine, carbon monoxide or other substance that smokers get from cigarettes, or reduce their risk of smoking-related health problems.

4. *"Substantially similar product"* shall mean any smoking-cessation product or cigarette-modification product that punches one or more holes in a cigarette or pack of cigarettes.

5. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. Survey evidence may be appropriate depending on the representation made.

6. Unless otherwise specified, *"respondents"* shall mean Phaseout of America, Inc. and Products & Patents, Ltd., corporations, their successors, assigns, agents, representatives and employees.

7. *"Purchaser for resale"* shall mean any purchaser or other transferee of the PhaseOut device, or of the right or license to sell the PhaseOut device, other than respondents, who sells, or who has sold, the PhaseOut device to other purchasers or to consumers.

8. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the PhaseOut device or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

A. The Johns Hopkins study proves that such product significantly reduces the amount of tar, nicotine, or carbon monoxide smokers get under normal smoking conditions;

B. The Johns Hopkins study proves that such product is effective in enabling smokers to quit smoking; or

C. The Johns Hopkins study proves that smokers who use such product and continue to smoke significantly reduce their risk of smoking-related health problems.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any smoking-cessation product or cigarette-modification product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

1. The product reduces the amount of nicotine, tar, carbon monoxide, or any other component of cigarette smoke that smokers get from smoking a cigarette;

2. The product is effective in enabling or helping smokers to quit smoking;

3. The product reduces the risk of smoking-related health problems, including, but not limited to, lung cancer or heart disease, for smokers who continue to smoke;

4. The product reduces the amount of nicotine, tar, carbon monoxide, or any other component of cigarette smoke that smokers get without changing a cigarette's taste or draw;

5. Smokers using the product will not compensate for the product's effects by increasing the number of cigarettes they smoke per day;

6. The product is effective in enabling or helping smokers to quit smoking without withdrawal symptoms; or

7. The product provides immediate health benefits, including, but not limited to, reduced congestion, coughing or windedness, for smokers who continue to smoke;

unless, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any smoking-cessation product or cigarette-modification product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the performance, benefits or efficacy of such product, unless, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any smoking-cessation product or cigarette-modification product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

V.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with

the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any smoking-cessation product or cigarette-modification product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0 (b).

VI.

It is further ordered, That respondents Phaseout of America, Inc. and Products & Patents, Ltd., and their successors and assigns shall:

A. Within forty-five (45) days after the date of entry of this order, compile a current mailing list containing the names and last known addresses of all purchasers of the PhaseOut device since January 1, 1992. Respondents shall compile this list by:

1. Searching their own files for the names and addresses of such purchasers; and

2. Using their best efforts to identify any other such purchasers, including but not limited to sending by first class certified mail, return receipt requested, within five (5) days after the date of entry of this order, to all purchasers for resale with which respondents have done business since January 1, 1992, an exact copy of the notice attached

hereto as Attachment A. The mailing shall not include any other documents. In the event that any such purchaser for resale fails to provide any names or addresses of purchasers in its possession, respondents shall provide the names and addresses of all such purchasers for resale to the Federal Trade Commission within forty-five (45) days after the date of entry of this order.

In addition, respondents shall retain a National Change of Address System ("NCOA") licensee to update this list by processing the list through the NCOA database.

B. Within ninety (90) days after the date of entry of this order, send by first class postcard, postage prepaid, to the last known address of each purchaser of the PhaseOut device identified on the mailing list compiled pursuant to subparagraph A of this part, an exact copy of the notice attached hereto as Attachment B. The mailing shall not include any other documents.

C. For one (1) year after the date of entry of this order, make the mailing described in subparagraph B of this part to any person or organization not on the mailing list prescribed in subparagraph A of this part about whom respondents later receive information indicating that the person or organization is likely to have been a purchaser of the PhaseOut device, and to any purchaser whose notification postcard is returned by the U.S. Postal Service and for whom respondents obtain a corrected address, from the U.S. Postal Service or elsewhere. The mailing required by this subparagraph shall be made within ten (10) days of respondents' receipt of a corrected address or information identifying each such purchaser.

D. In the event that respondents receive any information that, subsequent to its receipt of Attachment A, any purchaser for resale is using or disseminating any advertising or promotional material that contains any representation prohibited by this order, immediately notify the purchaser for resale that respondents will terminate the use of said purchaser for resale if it continues to use such advertising or promotional material; and

E. Terminate the use of any purchaser for resale about whom respondents receive any information that such purchaser for resale has continued to use or disseminate advertising or promotional material that contains any representation prohibited by this order after receipt of the notice required by subparagraph D of this part.

VII.

It is further ordered, That respondents Phaseout of America, Inc. and Products & Patents, Ltd., and their successors and assigns shall, for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. Copies of all notifications sent to purchasers pursuant to subparagraphs B and C of part VI of this order;

B. Copies of all notification letters sent to purchasers for resale pursuant to subparagraph A of part VI of this order;

C. Copies of all communications with purchasers for resale pursuant to subparagraphs D and E of part VI of this order.

VIII.

It is further ordered, That respondents Phaseout of America, Inc. and Products & Patents, Ltd., and their successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IX.

It is further ordered, That respondents Phaseout of America, Inc. and Products & Patents, Ltd., and their successors and assigns shall deliver a copy of this order to all current principals, officers, directors, and managers, and to all current employees, agents, and representatives having responsibilities with respect to the subject

matter of this order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order.

X.

It is further ordered, That respondents Phaseout of America, Inc. and Products & Patents, Ltd., and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

It is further ordered, That respondents Phaseout of America, Inc. and Products & Patents, Ltd., and their successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XII.

This order will terminate on February 12, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

ATTACHMENT A

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

[To be printed on Phaseout of America, Inc. letterhead]

[date]

Dear [purchaser for resale]:

This letter is to inform you that Phaseout of America, Inc. recently settled a lawsuit with the Federal Trade Commission ("FTC") concerning certain claims we made for our product, PhaseOut, which the FTC has challenged as deceptive. Although we do not admit the FTC's allegations, we have agreed to notify our distributors, wholesalers and others who sell PhaseOut to consumers to stop using or distributing advertisements or promotional materials containing those claims. We are also asking PhaseOut sellers to provide us with the names of their customers so that we may contact them directly.

The FTC Settlement

The FTC claimed that we made unsubstantiated claims about PhaseOut's effectiveness in reducing the adverse health effects of smoking and in helping smokers to stop smoking. The FTC also alleged that the company made misrepresentations about a study conducted at The Johns Hopkins University using PhaseOut.

*Claims about reduced tar, nicotine and carbon monoxide yields.

The FTC alleged that the company made unsubstantiated claims that PhaseOut reduces the amount of tar, nicotine and carbon monoxide smokers get from smoking a cigarette by specific, substantial percentages. The company has agreed that it will substantiate any future claims that PhaseOut reduces the amount of any component of cigarette smoke that smokers get from smoking a cigarette.

The FTC also alleged that the company misrepresented the Johns Hopkins test results by claiming that the study proved that PhaseOut significantly reduces the amount of tar, nicotine and carbon monoxide smokers get under normal smoking conditions. Smokers often compensate when smoking low tar or nicotine cigarettes by taking more puffs from a cigarette, inhaling more deeply or blocking ventilation holes, such as the perforation holes produced by the PhaseOut device. The company has agreed that it will accurately represent the results of the Johns Hopkins study and any other test or study.

*Claims that PhaseOut is effective in enabling smokers to quit smoking.

The FTC alleged that the company made unsubstantiated claims that PhaseOut is effective in enabling smokers to quit smoking. The company has agreed that it will substantiate any future claims that PhaseOut is effective in enabling smokers to quit smoking.

The FTC also alleged that the company misrepresented the Johns Hopkins test results by claiming that the study proves PhaseOut is effective in enabling smokers to quit smoking. The company has agreed not to make this representation in the future.

*Claims that PhaseOut provides immediate health benefits and reduces the risk of smoking-related health problems for people who continue to smoke.

The FTC alleged that the company made unsubstantiated claims that smokers would derive substantial health benefits by using the PhaseOut product even if they continued to smoke. The company has agreed that it will properly substantiate any future claims of this type.

The FTC also alleged that the company misrepresented the Johns Hopkins test results by claiming that the study proved that smokers who use PhaseOut and continue to smoke significantly reduce their risk of smoking-related health problems. The company has agreed not to make this representation in the future.

*Claims that PhaseOut reduces tar, nicotine and carbon monoxide yields without changing a cigarette's taste or draw.

The FTC alleged that the company made claims that use of the PhaseOut device would not produce any change in a cigarette's taste or draw. The company has agreed to substantiate any future claims regarding taste or draw.

*Claims that PhaseOut is effective in enabling smokers to quit smoking without withdrawal symptoms.

The FTC alleged that the company made these claims without adequate substantiation. The company has agreed that it will have proper substantiation before making these claims in the future.

*Claims that users of PhaseOut will not compensate for the product's effects by increasing the number of cigarettes they smoke per day.

The FTC alleged that the company made these claims without adequate substantiation. The company has agreed to have proper substantiation before making these claims in the future.

*Claims that testimonials and consumer endorsements used in our ads reflect the typical or ordinary experiences of PhaseOut users.

The company has agreed that it will make these claims only if they reflect the typical experience of PhaseOut users or there is a proper qualifying disclosure to the effect that the results are not typical. No issue was raised regarding the

authenticity of the actual testimonials and endorsements that have been used in PhaseOut advertising.

Our Obligations to Notify Distributors and Customers

In addition to our obligations discussed above, we have also agreed to provide notification of the FTC's allegations to consumers who have purchased PhaseOut. We need your assistance in complying with certain provisions of our settlement with the FTC.

First, we request that you discontinue using, relying on or distributing any PhaseOut advertising or promotional materials currently in your possession. We also ask that you notify any of your retail or wholesale customers who may have such materials to discontinue using them. These materials may contain claims that the FTC has alleged to be false or unsubstantiated. If you continue to use those materials, we are required by the FTC settlement to stop doing business with you. You should also avoid making any of the representations challenged by the FTC, as described in this letter.

Second, please send us immediately the names and last known addresses of all persons, including other resellers and consumers, to whom you have sold the PhaseOut device since January 1, 1992. We need this list in order to provide the notification required by our settlement with the FTC. If you do not provide this information, we are required to provide your name and address to the FTC.

If you have any questions, you may call us at (516) 599-1900 or you may call Devenette Cox at the FTC at (202) 326-3360. We apologize for any inconvenience this may cause you and thank you for your assistance.

Sincerely,

Irwin Pearl, President
Phaseout of America, Inc.

ATTACHMENT B

IN THE MATTER OF

INTERNATIONAL ASSOCIATION OF CONFERENCE INTERPRETERS, ET AL.

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

Docket 9270. Complaint, Oct. 25, 1994--Final Order, Feb. 19, 1997

This final order requires, among other things, the International Association of Conference Interpreters, a Switzerland-based voluntary professional association of interpreters from 68 countries, and its U.S. affiliate members to eliminate Association rules and bylaws regarding, among other things, fees, travel expenses, pro bono work, and commissions.

Appearances

For the Commission: *Kent Cox* and *Michael D. McNeely.*

For the respondents: *James Meyers* and *Robert Skitol, Drinker, Biddle & Reaths*, 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 respondents, the International Association of Conference Interpreters, also known as the Association Internationale des Interprétes de Conférence (hereafter, "AIIC"), a corporation, and the United States Region of the International Association of Conference Interpreters (hereafter, "the U.S. Region"), an unincorporated association, have 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 AIIC is a corporation organized, existing and doing business under and by virtue of the laws of France, with its principal place of business located at 10, Avenue de Sécheron, 1202 Geneva, Switzerland. AIIC is a voluntary professional association of individuals in 68 countries engaged in the business of conference interpreting. Respondent the U.S. Region is a

voluntary, unincorporated professional association of individuals residing in the United States and engaged in the business of conference interpreting who are members of AIIC.

PAR. 2. Except to the extent that AIIC and the U.S. Region have restrained competition as described herein, AIIC members, including those in the U.S. Region, have been and are in competition among themselves and with other interpreters.

PAR. 3. AIIC and the U.S. Region engage in substantial activities that further their members' pecuniary interests. By virtue of these activities, AIIC and the U.S. Region are corporations within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. The acts and practices of AIIC and the U.S. Region, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. AIIC maintains a set of work rules that are binding on members performing services in the United States and that require members to refuse to work on inferior terms. AIIC members have agreed to abide by the work rules and can be investigated and expelled for violations. The U.S. Region has participated in formulating, securing agreement to, and enforcing those rules as they are applied in the United States.

PAR. 6. AIIC has periodically created and distributed fee schedules containing minimum fees for interpretation services in the United States. AIIC work rules state or have stated that members' rates of daily remuneration shall be the rates specified in the fee schedules. The U.S. Region has participated in formulating and securing agreement to those fee schedules as they apply in the United States.

PAR. 7. Within the United States the AIIC work rules require or have required:

A. Identical compensation for interpreters working on the same interpretation team and performing the same function regardless of differences in interpreters' experience, skill, or other characteristics;

B. Members to calculate conference interpretation fees on an indivisible full-day basis, regardless of the duration of the actual assignment during the day;

C. Members to charge an added fee when they whisper or interpret alone;

D. Members to charge for cancellations; and

E. Members to pay their own travel and subsistence expenses when providing services free of charge.

PAR. 8. Within the United States the AIIC work rules prescribe or have prescribed rates for:

A. Reimbursement or allowances for travel, lodging, subsistence and other expenses;

B. Compensation for travel time, briefing time, rest time, and weekends or other non-working days over the duration of a conference; and

C. Recording of interpretations.

PAR. 9. Within the United States the AIIC work rules prescribe or have prescribed mandatory standards for:

A. The maximum hours worked per day and per shift by interpreters;

B. The composition of interpretation teams, including the minimum number of interpreters based on the number of target and source languages used at a conference;

C. The quality of transportation to and from conferences; and

D. Members' use of portable electronic simultaneous interpretation equipment.

PAR. 10. Within the United States the AIIC work rules prohibit or have prohibited:

A. Members from accepting or paying commissions;

B. Members from engaging in comparative advertising;

C. Members from offering or accepting "package deals" (which combine interpretation with other cost items) and lump sum payment arrangements;

D. Members from performing non-interpretation services at conferences for which they have been hired as interpreters;

E. Members from entering into arrangements whereby particular interpreters are available exclusively through them;

F. Members from accepting more than one assignment for the same period of time; and

G. Members who coordinate interpreters from operating under a trade name.

PAR. 11. As applied to members residing in or traveling to the United States, the AIIC work rules require or have required that travel expenses to a job be charged based on a member's declared professional address, regardless of the member's actual location and even if no travel is actually involved. The AIIC work rules also require or have required members to declare a single professional address, to change such professional addresses no more than once every six months, and to give three months' advance notice of any change.

PAR. 12. Within the United States the AIIC work rules:

A. Required or have required members selecting an interpretation team to hire freelance interpreters before hiring interpreters who have permanent positions; and

B. Discourage or have discouraged interpreters with permanent positions from competing with freelancers.

PAR. 13. By enacting, participating in, securing agreement to, or enforcing the fee schedules, work rules, and other restrictions, as set forth in paragraphs five through twelve, respondents AIIC and the U.S. Region have been and are acting as a combination of their members or in conspiracy with their members or others to fix or stabilize fees and to restrain competition by attempting to control the price, output and marketing of interpretation services performed in the United States.

PAR. 14. The combination or conspiracy and acts or practices described above have had and continue to have the purpose and actual or likely effects of unreasonably restraining competition and injuring consumers in the United States by, among other ways, depriving consumers of the benefits of price and other forms of competition among interpreters.

PAR. 15. The acts and practices herein alleged were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition

in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION

BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE
JULY 26, 1996

The Commission's complaint in this matter, issued October 25, 1994, charges the International Association of Conference Interpreters ("AIIC") and the U.S. Region of AIIC with unfair methods of competition.

The complaint charges that AIIC maintains work rules binding on members; that AIIC members can be expelled for violations; that the U.S. Region of AIIC has participated in enforcing those rules; that AIIC has minimum fees for interpretation services in the United States; that members' rates of daily remuneration shall be the rates specified in the fee schedules.

The complaint alleges that AIIC rules require: (a) identical compensation for interpreters working on the same interpretation team regardless of differences in their experience or skill; (b) payment of interpretation fees on an indivisible full-day basis, regardless of the number of hours actually worked; (c) added fees for whispered or solo interpretation; (d) cancellation charges; and (e) restrictions on providing services free of charge.

The complaint alleges that AIIC rules prescribe rates for: (a) reimbursement for travel, lodging, and subsistence; (b) compensation for travel time, briefing time, rest time, weekends or other non-working days over the duration of a conference; and (c) recording of interpretations.

The complaint alleges that the AIIC work rules prescribe mandatory standards for: (a) the maximum hours worked per day and per shift by interpreters; (b) the composition of interpretation teams, including the minimum number of interpreters based on the number of languages used at a conference; (c) the quality of transportation to and from conferences; and (d) members' use of portable interpretation equipment.

The complaint alleges that AIIC work rules prohibit: (a) the acceptance or payment of commissions; (b) comparative advertising; (c) "package deals" that combine interpretation with other services, and lump sum payment arrangements; (d) the performance of non-interpretation services by interpreters; (e) exclusive availability

arrangements for particular interpreters; (f) the acceptance of more than one assignment for the same period of time; and (g) the use of trade names.

The complaint alleges that AIIC rules require members to declare a single professional address, to change such professional addresses no more than once every six months, and to give three months' advance notice of any change; and that, as to members residing in or traveling to the United States, travel expenses to a job be charged based on the member's declared professional address, regardless of the member's actual location and even if no travel is actually involved.

The complaint alleges that AIIC requires members selecting an interpretation team to hire freelance interpreters before hiring interpreters who have permanent positions; and discourages interpreters with permanent positions from competing with freelancers.

The complaint alleges that the AIIC and the U.S. Region conspire with their members to fix price and output of interpretation services in the United States; that the effect of this conspiracy is to unreasonably restrain competition and injure consumers in the United States by depriving consumers of the benefits of price and other forms of competition among interpreters; and that the acts and practices alleged are to the prejudice and injury of the public.

Respondents moved to dismiss the complaint on jurisdictional grounds on December 8, 1994. This motion was denied on January 24, 1995, and by modified order on February 7, 1995. Respondents subsequently filed an answer to the Commission's complaint on February 10, 1995. On October 13, 1995, respondents moved for partial summary decision, which was denied on November 20, 1995. On October 23, 1995, complaint counsel moved for partial summary decision on jurisdictional issues, which was denied on November 29, 1995, except as to the existence of interstate commerce jurisdiction and the amenability of the U.S. Region to personal jurisdiction, which respondents did not dispute.

Except for one witness who testified on November 27, 1995, the hearing in this matter began on December 4, 1995. The last witness testified on April 17, 1996. In total, complaint counsel called 16 witnesses, including an economist and a cognitive psychologist, and respondents called five witnesses, including an economist and a psychologist. There were a total of 26 days of trial and 4,000 pages

of trial transcript. Approximately 1,000 complaint counsel exhibits numbered CX-1 through CX-3007 were admitted into evidence.[1] Respondents introduced approximately 240 exhibits numbered RX-2 through RX-820.[2] The record also includes 94 stipulated facts, adopted by order on April 8, 1996.

FINDINGS OF FACTS

I. THE CONFERENCE INTERPRETATION INDUSTRY

A. Respondents

1. AIIC

1. Respondent International Association of Conference Interpreters, "AIIC" (CX-600-A) is an association of professional conference interpreters. (Stip. 6.) AIIC's Secretariat is located in Geneva, Switzerland. (Stip. 7.) AIIC's rules are in its "Basic Texts." (Stip. 9; CX-1; CX-2.)

2. AIIC's supreme body, the Assembly (all Association members), meets once every three years. (Stip. 10.) AIIC also has a "Council" (president, three vice presidents, a treasurer, and representatives from each of the Association's regions), nominated by their regions and elected to the Assembly. (Luccarelli, Tr. 1628; Stip. 11.) The Council implements Assembly decisions and adopts the annual budget. (Stip. 12.) AIIC also has a "Bureau" (the president, the three vice presidents and the treasurer), exercising the Council's functions. (Stip. 13.) AIIC has 2,000 members worldwide, and 141 in the United States. (CX-600-K; Stip. 36.)

3. AIIC publishes a Bulletin to members. (Stip. 67.) AIIC sends Bulletins to the United States reporting on the business of AIIC (including matters relating to the rates of remuneration and work rules.) (Stip. 17.) Proposed amendments to AIIC's Basic Texts are in the Bulletin. (Stip. 18.)

4. AIIC has two sectors. The "Agreement Sector" safeguards AIIC members working as freelance interpreters pursuant to AIIC's negotiated agreements with international organizations. (CX-2085-E;

[1] By order of July 10, 1996, approximately 430 of complaint counsel's exhibits were withdrawn.

[2] By order of July 11, 1996, approximately 100 of respondents' exhibits were withdrawn.

F. 492-97.) The "Nonagreement Sector," or "NAS," involves AIIC freelance interpreters working in the private sector not covered by AIIC's Agreements. (CX-278-Z-2; CX-242-E.) NAS meets twice annually. (CX-245-F.)

2. The U.S. Region of AIIC

5. Members of AIIC in any country with 15 members may form a "Region." (Stip. 32.) The membership of an AIIC region consists of the AIIC members then having their professional address in that region. (Stip. 33.) Currently, AIIC has 22 regions. (Stip. 35.) One of these is the U.S. Region of AIIC. (Stip. 33, 36.)

B. The American Association of Language Specialists

6. The American Association of Language Specialists ("TAALS") is an association of conference interpreters, translators, precis-writers and editors based in the Western Hemisphere, principally the United States. (CX-997-C, Q, Z-35 to Z-49; CX-995-C, J.)

7. TAALS has a professional code, binding on members, that, prior to 1994, included many of the restraints now challenged in the complaint against AIIC. (F. 304, 307-13.)

8. The Federal Trade Commission issued a consent order against TAALS (Aug. 31, 1994) prohibiting TAALS from price fixing or limiting price competition, agreements to restrict the time that interpreters work or the number of interpreters used and prohibiting restraints against advertising professional address rules and portable equipment restrictions.

C. The Conference Interpretation Industry in the United States

9. Interpretation refers to the conversion of the spoken word from one language into another. Translation involves written statements. (Luccarelli, Tr. 1572-73.)

10. Conference interpretation involves business meetings, meetings with audiences, seminars and conferences involving sensitive subjects or technical material. (Clark, Tr. 589/21.) There are two principal modes of conference interpretation, consecutive and simultaneous. (Stip. 1.)

11. In consecutive interpretation, interpreters listen to the speakers for a while, and then interrupt to interpret what they have heard into

another language. (Stip. 2.) Consecutive interpretation is usually limited to two languages because of the time required when multiple languages are involved. (CX-304-K (Motton); Obst, Tr. 265, 267-68.)

12. In simultaneous interpretation, the interpreter talks at the same time as the speaker. (Obst, Tr. 264.) Interpreters sit in soundproof booths with microphones and headsets and provide a running interpretation into another language, which conference participants hear with their own headsets. (Stip. 3; CX-300-Z-54 (Motton); Obst, Tr. 264.) Simultaneous interpretation is performed in half the time as consecutive. (Obst, Tr. 265.) While conference interpreters sometimes perform consecutive interpretation, simultaneous interpretation is used for larger conferences. (Hamann-Orci, Tr. 15, 18; Stip. 4; Van Reigersberg, Tr. 433.)

13. Whispered interpretation is simultaneous without equipment and with the interpreter sitting next to two or three listeners. (CX-300-Z-57 to Z-58 (Motton); Hamm-Orci, Tr. 19.) Whispered interpretation is used at state dinners, for heads of state and at press conferences. (Hamann-Orci, Tr. 19; Obst, Tr. 268.)

14. A conference interpreters usually interprets simultaneously in a booth. (Clark, Tr. 591.) Conference interpreters listen and speak at the same time as someone else. (Hamann-Orci, Tr. 17.) In addition to language fluency, a conference interpreter must switch easily between two cultures and languages, which ideally involves having lived extensively in the countries where the foreign languages are spoken. (Weber, Tr. 1164, 1178; CX-303-R to S (Moggio-Ortiz).) Conference interpreters usually undergo specialized training in simultaneous interpreting. (Hamann-Orci, Tr. 17.) They are usually university educated and knowledgeable in many fields. (Davis, Tr. 854; Van Reigersberg, Tr. 384-85.) The majority of them are trained from two to five years. (CX-242-J.)

15. The number of languages at private conferences in the United States can vary from one other than English, to six or seven, but are usually two or three; the attendees can range from a couple of dozen into the thousands. (Neubacher, Tr. 762.) English and Spanish are the most common languages, followed by French. (CX-300-Z-134 (Motton); Citrano, Tr. 520.) In the United States, typical speeches are in English with interpretation into other languages. (Clark, Tr. 627.)

16. At conferences, simultaneous interpreters work in teams. (Luccarelli, Tr. 1617; Moser-Mercer, Tr. 3450.) Under AIIC's current

rules, a conference in English and Spanish could have a team of three members working together in one booth, or it could have two teams of two persons each working in two separate booths: a team interpreting from Spanish into English and a team interpreting from English into Spanish. (F. 160-61.) If there are two booths, when English is spoken on the floor the interpreters in the Spanish booth would take turns interpreting from English into Spanish, but when Spanish is spoken on the floor the interpreters in the Spanish booth would be listening. (Clark, Tr. 628-29.)

17. In the United States, except for large organizations such as the State Department or United Nations, conference interpretation teams are most often organized by intermediaries. (Weber, Tr. 1121; CX-302-Z-311 to Z-312 (Luccarelli); Stip. 5.) Intermediaries supply conference interpreters to users of interpretation services such as international associations, corporations, museums and non-profits. (Davis, Tr. 838, 846; Clark, Tr. 595.) Berlitz, Brahler, Language Services International, and CACI are examples of intermediaries. (Saxon-Forti, Tr. 2600; Luccarilli, Tr. 1564-65; Swetye, Tr. 2759; Weber, Tr. 1123.)

18. Berlitz uses conference interpreters for all simultaneous interpretation and for any assignment that is complex in nature; for sensitive subject matter or highly technical material; for large audiences, media assignments, live interviews; where quality is of the utmost importance; and for assignments involving important business meetings. (Clark, Tr. 589-91.) Some business meetings are interpreted simultaneously, others consecutively. (Clark, Tr. 590.)

19. Intermediaries advise conference sponsors about the conference interpretation business. Most clients do not know what is needed to supply simultaneous interpretation for a conference. (Clark, Tr. 602, 644; Weber, Tr. 1150; Davis, Tr. 875.)

20. Intermediaries educate clients about how difficult it is to interpret simultaneously, and the number of interpreters required. (Clark, Tr. 630-31; Weber, Tr. 1151.) Most clients do not get involved in the details of organizing interpretation teams once they have selected an intermediary, and have never heard of TAALS and AIIC. (Clark, Tr. 602, 607-08; Jones, Tr. 705.)

21. According to intermediaries, a reputation for quality is important in the interpretation business. (Weber, Tr. 1152.) Berlitz has a name to uphold in the industry and wants to maintain a good reputation for quality service. (Clark, Tr. 597, 640-41.) In CACI's

experience, prospective clients take reputation, as well as price, into consideration when choosing an intermediary. (Jones, Tr. 704.) The quality of interpretation is the most important factor to Brahler because it has a reputation as a high-quality supplier. (Davis, Tr. 849, 872.)

22. Berlitz wants repeat business. (Clark, Tr. 596-97.) CACI gets repeat work because of its reputation for providing quality conference interpretation. (Jones, Tr. 704.) Half of Brahler's clients are repeat clients. (Davis, Tr. 838.)

23. Intermediaries decide the number of interpreters (Clark, Tr. 642; Davis, Tr. 862-65, 870; Jones, Tr. 697-99, 748-49), the length of the working day (Clark, Tr. 642-43; Davis, Tr. 862, 871; Lateiner, Tr. 972), and the type of equipment to use. (Davis, Tr. 871; Clark, Tr. 600-01, 643-44.)

24. The needs of clients vary with the subject matter of the meeting, the duration, the number languages that are required, and the level of quality desired. (Weber, Tr. 1151-52; Clark, Tr. 625-27.) Intermediaries can choose the working conditions when staffing a conference rather than adopting blanket rules. (Van Reigersberg, Tr. 467.)

II. CONSPIRACY

A. AIIC's Basic Texts

25. The Basic Texts include the basic rules of procedure and membership. (CX-300-Z-1, Z-163 to Z-243 (Motten).) The Basic Texts include AIIC's Statutes, Disciplinary Procedure, Admissions Procedure, Code of Professional Ethics, Professional Standards, and various Annexes to the Professional Standards. (CX-1-A to Z-55; RX-2, 1-80; Stip. 9.) The Basic Texts are published in the AIIC Bulletin, the AIIC publication disseminated world-wide to all its members. (Stip. 18.)

26. AIIC's Basic Texts bind all members of the association, including United States members. (CX-305-Z-341 (Sy); CX-218-L; CX-221-D; CX-284-D.) In 1994 the Council approved a resolution stating that "Council confirms the binding character of the professional standards." (CXT-501-T, p.2; CX-302-Z-388, Z-939 (Luccarelli); Luccarelli, Tr. 1860, 1862.) The Basic Texts are published in English and French. (CX-1-3.)

1. Code of Ethics and Professional Standards

27. AIIC's Code of Ethics ("Code") governs the professional conduct of members of the association. (CX-305-Z-29 (Sy).) Professional Standards ("Standards") provide the base working conditions. (CX-1-Z-40; CX-2-Z-40; CX-3-F.) The Code and the Standards include rules on: "double-dipping," advertising, working without a booth, required paid briefing sessions, professional address, recording fees, cancellation fees, paid non-working days, rest days and travel fees, length of day, team strength, indivisible daily rates, same team/same rate, commissions, charity restrictions, daily rate, per diem, and travel conditions. (CX-2.)

28. Annexes attached to the Standards contain the Guidelines for Recruiting Interpreters (CX-1-Z-47 to Z-50; CX-2-Z-50 to Z-53; RX-2, 61-62, 65-66), and the Staff Interpreters' Charter (CX-1-Z-53; CX-2-Z-54; RX-2, 79).

29. AIIC's 1991 Code and Standards (including the Annexes) were adopted by vote at the AIIC 1991 General Assembly. (CX-301-Z-7, Z-10, Z-44, Z-153 to Z-172 (Bishopp); CX-300-Z-3, Z-102, Z-163 to Z-243 (Motton); CX-2.) At the 1991 Assembly, the members voted on whether to remove the monetary conditions from the Basic Texts, but the vote failed. (Luccarelli, Tr. 1851; CX-262-C to J.) Thus, the 1991 Basic Texts retained references to rates in the Standards. (CX-270-K; CX-441-B.)

30. AIIC called a 1992 Extraordinary Assembly "to determine the broad lines of the structure and guiding principles of the AIIC of the future, the actual texts remaining to be adopted at the next Ordinary Assembly." (CX-272-H; CX-273-F.) AIIC members voted "to remove all mention of monetary conditions . . . from out basic texts" and invited "the council to take all necessary steps for the immediate implementation of these decisions." (CX-273-G.) The Council decided that "All provisions of the Basic Texts that refer to financial conditions are immediately withdrawn. . . .The Basic Texts shall be amended consequently at the next Ordinary Assembly." (CX-279-I; CX-273-O, CXT-273-O, p.1.)

2. Annexes to the Code

31. Like the Basic Texts, Annexes to the Basic Texts are binding on AIIC's members. (Weber, Tr. 1340/2; CX-284-D; CX-221-D; CX-

218-J.) Non-compliance with "any rules of the code of professional conduct and its annexes" could be the subject of disciplinary proceedings. (Weber, Tr. 1128/16.)

a. Guidelines for recruiting interpreters

32. AIIC's Guidelines for Recruiting Interpreters ("Recruiting Guidelines") are attached as Annex 1 to AIIC's Standards. (CX-1-Z-47; CX-2-Z-50; CX-214-M to N.) The Recruiting Guidelines were approved at the 1991 Assembly, and are part of the 1991 Basic Texts, (CX-300-Z-14 to Z-15 (Motton); Luccarelli, Tr. 1855/1), and the 1994 Basic Texts. (CX-1-Z-47 to Z-50; RX-2, 62, 65-66.) The Recruiting Guidelines contain five of the restraints challenged in this action: ban on package deals and lump-sum payments, commissions, and exclusive agency arrangements; restriction on trade names; and regulation of advertising. (CX-1-Z-49.) When a conference interpreter makes up a team, "she or he sees to it not only that the Association's rules, but also its recommendations are complied with." (CX-1-Z-47.) The coordinating interpreter must apply the guidelines to all interpreters he or she appoints, whether or not they are AIIC members. (CX-1-Z-47.)

33. The rules in the Recruiting Guidelines currently bind members. (Weber, Tr. 1154-56; CX-284-D; RX-336, 8145; Luccarelli, Tr. 1680-82.)

34. The precursor to the present version of the Recruiting Guidelines was originally adopted by the AIIC Assembly held in New York and published as Annex 2 to the 1983 Basic Texts. (CX-2422; CX-256-Z-45; CX-260-Z-106.)

b. Staff interpreters' charter

35. The Staff Interpreters' Charter was first adopted in 1977. (CX-215-D.) The 1991 Charter provides that "staff interpreters should...act as interpreters outside their organization only with the latter's consent, in compliance with local working conditions, and without harming the interests of the free-lance members of AIIC." (Stip. 89; CX-1-Z-53; CX-2113; CX-262-Z-129 to Z-130.)

c. Videoteleconferences

36. An annex to AIIC's 1994 Standards circumscribes members' ability to perform videoteleconferencing services. (CX-1-Z-54 to Z-55.) A videoteleconference is a remote conference where the interpreters are not at the same location as the speakers. (CX-1-Z-54.) The rules are in the 1994 Basic Texts. (CX-5-D; CX-2-Z-55 to Z-56;

CX-1-Z-54 to Z-55.) The videoteleconferencing rules restrict the number of hours an interpreter is allowed to work to not more than three hours a day, or else "manning strengths shall be correspondingly increased. If remote conferencing leads to night work, interpreters shall be entitled to appropriate compensation." (CX-1-Z-54.)

B. Creation of the Work Rules by Agreement

1. General Assembly Vote

37. AIIC's Assembly conducts the business of the association and sets polity by debates and votes on standards, the code of ethics, admissions procedure and budget. (CX-1-E to F, Art. 19; Luccarelli, Tr. 1628.) All members may vote, personally or by proxy. (CX-1-E to F, Art. 19; CX-1-P, Rule 7.)

38. The Standards and the Code are adopted by vote at the AIIC Assembly. (CX-305-Z-8 (Sy); CX-300-Z-4 (Motton).) A two-thirds majority of the Assembly is required to amend existing Basic Texts or to expel a member. (CX-1-T, Rule 14; Luccarelli, Tr. 1629.) Changes to the Annexes also can be made by the Assembly. (CX-253-D.) A simply majority of AIIC's members is otherwise acceptable for most Assembly votes. (CX-1-T, Rule 14.)

2. Council Action

39. Each AIIC Region nominates its representative to the AIIC Council, and the Assembly votes on those nominations. (Luccarelli, Tr. 1628.) The Council may oversee the daily activities of the association, implementing Assembly decisions, granting waivers to rules, resolving member disputes, maintaining disciplinary investigations and actions, and adopting the annual budget. (CX-1-G to H, Art. 24, Z-1; Stip. 12; Lucarrelli, Tr. 1630.)

40. The Council may adopt Council texts, recommendations of the NAS or self-generated texts. (Lucarrelli, Tr. 1631.) "As consensus develops on rules, binding on the profession as a whole, they are gradually included in the Code. Pending consensus on rules, however, AIIC intends to publish guidance material to make all members more familiar with their rights and responsibilities in private sector negotiations. . . ." (CX-206-C.)

41. The Council approves the rates and per diem published by the association, by country or by region. (CX-304-Z-49 (Motton).) The Council grants waivers to the application of Basic Text provisions. (CX-1-Z-1, Rule 14; CX-300-Z-35 (Motton); F. 56-57.)

3. AIIC's Nonagreement Sector

42. The NAS includes interpretation markets not governed by agreements negotiated by AIIC. (CX-278-Z-2.) Within the NAS, interpreters are recruited solely on the basis of the AIIC Code and their contracts are governed by the AIIC Code. (CX-242-E.) The purpose of the NAS is to "promote interpretation in the NAS in an equally systematic and AIIC-subsidized manner as in the Agreement Sectors [and to prepare] AIIC Standards of Professional Practice applicable to the sector for ratification by Council and Assembly." (CX-278-Z-2.) The NAS accepts the AIIC texts regarding working conditions. (CX-272-F, CXT-272-F to G.) The NAS exhorted members to "comply with AIIC standard practices." (CX-222-H.)

C. Agreement to Follow the Basic Texts

43. To become an AIIC member, a candidate must have practiced professional conference interpretation in a booth for at least 200 days, without complaints from employers or colleagues, while following all of AIIC's rules. (Stip. 16; CX-1-B, Art. 1; CX-304-Z-110 (Motton).) Before becoming members of AIIC, all conference interpreters must enter into the commitment described in the application form. (CX-1-C; CX-2-C; F. 44-46.)

1. Applicants for Membership

44. There are two types of candidates for AIIC membership: pre-candidate and candidate. (CX-300-Z-5 (Motton).) Pre-candidates for AIIC admission are simultaneous conference interpreters who have worked less than 200 days in the booth. (CX-2053-A; CX-1-Z-29, Art. 4.) Pre-candidates agree to be "bound to observe [AIIC's] Statutes, its Code of Professional Ethics and all of its other rules and regulations." (CX-1-Z-30; CX-2-Z-30.) AIIC requires the pre-candidate to agree, in writing, that: "Having taken cognizance of the rules and regulations of the Association, and namely the provisions

of the Code of Professional Ethics, I hereby undertake to abide by them." (CX-2053-A.)

45. Candidates for AIIC admission are conference interpreters who have worked at least 200 days in the booth. (CX-2054-C; CX-301-S to T, W (Bishopp); CX-300-Z-8 (Motton).) AIIC's Admissions Procedures require the applicant, "without exception," to observe the Code and all of its other rules and regulations. (CX-1-Z-30; CX-2-Z-30; CX-300-Z-8 (Motton).)

46. Five AIIC member-sponsors are required for each candidate. (CX-1-Z-30, Art. 5; Lucarrelli, Tr. 1558; CX-300-Z-7 (Motton).) The sponsors certify that: "to the best of our knowledge, the candidate possesses the required professional experience and that she/he observes the rules and regulations of the Association." (CX-2054-A; CX-300-Z-7 to Z-9 (Motton); CX-271-G.) The sponsors guarantee that the candidate has respected AIIC's rules. (CX-202-F.) The names of candidates are published in the AIIC Bulletin (CX-300-Z-10 (Motton)) and members are expected to challenge them on their "respect of AIIC rules (including the professional code)." (CX-202-F; CX-300-Z-10 (Motton).)

47. Once the 200-day period is complete, the application process itself takes approximately one and one-half years. (Hamann-Orci, Tr. 20.) During this period all candidates follow AIIC's professional standards. (CX-300-Z-10 to Z-13 (Motton).) The 200 working day requirement may mean that applicants will follow the AIIC rules five years before membership is granted because "beginners don't work as much [as] more experienced interpreters." (CX-306-Z-143/20 (Weide).)

2. AIIC Rules Are Binding

48. AIIC's Statutes require, as a condition of membership, that conference interpreters "enter into a commitment to respect the statutes, the Code of Professional Ethics, and all of the Association's other rules and regulations as well as the other rules of the profession." (CX-1-C; CX-2-C.) AIIC members are "bound to observe its Statutes, its Code of Professional Ethics, and all other rules and regulations." (CX-2-Z-30.) A member of AIIC pledges to abide by the rules set forth in AIIC's Basic Texts. (Luccarelli, Tr. 1558-59.)

49. AIIC's Basic Texts, including the Code, the Standards, and AIIC's rules and working conditions, are binding on all AIIC members. (CX-305-Z-4, Z-6 to Z-7 (Sy); CX-2-Z-30.) AIIC members in the United States understand that the Code applies to interpreters in the United States. (CX-306-Z-134/1-15 (Weide); CX-284-C to D; CX-208-I.)

50. Article 8 of the 1991 version of AIIC's Code states that: "Members of the Association shall neither accept nor, a fortiori, offer for themselves or for other conference interpreters recruited through them, be they members of the Association or not, any working conditions contrary to those laid down in this Code or in the 'Standards of Professional Practice' applying to the work of members of the Association, which establish, in particular, rules concerning remuneration, travel, copyright, subsistence allowances and travel expenses." (CX-2-Z-39.)

51. The 1994 version of the Basic Texts states: "Members of the Association shall neither accept nor, a fortiori, offer for themselves or for other conference interpreters recruited through them, be they members of the Association or not, any working conditions contrary to those laid down in this Code or in the Professional Standards." (CX-1-Z-39.)

52. Malick Sy, the President of AIIC, explained that AIIC's working conditions are binding: in the March 1995 Bulletin, he wrote, "I wish to take this opportunity to state clearly and unequivocally once again on behalf of the Council, the Bureau, and myself as President, that our working conditions are binding upon all our members." (CX-284-D.) He confirmed that members of the association adhere to the association's rules. (CX-305-Z-4, Z-7 (Sy); CX-300-Z-9 (Motton).)

53. AIIC provides a standard form contract ("model") to be used by members in their dealings with clients. (CX-1-Z-49; CX-2059; CX-301-Z-25 to Z-27 (Bishopp); Hamann-Orci, Tr. 22-23.) TAALS also has such a model contract, approved by TAALS "and in conformity with the standard practices of the International Association of Conference Interpreters-AIIC." (CX-1063-A; Hamann-Orci, Tr. 23.) AIIC has provided such a model since at least 1963. (CX-206-D.) The model has been made available to U.S. Region interpreters. (CX-427-B; CX-428-A.) The AIIC contract implements AIIC's hours, package deals, provision of non-interpretation services, commissions, portable equipment, recording, travel fees, travel

conditions, cancellation fees, per diem, and professional domicile restraints. (CX-2059-A to B.)

54. Interpreters use the AIIC contract when negotiating with clients because it provides the backing of a professional organization. (Hamann-Orci, Tr. 22.)

55. AIIC's Guidelines for Recruiting Interpreters state that the Association's contract should be used by members. (CX-1-Z-49.) AIIC members use the form contract. (Hamann-Orci, Tr. 21-23.) AIIC members cite to the associations' rules in their contract negotiations with intermediaries. (Clark, Tr. 602; Weber, Tr. 1153-54.)

3. Waivers of the Rules

56. AIIC's rules provide a waiver by which rules may be temporarily modified by the AIIC Council. (CX-1-Z-1, Rule 14; CX-300-Z-33 (Motton).) The waiver mechanism shows that the rules are mandatory rather than advisory. (CX-300-Z-34 to Z-37 (Motton).)

57. Waivers, if granted by the Council, are "authorized for a stated period only, and if renewal is requested, a further request must be made." (CX-208-H.)

4. Members Adhere to AIIC Rules

58. According to Claudia Bishopp, the U.S. Region Representative on the AIIC Council from 1978 to 1993, interpreters largely succeed in applying AIIC's working conditions. (CX-301-Z-140 (Bishopp).) AIIC members generally follow AIIC's Standards, Code, and other Basic Texts and Guidelines. (Luccarelli, Tr. 1621-23; Hamann-Orci, Tr. 28; Weber, Tr. 1155.)

59. Interpreters expect intermediaries to conform to AIIC's rules and are generally unwilling to negotiate rates and certain working conditions. (Citrano, Tr. 502-06, 509.) Interpreters view the AIIC and TAALS rules "like a bible. That was how the business was conducted." (Citrano, Tr. 507/4-14; Neubacher, Tr. 778-79; Jones, Tr. 696-97, 700.)

5. AIIC Enforces Its Rules

60. AIIC members are subject to punishment, including expulsion, for failure to follow the AIIC Code or the Standards. (CX-301-Z-8 (Bishopp); CX-1-H; CX-2-H; Luccarelli, Tr. 1630.) AIIC has taken formal measures to discipline members through warnings, threats, investigations, and inquiries into violation of AIIC rules by U.S. members. (Wilhelm Weber, F. 181, 229, 242, 249, 344-60; Marc Moyens, F. 219, 277; Jeannine Lateiner, F. 182, 285, 316.)

61. Under AIIC's rules (CX-1-G, Art. 24 1-2), if anyone accuses a member of the Association "of failure to observe the Statutes, the Code of Professional Ethics or any other applicable rules and regulations," it will be referred to the Council. (CX-1-Z-26; CX-2-Z-26.) The Council then appoints a three-member committee to investigate disciplinary charges. (CX-1-Z-26.) The disciplinary committee has authority to gather information from complainants, third parties, and the accused. (CX-1-Z-26.) "The refusal of any person accused [of a violation of the rules] to supply such information may be interpreted as evidence against them." (CX-1-Z-26.) The Council usually adopts the recommendation of the disciplinary committee. (CX-301-Z-122 to Z-123 (Bishopp).)

62. The AIIC Council may warn, reprimand, or suspend a member for failure to follow AIIC's rules. (CX-1-Z-27; Luccarelli, Tr. 1815-16; CX-300-Z-111 (Motton).) There is no right of appeal for warnings, reprimand or suspension. (CX-1-Z-27.) If the Council deems the member's violation sufficient to warrant explusion, it recommends to the Assembly that the member be expelled. (Luccarelli, Tr. 1630; CX-300-Z-111 (Motton).) Only the Assembly, by two-thirds vote, may expel a member. (CX-1-T, Rule 14; Luccarelli, Tr. 1629.)

63. Charges of non-adherence to the rates set forth in the Standards, including charges of undercutting, could be the subject of AIIC's disciplinary proceedings. (Weber, Tr. 1128-29.)

64. Whenever a member is reprimanded, suspended, or expelled, the disciplinary action "shall be ... made known to the members of the Association." (CX-1-Z-27.) AIIC announces disciplinary measures taken in the Bulletin. (CX-284-N; CX-1-Z-27.) The possibility of such publication is a credible threat of punishment. (Wu, Tr. 2166.)

65. Article 12, of the AIIC Statutes states that resignation from the Association "shall not prevent disciplinary proceedings arising out of any earlier occurrence." (CX-1-C; CX-2-C.) Censure could affect

an interpreter's ability to get referrals and therefore make sales. (Wu, Tr. 2167-68.)

66. Someone expelled from AIIC might never be hired by another AIIC member ever again. (Weber, Tr. 1268/21.) Publication of disciplinary actions and investigations can damage interpreters' reputations among other interpreters. (Hamann-Orci, Tr. 26-27; Citrano, Tr. 553; Wu, Tr. 2166.) Two complaints against AIIC member, Jeannine Lateiner, were sent, apparently by the complaining party, to the other members of her team. No formal disciplinary action was taken. (Lateiner, Tr. 904; F. 182, 285, 316.)

67. The Executive Secretary of AIIC reported that the AIIC Council "stressed the need to encourage members not to hesitate to raise such matters (failure to observe obligations under the Code) even though they may not personally be involved, through appropriate channels in the future." (CX-226-B.) Similarly, AIIC's President warned the membership that members must be vigilant against lapses in adherence to the rules, that "there is not unity without the cement of discipline." (CX-227-H to I.)

68. In 1995, AIIC referred penalty matters against seven members to a committee of inquiry, announced that it suspended three members, issued reprimands to eight members, and issued "number of warnings." (CX-284-N.)

69. Interpreter associations have used fear of retaliation to force adherence to their rules. According to Luigi Luccarelli, U.S. Region representative to the AIIC Council, speaking at a TAALS meeting, "we have operated with a lot of fear in the past" and young interpreters "had heard from their teachers that they should obey the rules in order not to make enemies." (CX-962-D; CX-302-Z-326, Z-335, Z-337, Z-853.)

70. Interpreters get work through word of mouth, and they need to establish a positive reputation among their colleagues to get work because a lot of referrals come from other interpreters. (Hamann-Orci, Tr. 26; Swetye, Tr. 2795/24 to 2796/2; Citrano, Tr. 553.)

71. Interpreters must get along with their boothmate. (Hamann-Orci, Tr. 26.) Requests to work with particular colleagues are often made by future boothmates when contacted by clients. (Hamann-Orci, Tr. 26-27.) "If you can't get a partner to work with you, then you're basically unemployed." (Citrano, Tr. 516, 553.) Interpreters ask who

their partners will be before they ask other questions. (Citrano, Tr. 553-54.)

72. Price undercutters could be cut out of the referral network or blacklisted. (Jones, Tr. 690; Swetye, Tr. 2795-96; CX-300-Z-108 (Motton).)

73. One intermediary testified that interpreters have agreed to deviate from the AIIC rules, and asked him to keep the terms of the agreement secret, for fear of retaliation by other interpreters. (Citrano, Tr. 516-17.)

74. In the summer of 1995, Mr. Weber, acting as an intermediary, received two anonymous telephone calls threatening him with retaliation if he testified against AIIC in this proceeding. (Weber, Tr. 1347-48.) One anonymous caller told him that if he testified, there "will be consequences." (Weber, Tr. 1347/22, 1348/4.) The other caller threatened that if Mr. Weber testified, AIIC would boycott the 1996 summer Olympic games for which he is responsible for organizing the interpretation services. (Weber, Tr. 1348/7-12.)

D. Respondent U.S. Region and the Conspiracy

1. AIIC's Mandatory Rates

75. U.S. Region members discussed rates and voted at U.S. Region meetings to set daily freelance conference interpretation fees in the United States. (CX-409-A; CX-1136.)

76. The U.S. Region provided the AIIC Council with the rates for the United States to be published in the AIIC Bulletin. (CX-301-Z-45, Z-46, Z-175 to Z-182 (Bishopp).) When the AIIC Bulletin published the incorrect figure for the United States in a report from various regions in 1990, the U.S. Region Representative corrected the Bulletin figure at a U.S. Region meeting. (CX-436-F.)

77. In December 1981, AIIC's U.S. Region noted that, on the advice of antitrust lawyers, although "it is preferable not to appear with a fixed figure on the rate sheet," "there is a 'gentleman's agreement' not to ask for less than U.S. Dollars 250 per day." (CX-1226-A.)

78. In 1986, AIIC's U.S. Region agreed that "the region should publish suggested minimum rates. As far as per diem, the meeting agreed that the rules we have been applying in the U.S. are still the best for the region. . . ." (CX-427-B; CX-432-F; CX-434-C.)

79. In 1988, the U.S. Region noted that AIIC did not publish a daily nongovernmental freelance rate for 1989. (CX-432-E.) The Region agreed to "publish 'Available on request,' which is considered better than not indicating any rate at all." (CX-432-E.)

2. The U.S. Region Connection to AIIC's Rules

80. AIIC's U.S. Region members or their elected representatives voted on AIIC's fees, Standards, and Code of Ethics. (CX-441-B; CX-300-Z-100 to Z-103 (Motton).) The U.S. Region urged members to attend, or to tender proxies to those who would attend, AIIC General Assembly meetings. (CX-407-E; CX-436-E; CX-446-A; Stip. 40, 42.) The U.S. Region contributed funds to members to defray travel costs for trips to European AIIC meetings "on our behalf." (CX-427-A.)

81. In response to the prospect of litigation at the Federal Trade Commission, in 1994, AIIC's U.S. Region published a resolution urging the "AIIC Council to continue its support of the U.S. Region's effort to defend those Standards." (CX-448-A, E.) In 1995, the representative for the U.S. Region to the AIIC Council stated that the "major concern all along has been to maintain AIIC's right to set working conditions for its members." (CX-450-B, C.)

3. The U.S. Region and Compliance with AIIC's Work Rules

82. The U.S. Region has secured compliance with AIIC's work rules. (CX-1393; CX-1396; CX-1470-A; CX-1471.) The U.S. Region reminded U.S. members of their obligations under the AIIC rules and urged adherence to the work rules for the United States (CX-56; CX-407-F; CX-439-B), and informed members of the availability of AIIC's standard form contracts. (CX-428-A.)

83. The U.S. Region enforces the AIIC rules. In 1984, the AIIC Council passed a resolution opposing the use of unpaid students in place of professionals and requested "the U.S. Region to report to the Bureau as soon as possible. . . ." (CX-236-G.)

84. The U.S. Region agreed to recommend to the AIIC Council a change in universal minimum manning strengths, but decided that it would fix the charges for non-working days and travel days. (CX-427-B.)

4. AIIC's Work Rules Were Binding on U.S. Members

85. In May 1994, after receiving a report that the AIIC Council reaffirmed the binding nature of the professional standards on all the members of the association, the U.S. Region passed a resolution to maintain AIIC's standards. (Luccarelli, Tr. 1862-63.) Absent a waiver, it is not possible for any AIIC region to rescind any of AIIC's Basic

Texts. (CX-300-Z-34 (Motton); Luccarelli, Tr. 1813; CX-302-Z-295 to Z-296 (Luccarelli).)

86. In 1988, the U.S. Region requested a renewal of its waiver from the rule against solo interpretation. (CX-432-G.) The U.S. Region applied for, and received, waivers for an interpreter to work alone when a meeting is no more than 40 minutes long. (CX-300-Z-34 to Z-35 (Motton); CX-259-H; CX-268-F.) The U.S. Region applied for a renewal of this waiver once again the following year. (CX-435-A; CX-2452.)

87. In 1986, AIIC's U.S. Region considered, but did not request a waiver for interpreters to accept 80% of the standard fee for meetings of less than 2 and 1/2 hours duration. (CXT-245-Q; CX-428-B; CX-301-Z-136 (Bishopp).)

88. In December 1989, the AIIC Council member for the U.S. Region passed on to members of the U.S. Region caution about working for three agencies who purportedly did not respect AIIC conditions and noted that some regions had refused work from these agencies. (CX-434-B; CX-301-Z-151.12 (Bishopp); CX-253-D.)

89. In 1990, AIIC's U.S. Region representative prepared a provisional paper on the local working conditions in the U.S. Region in response to a request from AIIC. (CX-435-A; CX-1408-A, C to E; CX-439-D to F.) The paper, sent to members with the U.S. Region minutes for discussion or revision, was intended "to ensure the uniform application in the USA of the AIIC Code of Professional Conduct and its Annexes." (CX-439-D.) The local working conditions described AIIC's rules on team strength, including: a daily rate multiplier for solo consecutive work; rules for recruiting interpreters; rules for direct contracts between the interpreters and the conference organizer; provision for cancellation, preparation, non-working days, and travel fees; and recording, and films. (CX-439-D to F; CX-301-Z-152.18.)

III. AIIC's RESTRAINTS

A. Minimum Daily Rates

90. AIIC specifies minimum rates charged by AIIC members for work done in the United States. (F. 102.) Article 8 of the 1991 Standards provides, "The rate of daily remuneration shall be the

standard rate applicable in the region concerned and, more precisely in the appropriate cases, in the country concerned . . . in those countries where it is possible to apply a standard rate." (CX-2-Z-43-44.) Articles 9, 10 and 11, concerning simultaneous, consecutive, and whispered interpretation, specify that members shall charge the standard rate. (CX-2-Z-43-44.) Article 8 of the 1991 Standards provides for a "basic rate," which equals two-thirds of the standard rate. (CX-2-Z-43.) Its purpose is to calculate the charge for non-working days, such as travel and briefing days. (F. 130-32, 134.)

91. The "standard" and "base" rates originate from AIIC's defining large and small teams of interpreters for simultaneous interpretation. (F. 170-74.) The standard rate was the "small team rate" and the base rate was the "large team rate." (F. 174.) The small team got a higher rate because each interpreter worked harder. (CX-300-Z-106/3-16 (Motton); Lateiner, Tr. 913-16; Weber, Tr. 1134/7-19; CX-304-T/12-U/5 (Motton).) AIIC members in the United States did not distinguish rates for teams. (Weber, Tr. 1134.)

92. Since its founding in 1953, AIIC published rates of remuneration for its members. (CXT-2468, p.1; CX-3-D, K to M; CX-4-I to K; CX-5-F, I to K; CXT-6, pp. 3, 507; CX-7-E, H, J; CX-8-F, H, J; CX-9-F, I to K.) It required members to comply with local fees when they exceed AIIC minimums. (CX-50; CX-9-M; CX-2-Z-48.)

93. From 1970 to 1975, AIIC rate lists included the term "minimum." (CX-50; CX-58.) From 1976 until 1980, the rate lists carried the title, "AIIC Minimum Rates." (CX-60-65.) From 1983 to 1991, it sent out the rates under the title "Market Survey." (CX-71-84.)

94. Rates labeled "Market Survey" are not the product of a survey. (CX-300-Z-90 (Motton); CX-77; CX-306-Z-111-114 (Weide).) A memo sent to the Regions by then AIIC Treasurer Patricia Longley explains that these "surveys" actually are local minimum daily rates. (CX-2446-C; F. 519.)

95. AIIC rates were published in the Bulletin, which AIIC regularly mailed from Geneva to its U.S. members. (Stip. 19; CX-301-Z-42 (Bishopp); Weber, Tr. 1263-64; CX-305-Z-49-50 (Sy); Luccarelli, Tr. 1749; CX-257-E.)

96. AIIC's published rates included a "standard" and "base" rate for each region of AIIC (CX-71 to CX-83), or earlier, a "small team" and "large team" rate. (CX-57-68.) For the United States, however,

they included a single rate (CX-55-65), because the U.S. Region did not use the small team. (F. 171.)

97. After the Federal Trade Commission investigation of the conference interpretation industry began, AIIC ceased publishing rates. (F. 93, 538.) AIIC's Extraordinary Assembly in 1992 in Brussels decided to remove "monetary conditions" from its Basic Texts. (F. 509.) At its General Assembly meeting in 1994, it adopted new versions of its Code and Standards, modifying references to rates. (CX-970-A; CX-1-Z-37-46.)

98. Originally, the AIIC Assembly discussed and voted on rates. According to former member Wilhelm Weber, "Typically, council would make proposal concerning rates. And then there would be a discussion in the assembly, and the assembly would either accept the proposal or reject it." (Weber, Tr. 1135.)

99. Until 1973, AIIC published a single rate for all interpreters worldwide (CX-203-C), except in certain countries, including the United States, where mandatory minimum rates were higher. (Weber, Tr. 1142.) In May 1973, AIIC began "readjustments and alignments to rates," (CX-201-E) setting rates in the currencies of individual countries. (CX-220-L; Weber, Tr. 1142-46.)

100. Members of the U.S. Region voted on the rates to charge in the U.S. and sent them to AIIC in Geneva to be published by AIIC as the rates for the United States. (Lateiner, Tr. 918-20; CX-405-C; CX-432-B; CX-1136.) The U.S. Region also supplied AIIC with the rates created by TAALS. (F. 307-08.)

101. The TAALS rates were created by vote at TAALS General Assembly meetings. (F. 307.) U.S. Region members were also members of TAALS and voted on rates. (F. 370-73; CX-432-E.)

102. U.S. Region members understood AIIC's rates to be mandatory minimums. (CX-1238 (Langley); CX-303-Z-86 (Moggio-Ortiz); Hamann-Orci, Tr. 38; Lateiner, Tr. 955.) The phrase "minimum daily rates" left to the judgment of individual interpreters to ask for higher rates, but not to work for less than the minimum rate. (Weber, Tr. 1140; F. 519.)

103. The three U.S. Region members who testified about undercutting charges lodged against them each defended themselves on the basis that they did not in fact undercut. (Hamann-Orci, Tr. 53; Leteiner, Tr. 903; CX-1273-C.) AIIC members testified that they

never charged below the AIIC rate. (Luccarelli, Tr. 1757-58; Lateiner, Tr. 977; CX-303-Z-90 (Moggio-Ortiz); Hamann-Orci, Tr. 38.)

104. From 1988 to 1991, intermediaries generally paid the TAALS/AIIC rate or more. (F. 328-34.)

105. After 1973, regions proposed their own rates to the AIIC Council (CX-224-Z-7 to Z-8) and the Council approved them. (CX-267-H; CX-301-Z-41 to Z-42 (Bishopp).) AIIC became concerned about regional differences in rates, "lest divergent currency and rates developments weaken or destroy [the] universal system on which AIIC hinges." (CX-207-C.) The NAS tried to reduce these differences. (CX-223-L to M.)

106. U.S. Region members feared that if they charged less than AIIC minimum for the United States, they would be branded as undercutters, losing important referrals from other members. (CX-301-Z-152.9 to Z-152.10 (Bishopp); Hamann-Orci, Tr. 38.) Interpreters expressed concern to intermediaries about being known to other interpreters as price undercutters. (Jones, Tr. 690.) They feared other interpreters may not give them references for future work. (Jones, Tr. 690; Citrano, Tr. 514.) Interpreters explained they could not work for Metropolitan because of its lower pay because "in this business, you have to work with a partner and if you can't get a partner, you're kind of dead in the business." (Citrano, Tr. 516.)

107. The term "undercutting" refers to not respecting the AIIC rules (Swetye, Tr. 2820-21); working under inferior conditions, such as improper manning strength, working alone all day, or working without the proper equipment (Swetye, Tr. 2820-21; Hamann-Orci, Tr. 53); and working for lower rates than suggested by AIIC. (CX-305-Z-173 to Z-174 (Sy); CX-301-Z-152.9 (Bishopp); Hamann-Orci, Tr. 53.)

108. The Secretary-General of AIIC felt that "members know very well that they must not undercut" AIIC's rates. (CX-1238.) On November 10, 1983, Wilhelm Weber wrote to the Secretary-General of AIIC that he was concerned about a clause on the back of the AIIC standard contract, which the Los Angeles Olympics Organizing Committee interpreted to mean that interpreters could be negotiated downwards from the going rate. (CX-1236; Weber, Tr. 1206.) The Secretary-General of AIIC replied on December 15, 1983. She wrote, "I don't see how anyone could honestly use it for undercutting purposes. Members all know [w]hat the local rate is, and any bargaining with the client can only be upwards and not downwards.

It was inserted in this way because of the 'cartel' pricefixing laws in some countries, but members know very well that they must not undercut." (CX-1238; Weber, Tr. 1207-09.)

109. AIIC's publication of a "suggeted minimum" rate raised prices by defining the price below which AIIC members would not compete. (Wu, Tr. 2085.) With AIIC's rules that all members of an interpretation team be paid the same rate, AIIC's rules affected prices paid to non-members as well as members of AIIC. (Wu, Tr. 2086.)

B. Per Diem

110. According to Article 13(a) of the 1991 Standards of Practice, "For the whole of the period spent away from the place of her or his professional address the interpreter shall receive a subsistence allowance, calculated per night of absence. As a general rule, this allowance shall be paid on the first day of the conference and in the currency of the country where it is being held." (CX-2-Z-46.) Members were required to charge for subsistence when they worked away from their professional address. (CX-300-Z-71 to Z-72 (Motton); CX-301-Z-67 (Bishopp).)

111. Previous versions of the AIIC Code and Annexes required members to charge clients per diem for lodging and subsistence. (CX-3-N; CX-4-L to N; CX-5-K to L; CXT-6-E-M, p.4; CX-7-F, J; CX-8-G; CX-9-F to G.)

112. AIIC prepares per diem sheets which are mailed to members in the United States. (CX-259-V; CX-300-Z-74/9 to Z-75/5 (Motton); CX-268-B, E, M; CX-102 to CX-130 (lists of per diem rates).)

113. AIIC Council approved per diem rates. (CX-130; CX-301-Z-152.41 to Z-152.42 (Bishopp); CX-268-E; CX-300-Z-72/3 to Z-74/22 (Motton).)

114. At meetings in 1980 and 1981, the Non-Agreement Sector discussed how to calculate the per diem amount for travel of less than a full day that did not require an overnight stay. (CX-223-N; CX-228-F to H.) Secretary-General D. Hespel and past President W. Keiser noted that a full subsistence allowance "is owed per night spent away from the professional domicile" and a one-half subsistence allowance (per diem) is owed per day if all travel can be completed between 8:00 a.m. and 8:00 p.m. and the interpreter does not cross a border. (CXT-229-B; CX-230-C.)

115. AIIC published per diem for the United States of America, one for New York, one for Washington and one for "elsewhere," which "shall be due for each night spent away from the interpreter's professional domicile." (CX-247-Z-2, Z-5; CX-124-E; CX-125-E.)

116. The U.S. Region adopted a formula whereby the organizer pays the interpreter's hotel room, including tax and service, and the interpreter would then charge the organizer a fixed percentage of the hotel rate (40% in 1991) for meals. (CX-301-Z-65, Z-150 to Z-152.1 (Bishopp); CX-432-F; CX-343-C; CX-439-F.)

117. According to Berlitz, "there has always been a standard per diem that interpreters charged." (Clark, Tr. 614; Neubacher, Tr. 771.)

118. The chairman of a NAS meeting cited the "disastrous effect" of "bargaining" away the per diem, and the need for "clear, easily applicable, unambiguous rules" to avoid this. (CX-223-L.) AIIC's Council worried that interpreters working for two clients holding consecutive conferences might try to split expenses as a "sales argument" which would constitute "unfair competition." (CX-222-Q.) In such cases, the interpreter must charge both clients a full per diem. (CX-222-Q.) According to a report given at its January 1987 NAS meeting, the fact that in Canada no per diem "can be set," as a result of the action against AIIC under the Anti-Combines Act, "leads to true competition between members." (CX-245-H.)

119. AIIC's agreement on travel expense and per diem prevents competition on the total price for an interpretation assignment. (Wu, Tr. 2093-94.) These rules make the detection of cheating more likely, by requiring these reimbursements and payments to be stated separately on contracts for interpretation. (Wu, Tr. 2093-94.)

C. Indivisible Daily Rates

120. AIIC's rules require that members charge for a full day regardless of the amount of time they actually work. The 1991 AIIC Standards provide that "remuneration shall be on an indivisible daily basis." (CX-2-Z-42.) AIIC's Code and Annexes dating back to 1972 include the same requirement. (CX-3-I; CX-4-H; CX-5-H; CX-6-G; CXT-6-E to M, p.3; CX-7-E; CX-8-F; CX-9-F.)

121. AIIC is opposed to hourly rates for interpretation. (CX-304-Z-113 (Motton); CX-301-Z-32 to Z-33 (Bishopp).) AIIC's rules mean that "you charge per day no matter how long you work." (CX-303-Z-

109 (Moggio-Ortiz); CX-886-D; Saxon-Forti, Tr. 2696; CX-305-Z-89, Z-97, Z-110 (Sy).)

122. Where they received an AIIC waiver, interpreters who worked alone for 40 minutes in the U.S. were required to charge the full daily rate. (CX-301-Z-152.1 (Bishopp); CX-432-G.)

123. The June 1993 Bulletin recommended that interpreters negotiate indivisible rates for "conferences of short duration," explaining that "one cannot take other assignments in the course of a free half-day." (CXT-276-E-G, p.2.)

124. According to one U.S. Region member, charging twice for the same day is unethical, and interpreters will only take one assignment at the daily rate. (CX-2579-A.) If members accept two contracts on the same day, it must be "after having ascertained that no other member is available . . . provided . . . appropriate fees are paid." (CX-481-I.)

125. According to a U.S. Region member, a TAALS proposal to accept 80% of the daily fee for short meetings was unacceptable because it violated AIIC's rule and "would undermine the hard won gains of TAALS and AIIC and open the door to abuse by the greedy." (CX-886-D.) The NAS voted to ask the Council not to permit regions to charge 80% of the daily rate or remuneration for sessions not exceeding two and one-half hours. (CX-245-I, F.)

126. U.S. Region interpreters charge indivisible daily fees. (Swetye, Tr. 2830-31; CX-306-Z-129 (Weide); CX-300-Z-143 (Motton); Weber, Tr. 1264.) For example, Idette Swetye sent a contract (CX-2601) to the Konrad Adenauer Foundation in which she was to be paid a full day's pay for interpreting one luncheon speech lasting forty minutes. (Swetye, Tr. 2826-28.) AIIC members charge for a full day regardless of the number of hours even if it's a half day. (Weber, Tr. 1264; CX-300-Z-143 (Motton) ("We don't have hourly rates"); (CX-306-Z-129 (Weide).)

127. Intermediaries understood the "AIIC rate" or "industry rate" to mean a daily rate for services regardless of the actual time required. (Neubacher, Tr. 763, 765-66; Citrano, Tr. 552-53; Clark, Tr. 617.)

128. Berlitz always pays conference interpreters on a daily basis. (Clark, Tr. 624.) Although it rarely happens, Brahler pays interpreters a daily rate even for a short meeting of two to three hours. (Davis, Tr. 860.) Half of Brahler's interpreters are not members of AIIC or TAALS. *Id.*

129. AIIC's rule requiring that fees be paid on an indivisible daily basis standardizes the unit of output to which the agreed daily rate applies. (Wu, Tr. 2107.) It also helps AIIC detect cheating by making rates more comparable. (Wu, Tr. 2107.)

D. Fees for Non-Working Days

130. AIIC rules require interpreters to be paid for days traveling, preparing for a conference, or resting. Article 12(a) of the 1991 Standards of Professional Practice states: "When an interpreter is recruited to work in a place other than that of her or his professional address she or he shall receive a remuneration for each day required for travel and rest as well as for Sundays, public holidays and non-working days in the course of a conference or between conferences. This remuneration shall be at least equal to the base rate." (CX-2-Z-46.)

131. AIIC's rules required that "every contract signed with a member of the Association for a conference ... must include payment of travel. . . ." (CX-2-Z-48.) AIIC specified unrestricted tickets and, for journeys of more than nine hours, the interpreter was "entitled to" rest days, which "equated to non-working days and remunerated at the same rate." (CX-4-L.) In lieu of rest days, the interpreter could accept first class airfare. (CX-2-Z-47.)

132. Article 12(b) of the 1991 Standards requires payment for non-working days when an interpreter is working at his or her home base. It states: "When an interpreter is recruited to work in the place of her or his professional address she or he shall receive a remuneration for each non-working day in the course of the conference (up to a maximum of two). This remuneration shall be at least equal to the base rate." (CX-2-Z-46.)

133. Article 14 of the 1991 Standards provides that "Contracts for the recruitment of members of the Association shall make provision for the payment of a fee for each journey made between the place of the interpreter's professional address and the conference venue." (CX-2-Z-47.) This fee is to be paid in addition to expenses for travel and per diem. (CX-2-Z-47, Z-48.)

134. Article 14 of the 1991 Standards further requires payment of fees for rest days after travel, unless flying first class. (CX-2-Z-47.) The rule specifies that the interpreter receives one paid rest day if the journey time is 9-16 hours, two paid rest days for a journey of 16-21 hours, and three paid days for a journey of more than 21 hours. If the interpreter could finish the trip after normal working hours on the eve of the conference or after the conference, the interpreter receives only one-half of the base rate as a travel fee. (CX-2-Z-47.)

135. Article 7(g) of the 1991 Code provides that members "shall request a paid briefing session whenever appropriate." (CX-2-Z-39.) The 1991 Recruiting Guidelines provide that the "coordinating interpreter shall ensure . . . that, if necessary, a briefing session be held." (CX-2-Z-51.)

136. The 1994 Standards perpetuate the rule that members must charge for non-working days. Article 8 provides: "The remuneration for non-working days occurring during a conference as well as travel days, days permitted for adaptation following a long journey and briefing days that may be compared to normal working days shall be negotiated by the parties." (CX-1-Z-45.)

137. The 1994 Standards quantify rest days. Article 10 provides: "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey. This means that journeys lasting a long time or involving a major shift in time zone call for the scheduling of rest days (generally one rest day for journeys of between nine and sixteen hours, and two rest days for journeys of 16-21 hours and three for journey[s] in excess of 21 hours.)" (CX-1-Z-45.)

138. The 1994 Code continues the briefing days requirement, stating that members "shall request a briefing session whenever appropriate." (CX-1-Z-39.)

139. AIIC provides for fees for non-working days in the standard form contract used by its members. (CX-2060-A; CX-226-B; Weber, Tr. 1221.) The Recruiting Guidelines state that AIIC's model contract "should normally be used" and any other contract used "must at least embody the standard conditions specified by the Council," without limiting clauses. (CX-1-Z-49.)

140. AIIC had a provision calling for payment of non-working days in 1972. (CX-9-F,K,G,L; CXT-6-E to M, pp.4-5, 7-8.) Over the years, the fees due for non-working days (including briefing, travel and rest days as well as for the intermediate days of a conference) increased as a percentage of the daily rate. (CX-217-D; CX-2-Z-46.)

141. At its July 1979 meeting in Geneva, the Council agreed that an interpreter working for two employers, one after another, in the same city away from his or her professional address, could allocate the travel fees between the two employers if it was done retroactively, and not as an inducement to obtain the contract, providing all intervening days were paid in accordance with the provisions of Art. 16c of the Code. (CX-222-Q.)

142. At the February 1980 Private Sector (NAS) meeting, the chairman "asked for an indicative vote as to whether half the small fee is always due for travel taking place the day before or after normal working hours on the last day of a conference. A large majority of those present felt that this was so at the moment. . . . The meeting then decided: When the journey takes place the day before or after a conference at times which makes [sic] it impossible to accept work on these days a large majority felt that the amount paid should be higher than half the small fee - there was no agreement on the actual level of this higher amount." (CX-223-O.)

143. The September 1986 AIIC Bulletin advised, "Divergent interpretations of Annex I, par. 4 of the [AIIC Professional] Code result in evident undercutting among AIIC members. It must always be stipulated that . . . the basic rate applies to non-working days except for special terms negotiated with agreement organizations." (CXT-243-D to F, p.1.)

144. These rules specifying payment for non-working days help AIIC members to detect cheating on the fee agreement, by requiring separate payment for these days. Requiring separate payments allows AIIC members to determine whether their fellow AIIC members adhere to the minimum fee rule. (Wu, Tr. 2089.)

145. In 1981 the Executive Secretary reported to AIIC members a complaint against another member for not following the non-working days rule. After investigation, AIIC found the complaint to be "now without foundation as the member concerned succeeded in amending the contracts." (CX-2438.)

146. In the 1984 Los Angeles Olympic Games, the Olympic Committee negotiated to reduce costs by not paying interpreters for non-working days. (Weber, Tr. 1222/4-14.) AIIC-member Wilhelm Weber, who organized interpretation teams at the Olympics, told the Committee that it was "part of our code of professional conduct and that it was also current practice in the profession."The Committee agreed to pay for non-working days. (Weber, Tr. 1223/10-13.) The LAOOC eventually conformed to AIIC rules on non-working days. (Weber, Tr. 1262.)

147. Members of the U.S. Region adhered to the AIIC agreement to charge for non-working days. (Luccarelli, Tr. 1605; CX-302-Z-8 (Luccarelli).) According to a New York intermediary, interpreters insist on being paid a half day's travel, on top of a full day's

interpretation fee, even when they work and travel on the same day. (Citrano, Tr. 552-53.) One AIIC member refused to work without two full paid travel days. (Citrano, Tr. 512, 514.) AIIC or TAALS members who accepted conditions and remuneration less favorable than the rules provide did so only after extracting the intermediary's promise not to reveal their actions to any other AIIC or TAALS member. (Citrano, Tr. 516-18.)

148. Mr. Misson, a member of the U.S. Region, wrote to a client on May 26, 1990, seeking an amendment to his contract. He explained that he had mistakenly quoted the previous year's rate but would honor his quote and would waive the per diem. However, Mr. Misson insisted that he had to charge extra for the day spent traveling because he could be accused of undercutting by his colleagues in AIIC, which is more important to him than the money involved and asked the client to keep the discussion confidential. (CX-2456-A.) The client accepted the new terms. (CX-2456-B.)

149. AIIC's rules specifying payment for non-working, rest, travel and briefing days prevent competition on the total price for an interpretation assignment. (Wu, Tr. 2088-91; CX-223-L.)

E. Same Team Same Rate

150. AIIC requires that all interpreters on a team receive the same rate. Article 6(c) of the 1991 AIIC Standards provides that members shall accept assignments only if all the freelance interpreters of that team are contracted to receive the same amount of remuneration. (CX-2-Z-42; CX-301-Z-33, Z-35 (Bishopp); CX-305-Z-101 (Sy); Weber Tr. 1224-25.) Previous versions of AIIC's Code and its Annexes dating from 1972 contain similar rules. (CX-3-I, Art. 6(c); CX-4-H, Art. 6(d); CX-5-F, Art. 13(c); CXT-6-E-M, Art. 13(d); CX-7-E, Art. 12(d); CX-8-F, Art. 11(d); CX-9-F, Art. 11(d).) AIIC's Recruiting Guidelines require that if a coordinator is a member of the interpreting team, her or his fee as an interpreter shall be the same as the other interpreters on the team. (CX-1-Z-49.)

151. AIIC's rule that members of the same team receive the same pay did not apply when interpreters were recruited for an "exotic" language. (CX-2-Z-42, Art. 6(c); CX-301-Z-33, Z-35 to Z-36 (Bishopp); CX-300-Z-82 (Motton).) This exception applies to languages like Russian, Japanese, or German for which "there is

difficulty finding interpreters." (CX-301-Z-33, Z-35 to Z-36 (Bishopp); CX-300-Z-82 (Motton).)

152. AIIC's "same team same rate" rule, according to AIIC's past-president, Mr. Thiery, means that conference interpreters are paid "the same daily remuneration at the start of one's career as a colleague with twenty years' experience." (CX-203-C.)

153. Except for interpreters working in exotic languages, the experience of members of the U.S. Region has been that interpreters on the same team are normally paid the same rate. (Swetye, Tr. 2819-20; CX-303-Z-110 (Moggio-Ortiz); Hamann-Orci, Tr. 40; Saxon-Forti, Tr. 2681.)

154. AIIC avoids competition from new interpreters through use of its "same team same rate" rule. (CX-220-M.) In 1980, the AIIC Schools Committee declared, "The idea of a beginner's rate in the Nonagreeent Sector is out of the question." (CX-224-W.)

155. AIIC's rules which specify that members must charge at least the AIIC rate, and that all members of an interpretation team be paid the same rate, also affect prices paid to non-members and intermediaries pay AIIC rates to non-members. (Wu, Tr. 2085-86; Jones, Tr. 694; Neubacher, Tr. 763-64.

156. The rule also discourages AIIC members from working with undercutters. One interpreter explained that, "Even if I were recruited to work with undercutters, I couldn't accept according to AIIC rules because I would be paid more than they would." (CX-231-Q.)

157. AIIC's rule requiring all members of an interpretation team to be paid the same rate reinforces the assurance that members are adhering to the rates and rules generally. (Wu, Tr. 2101.) It also helps AIIC members detect cheating by making prices more easily observed and compared. (Wu, Tr. 2103.) It helps AIIC members deter entry by novices gaining experience by working for lower rates. (Wu, Tr. 2104-05.)

F. Team Size and Hours of Work

1. History

158. AIIC rules specify the number of hours that members will work in a single day. Article 4 of AIIC's 1991 and 1994 Standards, entitled "Definition of the interpreter's working day," provides, "The

normal duration of an interpreter's working day shall not exceed two sessions of between two-and-a-half and three hours." (CX-2-Z-42; CX-1-Z-45.) The six hour length of day rule applies to simultaneous, consecutive, or whispered interpretation. (CX-1-Z-45; CX-2-Z-42.)

159. AIIC has rules on the number of interpreters to be hired per job per number of languages used at a conference. (Article 5 of the 1991 Standards; CX-2-Z-42.) Article 8 requires that members charge the standard rate (F. 90), and sets the team size. (CX-2-Z-42; F. 160-62.)

160. Article 11 of the 1991 Standards provides for teams of simultaneous interpreters: "As a general rule, a team is composed of at least two interpreters per language and per booth." (CX-2-Z-44.) Article 11 also contains a table "that must be respected" that specifies the number of target and source languages used in the conference room, the number of booths, and the number of interpreters "at the standard rate." (CX-2-Z-44 to Z-45.) For a one-language conference, the table specifies that if the interpretation is into one other language there be two interpreters at the standard rate, and if the interpreteration is into two other languages there be four interpreters at the standard rate. (CX-2-Z-45.) For a two-into-two language conference, the table calls for three interpreters. A three-into-three-language conference requires five interpreters. (CX-2-Z-45.)

161. Article 9 of the 1991 Standards provides for consecutive interpreters with two languages being interpreted into two, the minimum number of interpreters required is two at the standard rate. If the number of languages used is three, the minimum number of interpreters is three at the standard rate. (CX-2-Z-43.)

162. Article 10(a) of the 1991 Standards provides that for whispered interpretation a conference of one or two languages there be two interpreters "remunerated at least at the standard rate." (CX-2-Z-43.)

163. The 1994 Standards retain the identical team size requirement as the 1991 Standards. (CX-2-Z-43.) However, in Article 6 of the 1994 Standards references to the standard rate are removed, and makes no mention of having one interpreter for whispered interpretation in certain circumstances. (CX-1-Z-42.)

164. Versions of the AIIC Code or its Annexes, back to 1972, specified the number of interpreters for a conference. (CX 3-K to M; CX 4-I to K; CX 5-F, J to K; CX 6-E, J to K; CX 7-C, H to J; CX 8-D, H to J; CX 9-D.)

165. Article 6(a) of the 1991 Standards provides that "remuneration shall be on an indivisible daily basis." (F. 120.)

166. Many AIIC interpreters charge for overtime when working beyond six hours. (Neubacher, Tr. 767/19 to 770/5, 781/17-24, 804/18 to 805/4; Jones, Tr. 750/5-8; Weber, Tr. 1189/25 to 1190/7; Davis, Tr. 860/22 to 862/8; Clark, Tr. 636/2-8; Citrano, Tr. 539/20-24, 542/11 to 544/11, 544/25-546/20; Luccarelli, Tr. 1662/3 to 23; CX-2330 to CX-2336; Saxon-Forti, Tr. 2697-99; CX-2596-B; Wu, Tr. 2238/8-2239/7; F. 343.)

167. The AIIC standard form contract defines the length of the day as six hours, and members have used it to charge for overtime. (CX-306-Z-9/13 to Z-10/2, Z-55/6 to Z-56/3, Z-61/13 to 22, Z-63/8 to Z-64/7, Z-65/19 to Z-66/24, Z-71/13 to Z-72/23 (Weide); CX-2347-B; CX-2348-B.)

168. AIIC's rules allow members to work beyond the hours specified by AIIC as long as they are paid for overtime. (CXT-6, p.6; CX-221-Z-9 to Z-10; CX-2064-C.)

169. Articles 9, 10 and 11 of the 1991 Standards list the number of interpreters to be used for particular numbers of language combinations "at the standard rate." (CX-2-Z-43 to Z-44.)

170. In the 1970's, AIIC maintained two team size tables for simultaneous interpretation that set forth the number of interpreters to be hired for a conference. There was the "small team" (or in French "petite équipe,") and the "large team" (or in French "grande équipe)." (CX-9-I, J; CX-6; Lateiner, Tr. 912/19 to 914/23; Weber, Tr. 1132/20 to 1133/21.) For simultaneous interpretation going from two languages into two languages, AIIC's tables called for higher remuneration per interpreter for a conference using two interpreters, and lower remuneration when using three or four interpreters. (CX-9-I, J; CX-6-J, K, CXT-6-E to M, pp. 6-7; Lateiner, Tr. 912/19 to 914/23; Weber, Tr. 1134.) A higher rate applied to the small team size table, ostensibly, because the workload was greater when an interpreter was working in a small team. (Lateiner, Tr. at 913/5 to 916/3; Weber, Tr. 1134/7-19; CX-300-Z-106/3-16 (Motton).) The small team rate was 160% of the large team rate. (CX-9-J; CX-2461-A (1990).) Prior to 1981, AIIC required interpreters working alone in consecutive to charge twice the large team rate (200%). (CX-6-J; CXT-6-E-M, p.6.)

171. The U.S. Region decided not to adopt the small team in the United States. (CX-211-C; CX-405-C; CX-407-F to G.) At the U.S. Region's November 1975 meeting, the U.S. Region voted unanimously to "remind AIIC in general that it never had the petite equipe and is determined to expose all outside interpreters who accept the practice in our Region." (CX-405-C.) Its warning was published in the AIIC Bulletin. (CX-210-E.) AIIC published rate sheets entitled "Local Conditions in the U.S.A." that set forth a single rate of remuneration when working in the U.S. rather the small team rates and large team rates as published for other regions. These sheets contained the U.S. Region's team size rules. (CX-50; CX-56.)

172. The varying systems of team configuration and remuneration for small and large teams became too complicated. AIIC found that the system resulted in "grey areas" where there was competition among interpreters. (CX-220-V, Z-29 to Z-32, CXT-220-Z-29 to Z-32 at 1.) Competition in the application of the two team size tables in the private sector led to undercutting. (CX-206-B-2; CXT-206-B-2.)

173. The single team size table was meant to simplify the teams and remuneration and increase interpreter incomes and rates. (CXT-220-Z-30, p.2; CX-225-B.) The AIIC Council wanted to standardize the system of teams and remuneration to get rid of competition regarding team size. (CXT-206-B-2 at 1; CXT-220-Z-29 to 32 at 2; CXT-224-Z-4.)

174. The 1981 General Assembly voted to retain the "two-tiered" system, but dispensed with the terms "small team" and "large team," publishing new team size tables designating the number of interpreters needed at either the "standard rate" or the "base rate." (CX-224-K; CX-226-U to V.) The standard team size table increased the number of interpreters needed in the former small team table for two-into-two languages conferences from two to three interpreters and from four to five interpreters for a three-into-three language conference using simultaneous interpretation. The new team size table provided, however, that one less interpreter would be needed for two language and three language conferences that were of short duration. (CX-2-Z-46; CX-224-K; CX-5-J to K.) Thereafter, AIIC's "market surveys" set forth a "standard rate" and a "base rate" corresponding to the team size tables in AIIC's professional standards. (CX-71 to CX-74; CX-76 to CX-83; CX-5-I; CXT-6-E to M, p.6.)

175. In 1991 the General Assembly adopted a single team size table for simultaneous interpretation. Most regions had already

abolished the old "small team" by then. (CX-260-Z-88.) The 1991 Basic Texts retained the earlier "standard" team size table setting forth the minimum number of interpreters needed at the standard rate. These texts, however, eliminated the table with larger team sizes charged at the base rate. (CX-2-Z-45; CX-260-Z-88, Z-94; CX-256-Z-28, Z-32.)

176. AIIC team size rules prohibit interpreters from working alone, and interpreters working in the same booth take turns at the microphone. (Moser-Mercer, Tr. 3450/4 to 23; CX-302-Z-86/2 to 87/19 (Luccarelli).) Team size rules provide for interpreter relief, so during a working day interpreters spend no more than three hours interpreting. (Moser-Mercer, Tr. 3450/4 to 23; Luccarelli, Tr. 1617/15 to 18/19; CX-302-Z-86/2 to 87/19 (Luccarelli).)

177. The team size and length of day rules affect workload. The number of interpreters in a bilingual meeting in the United States depends upon the length of the meeting. (Swetye, Tr. 2776/4-14.) For two-language conferences, three interpreters are required for a full-day meeting and two interpreters for a meeting lasting half a day or no more than four hours. Six interpreters are required for a three language conference. (CX-439-B, D to F; CX-301-Z-152.46 to Z-152.48 (Bishopp); Weber, Tr. 1132/20 to 1133/21.)

2. Compliance

178. Interpreters have refused to work for intermediaries under working conditions that exceed AIIC's team size and length of day rules. (Neubacher, Tr. 778/21 to 779/7; Jones, Tr. 694/13 to 695/15, 696/13 to 697/9, 700/11-16; Davis, Tr. 839/19 to 840/1, 869/22 to 870/2; Clark, Tr. 601/5-24, 614/22 to 615/20.) During the 1984 Olympics, a team leader and AIIC member pulled the interpreters from a meeting that continued for more than six hours, because that is what the AIIC rule says. (Weber, Tr. 1253/13-1255/15.) AIIC members have charged overtime for work in excess of six hours. (F. 166-68, 343.)

179. AIIC members adhere to AIIC's team size table. (Luccarelli, Tr. 1669/17-19; Hamann-Orci, Tr. 44/9-23; CX-306-Z-55/6 to Z-56/3, Z-65/19 to Z-66/24, Z-71/13 to Z-72/23 (Weide); CX-2347-B; CX-2348.)

180. In 1988, the U.S. Region asked the AIIC Council for a waiver to allow an interpreter to work alone for up to 40 minutes, which the Council granted. (CX-432-G; CX-435-A; CX-301-Z-152/24 (Bishopp); Luccarelli, Tr. 1788/5 to 1789/10; CX-300-Z-34/15 to Z-35/2 (Motton).)

181. TAALS wrote to Wilhelm Weber questioning his proposed hours of work and team size for the 1984 Olympic Games as a possible violation of the TAALS/AIIC codes. (CX-1248-A.) AIIC also wrote a letter warning him to conform to AIIC's code. (CX-1253, CXT-1693-A-C; Weber, Tr. 1223/14 to 1224/20, 1226/2 to 1228/17.) An AIIC member objected to a contract offered by Mr. Weber to provide interpretation services at the Olympics with seven hour days. (CX-1300-A; Weber, Tr. 1252/22 to 1253/11.)

182. In 1985, AIIC reprimanded U.S. Region member Marc Moyens in the AIIC Bulletin for "pushing the limit of" the Code, "concerning the composition of teams that lie behind the team strength tables." (CXT-239-I.) The Canadian Region complained to AIIC and TAALS that a member of the U.S. Region, Jeannine Lateiner, organized a conference in Canada using a petite equipe team size when Canada did not use a petite equipe. (CX-1066-D; CX-1086; CX-1090; CX-1100; Lateiner, Tr. 901/8-904/11, 909/13-910/8, 946/2-947/17.)

183. The U.S. Region decided at its November 23, 1991, meeting to send the table of manning strength to all members of the region. (CX-439-B.)

3. Effects

184. To the extent that interpreters use it to limit the length of their working day, AIIC's "normal working day" rule reduces output. (Wu, Tr. 2125; Silberman, Tr. 3122.)

185. The AIIC rule defining the length of the normal working day fixes price, specifying the time period for which the daily rate is to be paid, after which overtime is charged. (Wu, Tr. 2123-25.) An agreement not to work more than six hours a day without being paid overtime could reduce competition. (Silberman, Tr. 3122.)

186. AIIC's "normal working day" rule helps AIIC detect cheating on the price agreements by standardizing the working day, an observable aspect of output. (Wu, Tr. 2123.)

187. AIIC's team size rules restrict interpreters from competing bi-directionally (French to English and English to French). (Wu, Tr. 2126-27.)

188. AIIC's team size rules reduce output, specifying the work that an interpreter will perform. By raising price, the rule reduces output. (Wu, Tr. 2128-29.) AIIC's team size rules fix price, specifying the amount of output for which the rate is to be paid. Interpreters have worked on smaller teams for additional compensation. (Wu, Tr. 2127-28.)

189. AIIC's team size rules help AIIC detect cheating, specifying the number of interpreters required. Deviation would be observable. (Wu, Tr. 2127.)

190. AIIC's team size and length of day rules increase consumer costs. (Jones, Tr. 702/8 to 703/12; Clark, Tr. 627/22 to 632/3.) The U.S. State Department's costs of interpretation would increase with a six-hour rule because it would have to hire additional interpreters. (Obst, Tr. 300/20 to 301/4.)

4. Health and Quality

191. The 1994 General Assembly inserted a justification for its length of day rules by alluding to "the principles of quality and health." (CX-1-Z-42 to Z-45.) References to "quality and health," were added to the team size and hours of work provisions after the FTC investigation began. (F. 537-39; CX-1-Z-42 to Z-44.)

192. Respondents have no studies addressing performance falling during the work day (Moser-Mercer, Tr. 3431/11-15), or for interpreters working outside the team strength tables. (Moser-Mercer, Tr. 3431/16-20.) No scientific studies support respondents' health and quality claims with respect to conference interpretation. (Parasuraman, Tr. 3804/12-20, 3702/6-23, 3625/23 to 3630/1.)

193. The United Nations uses a six-hour rule based upon its negotiated agreement with AIIC. (CX-2069-I; Moser-Mercer, Tr. 3539.)

194. As support for the health and quality justifications for the team size and length of day rules, AIIC referred to a memorandum from the United Nations in the 1950's. (CX-305-Z-88/2 to Z-89/8, Z-142/12-14 (Sy); CX-306-Z-94/7-11 (Weide); Saxon-Forti, Tr. 2705/19 to 2706/2; CX-300-Z-48/10-52/2 (Motton).) The 1957 U.N.

Medical Officer's memorandum recommends that issues of workload be handled on an individual basis:

> The question of fatigue due to the length of time on duty in the booths does not lend itself to such general solutions. Some of the interpreters have not found the existing hours of work excessive; others find 1 ½ hours at a time all they can manage efficiently and would even require every third day off. The question of workload therefore is one which should be dealt with administratively on an individual basis, bearing in mind such considerations as the volume of work in particular booths etc. (RX-668 at 2 ¶ 7; Parasuraman, Tr. 3711/21-3713/4; Moser-Mercer, Tr. 3551/20-3552/7.)

195. AIIC's agreements with the International Trade Secretariats, Interpol, and Coordonnees provide that the work day should not exceed seven hours (two sessions of 3 to 3 ½ hours). (CX-2066-B; CX-245-L (International Trade Secretariats); CX-2067 (Interpol); CX-2068 (Coordonnees); Luccarelli, Tr. 1841/22 to 1843/3 (European Union, Coordonnees, and Interpol).) Interpol provides longer coffee breaks. (Weber, Tr. 1843.)

196. AIIC's agreement with the European Commission provides that the interpreter may work up to three sessions a day for three and one-half hours for each session except for sessions beginning after 3:30 p.m, which cannot exceed three hours. Thus, the work shall not exceed ten hours as set forth in the European Commission's regulations for staff and independent interpreters. (CX-2632-B, CXT-2632-B to G, p.1 (European Union); Luccarelli, Tr. 1841/22 to 1842/6 (European Union); Obst, Tr. 300/8-17.)

197. Quality and health do not suffer under AIIC's agreements in the Agreement Sector. The length of day rules and team size tables in these AIIC agreements assure health and quality. (Moser-Mercer, Tr. 3540-3541.)

198. The U.S. State Department expects its conference interpreters to work as long as needed for the conference and does not follow the six-hour rule. (Obst, Tr. 293/3 to 294/4, 295/9-25, 300/8-19.)

199. The number needed and the time they are able to work varies with the interpreters' language skills, experience, and stamina. (Moser-Mercer, Tr. 3479/13-19, 3538/15-23; CX-306-Z-89 (Weide); CX-305-Z-87/4-17 (Sy); CX-300-Z-47/10-24 (Motton); Clark, Tr. 666/5-13.)

200. The number of interpreters needed for a multilingual conference varies depending upon: (a) difficulty of the material, (Weber, Tr. 1151/14 to 1152/9; Obst, Tr. 298/12 to 300/7; Van Reigersberg, Tr. 404/17 to 405/7; Jones, Tr. 697/10 to 698/23; Davis, Tr. 862/10 to 867/19; CX-302-Z-86/2 to 90/18 (Luccarelli); (b) duration of the conference day (Weber, Tr. 1151/14 to 1152/9, 1188/24 to 1189/24; Van Reigersberg, Tr. 435/10 to 436/16); and (c) amount of time each target language is spoken on the conference floor. (Van Reigersberg, Tr. 406/12 to 407/10; Jones, Tr. 697/10 to 698/23, 700/3-10, 748/16 to 749/13; Davis, Tr. 862/10 to 867/19; Clark, Tr. 595/19 to 96/9; Luccarelli, Tr. 1600/8 to 1601/20; 1617/15 to 1618/19.)

201. Intermediaries sometimes ask AIIC members to work beyond AIIC's team size table and length of day rules and believe the quality would remain acceptable. (Davis, Tr. 862; CX-254-C (right column); CX-248-H to I; Weber, Tr. 1188-89; CX-306-Z-4/4 to Z-7/15, Z-8/7 to Z-12/16 (Weide).)

202. In the United States, in 1994 freelance interpreters worked an average of 102 days. (CX-285-F to G.) U.S. interpreters working 160 days per year are in the top quarter in volume of work. (Luccarelli, Tr. 1607-09.)

203. Comparing occupations is accepted scientific methodology for opinions about AIIC's team strength and length of day rules. (Parasuraman, Tr. 3626/19 to 28/21, 3641/16 to 45/22; Moser-Mercer, Tr. 3508/3 to 10/17.)

204. Worker performance may vary with the cognitive demands on the worker. (Parasuraman, Tr. 3797/18 to 98/5.) Cognitive means mental processes of human behavior such as language, reading, memory, and decision making. (Parasuraman, Tr. 3602-25.)

205. Conference interpreting requires cognitive skills of verbal memory, speaking, and reasoning. (Moser-Mercer, Tr. 3417/7 to 19, 3486/25 to 89/13; Parasuraman, Tr. 3647/1 to 48/4, 3655/15 to 83/10.) Interpreters perform cognitive tasks when performing conference interpretation. (Moser-Mercer, Tr. 3486/25 to 88/4; Parasuraman, Tr. 3799/2 to 13.) However, interpreters usually work in half hour shifts and then are relieved by their boothmate. (CX-301-Z-13-14 (Bishopp); CX-300-Z-48 (Motton).) A six-hour day means that interpreters are on the microphone three hours a day. Interpreters may work even less because they are not interpreting

when their target language is being spoken on the floor. (Luccarelli, Tr. 1617/15 to 18/19.)

206. Air traffic control and piloting involve high cognitive demand. (Moser-Mercer, Tr. 3509/10 to 09/17; Parasuraman, Tr. 3626/19 to 28/21, 3630/2 to 31/7, 3635/9 to 36/3.) Air traffic controllers engage in cognitively demanding tasks. (Parasuraman, Tr. 3632/22 to 34/11; CX-2636.) Likewise, a pilot engages in cognitively demanding tasks. (Parasuraman, Tr. 3637/3 to 19.)

207. Dr. Parasuraman, complaint counsel's expert, compared the cognitive demands of conference interpreting (both simultaneous and consecutive), air traffic controllers, and pilots regarding whether AIIC's team size tables and length of day rules are reasonably necessary for quality and health of the interpreter. (Parasuraman, Tr. 3625/12 to 22, 3626/19 to 28/21, 3629/7 to 30/11, 3702/24 to 04/2.) He used scientific methodology to compare performance of occupations. (Parasuraman, Tr. 3627/12 to 28/21, 3639/17 to 41/23, 3648/5 to 49/14, 3703/10 to 04/2; CX-2639.) The task analysis compared the cognitive demand imposed by 17 job characteristics in each occupation. (Parasuraman, Tr. 3648/5 to 21, 3649/10 to 53/19; CX-2639; CX-2635.)

208. Dr. Parasuraman found that the cognitive demand on conference interpreters for consecutive or simultaneous interpretation is not as high as the cognitive demand on air traffic controllers and pilots. (Parasuraman, Tr. 3626/19 to 28/21, 3639/17 to 40/4, 3649/10 to 14, 3655/3 to 14, 3683/11 to 84/3, 3655/15 to 83/10; CX-2639.)

209. Studies of the performance and health of air traffic controllers and pilots show that they do not decline for the first eight to ten hours of work. (Parasuraman, Tr. 3626-28; CX-2635.) Dr. Parasuraman believed that interpreters' performance would not decline for an eight to ten hour work day. He concluded that respondents' six-hour work rule is not reasonably necessary to maintain quality. (Parasuraman, Tr. 3622/13 to 22, 3692/7 to 15, 3692/25 to 93/11, 3693/23 to 24, 3694/19 to 95/9, 3700/20 to 01/4.) Studies of air traffic controllers' health show no link between adverse health effects and the occupation. (Parasuraman, Tr. 3713/6 to 14/15, 3704/20 to 05/20; CX-2635-B.) Dr. Parasuraman believed that there is no link between the occupation of conference interpreter and adverse health effects. He concluded that the six-hour work rule is not reasonably necessary to protect interpreters' health. (Parasuraman, Tr. 3628/22 to 29/6, 3704/20 to 05/20, 3714/16 to 15/7.)

210. AIIC commissioned a study of stress among interpreters. The 1981 Cooper and Cooper study arose after AIIC adopted its six-hour rule in 1979 (F. 158), but never examined the issue of the length of the work day or the performance of interpreters. (RX-147-48; Parasuraman, Tr. 3705/21 to 3709/7; Moser-Mercer, Tr. 3557/18 to 61/11.) It did not include any physiological examination, but used a questionnaire sent to AIIC members. (RX-147-48; Parasuraman, Tr. 3705/21 to 3709/7; Moser-Mercer, Tr. 3557/18 to 61/11.) The study concluded that interpreters' occupational stress was about the same as experienced by business executives. (RX-147-48; Parasuraman, Tr. 3705/21 to 3709/7; Moser-Mercer, Tr. 3557/18 to 61/11.)

211. Some AIIC members recognize that the team strength tables and length of day rules are exceptionally protective when conference interpreting is compared to other occupations. (CX-247-Y; CX-248-Z-7.) One commented that:

> No profession that I know of has a 21-hour working week. And no matter how great the mental stress, nervous tension, etc. of our job, there are plenty of other professions where working conditions are just as trying, physically and mentally, where strains, stresses and responsibilities are considerably greater and far more sustained, remuneration no better and hours far longer than ours. To claim that our profession is unique on any of those counts is ridiculous. (CX-215-D; CX-248-Z-7; CX-247-Y.)

G. Professional Address Rule

1. History

212. AIIC rules require that members declare a single professional address, keep such address for at least six months, and provide three months' notice before any change. (CX-300-Z-39 to 41, Z-71 to Z-72 (Motton); Bowen, Tr. 1008, 1012; CX-301-Z-22 to Z-23 (Bishopp); CX-2-Z-40; CX-1-Z-40.)

213. The professional address rule has been in effect since AIIC was founded. (CX-2434.)

214. Article 1(a) of the 1991 Standards of Professional Practice states that the declared professional address "shall be the only place on which contracts shall be based." (CX-2-Z-40.)

215. Under AIIC rules, professional address determines when members must charge for travel and rest days. Article 12(a) states, "When an interpreter is recruited to work in a place other than that of

her or his professional address she or he shall receive a remuneration for each day required for travel and rest. . . . This remuneration shall be at least equal to the base rate." (CX-2-Z-40, Z-46.)

216. Under AIIC rules, professional address determines when members must charge per diem or subsistence allowances and train fare or airfare. (CX-2-Z-46; F. 110.) Article 14 requires contracts to include fees "for each journey made between the place of the interpreter's professional address and the conference venue," and sets out the calculation of such fees. (CX-2-Z-47; F. 130.) Article 15(a) states that every contract signed with a member "away from the place of her or his professional address must include payment of travel." (CX-2-Z-48; F. 237.)

217. "Professional address" refers to the location from which an AIIC member is to base travel charges. (CX-268-C; CX-495-P.) For work outside the professional domicile, the interpreter will charge for travel and per diem. (Bowen, Tr. 1008; CX-301-Z-19 to Z-20, Z-21 (Bishopp); Hamann-Orci, Tr. 45.)

218. Each member's professional address is in the AIIC Directory. (CX-2-Z-40; Weber, Tr. 1210-1211; CX-600.)

219. Members are allowed one professional address at a time. (CX-301-Z-19 to Z-20, Z-21(Bishopp); CX-300-Z-38 (Motton); CX-2-Z-40.) Some interpreters have alternating domiciles -- six months in one city and six months in another. (Hamann-Orci, Tr. 46; Bowen, Tr. 1010.)

220. Interpreters' professional addresses are not always where they reside. (CX-302-Z-140 (Luccarelli); Bowen, Tr. 1009; CX-495-P.)

221. Interpreters may declare their professional address away from their home so they get more work "because it would mean that they wouldn't charge for travel." (CX-302-Z-140 (Luccarelli).) However, when interpreters work near their home they charge the client for travel based on their professional domicile, not their residence. (CX-302-Z-140 to Z-141, Z-438 (Luccarelli); CX-2-Z-40; CX-301-Z-20 (Bishopp).)

222. Under the professional address rule, an interpreter with a professional domicile in Brussels, would charge any client in the United States for a round trip ticket between Brussels and the U.S. (Hamann-Orci, Tr. 45.) A member vacationing in Europe, with a professional address in Washington, D.C., could accept a conference interpreting job in Europe by charging for travel from the United States. (CX-301-Z-21 to Z-22 (Bishopp).)

223. Because of this professional domicile rule, Dr. Margareta Bowen, an AIIC member, traveled round-trip between Washington and New York to work a conference in New York but charged the client for roundtrip travel between Vienna and New York because Vienna was her professional domicile. (Bowen, Tr. 1011-12.)

224. The professional address rule protects local interpreters from outsiders who might travel at their own expense in order to work, replacing a local person. (CX-300-Z-42 to 43 (Motton); Weber, Tr. 1213.)

225. An AIIC member, C. Gibeault-Becq., was offered a job in Washington on November 15, 1991. Her professional address would change to Washington on December 20. The U.S. Region Representative suggested that she contact AIIC in Geneva, or "telephone all other colleagues with your language combination in the Washington area, to verify that they were all indeed working on that date." (CX-1471.)

226. Members of the U.S. Region of AIIC testified that it is unethical and unfair to local colleagues for interpreters not to charge for travel when working away from their own professional address. (CX-300-Z-39 (Motton); Hamann-Orci, Tr. 32.)

2. Enforcement

227. Members follow the professional address rule, unless they obtain a waiver. (CX-300-Z-38 (Motton); CX-284-L; Bowen, Tr. 1029-30.) In July 1984, the AIIC Council adopted a policy for granting waivers of the professional address rule and reaffirmed its determination to enforce the rule. (CX-237-H; CXT-237-H.) The AIIC Council issued reprimands for changing professional domicile without providing three-months' advance notice. (CX-237-I; CXT-237-I.)

228. AIIC's Recruiting Guidelines require AIIC members who are recruiting interpreters to apply AIIC rules to non-members. (F. 32.) AIIC construed the professional domicile rule to prohibit Mr. Weber from recruiting an Austrian interpreter, whose parents lived in Los Angeles, to work at the Olympics -- even though the interpreter was planning to travel to Los Angeles at his own expense and avoid lodging costs by staying with his parents. (Weber, Tr. 1211-12)

229. U.S. Region member Wilhelm Weber was accused of violating AIIC's rule on professional domicile. (Weber, Tr. 1264.) In 1983, he transferred his professional domicile for six months from Monterey to Geneva to obtain work. Weber stayed in Geneva for about six weeks and went back to Monterey. (Weber, Tr. 1265.) Weber accepted an interpreting job at a conference in San Francisco, although his professional address was still in Geneva. In July 1984, the AIIC Council threatened to issue sanctions against Mr. Weber for violation of the professional address rule. (CXT-237-H.)

230. The AIIC General Assembly in 1985 voted on whether to expel U.S. Region member Marc Moyens (CX-304-Z-128 (Motton)), for violating the professional address rule, for working for two employers in Europe without charging each for transatlantic travel. (CXT-239-I.) His expulsion was rejected but a Committee of Inquiry recommended that the Council reprimand Mr. Moyens. (CXT-239-I.) He resigned from AIIC. (CX-304-Z-128 (Motton).)

231. On November 30, 1991, the U.S. Region Representative wrote to one member who "without officially notifying AIIC of his change of address" had been working in the New York area although he had a Washington, D.C. professional address. The U.S. Region Representative declared, "this is against our rules." (CX-1470-A; CX-608-Z-221.)

232. The 1994 AIIC Standards retain the professional address rule but not as the basis for calculating travel and subsistence charges. (CX-1-Z-40.)

233. The proposed amendments to the AIIC Basic Texts, "eliminated the monetary conditions while taking care to preserve the great principles which the association holds to, such as professional address. . . ." (CXT-279-K to O, p.4.) In January 1984, the NAS reaffirmed "its moral commitment to the concept and the application of the principle of professional address." (CX-1568-A; Luccarelli, Tr. 1770.)

234. The Council granted a waiver to one member, in January 1995, "allowing her to work four months per year for the Canadian Government while retaining her professional address in Norway." (CX-284-L.)

3. Economic Effect

235. The professional address rule reduces output by protecting local interpreters from competition. (Wu, Tr. 2199-2100.) It discourages out of town interpreters from working at a conference without being paid for travel, and from taking work from local interpreters. (Wu, Tr. 2100-01)

236. The professional address rule also deters cheating by helping members to detect undercutting by out-of-town interpreters in violation of the AIIC rules on fees. (Wu, Tr. 2100.)

H. Travel Arrangements

237. AIIC set rules for travel arrangements. Article 15(a) of the 1991 Standards provides "Every contract signed with a member of the Association for a conference, or a number of immediately consecutive conferences, away from the place of her or his professional address must include payment for travel" by the shortest possible round trip. (CX-2-Z-48.) It further specifies that travel by air shall be first class, business class, or club class and that tickets are not to be restricted to a particular carrier. (CX-2-Z-48.) The rule also requires that for successive conferences away from the interpreter's professional address, unless there is a separate payment for return travel from each conference, the interpreter shall receive a fee and a subsistence allowance for every day between conferences. (CX-2-Z-48.)

238. In the 1994 Standards, AIIC has replaced the former provisions with the statement in Article 10, "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey," and Article 9 provides, "Except where the parties agree otherwise, members of the Association shall be reimbursed their travel expenses." (CX-1-Z-45.) AIIC's standard form contract continues to provide for first class travel on journeys of long duration. (CX-2059-B.)

239. AIIC's rule concerning travel arrangements was binding in the U.S. The 1991 paper, "Working conditions for interpreters in U.S.A.," the purpose of which was to ensure the uniform application in the U.S. of the AIIC rules, states, in ¶ 6, that "In addition to professional fees, each interpreter shall be entitled to: return economy air fare for trips under 8 hrs. Restricted tickets are not acceptable. For trips longer than 8 hrs. Interpreters are entitled to business class or

first class tickets. When train service is more convenient, first class tickets." (CX-439-D to E.)

240. AIIC's travel rules help its members maintain their agreement by deterring cheating. (Wu, Tr. 2093-94.)

I. Cancellation Fees

241. AIIC requires that members be paid even if the event for which they are hired is canceled. Article 2(c) of the 1991 Standards provides: "Any contract for the recruitment of a member of the Association must specify that in the event of the organizer canceling all or part thereof, whatever the reason for and the date of cancellation, the interpreter shall be entitled to the payment of all fees contracted therein (working and non-working days, briefing days as well as days allowed for rest and travel) in addition to the reimbursement of any expenditure already incurred." (CX-2-Z-41.) Article 2(d) of the 1991 Standards further states that the interpreter cannot be forced to accept an alternative job to mitigate the organizers' liability. (CX-2-Z-41.)

242. When Wilhelm Weber began to organize interpretation services for the 1984 Los Angeles Olympics, he did not offer the standard AIIC cancellation clause to interpreters. (Weber, Tr. 1235-36, 1244-45.) When news of this reached AIIC, AIIC warned Mr. Weber about his breach of the rules. (CX-1693-A to C; CXT-1693-A to C; Weber, Tr. 1243-48, 1255-56.) As a result of the pressure by AIIC, an "acceptable" cancellation clause was included in the Olympics contracts and Mr. Weber received a reprimand from AIIC for his actions. (Weber, Tr. 1257; F. 356.)

243. Other AIIC interpreters have relied on AIIC's standards to obtain cancellation clauses in contracts. Ursula Weide wrote a June 28, 1992, letter relying on the AIIC standard contract cancellation clause in requesting a fee from a person who had tried to put together a team of interpreters for an arbitration, but who postponed the engagement. (CX-2571-A to B.)

J. Recording

244. AIIC requires that fees should be charged for recordings of the interpretation at conferences. Article 2(b) of both the 1991 and 1994 Standards provides: "Any contract for the employment of a member of the Association must stipulate that the interpretation is

intended solely for immediate audition in the conference room. No one, including conference participants, shall make any tape recording without the prior consent of the interpreters involved, who may request appropriate remuneration for it, depending on the purpose for which it is made and in accordance with the provisions of international copyright agreements." (CX-2-Z-41; CX-1-Z-40.) AIIC's rule on recordings is binding in the United States. (Weber, Tr. 1251.)

245. Interpreters' practice of charging for recordings goes back to the 1979 Code. (CX-6, CXT-6-E to M, p.1.) The April 5, 1989, AIIC Bulletin reported that members at the NAS meeting held in Dublin in January voted that recordings not for resale should be charged at 25% of the daily rate, and recordings for resale, at 100% the daily rate. (CX-253-D; CXT-251-W at pp.2-3.)

246. AIIC's rule on recordings helps the AIIC agreement by discouraging potential undercutting on the minimum daily fee by waiving a charge for recordings. (Wu, Tr. 2119.)

K. Charity

247. AIIC limits free charitable work by its members. Article 7 of the 1991 Basic Texts, Standards of Professional Practice, titled "Non-Remunerated Work," states: "Members of the Association may provide their services free of charge, especially for conferences of a charitable or humanitarian nature, provided they pay their own travel expenses and subsistence (subject to the granting of a waiver by the Council beforehand). All the other conditions laid down in the Code of Professional Ethics and in these Standards of Professional Practice must be observed." (CX-2-Z-42; CX-1-Z-41; CX-9-F; CXT-6-E to M, p. 4; Weber, Tr. 1232.)

248. The 1983 AIIC General Assembly in Berlin passed a resolution that student interpreters should work only at conditions of remuneration that are in conformity with the professional code of conduct. (Weber, Tr. 1231; CX-234-J to K.) The resolution further provided that the students should work free of charge only if they pay for their own travel costs and per diem. (Weber, Tr. 1231-32.)

249. The student interpreters at the 1984 Olympics did not comply with the Code, because the LAOOC paid the student interpreters' airfare from Monterey, CA to Los Angeles, CA. (Weber,

Tr. 1232-33.) As a result, the Council determined that a letter of warning should be sent. (Weber, Tr. 1271-72.) U.S. Region Representative Jean Neuprez then wrote to Wilhelm Weber, who was responsible for coordinating the Olympics' interpretation services, on June 16, 1984, warning that his actions "go against a number of principles and rules of our profession." (CXT-1320-A to C, p.1.)

250. AIIC's restrictions on pro bono work deter entry by novice interpreters working without charge. Absent the rule, student or novice interpreters could seek to work without charge in order to gain experience and make contacts in the profession. (Wu, Tr. 2109.)

L. Commissions

251. AIIC prohibits its members from giving or receiving commissions. Paragraph c)4 of the AIIC Guidelines for Recruiting Interpreters, under "Duties Towards the Profession," provides that "Members of the Association shall not accept or give commissions or any other rewards in connection with team recruitment or the provision of equipment." (CX-1-Z-49; CX-2-Z-52; CX-301-Z-100 (Bishopp); Luccarelli, Tr. 1690-1691.) Article 6(d) of the 1991 Standards states that: "Remuneration shall be net of any commission." (CX-2-Z-42.)

252. AIIC's rule against commissions prohibits granting secret discounts. The ban on commissions is based on a practice in Europe of an organizing interpreter charging a commission "under the table" as a condition of hiring an interpreter. (Luccarelli, Tr. 1691.)

253. The March 1981 AIIC Bulletin reports a meeting involving AIIC members where the practice of intermediaries taking a commission was "heartily condemned" and states, "There is no reason why an intermediary, AIIC member or otherwise, should not request a fee from the organizers for expenses incurred in recruiting a team, but this must be charged to the organizer and clearly shown as distinct from the interpreters fees and never deducted from the interpreters fees." (CX-227-J.)

254. AIIC's ban on commissions deters entry by preventing new interpreters from gaining experience by paying commissions to intermediaries. (Wu, Tr. 1251.)

M. Package Deals

255. Paragraph b)7 of the AIIC Guidelines for Recruiting Interpreters, under "Duties Towards Colleagues," provides that "Members of the Association acting as coordinators shall not make 'package deals' grouping interpretation services with other cost items of the conference and shall in particular avoid lump-sum arrangements concealing the real fees and expenses due individual interpreters." (CX-1-Z-49.) Similarly, paragraph c)1 states, in part, "The provision of professional interpretation services is always kept clearly separate from the supply of any other facilities or services for the conference, such as equipment." (CX-1-Z-49.) Paragraph b)5 of the AIIC Guidelines for Recruiting Interpreters, provides, "Interpreter's fees shall be paid directly to each individual interpreter by the conference organizer." (CX-1-Z-49.)

256. AIIC opposed package deals, and required direct contracts between the interpreter and the conference sponsor. (CX-301-Z-100 (Bishopp); Luccarelli Tr. 1692) A provisional paper on AIIC working conditions for interpreters in the United States, prepared for and discussed at meetings of the U.S. Region in 1990 and 1991, stated, "All contracts shall be concluded directly between the conference and the interpreter; the conference shall make payment directly to the interpreter." (CX-439-B, D-E; CX-435-A.)

257. AIIC feared that "[n]on-interpreter intermediaries (such as multinational language schools) and commercial intermediaries (providers of temporary labour, translation bureaux) are eating into our markets. They all facilitate the gradual mushrooming of a 'grey market'." (CX-237-B.)

258. The Council issued an emergency suspension against a member for failing to provide a direct contract to the interpreters on a team that she was organizing to perform conference interpretation work. (CXT-240-G.) At its July 1985 meeting, the Council decided to lift her suspension as soon as she "submitted to the AIIC her written promise to respect henceforth all commitments incumbent upon her as member of the Association." (CXT-240-G.)

259. An AIIC founding member and past president, Christopher Thiery (Weber, Tr. 1137), wrote in the Bulletin in 1978 that the danger of "losing our freedom to establish our own rates" would come from losing direct contact with the people who used interpretation services. "We must never forget that when the chips are down an intermediary may well have to cut costs to stay in business. And if

we happen to be one of the 'costs,' then that's just too bad for us." (CX-219-U; CX-616-Z-53.) He wrote earlier, "The danger lies for us in the presence of the intermediary, whose interests can never be identical to ours. . . . Once we accept impresarios and professional conference organizers and conference halls as our employers, we lose control over the situation and end up by being paid what they decide is good for us. Hence, the gradual introduction of the direct contract and direct payment principle. . . ." (CX-203-C.)

260. Clients prefer contracting through intermediaries because intermediaries can more readily be held financially liable if the conference is unsuccessful and provide quicker response time to requests for services than individual interpreters. (CX-227-J; CX-1633-B.)

261. AIIC's ban on package deals helps AIIC detect cheating on the AIIC price agreements by requiring that prices for interpreters be separately stated, and therefore permitting those prices to be monitored. (Wu, Tr. 2153.) AIIC sought "to avoid letting happen to conference interpreters what had happened to other 'interpretive' professions (actors, musicians, etc.): to fall into the hands of commercial impresarios with all that would entail: paying commissions, varying rates of remuneration with the creation of 'divas.' Hence direct contract rules with equal remuneration for all the members of a given team." (CXT-233-J & M.)

N. Exclusivity

262. Paragraph c)3 of the AIIC Guidelines for Recruiting Interpreters, under "Duties Towards the Profession," provides, "The conference interpreter makes it clear that he or she does not 'provide' interpreters, but that she or he recommends them and negotiates contracts on their behalf. She or he avoids creating the impression that certain interpreters are available only through him or her or that she or he controls teams of fixed composition." (CX-1-Z-49; CX-256-Z-45; CX-214-N; CX-5-Q.)

263. In the United States, recruiting interpreters do not exclusively represent interpreters and no AIIC member has established a commercial interpretation firm with interpreters as employees. (Luccarelli, Tr. 1693-94; CX-301-Z-105 (Bishopp); CX-428-A.)

264. AIIC's prohibition of exclusivity helps the AIIC agreement by preventing the formation of firms of interpreters. (Wu, Tr. 2147.) Reduction in product heterogeneity makes it easier for members to agree. (Wu, Tr. 2147.) AIIC's prohibition of exclusivity also reduces output by preventing the formation of interpreter firms, which might be an efficient means of providing interpretation services. (Wu, Tr. 2149.) It also deters entry by new interpreters benefitting from the reputation of a firm and letting them enter the market, gain experience and develop a reputation. (Wu, Tr. 2148.)

O. Trade Names

265. Paragraph c)1 the AIIC Guidelines for Recruiting Interpreters provides, "The coordinating interpreters's conduct must always be in keeping with the dignity of the profession. She or he acts under her or his own name and does not seek anonymity behind the name of a firm or organization, although co-operative services may be offered by a group of interpreters who carry on business under a group name." (CX-1-Z-49.)

266. Cooperative services as referred to in this rule, means that a group of interpreters set themselves up as an office. There are no such "cooperatives" of interpreters in the United States. (CX-301-Z-104 (Bishopp).)

267. The 1983 Code of Ethics provided that members had a duty towards the profession not to seek anonymity behind the name of a firm or organization. (CX-5-Q.)

268. AIIC's prohibition of trade names helps reduce competition among AIIC members by reducing the ability of members to differentiate themselves in the minds of consumers. The restriction therefore reduces product heterogeneity, which makes it easier for members to reach and maintain price agreements. (Wu, Tr. 2146.) It deters entry by new entrants trying to make themselves known. (Wu, Tr. 2147-48.)

P. Portable Equipment

269. A "bidule," is a miniature portable interpretation system small enough to be carried in a briefcase. (Davis, Tr. 846-47; CX-302-Z-80 (Luccarelli); Hamann-Orci, Tr. 47.) Portable booths are versions of permanent booths. (Luccarelli, Tr. 1699-1700.)

270. AIIC restricts members' use of portable equipment. AIIC's Code of Ethics prohibits members from simultaneous interpretation without a sound booth except when the quality of the interpretation work is not impaired. (CX-1-Z-38; CX-301-Z-133 to Z-134 (Bishopp).)

271. In January 1991 the AIIC Council adopted standards governing members' use of portable electronic simultaneous interpretation equipment. (CX-266-Z-14; CX-2-Z-38; CX-301-Z-15, Z-133 (Bishopp).) Those standards permit use of portable equipment for visits to factories, hospitals or remote field visits. (CX-266-Z-14.) The standards limit the use of portable equipment to short meetings (two hours) with 12 or fewer participants. (CX-266-Z-14; CX-267-F; CX-301-Z-133 (Bishopp).) The standards mandate at least two interpreters when portable equipment is used. (CX-266-Z-14; CX-267-F.)

272. The Council standards must be met before members may accept an interpretation assignment with portable equipment. (CX-266-Z-14; CX-300-Z-70 to Z-71 (Motton).)

273. Portable equipment costs less. (CX-270-G.) The rent of portable equipment is less that the cost for standard booths. (CX-302-Z-282 to Z-283, Z-804 (Luccarelli); Clark, Tr. 634; Obst, Tr. 303.) No technician is required. (Hamann-Orci, Tr. 47; Obst, Tr. 307/5; Neubacher, Tr. 778; Clark, Tr. 632.)

274. The NAS agreed that use of the "bidule" "must be strongly discouraged." (CX-259-U.) In January 1992 in Washington, D.C., the NAS exhorted members to dissuade the use of portable equipment. (CX-270-G.)

275. AIIC's rules against portable equipment reduce output by limiting the use of interpretation technology. (Wu, Tr. 2139.) The rules force adherence to AIIC's team strength tables for simultaneous interpreting. (F. 175, 188-90.) The rules reduce output by specifying the number of interpreters required, limiting the amount of work an individual interpreter will perform, raising the price of the interpretation services, and aiding in the detection of cheating. (Wu, Tr. 2123, 2127-29, 2139.) Specifying the time an interpreter may work (two hours), AIIC's rules against portable equipment reduce output. (Wu, Tr. 2139, 2125; Silberman, Tr. 3122.)

Q. Other Services

276. The AIIC model contract states: "The functions of the interpreter shall exclude the written translation of texts; they shall therefore be confined to the interpretation of spoken proceedings and shall not cover any event not specifically provided for in the contract." (CX-2347-B, ¶ 2; CX-2060-D, ¶ 2.)

277. The rule against performing other duties does not discourage interpreters from translating on weekends or on breaks when they are not interpreting. (CX-301-Z-26 (Bishopp).) Members occasionally depart from this rule without punishment from AIIC. (Luccarelli, Tr. 1672.)

278. Harry Obst, the Chief Interpreter of the State Department, and a highly credible witness, sometimes asks an interpreter to translate a written document when a translator is unavailable, "and they usually do." (Obst, Tr. 301-02.)

279. The intermediary, Metropolitan Interpreters and Translators, sometimes asks interpreters to interpret when clients are checking in, or at the gift shop. While no interpreter has directly refused, some have disappeared "when asked to perform such services." (Citrano, Tr. 523-24.) AIIC and TAALS members are a little more likely to avoid such extra services. (Citrano, Tr. 524.)

R. Moonlighting

280. AIIC's "Guidelines for Recruiting Interpreters" requires AIIC members to hire: "freelance interpreters rather than permanents having regular jobs." (CX-1-Z-48; CX-2-Z-51; CX-6-O.)

281. AIIC's "Staff Interpreters' Charter" provides that staff interpreters should act as interpreters outside their organization "only with the latter's consent, in compliance with local working conditions, and without harming the interests of the free-lance members of AIIC." (CX-1-Z-53; CX-2-Z-54.)

282. "Moonlighting" refers to an interpreter who already has permanent employment seeking temporary employment elsewhere. (CX-305-Z-99 (Sy); CX-304-Z-84 to Z-85 (Motton).)

283. AIIC members understood the provisions of AIIC's rules regarding moonlighting to mean that permanents should not perform freelance work unless no freelance interpreter is available. (CX-301-Z-106 to Z-107 (Bishopp); CX-300-Z-121 to Z-122 (Motton); Lateiner, Tr. 907/4-5.) At the U.S. Region meeting in 1988, AIIC

members were warned: "[O]ur permanent colleagues are reminded that if they are offered a contract outside their organization they should check first whether there are any free-lance interpreters available with the required language combination. They have a permanent, steady job and freelancers don't. Therefore they should show some 'restrain' [sic] in the private market." (CX-432-M.)

284. The majority of AIIC's members are freelancers. In 1981 only 17% of AIIC members were Staff interpreters. (CX-230-N; Stip. 57, 58, 60). At its November 1975, and 1976 meetings, the U.S. Region agreed that staff interpreters should not work in the private sector unless all freelancers were already engaged. (CX-405-C; CX-407-F.)

285. In 1980, Jeannine Lateiner was investigated for hiring permanent interpreters instead of local freelance interpreters. (Lateiner, Tr. 905; CX-1138-A to B.) The next year, AIIC's Council stated that: "The Council meeting of July 1981 had condemned the practice of moonlighting and had called for restraint from retired staff interpreters, wishing to do freelance work despite their pensions." (CX-230-M.) In 1984, the AIIC Council suspended three members (CX-236-C), following a case of moonlighting which attracted a lot of attention in Switzerland. (CX-1256-B.) In 1986, after press articles and the Council action, moonlighting practically disappeared in Geneva. (CX-241-B to C.)

286. The NAS has asked permanents to show restraint in accepting work in the Non-Agreement Sector (CX-240-I), discussing what it called "the problem" of moonlighting and retired permanents working on the private market (CX-1538-G).

287. The purpose of the anti-moonlighting rule is to protect the interests of freelance interpreters. (CX-300-Z-114 to Z-115 (Motton); Motton CX-300-Z-121 (Motton); CX-301-Z-95 to Z-97 (Bishopp).)

288. The AIIC Bureau invited members to file official complaints concerning any violations of the moonlighting rule, including written proofs or copies of contracts. (CX-301-Z-152/5-6 (Bishopp).)

289. Interpreters honor the anti-moonlighting rules, and attempt not to compete with AIIC's freelance members who are not employed. (Hamann-Orci, Tr. 14-15; Van Reigersberg, Tr. 363-64.)

290. AIIC's rules against moonlighting reduce output by restricting the output of staff interpreters. (Wu, Tr. 2136.) They deter entry into the private sector by preventing staff interpreters from

entering the private sector without giving up their staff positions. (Wu, Tr. 2136.)

291. There are no justifications for the moonlighting rule. (F. 191-211.) The moonlighting rule is over broad, since it prohibits staff interpreters from working freelance on days when they are not working for their organizations.

S. Double-Dipping

292. Article 3 of the AIIC Code provides that "members of the Association shall not accept more than one assignment for the same period of time." (CX-1-Z-37; CX-2-Z-37; CX-3-B, Art. 4(c); CX-4-C, Art. 3(b).) AIIC referred to this as "double-dipping." (CX-432-G.)

293. AIIC's president explained that interpreters cannot accept two contracts for the same time. (CX-305-Z-94 (Sy).) The rule means that only overlapping assignments are prohibited, which does not prevent members from accepting more than one assignment in a day. (*Id.*; Luccarelli, Tr. 1673-74.)

294. Part of the reason for the rule against double-dipping was to avoid over booking by an interpreter who accepts more than one assignment for a day, which could be deceptive and leave a team short handed. (Luccarelli, Tr. 1675-76.)

295. AIIC allowed departures from the rule against double-dipping so long as there was no other member available and "appropriate fees" are paid. (CX-237-K.) AIIC has not enforced the rule. (Luccarelli, Tr. 1673-76.)

296. In 1988, the U.S. Region discussed double-dipping where an interpreter is engaged in a conference and accepts work at a short meeting during that employment. "It is said that the practice is widespread in Washington, and there is the anecdote of interpreters working with a taxi waiting to take them back to their other meeting." (CX-432-G.)

T. Advertising

297. AIIC prohibits comparative advertising. The AIIC Code excludes "commercial forms of one-upmanship." (CX-1-Z-49; CX-2-Z-52.)

298. Members understand "commercial forms of one-upmanship" to be about comparative claims. This provision means that interpreters cannot disparage their colleagues in order to get work. (CX-2-Z-52; CX-301-Z-103 (Bishopp); Luccarelli, Tr. 1682-1683.)

299. The 1994 Code of Ethics provides that AIIC members "shall refrain from any act which might bring the profession into disrepute." (CX-1-Z-38; CX-2-Z-38.)

300. The 1972 AIIC Code of Ethics stated, "Members shall refrain from any activities likely to bring discredit on the profession, including all forms of personal publicity." (CX-9-C.) This barred "activities such as canvassing or commercial forms of one-upmanship or advertising." (CX-5-Q; CX-260-Z-109; CX-232-F.) Prior to 1991, AIIC prohibited members from publicizing individually that they are conference interpreters. (CX-301-Z-12 to Z-13 (Bishopp).)

301. In 1994, AIIC acted against Carol Gold, an AIIC member in Canada, for making comparative pricing claims. Ms. Gold wrote a letter to a client that stated that "Using accredited conference interpreters [meaning: "AIIC members" (CX-305-Z-332/24-25 (Sy))] would be much more expensive and would involve bringing in two interpreters from Montreal, plus one local." (CXT-501-W.) The AIIC Council concluded that Ms. Gold's conduct "constitutes a flagrant violation of paragraph (b) of Article 4 of the Code of Professional Ethics." (CXT-501-V to W; CX-305-Z-336/1-4 (Sy).) Ms. Gold sent documents concerning this matter to the Canadian Bureau of Competition; the AIIC Council issued a warning to Ms. Gold. (CX-305-Z-336 (Sy); CXT-501-W at p.2.)

302. Also in 1994, thirty-six members of AIIC filed a complaint against a member named T. Cordon Vilas. (CXT-502-Z-53 to Z-54; CX-305-Z-337 (Sy).) Ms. Vilas had written a letter to an international organization offering to reduce the cost of language services through her own full-time employment. (CXT-502-Z-53-54; RX-815.) The AIIC Council suspended Ms. Vilas for two years, until the next Assembly. (CX-502-Z-36; RX-815; CX-305-Z-338 (Sy).)

303. AIIC's prohibition on comparative advertising reduces product heterogeneity, which makes it easier for the members to

agree. (Wu, Tr. 2144/20-22.) It deters entry by making it more difficult for entrants to make themselves known. (Wu, Tr. 2145/1-8.)

IV. TAALS

A. TAALS' Rules

304. TAALS' rules are binding on its members. (Saxon-Forti, Tr. 2689; CX-2240-A; CX-995-C; CX-993-D.) Applicants for TAALS membership follow the association's rules for the 200 day period "in the booth" prior to becoming members. (CX-997-Q; Hamann-Orci, Tr. 20.) In signing the TAALS application form, candidates undertake to abide by the TAALS rules. (CX-986-A.) TAALS members voted on rules at TAALS Assembly meetings. (Lateiner, Tr. 923-24, 929; CX-895-B; CX-962-I.)

305. TAALS enforces its rules. (CX-1742.) Members who infringe the Code are subject to expulsion or other penalties. (CX-997-I; Hamann-Orci, Tr. 51, 53-54.)

306. In 1989, Janine Hamann-Orci was investigated by TAALS for quoting low rates and manning strength at odds with TAALS guidelines.(Hamann-Orci, Tr. 52; CX-2552; CX-2553.) The interpreter who filed the complaint was a member of AIIC, as were three members of the TAALS disciplinary committee that investigated Ms. Hamann-Orci. (Hamann-Orci, Tr. 93-94; CX-2554.) The Committee to Ensure Respect for the Code exonerated Ms. Hamann-Orci. (CX-2557-A to B; CX-913-F.)

B. AIIC and TAALS Rates

307. TAALS voted on the rates at its General Assembly meetings. (Hamann-Orci, Tr. 31; CX-301-Z-56 to Z-58 (Bishopp).) Charging less than the association rate was undercutting for which violators would be expelled. (Hamann-Orci, Tr. 53-54.)

308. AIIC used the TAALS rate as its published rate for the United States. (CX-301-Z-45/10-20, 49/15 (Bishopp); CX-304-Z-80, Z-207, Z-221 (Motton); CX-83; CX-925-A; CX-409-A.) AIIC obtained the TAALS rate either from the U.S. Region Representative to the Council or by writing directly to the president of TAALS. (CX-301-Z-45 to Z-46 (Bishopp).)

309. Prior to 1991, intermediaries understood the "industry rate" to be the rate recommended by TAALS and AIIC. (Davis, Tr. 843; Clark, Tr. 610-11; Jones, Tr. 688-89, 694; Neubacher, Tr. 763.) In the late 1980's, to determine the rate for private sector freelance conference interpretation, intermediaries contacted a member of TAALS or AIIC. TAALS and AIIC interpreters charged the same. (Clark, Tr. 668; Jones, Tr. 688-89; Citrano, Tr. 555.)

310. Members of AIIC and TAALS frequently have the same rates today. (Jones, Tr. 690-93; Citrano, Tr. 573.)

C. Same Rules

311. Before the Federal Trade Commission Consent Order against TAALS (The American Association of Language Specialists ("TAALS"), C-3524 (Aug. 31, 1994) (consent order)), AIIC and TAALS had the same rules. (Saxon-Forti, Tr. 2677; CX-301-Z-140 (Bishopp); Lateiner, Tr. 922.) The TAALS standard contract form states that it conforms with the standard practices of AIIC. (CX-2114-A to B; Hamann-Orci, Tr. 23.)

312. AIIC and TAALS had similar rules concerning per diem (F. 110; CX-997-J, Art. 13a, K, Art. 3); charges for non-working days (F. 130-35; CX-997-K, Art. 4, J Art. 11(a)); cancellation clauses (F. 241; CX-997-K, Art. 1); and recordings (F. 244; CX-997-L, ¶ C.6). Each association specified minimum travel arrangements (F. 237; CX-997-K, Art. 4); and prohibited members from being paid for travel and subsistence when working for free (F. 247; CX-997-J, Art. 12). AIIC and TAALS required all interpreters on the same team be paid the same rate (F. 150-51; CX-997-J, Art. 10d; Hamann-Orci, Tr. 40) and on an indivisible daily basis (F. 120; CX-997-J, Art. 10b; Saxon-Forti, Tr. 2696); and both required that fees be payable without the deduction of any commission. (F. 251; CX-997-J, Art. 11b.) AIIC and TAALS had rules on the number of booths and interpreters required (F. 160-62; CX-997-L, ¶ B.3); and defined a working day as two sessions of three hours each. (F. 158-59; CX-997-L, ¶ B.4.) TAALS and AIIC had restrictions on the use of portable equipment (CX-988-B; CX-301-Z-134 (Bishopp); F. 269-72); on the performance of non-interpretation services at conferences (CX-997-J, Art. 7); and on advertising (F. 297; CX-997-I, Art. 4b). Both required that members declare a single professional address and base travel charges on that address. (F. 212, 215; CX-997-J, Arts. 8, 13.)

313. AIIC and TAALS required members to refuse work under conditions not in accord with their rules. (F. 48; CX-997-I, Art. 6.) TAALS told its members that they should use the AIIC rate when engaged in conference interpretation outside the United States. (Saxon-Forti, Tr. 2695.)

D. Coordination

314. TAALS and AIIC coordinated their activities. "[T]here is a systematic exchange of information between TAALS and AIIC." (CX-409-A; CX-218-J; CX-266-Z-6.)

315. In 1984 the TAALS Council appointed an official liaison from TAALS to AIIC with a term of eight years. (CX-1728-B.) Information discussed by either AIIC or TAALS is shared by the two organizations. (CX-300-Z-32 (Motton); Lateiner, Tr. 917; Luccarelli, Tr. 1766-68, 1802; CX-302-Z-402 to Z-405 (Luccarelli); CX-898-D to E.)

316. AIIC and TAALS worked together in enforcing their overlapping rules. (Lateiner, Tr. 904-05; CX-1066-A; CX-1090; CX-1138-A to B.) TAALS and AIIC coordinated enforcement against Wilhelm Weber for the 1984 Olympic Games. (F. 355, 359; CXT-237-H-I, p.1; CX-239-B.) In 1984, TAALS suspended Wilhelm Weber for working without charging for travel outside of his listed professional domicile. (CXT-1731-B.)

V. EFFECTS

A. Anticompetitive Effects

1. Price Study

317. Ninety-six AIIC freelance members reside in the United States. (Stip. 60.) Dr. Lawrence Wu, complaint counsel's economic expert, examined the daily rates charged by AIIC members domiciled in New York and Washington for private sector ("freelance") conference interpretation. (CX-3003-04.) Sixty-two members were subpoenaed; 51 returned the subpoena; and 42 produced private market contracts in response to the subpoena (the "Wu Data Set"). (Wu, Tr. 1995; CX-3005.)

318. The freelance prices charged by AIIC members indicate that AIIC members agreed to charge the AIIC "suggested minimum" rate or more during 1988 through 1991. (Wu, Tr. 2020-22, 2051-52.)

a. The "suggested minimum" rate was the most frequently charged price in each of the four years. (Wu, Tr. 2002-04.)

b. "Cheating" on the suggested minimum rate was only in 10% of transactions over this four-year period. (Wu, Tr. 2007.)

c. Ninety percent of prices charged by the AIIC members were at or above the "suggested minimum." (Wu, Tr. 1996.)

Prices by these AIIC members for private market freelance interpretation services were affected by the agreement to charge the "suggested minimum" or more as a day's rate for conference interpretation. (Wu, Tr. 2020/7-22.)

319. In the four years from 1988 through 1991, 90% of the transactions in the Wu Data Set were at or above the AIIC suggested minimum rate for that year. (Wu, Tr. 1996; CX-3004.) In the same four years, 70% of the transactions were at or within $50 above the AIIC suggested minimum rate (Wu, Tr. 1996; CX-3004), and 41% of the transactions were exactly at the AIIC suggested minimum rate. (Wu, Tr. 1996; CX-3004.)

320. In each of the four years from 1988 through 1991, the most frequently charged price of the transactions was the AIIC suggested minimum rate for that year, to the dollar. (Wu, Tr. 1996, 2004; CX-3004.) In 1988 through 1991, the percentage of transactions at the AIIC suggested minimum rate were 28, 39, 52 and 39%, respectively. (Wu, Tr. 2003, 2007; CX-3004.)

321. Ten percent of the 1988-1991 contracts (39 out of 384) were at prices below the AIIC suggested minimum. (Wu, Tr. 2007; CX-3005.)

322. Of those 39 contracts entered into by 18 interpreters (Wu Tr. 2008), eight were for conferences in January, and may have been entered into prior to the publication of that year's AIIC or TAALS rate. (Wu, Tr. 2008-09, 2262-63; Silberman, Tr. 3335; RX-189, 157-0031, 157-0053-54, (contract for Jan. 3-6, 1991); RX-194, 161-0057; RX-191, 126-0011 (contract dated Dec. 29, 1988).)

323. Seven of the contracts charging below the minimum rate were entered into by AIIC member Raquel Felsenstein, including contracts for short interpretation assignments at Eastern High School

in the District of Columbia. (Wu, Tr. 2009-10, 2221-22, 2258.) However, this member adhered to AIIC and TAALS rates and rules including proper team size when organizing teams of interpreters for conferences. (CX-2577-D; CX-2578-C; Wu, Tr. 2010-11, 2014-15.)

324. Interpreters differ in their reputation, training, experience, specialization and language combinations. (F. 199.) Conferences differ in subject matter, schedules, languages, and use of languages. (Wu, Tr. 2023-25; F. 200.) In a competitive market, prices would reflect that variety. However, the prices observed by Dr. Wu do not reflect variety, but are around the AIIC suggested minimum price. (Wu, Tr. 2025-26, 2028-29.)

325. These AIIC members were adhering to AIIC's rules as well as to AIIC's published rates. (Wu, Tr. 2017-20, 2054.)

326. The distribution of transaction prices is consistent with an agreement to charge the AIIC suggested minimum rate. The AIIC rate was charged 41% of the time; there was adherence to the suggested minimum rate 90% of the time; and there was no significant cheating on the minimum (less than 10%). (Wu, Tr. 1996.)

327. That AIIC members charged the agreed rates over four years indicates that AIIC had market power in U.S. conference interpretation in the years 1988 through 1991. (Wu, Tr. 2052-53, 2055.) The anticompetitive effects in the United States show that AIIC has market power, since market power is the ability to raise price or restrict output. (Wu, Tr. 1994-95, 2020-22, 2051-57.)

2. Industry Witnesses

a. Rates

328. Intermediaries learned from interpreters that TAALS and AIIC raised the minimum rates. Berlitz determined what to pay interpreters in Western European languages by contacting TAALS and AIIC interpreters. (Clark, Tr. 610-11.)

329. Intermediaries understand that TAALS and AIIC members charged the same rates. In the late 1980's, Susan Clark of Berlitz understood that the rate Berlitz was quoted was applicable to all AIIC and TAALS members. (Clark, Tr. 612-13.)

330. Even before 1987, Berlitz knew that the TAALS/AIIC rate changed every year. (Clark, Tr. 586, 611.) There were yearly increases in the TAALS/AIIC rates. (Clark, Tr. 611-12; CX-3002.)

331. Prior to 1991, interpreters' rates went up by the same amount, typically $25, at the same time of year. (Jones, Tr. 690-93; Davis, Tr. 845; Clark, Tr. 612; Neubacher, Tr. 764.) This pattern exists through the present. (Jones, Tr. 690-93.)

332. From 1988 through 1991, intermediaries generally paid the AIIC/TAALS rate or more, rather than attempt to negotiate lower prices with conference interpreters, whether they belonged to those organizations or not. (Clark, Tr. 613; Neubacher, Tr. 763; Jones, Tr. 688-89/10-12, 694.)

333. Joseph Citrano of Metropolitan Interpreters and Translators recruited conference interpreters and found that AIIC and TAALS interpreters did not negotiate rates, and only occasionally negotiated travel time. (Citrano, Tr. 504-06.) Members of AIIC and TAALS pointed out to Mr. Citrano that his offer "didn't conform to the rules that were in the book." (Citrano, Tr. 502-03.) In the past five or six years, interpreters referred to the rate as the TAALS rate and the AIIC rate. (Citrano, Tr. 555.)

334. Since 1991, the change in interpreter rates has been more erratic than it was before 1991, but interpreter rates have continued to climb. (Davis, Tr. 845; Weber, Tr. 1185-87.)

b. Rules

335. Interpreters viewed the industry rules "like a bible. This was how the business was conducted." (Citrano, Tr. 507.) Interpreters declined offers of employment, stating as their reason for declining the offers that those offers did not conform to industry standards. (Citrano, Tr. 508-09.)

336. Per Diem: In Susan Clark's experience at Berlitz there has always been a standard rate that conference interpreters charge for per diem. (Clark, Tr. 614.) In Berlitz's experience, the standard rate that all conference interpreters charged for per diem was $60, now it is $70. (Clark, Tr. 614.)

337. Travel: Interpreters insist on being paid a half day's travel, on top of a full day's interpretation fee, when they work and travel on the same day. (Citrano, Tr. 552-53.)

338. Indivisible Day: Berlitz always pays conference interpreters on a daily basis. (Clark, Tr. 624.) Brahler pays interpreters the daily rate regardless of how short the day is, and has paid a full day's rate to interpreters it hires for two to three hours. (Davis, Tr. 859-60.) "[I]t was generally understood that any portion of any full day was considered a full day's rate; in other words, the services were not prorated." (Neubacher Tr., 765-66.) The demands by interpreters conformed with AIIC's rules on indivisible day. (F. 120-29.)

339. Same Team, Same Rate: CACI pays the same rate at a conference to the most experienced and least experienced interpreters. (Jones, Tr. 688.) Neubacher paid the AIIC rate to AIIC and TAALS interpreters and to other interpreters who worked at conferences with AIIC and TAALS interpreters. (Neubacher, Tr. 763, 765.) LSI also pays the same rate to all conference interpreters in European languages. (Weber, Tr. 1184.) The demands by interpreters conformed with AIIC's rules on same team, same rate. (F. 150-57.)

340. Recording: Interpreters usually demand a fee if they are asked to provide a recording of the conference interpretation. (Jones, Tr. 705-06.) The demands by interpreters conformed with AIIC's rules on payment for recordings. (F. 244-46.)

341. Team Size: Intermediaries sometimes deviate from industry staffing requirements. In those circumstances, they pay interpreters extra compensation. (Citrano, Tr. 539; Neubacher, Tr. 767-69; Lateiner, Tr. 916.) The demands by interpreters conform with AIIC's rules on team size. (F. 169-77.)

342. Although interpreters can work alone for short presentations, CACI has found that in these situations interpreters usually ask for more money and may request that the acceptance be kept private. (Jones, Tr. 701, 745-46.) Berlitz occasionally negotiated a deviation from the strict industry staffing requirements, and in those circumstances, paid the interpreters extra compensation. (Neubacher, Tr. 767-69.)

343. Hours: Interpreters may insist on receiving overtime payments if the workday exceeds a normal workday. Berlitz pays interpreters more money when they work in excess of six hours in a single day. (Clark, Tr. 636.) Linx paid interpreters about 20% more than the standard rate when interpreters worked more than six hours in a day. (Neubacher, Tr. 804-05.) Metropolitan finds that interpreters seek overtime for anything over a seven hour workday, and it pays

them an extra $100 to $200 each. (Citrano, Tr. 543, 545.) Brahler has paid interpreters overtime on occasions that would be an hour or hour and a half over the schedule. (Davis, Tr. 861.)

3. Anticompetitive Effects

a. 1984 Olympics

344. In 1984, the Olympic Games were organized privately, and the Los Angeles Olympic Organizing Committee ("LAOOC") was extremely cost-conscious. (CX-1243-A; CX-1278-A; Weber, Tr. 1200-01.) LAOOC decided to save the expense of professional interpreters at the main Press Center by using unpaid, volunteer college students and professors. (CX-1336-D.) Wilhelm Weber, then a member of TAALS and AIIC, proposed that LAOOC use unpaid interpretation students from the Monterey Institute, where he was Dean, to replace volunteer college students and teachers who were going to be used to provide interpretation solely at the Press Center. (Weber, Tr. 1200-01.) Ten of the graduate students would act as interpreters and 40 would be translators. Professional interpreters would be used elsewhere. (CX-1268-B.) Weber wanted assurance that no professional interpreters be used at the Press Center because he "wanted to avoid the impression that by offering student interpreters [he] would be taking work away from professional interpreters." (Weber, Tr. 1202.) The LAOOC retained Weber as the Chief Interpreter, responsible for all professional interpreters and 45 student interns who worked at the games. (Weber, Tr. 1199-1201.)

345. The LAOOC initially sought to pay conference interpreters at rates below the then "going rate." Mr. Weber reported that LAOOC wanted to engage in "collective bargaining about fees." (CX-1236.) However, Mr. Weber explained to LAOOC that conference interpreters would not work for less than the "going rate" and it agreed to fees at the going rate. (Weber, Tr. 1203-05.) AIIC's Secretary-General wrote to Weber confirming that "any bargaining with the client can only be upwards and not downwards" from the local rate. (CX-1238; F. 517.) Although the LAOOC did not want to pay interpreters for non-working days, Mr. Weber told the LAOOC that such payments were "part of our code of professional conduct and that it was also current practice in the profession," and the LAOOC agreed to pay for them. (Weber, Tr. 1222/9-14, 1223/7-13.)

346. AIIC's president wrote to LAOOC from Geneva, warning against hiring non-AIIC interpreters at less than the going rate. (CX-1278-B.)

347. At its November 1983 meeting, the U.S. Region asked its representative on the AIIC Council, Jean Neuprez, to contact Mr. Weber about "potentially serious" charges. (CX-1240.) On November 21, 1983, Mr. Neuprez wrote Mr. Weber, asking him to clarify the situation. (CX-1240.)

348. At its meeting in early January 1984, the AIIC Council adopted a resolution, published in the Bulletin, disapproving Mr. Weber's use of unpaid interns. (CX-236-G; CX-1253-A; CXT-1693; Weber, Tr. 1230; CX-5-B.) The Council directed the U.S. Region to send to Weber a letter of warning. (CX-236-G; Weber, Tr. 1230.)

349. Following the Council meeting, the U.S. Region Representative to the AIIC Council, Jean Neuprez, sent Mr. Weber a second letter warning him not to violate any AIIC rule in connection with the Olympics. (CX-1253-B; CXT-1693.)

350. Mr. Weber understood the letter from Mr. Neuprez to the U.S. Region to be a warning, a sanction, "one of the . . . possible [AIIC] actions, the others being suspension or expulsion." (Weber, Tr. 1228.) Mr. Weber believed he had to respond to correct the rumors to protect his own reputation, and to prevent interpreters who agreed to work at the Olympics from being accused of violating AIIC's rules. (Weber, Tr. 1234/1-12.)

351. Some U.S. Region members wrote to Weber refusing his offers to work at the Olympics because of the contractual conditions, and out of fear that students would be integrated with professionals. (CX-1246-A; CX-1286-A; CX-1695-A; CX-1722.)

352. On March 1, 1984, Patricia Longley, the Secretary General of AIIC, wrote a letter to Mr. Weber about the contract for interpreters at the Olympics, stating "There seem to be . . . several deviations from the AIIC standard contract." (CX-1283-A.) She complained about the cancellation clause, provisions concerning rest days, non-working days, and per diem, and the clause on recording of interpretation because it carried no written guarantee that it is for internal use only, such as the preparation of minutes. (CX-1283-A.)

353. AIIC's president and secretary general also urged LAOOC to avoid "pitfalls," and to accept AIIC's contractual conditions. (CX-1278; CX-1280.) On February 29, 1984, AIIC's president warned the

LAOOC that it should not bring interpreters from other regions or non-AIIC interpreters willing to work at lower rates. (CX-1278-B.) On March 1, 1984, the secretary general, spelled out in detail AIIC's rules regarding cancellation fees, fees for rest days and non-working days, and per diem. (CX-1280-B-C.) She informed the LAOOC that officials of AIIC had asked Mr. Weber to "reopen discussions with you on the points raised in our letter and have asked M. Jean Neuprez to coordinate reactions on the part of the professional conference interpreters in North America." (CX-1280-C; Weber, Tr. 1243.)

354. Albert Daly, the president of AIIC, also wrote a letter to Mr. Weber, dated June 5, 1984, saying: "We shall hold you personally responsible as recruiting interpreter if for reasons of the non-appearance of the USSR at the games, any of the contracts offered by LAOOC are not honored and interpreters fees paid in full, provided they do not find work elsewhere." (Weber, Tr. 1255-56; CX-1316.) Weber understood this letter to mean that Daley would ask him to pay for any canceled interpreter contracts - which totaled approximately $700,000 - "out of his own pocket." (Weber, Tr. 1256-57.)

355. TAALS was also concerned about the Olympic games, and AIIC and TAALS shared information on enforcement and their efforts to change the terms of the contracts. (CX-1248; CX-1266-B; CX-1310; CX-1696; CX-1708; CX-1714-A; CX-1733; CX-1735.) Lisa Valiyova, an AIIC and TAALS member and chairman of TAALS' "fact-finding committee," and liaison to AIIC, wrote to Mr. Weber (CX-1248; CX-1728-B), questioning how he would bring the contracts "into line with the TAALS/AIIC Codes" regarding same team, same rate; hours; and team size. Valiyova kept AIIC informed about the progress of her "Fact-Finding" investigation. (CX-1310.)

356. The LAOOC acceded to AIIC's rules in its hiring of interpreters for the Olympics, and conformed their contracts to AIIC's rules. (Weber, Tr. 1257-58, 1262.) These contracts comported with AIIC's rules on when and for what use interpreters could be recorded. (Weber, Tr. 1250/20-21, 1252/4-8, 1262/20.) AIIC was also successful at forcing the LAOOC to include the full-payment cancellation clause required by AIIC's rules, rather than the partial payment clause initially negotiated by Mr. Weber with the LAOOC. (Weber, Tr. 1235/25 to 36/7, 1262/22.)

357. AIIC took credit for the changes. In a letter to Mr. Weber dated June 16, 1984, AIIC's U.S. Region Representative stated: "Thanks, especially to AIIC's pressure (you yourself acknowledged

it and were pleased), the proposed conditions were improved, and recently an acceptable cancellation clause materialized." (CX-1320-B, CXT-1320 at p.2; Weber, Tr. 1257/16 to 58/10.) That "acceptable cancellation clause" was the standard, full-payment AIIC clause. (Weber, Tr. 1235/25 to 36/7.)

358. As a result of the negotiations with Mr. Weber and AIIC, LAOOC had higher costs of simultaneous interpretation than anticipated. LAOOC reported to the president of AIIC in Geneva that: "These costs resulted in some Federations not holding Congresses here, and others substantially reducing their original interpretation requirements." (CX-1293.)

359. A November 26, 1984 letter from AIIC's president to Mr. Weber issued several warnings. (CX-1741.) Although, "the contracts finally issued were almost in conformity with normal standards, . . . because of inadequacies in the original offers, several colleagues refused work which should normally have been theirs, and this is unacceptable under Article 5 a) of the Code." (CX-1741-A.) AIIC's president also observed that several AIIC candidates worked at the Olympics while paying their own travel expenses, "does not promise them an easy acceptance into the Association," and he noted that a very close watch would be kept on Mr. Weber with regard to his handling of the 1988 Seoul games. (CX-1741-A-B.)

360. In January 1985, the AIIC Council passed a resolution, which it published in the Bulletin, commending "those members who rejected contracts offered for the Los Angeles Olympic Games when such contracts included provisions that were not in keeping with AIIC practice." (CX-239-B.) The resolution further "Congratulates the members of the United States Region for their efforts which resulted in obtaining contracts more in conformity with normal working conditions." (CX-239-B.)

b. Other anticompetitive effects

361. In a history of AIIC, Mr. Thiery, past president and founding member of AIIC, wrote,

> In 1957 . . . AIIC decided for the first time that the daily remuneration should go up. . . . [A]nd the intergovernmental organizations refused even to acknowledge letters. When AIIC's united front forced the decision upon them (members simply refusing contracts at earlier rates), we suddenly came to be considered as very reasonable

people who entirely deserved a long due increase in pay. In fact, that was the first test of AIIC's strength. And when, in 1963-1964, AIIC decided to increase the daily rate from $30 to $40, large as the rise was it went through much more smoothly. (CX-203-C.)

Those "intergovernmental organizations" included the United Nations and its New York headquarters. (Weber, Tr. 1137-38.)

362. In 1974, Mr. Thiery wrote that "AIIC minimum rates are recognized the world over." (CX-204-B.) AIIC interpreters at the United Nations in New York walked out in protest "against what were regarded as unreasonable working hours, and it is understood that satisfactory solutions have now been agreed by the authorities." (CX-204-F.)

363. AIIC and its members understand that the price fixing rules applied in the United States. (Weber, Tr. 1140/18-22 (mandatory minimums), 1223/11-13 (non-working days, travel), 1225/9-13 ("same team same rate"), 1247/18-22 (paid rest days), 1252/9-16 (per diem), 1266 (travel); (Bishopp) CX-301-Z-33/1-13 (indivisible daily rate), Z-35/12-16 ("same team same rate"), Z-58/14 to Z-59/5 (minimums), Z-67/19-24 (per diem), Z-87 to Z-89 (non-working days, rest days), Z-91/1 to Z-92/7 (travel days); Bowen, Tr. 1011-12 (phantom travel charges); Hamann-Orci, Tr. 38/1-5 (mandatory minimums), 39/25 to 40/16 (same team same rate); Lateiner, Tr. 955/10-14 (minimum rates); Lucarrelli, Tr. 1762-64 (travel fees); (Moggio-Ortiz) CX-303-Z-86/11-14 (mandatory minimum), Z-113/5-13 (non-working days); (Motton) CX-300-Z-80/5-7 (indivisible daily rate); Saxon-Forti, Tr. 2696/10-18 (indivisible daily rate); Swetye, Tr. 2819/14-16 (same team same rate).

364. In 1975, "the U.S. Region has finally managed to bring PAHO [Pan American Health Organization] into line." As Marc Moyens reported to the AIIC Council and to U.S. Region members, "PAHO's Chief of Personnel sent a letter to our Council member [Moyens] assuring him that the PAHO's fee would now be '154.15 gross' in the USA. It is the first time such an assurance has been given by PAHO." (CX-405-A-B.)

365. In 1976, AIIC members refused to work for the Organization of American States in Santiago de Chile at $83, insisting on the AIIC world-wide minimum rate of $105. U.S. Council member Marc Moyens negotiated fees with OAS, which "resulted in a deal under which AIIC members agreed for the last time to work for $83 provided that: 1) OAS rate would be raised to $105 right after the

Conference; 2) this fee would apply all over the American continent; 3) this fee would be $105 net in the U.S. region, in conformity with U.N. practice. The AIIC minimum was thus established and it was agreed that OAS would hold periodic meetings with M. Moyens to review the rates and settle any pending questions such as contracts and working conditions." (CX-407-C.)

B. Market Share

1. Relevant Markets

366. The relevant product markets in this case include conference interpretation of language pairs (English to Spanish, Spanish to English, French to English, etc.). (Wu, Tr. 2057, 2063; Silberman, Tr. 2985.) The relevant geographic market is the United States. (Wu, Tr. 2193-94.)

367. Conference interpretation is a narrower product market than all interpretation. Persons unable to provide simultaneous interpretation generally would not be hired as conference interpreters in the private sector. (Weber, Tr. 1172/4-5; Jones, Tr. 681; Clark, Tr. 591.)

2. Market Share Calculation

a. Numerator

368. AIIC's U.S. members are distributed among the following languages: 129 French, 95 Spanish, 22 German, 16 Italian, 23 Portuguese. (RX-503.) These figures include all interpreters rated A, B or C in any of those languages. An "A" rating represents native fluency, a "B" represents perfect command, and a "C" language is one that the interpreter can understand, but does not typically work into. (CX-600-O.) Including all such interpreters is necessary in order to be consistent with the data from other sources, since some other sources do not distinguish interpreters by A, B or C ratings. (RX-220 (Berlitz); RX-258; RX-342 (CACI); RX-335 (Lateiner); RX-334 (LSI); RX-288 (Metropolitan).)

369. In addition to AIIC members, the numerator of a market share calculation should include TAALS members. TAALS members adhered to the same rates and rules as did AIIC members. (F. 407-23.)

TAALS members in the United States worked primarily between English and the French, Spanish, German, Italian, and Portuguese. (CX-995; CX-997; CX-998.)

370. TAALS and AIIC have overlapping memberships. (Luccarelli, Tr. 1568; Lateiner, Tr. 917, 922; CX-301-Z-134, Z-148 (Bishopp).) AIIC and TAALS have the same membership requirements. (CX-1-B; CX-986-A, C.)

371. In 1995, in the United States, TAALS had 97 members and AIIC had 144 members. (CX-3006; CX-998; CX-600; CX-601.) The overlap of 52 members represents 54% of TAALS' members in 1995 that were also members of AIIC. (Wu, Tr. 1991-92.)

372. In 1991, in the United States, TAALS had 108 members and AIIC had 126 members. (CX-3006; CX-995; CX-608; CX-609.) The overlap of 54 members represents 50% of TAALS' members in 1991 that were also members of AIIC. (Wu ,Tr. 1991-92.)

373. Thus, the number and percentage of TAALS members that were also AIIC members stayed roughly the same from 1991 to 1995. Over many years, many U.S. Region members were also TAALS Council Members. (CX-913-F; CX-914-C; CX-919-B; CX-302-J (Luccarelli).)

374. Adding interpreters who are members of TAALS but not AIIC (RX-503), yields numerators of interpreters who were members of AIIC or TAALS at January 1, 1995: 159 French, 129 Spanish, 30 German, 20 Italian, 31 Portuguese.

375. In addition to AIIC and TAALS members, the numerator of a market share calculation should include candidates for admission to both TAALS and AIIC. Such candidates adhere to the rules of the associations. (F. 44-47, 304.) The number of such candidates is not in the record.

b. Denominator

376. Respondents' estimates of the total number of conference interpreters, by language, are set forth in RX-502. Respondents' expert offered three estimates. (RX-502; Silberman, Tr. 3008-11.) Respondents' expert made these estimates by counting the names that appeared on lists of interpreters obtained from the State Department, AIIC, TAALS, ASI, and the intermediaries who testified at trial. (RX-500; Silberman, Tr. 2992-93.) Some of those private

intermediaries' lists are not limited to conference interpreters. (Clark, Tr. 667 (Berlitz); Jones, Tr. 683-684 (CACI).)

377. Respondents' expert did not make any adjustment to his estimates to account for the fact that the lists he used included individuals other than conference interpreters. (RX-502 n.*; Silberman, Tr. 3010-11, 3223-24, 3237-38.)

378. The difference between respondents' largest estimate (no. 1) and their other estimates is that estimate no. 1 includes all State Department seminar interpreters, whether or not those interpreters appear on the list of any intermediary. (RX-500; Silberman, Tr. 3237/18-22.) State Department seminar interpreters should not be included as current participants in the market for conference interpretation.[3] The difference between respondents' intermediate estimate (no. 2) and smallest estimate (no. 3) is that estimate no. 2 includes 238 interpreters whose names appear in Berlitz's files but not on the lists of any other intermediary. (RX-500; Silberman, Tr. 3244/12-24.) The interpreters whose names appear in Berlitz's files but not in any other intermediary's files should not be included in the denominator. The difference between respondents' estimate no. 2 and estimate no. 3 is that estimate no. 2 includes 238 interpreters whose names appear in Berlitz's files but not on the lists of any other intermediaries. These intermediaries should not be counted in the denominator.[4]

379. Using respondents' smallest estimate, no. 3, as the denominator and an adjusted numerator consisting of all TAALS and AIIC members (less overlaps) yields "market shares" of the two associations combined based on headcounts, as follows: 44% of the estimated number of French conference interpreters (159 of 364); 34% of the estimated number of Spanish conference interpreters (129 of 374); 28% of the estimated number of German conference interpreters (30 of 107); 29% of the estimated number of Italian conference interpreters (20 of 68); and 24% of the estimated number

[3] Intermediaries do not regard seminar interpreters as substitutes for conference interpreters and have not used seminar interpreters rather than AIIC members or other conference interpreters. (Neubacher, Tr. 770; Weber, Tr. 1174.) The State Department, likewise, does not use seminar interpreters for conferences except "in a real emergency when no conference interpreter is available." (Obst, Tr. 285.)

[4] The Berlitz list used was not limited to conference interpreters (Clark, Tr. 667/4-6), is not currently used by the Berlitz employee who recruits interpreters (Silberman, Tr. 3239/2-6), and includes interpreters who do not perform simultaneous interpretation. (Silberman, Tr. 3247/9-18.)

of Portuguese conference interpreters are AIIC or TAALS members (31 of 131).

380. Knowledgeable intermediaries placed the number of conference interpreters between 300 and 500, making AIIC's (and TAALS') membership between 35 and 60% of all U.S. conference interpreters. (Wu, Tr. 2198-99; Clark, Tr. 597-98 ("a few hundred"); Weber, Tr. 1197 (500); Davis, Tr. 857 (500 plus various categories "off the top of my head"); Wu, Tr. 2214-15 (Berlitz Production Manager Lisa Broadwell estimated 300); Hamann-Orci, Tr. 56 (300).)

381. Alternatives to AIIC and TAALS interpreters are limited. (Citrano, Tr. 526-27.) In 1987 AIIC reported that "in North America, in particular in New York (United Nations). . . , local freelance interpreters are often difficult to obtain." (CX-248-Z-3.) Berlitz's business would suffer a "very negative" impact if it did not use AIIC or TAALS interpreters. (Clark, Tr. 638.) Brahler would find it difficult to staff a conference if it could not use AIIC or TAALS members. (Davis, Tr. 866.) In 1979, AIIC's president stated that "our association . . . includes, perhaps, nine tenths of the capable members of this profession world wide. . . ." (CX-221-K.)

382. The State Department is the second largest public employer of interpreters in the United States, after the United Nations (Obst, Tr. 330-31), yet it is frequently difficult for the State Department to find conference interpreters in the romance languages (French, Spanish, Italian, and Portuguese) in the United States. (Van Reigersberg, Tr. 407-08.)

383. AIIC and TAALS members constitute most of the qualified conference interpreters in the United States. (CX-2576-A, CX 2573 (Weide); CX-2600 (Swetye); CX-2459-E to F (Weber); Hamann-Orci, Tr. 44; CXT-221-A to Z-20, p.3.)

3. Ease of Entry

a. Historic entry

384. AIIC has maintained rates for the United States since at least 1973 (Weber, Tr. 1143; CX-201-F), and AIIC's agreements continue to achieve adherence to the "suggested minimum" rate. (F. 317-27.) New entry into the conference interpretation profession has not been sufficient to defeat the agreements.

385. Entry into the conference interpretation profession has been slow in the United States over the last several years. Wilhelm Weber, who for 14 years was Dean of the Interpretation Department at the Monterey Institute of International Studies (Weber, Tr. 1122), wrote in 1990 that several factors in the United States "have led to a very low turnover in the profession, thereby inverting the age pyramid in favor of older interpreters and seriously endangering the future of the profession in this country." (CX-2459-D.)

386. Interpretation schools in the United States produce very few graduates. During Mr. Weber's tenure at Monterey, that school produced "normally not more than four or five [conference interpretation graduates] a year." (Weber, Tr. 1195-96.) Georgetown's program in interpretation graduated 10 students in the past four years, 1992 through 1995. (Bowen, Tr. 997-98.) Georgetown and Monterey "are the two main places" that teach conference interpretation in the United States. (Luccarelli, Tr. 1652/12-13.)

b. Entry barriers

387. Private sector intermediaries will not hire as conference interpreters persons who have not had formal training or substantial experience in conference interpretation. Berlitz hires conference interpreters who are members of TAALS or AIIC, or have similar experience. (Clark, Tr. 592.) CACI requires formal education in simultaneous interpretation and at least two years of experience. (Jones, Tr. 684.) Language Services International and Metropolitan hire as conference interpreters only people trained in simultaneous conference interpretation. (Weber, Tr. 1161/11-19; 1163/9-23; 1178/13-24; Citrano, Tr. 531-32.)

388. In addition to an undergraduate degree, conference interpreters have training in conference interpretation. AIIC members who testified had extensive training: Margareta Bowen, Vienna and Georgetown (Bowen, Tr. 989-90); Janine Hamann-Orci, two certificates at Georgetown (Hamann-Orci, Tr. 11); Jeannine Lateiner, five years at Geneva (Lateiner, Tr. 897-98); Luigi Luccarelli, two years at Monterey (Luccarelli, Tr. 1552-54); Evelyn Moggio-Ortiz, three diplomas from Geneva (CX-303-J); Peter Motton, London (CX-300-I); Anna Saxon-Forti (Saxon-Forti, Tr. 2654); Idette Swetye

(Swetye, Tr. 3842); Ursula Weide, four semesters at Heidelberg and four semesters at Georgetown (CX-306-F); Wilhelm Weber studied interpretation and translation for four years at the University of Geneva. (Weber, Tr. 1118.)

389. A conference interpreter without specialized training cannot do simultaneous interpretation. (Davis, Tr. 853.)

390. The ideal candidate for training in conference interpretation should have lived extensively in the countries of each of his languages, and has a university degree in something other than languages or interpretation "such as economics, medicine, the law and so on." (Weber, Tr. 1166/7-9.)

VI. JURISDICTION

A. Personal Jurisdiction Over AIIC

391. U.S. Region members hear reports of AIIC's committees, groups, and sectors at U.S. Region meetings, and discuss AIIC-related issues, including upcoming AIIC meetings (CX-436-E; CX-417-B); the AIIC "rates" (CX-432-E) and working conditions (CX-435-A); the AIIC logo (CX-434-B); the future of AIIC (CX-438-A; CX-439-B); the procedure for proposing amendments to AIIC's Basic Texts (CX-1406-B); sponsorship of Russian-speaking interpreters for AIIC membership (CX-436-E; CX-439-B); and the possibility of adding intermediate level classifications of interpreters' language abilities (CX-436-F; CX-415-B).

392. AIIC asked the U.S. Region to send an observer to the Monterey Institute in California on behalf of the AIIC Schools Committee, and the U.S. Region did so. (CX-432-D; Stip. 50.)

393. The U.S. Region used the funds in its U.S. bank account (CX-300-K; CX-300-M (Motton); CX-432-B) to reimburse, fully or partly, Region members who travel to perform tasks for AIIC and for other AIIC business (CX-438-A), including Council (CX-432-C), NAS (CX-432-D to E), Permanents Committee (CX-432-D to E), and AIIC-wide meetings (Stip. 50; CX-405-B).

394. The Assembly elects a member who resides in the United States to be the U.S. Region representative to the AIIC Council. (Luccarelli, Tr. 1628; CX-304-Z-53 (Motton).) This person typically opens and presides over meetings of the U.S. Region. (Stip. 46.)

395. The Treasurer of the U.S. Region resides in the United States. (Stip. 45.) This person collects AIIC dues from U.S. members

and transfers the funds to AIIC in Geneva, reminds members of their obligation to pay dues (Stip. 45), and has warned that failure to do so would result in deletion of their name from the annual directory. (CX-407-B; CX-300-G, K, L (Motton); CX-401-A.)

396. The President of AIIC and other foreign-based AIIC officials travel to the United States on AIIC business. (CX-305-I, L, Z-282 to Z-283 (Sy); CX-245-J; CX-500-A to B.)

397. AIIC members with professional addresses in the United States participate directly or by proxy, in meetings of AIIC's U.S. Region, which are held once or twice a year. (CX-410; CX-441; CX-443; CX-450.)

398. Members of the U.S. Region actively participate in AIIC decisions by attending, or by giving their proxies to U.S. Region members who will attend an AIIC General Assembly. (CX-423-B, CX-436-E, CX-407-E; CX-300-Z-98 to Z-104 (Motton).) The U.S. Region has paid for expenses of U.S. Region members to participate in AIIC meetings. (Stip. 50.)

399. AIIC members domiciled in the United States serve on AIIC committees. (Stip. 27; CX-300-J (Motton).)

400. Members of the U.S. Region spent three years preparing for the AIIC General Assembly held in New York in 1979. (CX-407-F; CX-409-C to D; CX-410; CX-411-B; Stip. 28.)

401. A resident of New York, N.Y., served as AIIC vice-president, and a resident of Washington, D.C., served on the AIIC staff interpreters and budget committees. (CX-245-J; CX-300-O to Q; CX-616-Y; CX-606-Z-248.)

402. AIIC collects dues from U.S. members annually and wires 10% of the total annual dues of the U.S. Region's members back directly to the U.S. Region's bank account as a refund. (Stip. 49; CX-300-K to N, Z-157 (Motton); CX-304-Z-53 (Motton).)

403. U.S. Region members used to pay AIIC dues to the U.S. Region, which retained a portion of those dues to cover U.S. expenses and forwarded a portion to AIIC headquarters. (CX-407-A to B) More recently, U.S. Region members mail a check to the U.S. Region Treasurer who converts the dues into Swiss Francs and wires them to AIIC headquarters in Geneva. (CX-300-K to L; CX-434-C.)

404. AIIC sends funds to U.S. members to reimburse them for attending meetings on its behalf. (CX-432-C-D.)

405. The U.S. Region received special "outlying regions contribution" funds from AIIC. The U.S. Region has to account to the AIIC central organization for those funds. (CX-300-M to N, Z-24; CX-1510-A.)

406. AIIC holds meetings of its international membership within the United States. The General Assembly met in New York in 1979. (Stip. 28-30; CX-245-J; CX-255-F.)

407. AIIC held educational events in the United States. (CX-245-J; Stip. 51, 73; CX-300-Z-51 to Z-52; CX-434-D; CX-436-D.)

408. AIIC regularly sent Bulletins to the United States that report on the general business of AIIC, discuss AIIC's rules and announce the dates of future meetings. (Stip. 17-19; CX-302-Z-123 to Z-124 (Luccarelli); CX-303-Z-57 (Moggio-Ortiz); CX-306-Z-30 to Z-31 (Weide); CX-214-E to F; CX-259; CX-268; CX 270.)

409. AIIC regularly sent surveys and questionnaires to members in the United States. (Stip. 20-23; CX-239-B; CX-1643-E; CX-432-A; CX-434-A, C; CX-436-C.)

410. AIIC mails membership directories listing members' names, addresses and language combinations to U.S. consumers to help its members market their services. (Stip. 59, 61-62; CX-268-Z-7; CX-301-Y to Z-1 (Bishopp).)

411. AIIC provided the U.S. Region with an information packet on conference interpretation and interpreter terms and conditions, to which the region could add local information such as fees and per diem. (CX-432-F; CX-434-B; CX-303-Z-69 to Z-70 (Moggio-Ortiz).)

412. AIIC prepared form contracts for members, including U.S. members, to use when negotiating agreements with conference sponsors. (Stip. 66; CX-2059-A to E; CX-2060-A to H; CX-2-Z-41, 1991 Standards of Professional Practice, Article 2(a).)

413. AIIC negotiates "Agreements" with large intergovernmental and other international organizations that hold meetings and employ interpreters in the United States, governing the pay and working conditions of such interpreters. (Stip. 74-75; Moser-Mercer, Tr. 3540/1 to 41/5; Luccarelli, Tr. 1591/9-21, 1643/5 to 44/14; CX-305-Z-345/14 to Z-347/24 (Sy); CX-2598; CX-2597.)

414. AIIC offered insurance to U.S.-based members and published information in its Bulletin about insurance programs offered by unaffiliated third-parties. (Stip. 70; CX-301-Z-152.8 (Bishopp).)

415. AIIC sent membership cards in credit card format to U.S. members, entitling them to special discounts AIIC has negotiated for its members at hotels in the United States. (CX-268-Z-7; CX-432-I to J; CX-439-B.)

416. AIIC provided its U.S. interpreters with a computerized list of convention centers and other potential customers, seminars on public relations techniques and model Yellow Pages advertisements. (CX-268-Z-7 to Z-8.)

417. AIIC maintained a "solidarity fund" that lends money to members, including U.S. members. (CX-301-Z-152.8 to Z-152.9 (Bishopp).)

418. AIIC purposefully availed itself of the benefits of U.S. laws. AIIC's 1991 Standards of Professional Practice, Article 2(a), states, "As far as possible, members shall use a standard form of contract as approved by the Association." (CX-2-Z-41.) The AIIC standard form contract referred to by Article 2(a) calls for the application of U.S. law to interpretation of contracts negotiated by U.S. members. (CX-2059-B; CX-2060-D.) Further, AIIC members lobbied the United States Congress to protest the Postal Union's failure to hire U.S.-based interpreters. (CX-1404.)

B. Minimum Contacts With The United States Arising From Conduct Challenged In The complaint

419. AIIC published rates of remuneration for the United States. (F. 93-96.)

420. AIIC prepared schedules of per diem charges (to cover expenses while on work-related travel), with entries unique to the United States. (F. 113, 115.)

421. AIIC tailored its work rules for application in the United States. (F. 96 (rates); F. 113 (per diem); F. 125 (indivisible day waiver); F. 171 (team size).)

422. AIIC produced documents called "Local Conditions in the U.S.A.," which included interpretation team size, contracting methods, and paid briefing days for scientific and technical conferences. (Stip. 22; CX-50; CX-56.)

423. At the request of its U.S. members, AIIC waived the U.S. applicability of provisions concerning interpreters working alone and authorized interpreters within the United States to perform

simultaneous interpretation alone for up to 40 minutes. (CX-1384-A; CX-268-F; CX-301-Z-152.43 (Bishopp); CX-300-Z-33 to Z-36 (Motton); CX-432-G to H.)

424. The U.S. Region discussed and sent to Geneva a document called "AIIC Working Conditions for Interpreters in USA (Provisional Paper)." (CX-439-A, D; CX-1408-A.) This document was intended ensure the uniform application of the AIIC Code and its Annexes in the United States. (CX-439-A, D to F; CX-1408-A, C to E.)

425. In 1991, the AIIC Council gave 3500 Swiss Francs to the U.S. Region for FAX machines to be used in New York, Washington, D.C. and the West Coast. (CX-439-A.)

426. AIIC surveys its members, including those in the U.S., annually on market conditions. (Stip. 21, 23; CX-268-J; CX-1643-E; CX-434-A, C; CX-432-A.) The U.S. Region provided AIIC with information on the U.S. market for interpretation. (CX-210-F-G; CX-211-B-C; CX-218-G-H; CX-270-E; CX-435-A; CX-1346.)

427. AIIC reports on market conditions in the U.S. (CX-302-Z-164, Z-384 (Luccarelli); CX-245-H; CX-259-S; CX-305-Z-216 to Z-217 (Sy).)

428. AIIC investigated complaints against U.S. Region members for violations of its rules. (Wilhelm Weber, F. 181, 229, 242, 249, 344-60); Marc Moyens, F. 182, 230; Jeannine Lateiner, F. 182, 285, 316.)

429. AIIC cautioned U.S. Region members against moonlighting and double-dipping (CX-432-G to H) and solicited complaints from the U.S. Region against U.S. members who have moonlighted in violation of AIIC rules and asked for the moonlighters' names and copies of contracts. (CX-432-M.)

430. The U.S. Region conspired with AIIC. (F. 75-89.)

431. The U.S. Region representative to the AIIC Council advised members on how to comply with the rules and issued warnings. (CX-1471; CX-1470-A.)

432. U.S. members of AIIC serve on the bodies responsible for creating and enforcing AIIC's rules. (CX-300-O to Q (Motton); CX-2490-A to G; CX-1-G-H and CX-2-G to H (1991 & 1994 AIIC Statutes Article 24 (6).)

433. AIIC advised one U.S. conference organizer who had inquired about whether interpreters' conduct had violated the AIIC

Code of Ethics to contact the U.S. Region representative to the AIIC Council if she wanted to pursue the matter. (CX-1393; CX-1396.)

434. An AIIC Council member criticized some contracts in the United States that violated AIIC rules. (CX-405-B.)

435. AIIC has cooperated with TAALS with respect to conduct in the United States challenged in the complaint. (F. 307-16, 355.)

436. The AIIC General Assembly met in New York in 1979 and voted to adopt provisions challenged in the complaint, including rules prescribing equal remuneration for all members of an interpretation team and limiting the length of the working day. (CX-6-A to M, CXT-6-E to M; CX-219-P to R; CXT-221-A-Z-20, pp. 18-19; CX-221-D.)

437. AIIC's Non-Agreement Sector met in Key Biscayne, Florida in 1987, and decided to ask AIIC to be more restrictive in granting waivers of the AIIC rules challenged in the complaint. (CX-245-I.) At that meeting, the Non-Agreement Sector also agreed on manning strengths, fees for radio and television interpretation, and on an extra fee of 20% or 100% when interpretation is recorded. (CX-245-F to H.) In addition, members were informed that the daily rate in the United States was $320, with per diem based on the price of a single room in a good hotel, plus 50%. (CX-245-H.)

438. AIIC's Non-Agreement Sector met in Washington, D.C. in 1992. Members discussed AIIC provisions on team strength, portable equipment, and recorded interpretation. (CX-270-F to G.)

439. AIIC sends mail to U.S. members from Geneva about AIIC meetings, waivers, changes to the provisions, and disciplinary actions against members violating AIIC work rules. (Stip. 17-19; CX-268-F, K; CX-266-E; CX-300-Z-23 to Z-24 (Motton).) AIIC mailed to the United States copies of its rate schedules including rates unique to the United States. (CX-306-Z-31, Z-189 (Weide).)

440. AIIC mailed draft proposals of its Codes of Ethics and Standards of Practice to the United States for review and comment before General Assembly meetings. (CX-1406-B; CX-266-Z-5; CX-260-A to B.)

C. Personal Jurisdiction Over U.S. Region

441. The U.S. Region is subject to personal jurisdiction in the United States. (Order re Complaint Counsel's Motion for Partial Summary Decision, Nov. 29, 1995, at p.3.)

D. The U.S. Region As A Separate Entity Under Section 4

442. AIIC has 22 regions including the U.S. Region. (Stip. 31-32, 35; CX-1-G, I-K.)

443. The membership of the U.S. Region consists of AIIC members having their professional address in the United States. (Stip. 33, 36.)

444. AIIC's "General Document on Regions" and Articles 34 to 36 of the AIIC Statutes serve as the charter for the creation, recognition, representation, and governance of the U.S. Region and all regions. (Stip. 31; CX-1-K, Z-8-12.)

445. The U.S. Region has its own Rules of Procedure. (Stip. 38.) The rules govern its members' participation in the U.S. Region activities, identify the U.S. Region's officers, set down meeting schedules, and provide for budgetary disciplines. (Stip. 38, 43, 44, 46; CX-2124-A; CX-417-F; CX-304-Z-65 (Motton); CX-2449.)

446. The U.S. Region holds meetings, once or twice a year, at which nearly half of U.S. AIIC members are present or represented. At these meetings, the U.S. Region holds elections, reviews the U.S. Region's financial status, and conducts U.S. Region business. (Stip. 39, 40; CX-410-441; CX-443-450.) The U.S. Region mails to all members minutes of its meetings that are approved at the following meeting. (Stip. 47; CX-410 to CX-441; CX-443 to CX-450.)

447. The U.S. Region elects a treasurer and a regional secretary, and nominates a candidate for regional representative to serve on the AIIC Council. (Stip. 43, CX-1-K, Z-8 to Z-12; CX-429; CX-302-Z-348 to Z-349 (Luccarelli); Luccarelli, Tr. 1628.) The U.S. Region's treasurer, regional secretary, and regional representative serving on the AIIC Council operate together under the term "the Bureau." (Stip. 44; CX-2124-A; CX-429; CX-435-B; CX-304-Z-53 to Z-53 (Motton).)

448. When voting at AIIC Council meetings, Luigi Luccarelli, the current U.S. Region representative, votes according to his understanding of the views of the members of the U.S. Region. (CX-302-Z-350/2-20 (Luccarelli).)]

449. The U.S. Region maintains its own funds in bank accounts in the United States (CX-432-B; CX-443-A; CX-300-M/2-M/6), makes decisions regarding disbursements (CX-450-C; CX-436-D; Stip. 50), and receives and collects AIIC membership dues. (Stip. 49; CX-407-A to B; CX-300-K/10-M/6 (Motton).)

450. With AIIC's regional structure and according to its purposes, each region represents the profession of conference interpreters in its region and safeguards their interests. (CX-1-A; CX-2-A; CX-274-D.)

451. The U.S. Region represents conference interpreters in the United States and safeguards the interests of U.S. Region members. The U.S. Region: (a) recommended to the AIIC Council daily rates or agreed to daily rates applicable in the United States (Lateiner, Tr. 916-920; Weber, Tr. 1147; CX-201-F; CX-222-P; F. 90-103); (b) adopted recommendations relating to proposed revisions to AIIC's code and professional standards that reflected the interests of the U.S. Region (CX-435-B); (c) negotiated with the Organization of American States regarding daily rates for interpreters (CX-407-C); (d) adopted per diem rate formulas applicable in the U.S. Region (CX-301-Z-65 to Z-66 (Bishopp); CX-432-F; CX-434-C); (e) issued a warning letter to a U.S. member, Wilhelm Weber, about possible violation of AIIC's rules in connection with interpretation at the 1984 Olympics in the United States (Weber, Tr. 1226-28; CX-1253-A to C; CXT-1253-A to C); (f) cautioned U.S. members about accepting jobs at the 1984 Olympics in the United States that do not conform to AIIC's rules (CX-1253-B; CXT-1253-B); and (g) encouraged U.S. Region members to work in the United States in accord with the AIIC working conditions applicable in the United States. (CX-439-B; CX-301-Z-152.47 to Z-152.48 (Bishopp).)

452. The U.S. Region adopted team size tables and length of day rules for the United States that are different than AIIC's universal team size tables and length of day rules (CX-2254; CX-407-F; CX-409-A; CX-439-B, D-F; CX-50; CX-56; CX-301-Z-152.47 to Z-152.48 (Bishopp).) It has sought a waiver of the AIIC rules to allow interpreters to work alone for 40 minutes in the United States. (CX-301-Z-152.14 to Z-152.15 (Bishopp); CX-432-G; CX-435-A.)

E. Members' Profit

453. Respondents' members are profit seekers. AIIC's members engage in the profession of conference interpretation. (Stip. 8; CX-1-B, Art. 6.)

454. One of AIIC's goals is to represent the profession of conference interpreter and to safeguard the interests of its members. (CX-2490-D, ¶ 10; CX-1458-A; CX-1-A; CX-2-A; CX-245-D.)

455. AIIC defends the interests of its members "in case of controversy surrounding the application of agreed standards." (CX-1458-A.)

456. AIIC's president stated that the association exists to serve the interests of its members. (CX-305-Z-184 to Z-185 (Sy).)

457. AIIC adopted rules requiring its members to charge AIIC-published rates. (F. 90-157 (mandatory rates, per diem, non-working days, "same team same rate"); F. 237-54 (travel arrangements, cancellation, recording, charity).)

458. AIIC rules are designed to improve the terms and conditions under which members work. (F. 158-211 (team size and hours); F. 212-36 (professional address); F. 255-303 (package deals, exclusivity, trade names, portable equipment, non-interpretation services, moonlighting, double-dipping, advertising).)

459. AIIC holds meetings of its entire membership, as well as meetings of committees and regions, at which issues affecting interpreters' livelihoods are discussed. (CX-271-B; CX-259-Q.)

460. AIIC aims is to improve members' remuneration. (CX-208-I; CX-273-G; CX-231-O.) AIIC's president stated in 1957: "AIIC decided for the first time that the daily remuneration should go up." (CX-203-C.) The AIIC Council reminded members in 1973 that "it is the Council's duty, as part of its responsibility for protecting members' interests, to maintain interpreters' remuneration by effecting readjustments and alignments to rates." (CX-201-E; CX-224-Y.)

461. AIIC's Basic Texts refer to terms of employment that relate to members' remuneration. (CX-2-Z-40 to Z-49; F. 90-157 (daily rate and rate); F. 150-57 (same team).)

462. AIIC mailed schedules of rates for conference interpretation. (F. 93-96.)

463. AIIC aims to improve the working conditions for all interpreters. (Stip. 63; CX-245-C.)

464. Respondents assist freelance members to secure interpretation jobs. (F. 465-75.)

465. AIIC rules encourage the hiring of its members. AIIC Guidelines for Recruiting Interpreters require that "members of the Association and applicants for membership shall be approached before non-members." (CX-219-M to N; CX-2-Z-51; CX-1-Z-48.)

466. AIIC membership helps interpreters obtain work. (CX-304-Z-83, Z-110 to Z-111 (Motton); CX-301-Z-152.3 (Bishopp); CX-280-E.)

467. AIIC produces an annual directory, with the name, address and language combination of each member. (Stip. 59; CX-600-A, Z-12, Z-90 to Z-92; CX-606.) Conference interpreters and intermediaries use AIIC's directory to recruit interpreters. (Clark, Tr. 593; Weber, Tr. 1159; Hamann-Orci, Tr. 91.) AIIC sends its directory to purchasers of interpretation services. (CX-268-E; RX-22, 405; CX-304-Z-109/16 (Motton).)

468. The AIIC directory facilitates searching for interpreters with a specific languages or in a particular location. (Stip. 62.) AIIC intends its membership directory to be used by employers. (CX-274-B; CX-1458-A.) Interpreters join AIIC to get their names in the AIIC directory used by chief interpreters and conference organizers. (CX-271-M; Swetye, Tr. 2795; CX-306-X/2 (Weide); Hamann-Orci, Tr. 21; CX-304-L, Z-109/24 to Z-110/11 (Motton).)

469. AIIC provides members with Availability Cards used to inform potential employers of their available dates. (Stip. 64; CX-274-D; CX-2092-A-B.)

470. AIIC's treasurer wrote to members: "[D]on't forget that AIIC has been working for several years in order to improve physical and technical conditions of work . . . to improve our remuneration and that, in particular, the mention of your name and quality in the Yearbook is often most helpful in the pursuit of your professional career." (CX-201-B.)

471. AIIC refers business to members. (CX-427-A; CX-2050-B; CX-1583-A.)

472. AIIC posts employment opportunities in the AIIC Bulletin. (CX-253-E; CX-254-F; CX-276-W, CX-2497-K.)

473. AIIC promotes AIIC members to prospective customers. (Luccarelli, Tr. 1625; CX-274-B to C; CX-259-T; CX-257-O.) AIIC uses the Public Relations Committee "to get more work for our members." (CX-1593-A; CX-280-F; CX-2490-E, ¶ 11.)

474. AIIC advised potential buyers of interpretation services to "entrust the recruiting of a team of interpreters to those AIIC members who are ready to perform this essential service." (CX-215-B; CX-2093; CX-2103-A to J.)

475. AIIC published a magazine, Communicate, to promote interpretation to purchasers. (CX-2095-A to D; CX-279-I.)

476. AIIC provides members with form contracts (containing AIIC's working conditions) for agreements with clients. (Stip. 66; CX-2059-A to F; CX-2060-A to H.)

477. AIIC provides members with other materials to educate purchasers on interpretation services and the staffing of conferences. (CX-1458-A, L to M; CX-2088-A to F; CX-2089.)

478. AIIC rates interpretation equipment and facilities in a Directory of Conference facilities. (CX-259-N to O; CX-2073; CX-2074; CX-2070-A to Z-65; CX-2071-A to N; CX-2112.)

479. AIIC publishes a quarterly AIIC Bulletin to members. (Stip. 67; CX-259; CX-268; CX-270; CX-274.)

480. AIIC's Statistics Committee surveys AIIC members, including those in the United States. (Stip. 20.) These surveys provide members with accurate figures on employment, language trends, and venues of meetings. (CX-268-J; CX-269-G; CX-1643-E.)

481. AIIC surveys users of interpretation services. (Stip. 68; CX-259-I; CX-280-I to M.)

482. AIIC provides members with information concerning the calculation of Value Added Taxes with respect to interpretation services. (CX-280-E; CX-71 to CX-84; CX-1643-E.)

483. AIIC negotiates discounted prices on members' purchases. (CX-268-Z-7; CX-259-G.) AIIC membership cards entitle their holders to discounts at hotels and on airfares. (CX-268-Z-7; CX-1458-F; CX-2058-A to W.) Members of AIIC previously received discounts on the purchase of publications, such as dictionaries. (Stip. 69.) AIIC provides members with applications for credit cards. (CX-1658-E.)

484. AIIC provides its members insurance plans for health, loss of earnings, and retirement. (CX-259-E; CX-306-Z-135/6 (Weide); CX-301-Z-152.8/17 (Bishopp).) For the Non-Agreement Sector, AIIC negotiates agreements with insurance plans for accident, sickness and loss of earnings benefits to which members can then subscribe directly. (CX-1643-C; CX-261-W; CX-1458-M; CX-304-Z-126, Z-

331 (Motton).) AIIC also makes available travel insurance. (CX-1658-F; CX-1458-M; CX-304-Z-126, Z-331 (Motton).)

485. AIIC members manage two retirement plans for members. (Stip. 71, 72; CX-2077-D to E; CX-1458-M; CX-1643-C; CX-2076-A.)

486. AIIC maintains a "Solidarity Fund" to assist members through grants and loans in emergency distress situations, such as workplace accidents. (CX-226-Z-5; CX-301-Z-152.8/22 to Z-158.9/4 (Bishopp); CX-254-H; CX-2085-B.)

487. AIIC contacted European governments to obtain exemption from the Value Added Tax for interpretation services. (CX-280-D-E; CX-268-J.)

488. AIIC contacted a U.S. Senator to increase employment for U.S. interpreters in a meeting of the United Postal Union. (CX-1404-A-E.)

489. AIIC safeguards the interests of its members by training and research. (CX-301-Z-1/22-24 (Bishopp).) AIIC organized lectures and seminars to improve the quality of interpretation. (Stip. 73.)

490. AIIC has seminars to assist members with commercial aspects of interpretation (RX-27, 461; CX-277-Z-5); on sales and negotiating techniques (CX-1578-A; CX-253-B; CXT-279-Z-2 to Z-5); and on "Winning Work Competitively" (CXT-279-Z-2 to Z-5; CX-1578-A; CX-1579-A.) AIIC instructed members in "Sales Arguments" for interpreters negotiating with clients. (CX-302-Z-314 to Z-315 (Luccarelli); CX-1480-B.)

491. AIIC organizes seminars and lectures on the practice of interpretation. (CX-252-D; CX-269-I; CX-277-Z-25; CX-301-Z-1.1/12 (Bishopp).)

492. AIIC negotiates "Agreements" with large international organizations. (Stip. 74.) These Agreements govern the pay rates and working conditions applicable to all freelance interpreters working for those employers. (Stip. 75; CX-2490-E, ¶ 12; CX-1538-A.) AIIC's negotiated agreements for all freelance interpreters, whether or not members of AIIC. (CX-305-Z-186 (Sy); Stip. 76.) There are five Agreements, which AIIC refers to as the "Agreement Sectors": (1) members of the United Nations Common System ("United Nations"); (2) the European Union; (3) Coordonnees; (4) Interpol; and (5) various international trade secretariats. (Stip. 77.)

493. AIIC negotiates an agreement on remuneration and working conditions for freelance interpreters working for the United Nations Common System (including the United Nations, the World Health Organization etc.). (Stip. 78; CX-1643-B.)

494. AIIC negotiates an agreement, which is in effect throughout the world, with labor unions, known as international trade secretariats, that governs rates of pay and working conditions for all freelance interpreters (not just AIIC members). (Stip. 79; CX-277-W.)

495. AIIC negotiates an agreement with Interpol governing the wages and working conditions of freelance interpreters working for it. (CX-1458-M; Stip. 75, 78.)

496. AIIC negotiates an agreement with the European Union, which includes the European Commission, the European Parliament, and European Court of Justice, for an agreement to provide interpretation services. (CX-1458-M; CX-1643-C.)

497. AIIC negotiates an agreement governing the wages and working conditions of freelance interpreters working for Coordonnees, which consists of European Space Agency; the Council of Europe; the Organization for Economic Co-operation & Development; the North Atlantic Treaty Organization; and the Union de l'Europe Occidentale. (Stip. 81; CX-1643-C.)

VII. LABOR EXEMPTION

498. The State Department's list of freelance interpreters, which includes many AIIC members, is a "roster of independent contractors." (CX-242-H.)

499. Interpreters hold a copyright interest in any recording of their interpretation because they are independent contractors. (CX-244-F; CX-224-Z-8-9; CXT-273-O-P; CX-2121; CX-2059-B.)

500. AIIC's standard contract limits the control of the conference organizer over the work practices of interpreters because interpreters operate as independent contractors. (CX-2059-B.)

501. AIIC's agreements specify terms for freelance interpreters with various organizations, but not for staff interpreters who are employed by those organizations. (CX-302-Z-121/18 to Z-122/1 (Luccarelli).)

502. There exists an interpreters' union in the United States that is separate from AIIC and TAALS. *See* Motion for Leave to File

Amicus Brief on Behalf of the Translators and Interpreters Guild Affiliated with the Newspaper Guild, AFL-CIO, CLC, Oct. 17, 1995.

503. Freelance interpreters determine whether to work at a particular conference on a case by case basis. (Luccarelli, Tr. 1614-15, 1620-21; Swetye, Tr. 2775/2-14, 2793/10-19; Silberman, Tr. 3354/11-14, 3355/20-22.)

504. The AIIC committee that explored various options for restructuring the organization acknowledged that a trade union's members must be employees. (CX-268-W-X.) This was part of the reason AIIC rejected unionization. (*Id.*) Some governmental and intergovernmental organizations employ staff interpreters. (Luccarelli, Tr. 1693/24 to 1695/8.) No AIIC member has established a commercial interpretation firm with interpreters as employees. (Luccarelli, Tr. 1693-94; CX-301-Z-105 (Bishopp); CX-428-A.)

505. In 1992 respondents rejected the option of becoming a union. (CX-270-K, n.**; *cf.* CX-268-W-X.)

506. Since 1964, AIIC has negotiated collective bargaining agreements with institutional employers (EEC, UN, NATO). (CX-218K-L; CX-203-C; CX-225-B-C; CX-284-D; CX-286-Z-32.)

507. In 1978, AIIC's president felt that non-agreement (freelance) members were independent and not employees (CX-219-S), since employers could not instruct them how to do their work. (CX-219-U.)

508. Agreement sector AIIC members want AIIC to act as a union. (CX-284-C.)

VIII. NEED FOR AN ORDER

A. Likelihood of Continuing Violations

509. In August 1992 at the Extraordinary Assembly in Brussels, members of AIIC removed monetary conditions from the AIIC Basic Texts. (CX-273-G.) The resolution states:

> DEEPLY ATTACHED to the principles of universality and solidarity upon which AIIC, since its inception, has based its action in organizing the profession, for the benefit of both the interpreters and the users of interpretation,
> FULLY AWARE of the gradual implementation of anti-trust legislation in the various parts of the world,
> DECIDES on the following principles:

1. To remove all mention of monetary conditions (*e.g.* rates, subsistence and travel allowances, payment of non-working days) from our basic texts. . . ."

(CX-273-G.) The resolution provided that AIIC may negotiate agreements governing the working conditions of conference interpreters, including remuneration and manning strengths, with employers in non-governmental organizations. (CX-273-H.)

510. The day before the Extraordinary Assembly, the NAS held a meeting -- that was planned to have "neither minutes nor recording of the proceeding" -- to explain how, in light of the antitrust laws, it is possible to "operate in another way." (CX-271-C, F; CX-273-U.)

511. According to one of the members of the AIIC Council (CX-616-C), AIIC "deregulated" its monetary conditions at the Extraordinary Assembly and "trusted" its members to "keep the faith." (CX-285-S.)

512. The AIIC Council reminded members that they could still assert their "rights" despite removal of express mandatory conditions. (CXT-2479, p.1.) The U.S. Region Council member advised U.S. Region members in January, 1994, "We should not forget . . . that deregulation does not mean we have lost our rights as individual professionals. Those are still the same, and we have to defend them individually." (CX-1566.) Another Council member wrote, in June 1993, "competition must be exercised in conformity with the code of professional ethics" and working conditions. He also stated that interpreters have the "right" to the same working conditions in the future:

rights should be respected in the future as they were in the past: the interpreter working away from his "professional address" has the RIGHT to a per diem and to complete reimbursement of his travel expenses; the interpreter has a RIGHT to payment of "nonworking days"; the interpreter has a RIGHT to compensation for a "loss of earnings"; the interpreter has the RIGHT to fees that are a fair reflection of the difficulty and importance of his work. (CXT-2479, pp. 1-2.)

B. History of Attempts to Evade the Antitrust Laws

513. In November 1975, the U.S. Region meeting, "unanimously decided to set up a committee to study the [antitrust] question in liaison with TAALS." (CX-405-C.) AIIC's Executive Secretary wrote TAALS and requested information on antitrust legislation in the United States. (CX-210-E, D.)

514. AIIC knew it was illegal to agree on rates in the United States. (CX-305-Z-27, Z-35, Z-206 to Z-207 (Sy); Weber, Tr. 1208-09; CX-300-Z-88 to Z-89 (Motton).)

515. In 1979, the AIIC Council became aware of an antitrust suit against AIIC's Canadian region. (CX-222-N; CX-223-V.) AIIC ceased publishing rates for Canada because of the litigation. (CX-301-Z-59 to Z-60 (Bishopp).)

516. AIIC stopped publishing rates for the U.S. between 1981 and 1987 because of the antitrust laws. (CX-305-Z-36 (Sy); CX-72, CX-73, CX-75.) Nevertheless, its price agreements continued. (CX-1226) According to the report of the December 5, 1981, meeting of the U.S. Region, there was a "gentleman's agreement" to maintain the price conspiracy:

> As members of Council know, there is a "gentleman's agreement" not to ask for less than US Dollars 250 per day. Because of the advice given by the anti-trust lawyers consulted; it is preferable not to appear with a fixed figure on the rate sheet. There is a trend now to ask for 275. (CX-1226-A.)

517. In 1983, AIIC's Secretary General explained that despite the price-fixing laws, members know what they are supposed to charge:

> Members all know that [sic: what] the local rate is and any bargaining with the client can only be upwards and not downwards. It was inserted in this way because of the "cartel" price-fixing laws in some countries, but members know very well that they must not undercut. (CX-1238.)

518. In 1986, the U.S. Region Treasurer (CX-616-Z-4) reported to AIIC that "The minimum rate on the non-governmental sector is unchanged and is not to be published on account of U.S. Government regulations." (CX-1346.)

519. About 1983, AIIC began publishing its minimum rates under the label of "market survey." (CX-71; CX-2446-C.) In 1987, Patricia Longley, then AIIC Treasurer (CX-616-Y), stated that in these "market surveys": "The figures represent the currently applied daily rates of remuneration, in other words the minima for a given local market." (CX-2466-C.) U.S. Region members understood that the "standard" figures on the market survey were the "standard" rates referred to in Article 8 of AIIC's 1991 Standards of Professional Practice (which specify what "the rate of daily remuneration shall be"). (CX-303-Z-62 (Moggio-Ortiz); CX-2-Z-43; CX-76.)

520. Before its 1991 Assembly, AIIC was "strongly advised" for antitrust reasons to adopt amendments that would have removed the "monetary" references from the basic texts. (CX-262-Z-42; CXT-262-Z-45 to Z-47, p.3.)

521. At the 1991 Assembly, Malick Sy, now AIIC President, insisted that the monetary conditions could not be removed by simple majority. (CX-305-Z-244 to Z-245 (Sy); CX-301-Z-129 to Z-131 (Bishopp); CX-266-S.) The Assembly did not achieve the two-thirds majority "necessary to remove all mention of fee scales on the private market" from the Basic Texts. (CX-441-B; CX-270-K.)

522. In 1994, Malick Sy was elected president of AIIC on a platform of solidarity. According to Mr. Sy, AIIC is "like pillars of universality, rigorous professionalism, the solidarity between the members serving as cement, the binding material between the two pillars." (CXT-279-T-U.)

C. Changes to the Basic Texts

523. AIIC's new rules, the 1994 Professional Standards, "carefully" addressed "financial matters." (CX-1-Z-40 to Z-46; CX-1556-A.) An interpreter "may ask for the inclusion of" AIIC's form-contract cancellation clause (CX-1-Z-41, Art. 3); professional address (still changeable only once in six months and with three months notice) "shall be used, *inter alia*, as a basis for setting up Regions" (CX-1-Z-40, Art. 1); journeys (depending on their length) "call for the scheduling of [one to three] rest days" (CX-1-Z-45, Art. 10); members "shall" receive subsistence allowance and travel expenses unless "the parties agree otherwise" (CX-1-Z-45, Art. 9, 11); members "shall request a briefing day whenever appropriate," and non-working days "that may be compared to normal working days shall be negotiated by the parties." (CX-1-Z-45, Art. 8, Z-39.)

524. Reporting on the results of the 1992 Assembly the U.S. Region Representative did not indicate that freelance interpreters should change their practices as a result of any of AIIC's changes to its Basic Texts (CX-448-B; CX-303-Z-100, Z-99 (Moggio-Ortiz).)

525. The committee that drafted the 1994 rules, "eliminated the monetary conditions while taking care to preserve the great principles which the association holds to, such as the professional address. . . ." (CXT-279-K, p.4.)

526. While drafting the 1994 Professional Standards, AIIC prepared a "Vademecum" (CXT-2484-A-C, pp. 2-3) defined as a "pocket compendium of basic AIIC rules and recommendations" (CX-206-D) and "for internal use." (CX-277-Z-4; CX-245-C.) The purpose of the Vademecum is to "speak more openly on financial or related questions" ("since this document is not a basic text and has only an informative character") and "specify in maximum detail all the circumstances that are appended to each article of the Standards as an annex, as well as all the 'rules' that should not be forgotten in the case of an assignment." (CXT-2484-A-C, pp. 2-3.) The Vademecum indicates that interpreters should include in their cost estimates the following factors: indivisible daily rate, commission, travel expenses, subsistence allowances, remuneration for days of travel, remuneration for rest days, remuneration for nonworking days, remuneration for days of briefing, recording ("copyrights"), cancellation, and non-interpretation duties. (CXT-2609-A to C, pp. 3-5.)

527. After the FTC investigation began (F. 538), AIIC introduced "health and quality" into the preambles to its rules. The preamble to the Standards of Professional Practice, Version 1991, reads in part, AIIC "herewith adopts the following Standards of Professional Practice applying to the work of its members." (CX-2-Z-40.) The 1994 Version adds, "whose purpose is to ensure an optimum quality of work performed with due consideration being given to the physical and mental constraints inherent in the exercise of the profession." (CX-1-Z-40.)

528. AIIC's 1994 Professional Standards are virtually identical to the 1991 texts with restraints on staffing strength (CX-1-Z-42 to Z-44, CX-2-Z-43 to Z-46), hours (CX-1-Z-45; CX-2-Z-42), double-dipping (CX-1-Z-37, Art. 3(c); CX-2-Z-37), recording (CX-1-Z-40, Art. 2(b); CX-2-Z-41) and performing non-interpretation services (CX-1-Z-39, Art. 7(h); CX-2-Z-39). The "Guidelines for Recruiting Interpreters" remains appended to the Standards, with the same rules on advertising, commissions, exclusivity, package deals, and trade names that it contained prior to the vote to remove monetary conditions. (CX-1-Z-49; RX-2.) In July 1994, the AIIC Council "confirm[ed] the binding character of the Professional Standards [Normes professionelles]." (CXT-501-T, p. 2; CXT-249-C-D.)

529. According to AIIC's president, AIIC's monetary conditions can no longer be published "openly." (CX-1580.)

530. AIIC's standard form contract provides a template for members to continue to adhere to AIIC's price fixing rules. (CX-2060-A to B.) The contract has blanks for filling in daily remuneration, remuneration for travel days, rest time, recording, per diem for period away from the professional domicile, and first class travel. (CX-2060-A.) The "General Conditions of Work" on the contract (CX-2060-B) enumerate AIIC's rules about package deals (¶ 1), non-interpretation duties (¶ 2), working hours/overtime (¶ 3), recording fees (¶ 4), travel arrangements (¶ 7), and cancellation (¶ 9). (CX-2060-B.) The quadruplicate format, which provides a copy for the consulting interpreter, interpreter, recruiter, and conference sponsor, allows any of these parties to verify compliance with rules on same team same pay and package deals. (CX-2060.)

531. AIIC's March 1994 Bulletin contained a recommendation for interpreters to specify to clients that "interpreters' fees are unchanging." (CXT-279-Z-2 to Z-5, p.2.) This and other recommendations came in reports of "sales techniques" sessions that the NAS set up in August 1992 to learn to operate in light of the antitrust laws. (F. 510; CX-273-U; CXT-276-E to G, p.2.)

532. Rates remain stable among interpreters. (Weber, Tr. 1186; Clark, Tr. 614.)

533. The pricing of AIIC members in the United States in 1992-1995, during which AIIC did not publish suggested minimum prices, was similar to 1988-1991. (Wu, Tr. 2205-06; CX-3004; Silberman, Tr. 3068; CX-3004-A.)

D. Agreement Sector

534. AIIC continues to negotiate "agreements" with intergovernmental and international organizations, which govern the pay rates and working conditions for all freelance interpreters working for those employers. (F. 492-97; Stip. 75; Bowen, Tr. 1031.) AIIC publishes in its Bulletin the rates negotiated under its Agreement Sector agreements, including rates for the United States. (Luccarelli, Tr. 1840; CX-305-Z-347 (Sy).) Meetings pursuant to these agreements have taken place in the United States. (Luccarelli, Tr. 1600; CX-2597; CX-2598.)

535. By entering into an agreement with labor unions, referred to as the International Trade Secretariats (ITS), AIIC decided prices to charge private sector users. (Stip. 79-80.) ITS used such terms for conferences it organized in the United States. (CX-2597-98.) The March 1995 AIIC Bulletin, published 795 Swiss Francs as the daily rate applicable in the United States when interpreters are working for the unions. (CX-284-U; CX-2066-A.)

536. Members use the agreements for remuneration and working conditions in the rest of the private sector. (CX-226-C; CX-231-C; CXT-2484, pp. 2-3.) AIIC used the UN per diem levels as a floor in the private sector. (CX-226-C; CX-231-C.)

E. Underground Practices

537. AIIC's suspension of publishing rates in the United States during the 1980's created an irregular rate. (F. 524; CX-1348-B; CXT-244-H.) In 1986, the U.S. Region "decided to request the inclusion of a 'suggested minimum rate' on the annual 'market survey sheet,' as the lack of a figure for the US Region caused a number of problems (imported teams, use of the 'elsewhere rate', etc.)." The Council agreed, and the rate was scheduled to be published on the next market survey as the suggested minimum rate for the United States. (CX-1348-B.)

F. Changes to AIIC's Basic Texts Made In Response to Antitrust Investigation

538. AIIC knew of FTC investigations of interpreters in June 1991, when two U.S. Region members (also members of TAALS) responded to a Commission document request of TAALS concerning horizontal restraints. (Saxon-Forti; Valiyova; CX-608-Z-77; CX-935-B.) AIIC discussed the TAALS investigation at its January 1992 Non-Agreement Sector meeting in Washington, D.C. (CX-270-F) which agreed to organize a debate and find a lawyer. (CX-1480-A.) FTC Staff took testimony from U.S. Region member (and past TAALS President) Anna Saxon-Forti regarding AIIC (Saxon-Forti, Tr. 2687), contacted three U.S. Region members prior to May 1992 (CX-441-A), and took their testimony. (CX-301-B (Bishopp); CX-300-A (Motton); Swetye, Tr. 2804.)

539. The FTC investigation of AIIC led to AIIC's 1992 decision to remove monetary conditions from its Basic Texts. (CXT-1534.)

540. The AIIC Assembly voted in 1992 and in 1994 not to approach "DG-IV" (the European Union's antitrust enforcement department) for antitrust "exemption" and recognition of the right to establish working conditions for AIIC members. (CX-302-Z-362 to Z-363 (Luccarelli); CXT-280-P-Q, pp. 1-4; CX-273-H.) AIIC recognized that notifying the DG-IV implies "the impossibility of AIIC negotiating collective (bargaining) agreements with intergovernmental employers." (CXT-280-P-Q, p.4.)

541. Despite antitrust concerns raised in Germany, Canada, and the European Union, AIIC did not change its basic texts until the FTC

investigation began. (F. 523, 528-39; CX-84; CX-301-Z-59-60 (Bishopp).)

542. AIIC is dedicated to fighting to improve interpreter pay. (CXT-268-T-V.) Rates are one of AIIC's "most precious professional attainments." (CXT-268-T-V, p.3.)

LEGAL DISCUSSION

The profession of interpretering -- orally converting one language into another -- has long served to ease diplomacy, international trade and cultural exchange.[5] Consecutive interpreting grew from the League of Nations in the 1920's and simultaneous interpreting was first used in the Nuremberg Trials after the Second World War. In 1952, interpreters -- both civil servants and freelance -- decided to found a professional association "to regulate the profession, to impose standards and ensure their application." (CX-245-C.) This is the history of AIIC.

SUMMARY

For more than forty years, AIIC has regulated the livelihood of its members. AIIC specified the length of the working day and the number of interpreters to be hired at a conference. AIIC members agreed on minimum daily rates to be charged in the United States. AIIC required that all interpreters at a conference be paid the same daily rate.

AIIC rules protected its local freelance members from competition from other AIIC members, and prevented intermediaries from forming firms of interpreter employees. AIIC prohibited advertising by members of "commercial forms of one-upmanship." Its Basic Texts specified minimum fees AIIC members should charge, and for what amount of work. AIIC members adhered to those rules and AIIC and the U.S. Region took action on the rules in the United States.

AIIC required payment for travel expenses, per diem, rest days and non-working days depending on whether the interpreter was away from a "professional address." AIIC defined a "normal working day"

[5] "And they knew not that Joseph understood them; for he spoke unto them by an interpreter." Genesis, Ch. 42 v.23.

of six hours. Each effective restraint was part of a scheme to raise prices.

AIIC's restraints had anticompetitive effects. The conspiracy accomplished its purpose: fixing and raising the fees paid to AIIC members. As a result, AIIC interpreters earned more and worked less. The evidence obviates extensive inquiry into market power, market definition or market share. California Dental Ass'n, FTC Docket No. 9259 (1995) ("CDA"), slip op. at 28 n.19; *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461 (1986) ("IFD"); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 109-10 (1984) ("NCAA").

Endeavoring to improve interpreters' working conditions and income, respondents exist for the profit of their members. Their actions to improve the economic welfare of the interpreters resemble closely union activity which might be exempt from antitrust scrutiny. AIIC has determined, however, that it is a professional association -- not a union -- and respondents waived the defense by failing to raise it in pleadings or during the presentation of evidence.

A finding of violation shows that the Commission has jurisdiction over AIIC for acts performed in, or with effects in, the United States. And the Commission may proceed against the U.S. Region, an unincorporated association, as part of a AIIC.

Respondents continue to maintain rules on fees and working conditions that deprive consumers of the benefits of competition and violate the antitrust laws. AIIC tried to conceal price-fixing agreements in "gentlemen's agreements" and "market surveys," "unpublished" rates and a little book called a "Vademecum." Despite the removal of some offending rules from their Basic Texts after the commencement of the investigation that led to this case, respondents and their members continue to fix prices, allocate markets and violate the antitrust laws.

FACTS

AIIC's records show its intent to raise prices by eliminating competition between AIIC's members and to prevent intermediaries from coming between interpreters and clients. These documents are persuasive evidence of AIIC's beliefs as to the effects of its rules and practices.

1. Rates and Terms

Since the 1950's, AIIC members have forced employers to meet AIIC's rates and terms of employment. (F. 92.) As founding member and past president, Christopher Thiery (Weber, Tr. 1137) stated on AIIC's 20th anniversary in 1973 (F. 361):

> It was in 1957 that AIIC decided for the first time that the daily remuneration should go up. The base rate had been $25 since the end of the war, and it was decided to increase it to $30. It had to be a unilateral decision: for the private market there was no "interlocuteur valable" (nor is there now) and the intergovernmental organizations refused even to acknowledge letters. . . . When AIIC's united front forced the decision upon them (members simply refusing contracts at earlier rates), we suddenly came to be considered as very reasonable people who entirely deserved a long due increase in pay. In fact, that was the first test of AIIC's strength. And when, in 1963-64, AIIC decided to increase the daily rate from $30 to $40, large as the rise was it went through much more smoothly.

In 1976, the U.S. Region demanded and got its rates from the Organization for American States. AIIC and TAALS boycotted OAS until AIIC's U.S. Region council member struck a deal that would pay the AIIC minimum rate. (F. 365.) The AIIC rate increased every year; businesses like Berlitz and Brahler called a TAALS or AIIC member to find out the price for the year. (F. 328.)

AIIC's rates became the price for interpreters to charge worldwide -- except in the United States, where the mandatory minimum rate was higher. (F. 99.) The U.S. Region agreed to AIIC's rates for the United States by vote. (F. 100, 307.) In 1977, the U.S. Region adopted the rate voted on at TAALS' General Assemblies. (F. 307-08.) AIIC became concerned about regional differences in rates. The Non-Agreement Sector (freelance) came into existence to try to reduce these differences. (F. 105.) Competition began to arise from differing team strength tables resulting in competing bids. (F. 172.) AIIC adopted a uniform team strength table, increasing the minimum number of interpreters for a job. (F. 172-75.)

AIIC's price-fixing prevailed in the United States. Members of AIIC's U.S. Region feared that if they were branded as undercutters by not charging the U.S. rate they would lose the referrals from other members on which they depend. (F. 105.)

In November 1975, after *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), AIIC "set up a committee to study the question in liaison with TAALS." (F. 513.) In 1983, they changed their rate sheets to

documents called "Market Surveys." (F. 519.) A 1987 AIIC memorandum makes clear that the "Market Surveys" are in fact the mandatory minimum rates. (F. 519.) The U.S. Region adopted a "gentlemen's agreement" not to charge less than a particular rate. (F. 516.) In 1983, AIIC's secretary general wrote to Wilhelm Weber, who was recruiting interpreters for the 1984 Olympic Games in Los Angeles:

> Members all know that [sic: what] the local rate is and any bargaining with the client can only be upwards and not downwards. It was inserted in this way because of the "cartel" price-fixing laws in some countries, but members know very well that they must not undercut.

(F. 517.) In 1986, when the U.S. Region treasurer reported to AIIC on rates in the U.S. Region, she wrote, "the minimum rate in the non-governmental sector is unchanged and is not to be published on account of US Government regulations." (F. 518.)

In 1986 the U.S. Region decided it too should publish rates in the "market survey," and included what it called a "suggested minimum" (F. 537), again sending the TAALS rates to Geneva for publication. (F. 308.)[6] AIIC continued to publish rates for the U.S. Region, provided to AIIC by the U.S. Region, which used the rates voted on by TAALS, until AIIC ceased publishing its "Market Survey" in 1992. (F. 308; CX-17-84.)

2. Recruiting Guidelines

AIIC felt that intermediaries (organizers of interpreters for conferences) would erode interpreters' fees in the private market. According to Christopher Thiery, "once we accept impresarios and professional conference organizers and conference halls as employers, we lose control over the situation and end up by being paid what they decide is good for us. Hence the gradual introduction of the 'direct contract' and 'direct payment' principal . . . ." (F. 259.) Mr. Thiery later observed, "We must never forget that when the chips are down an intermediary may well have to cut costs to stay in business. And if we happen to be one of the 'costs,' then that's just too bad for us." (F. 259.)

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[6] Those rates had been voted on at TAALS meetings (F. 307); about half of the TAALS members were also members of AIIC (CX-3006).

In 1963, AIIC's 10th Assembly resolved that contracts should be between interpreters and conference organizers. "Step by step, this provision was later included in the Code" and in 1979 into the "Guidelines for Recruiting Interpreters." (CX-206-C.)[7]

The Recruiting Guidelines were adopted by AIIC Assembly in 1983 (F. 34), and sent to AIIC members as a binding annex to the 1991 Basic Texts. (F. 32-33.) The same document is also included in the 1994 Basic Texts. (CX-1-Z-47 to Z-50; RX-2 at 61-62, 65-66.) The Recruiting Guidelines have never been repealed. (F. 33.)

3. Abandonment

AIIC has never abandoned its price fixing. (F. 331, 333-34, 532-33.) It stopped publishing rates, removed some rules from its "Basic Texts," and rewrote other rules to avoid antitrust scrutiny. (F. 523, 528.) In 1991, AIIC rejected a proposal to remove its "monetary conditions." (F. 520-21.) AIIC's 1992 resolution reaffirms AIIC's commitment to collective action. (F. 509.) Council members exhorted "skeptics" and U.S. colleagues that the "rights" incorporated into the "monetary conditions" should be "respected in the future as they were in the past." (F. 512.) AIIC made certain that its "old" rules continue to be communicated to its members. (F. 523-33.)

AIIC's 1994 rules did not remove AIIC's monetary conditions; they rewrote them. (F. 523, 528.) Under AIIC's new rules, an interpreter "may ask for the inclusion of" AIIC's form-contract cancellation clause, which contains the same terms as the "removed" AIIC rule on cancellation fees (CX-1-Z-41); depending on length, journeys may "call for the scheduling of [one to three] rest days"; members "shall" receive subsistence and travel expenses unless "the parties agree otherwise"; members "shall request a briefing day whenever appropriate"; and non-working days "that may be compared to normal working days shall be negotiated by the parties." (CX-1-Z-45, Z-39.) The rewritten "professional address" rule still allows an interpreter to change her domicile only once every six months and then with three months notice. (F. 233.) At its meeting during the 1994 Assembly, NAS "reaffirm[ed] its moral commitment to the

[7] Five restraints are in the Recruiting Guideline: AIIC's bans on package deals and lump-sum payments, commissions, exclusive agency arrangements, trade names, and comparative advertising. (CX-1-Z-49.)

concept and application of the principle of professional address." (F. 233.)

In 1994 AIIC introduced "health and quality" language into its team size, working day and non-interpretation duties rules, leaving the substance of the rules unchanged. (CX-279, 527.) In July 1994, the AIIC Council "confirm[ed] the binding character of the Professional Standards." (F. 528.) AIIC's president stated in 1994 that monetary conditions "can no longer be published openly." (F. 529.) AIIC prepared a "Vademecum," a "pocket compendium of basic AIIC rules and recommendations" for "internal use." (F. 526.) The purpose of the Vademecum is to "speak more openly on financial or related questions." (F. 526.)

AIIC's Vademecum suggests that interpreters should include in their cost estimates the fee elements they included under the old rules: remuneration, indivisible daily rate, commission, travel expenses, subsistence allowances, recording ("copyrights"), cancellation, non-interpretation duties and remuneration for days of travel, rest days, non-working days, and days of briefing, and explains how to calculate those charges. (F. 526.)

AIIC still maintains its standard form contract, which provides a template for members to continue to adhere to AIIC's price fixing rules. (F. 476.) The contract still has blanks for filling in daily remuneration for travel days, rest time, recording, per diem allowances for the period away from the professional domicile, and first class travel. The standard contract's "General Conditions of Work" spell out AIIC's rules about package deals, non-interpretation duties, working hours, recording fees, travel arrangements, and cancellation. (F. 530.)

AIIC's Bulletin continues to explain AIIC's price restraints. Two months after the new rules were adopted, the Bulletin recommended that interpreters tell clients that "interpreters' fees are unchanging." (F. 531.) The June 1993 Bulletin recommended that interpreters negotiate indivisible rates for "conferences of short duration" by saying that "one cannot take other assignments in the course of a free half-day"; negotiate travel day charges by "explaining that the interpreter is at the client's disposal during the travel days"; and "promote our profession without noisy publicity" in light of some countries' prohibitions on comparative advertising. (F. 531.) These recommendations came in reports of a "sales techniques" session that

NAS instituted when it met in August 1992 to learn to operate in light of the antitrust laws. (F. 531.)

"Going rates" still exist and remain stable among interpreters. (F. 331, 333-34.) Prices in the years 1992-1995, when AIIC did not publish suggested minimum prices, closely resemble those in 1988-1991. (F. 320.) Published rates rose $25 per year. (F. 533.)

AIIC continues to negotiate collectively with large international organizations, which govern the pay rates and working conditions for all interpreters working for those employers. (F. 492-97.) AIIC publishes the rates negotiated under its Agreement Sector agreements, including rates for the United States. (F. 534.) AIIC has collectively entered into an agreement with international federations of labor unions. (F. 494, 535.) That agreement has governed fees and terms for conferences in the United States. (F. 535.) In March 1995, AIIC published a daily rate for the United States for interpreters working for those unions. (F. 535.)

I. AGREEMENT

At the heart of any conspiracy is an unlawful agreement. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). The evidence shows agreement by AIIC, the U.S. Region, and the interpreters to enforce its restrictive rules.

A. Conspiracy

An organization controlled by competitors is the agent of the group, and its conduct is a conspiracy of its members.[8] Respondents' members are competing conference interpreters (F. 453-54), and respondents' conduct in restricting competition constitutes a conspiracy of its members. A code of ethics, alone, "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." CDA, Slip op. at 10, citing *AMA*, 94 FTC at 998 n.33. Here, AIIC's members voted on the Association's Basic Texts and agreed to abide by "the rules and regulations of the Association" as a condition of membership. (F. 43, 48-52, 63-67.)

[8] *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) ("Professional Engineers"); *American Medial Association*, 94 FTC 701, 997-98 (1979) ("AMA"), aff'd by an equally divided Court, 455 U.S. 676 (1982); *Goldfarb*, 421 U.S. at 781-82.

1. Vote

The restraints were created by majority vote at AIIC General Assembly meetings attended by U.S. members. (F. 29-30, 37-38.) AIIC's rules are in the "Basic Texts," which include the Code of Professional Ethics and the Standards of Professional Practice. (F. 25.) Attached to the Basic Texts are binding annexes: AIIC's Guidelines for Recruiting Interpreters, Staff Interpreters' Charter, and Videoteleconferencing rules. (F. 28.) AIIC members and candidates sign commitments that they will follow the rules adopted by AIIC.[9]

The 1994 Code of Professional Ethics states that members are bound to respect the Code in their work as conference interpreters.[10] (F. 51.) Members are bound by the rules and follow them, recruiting other interpreters to follow AIIC rules. (F. 52, 58.)

AIIC enforces its work rules with penalties for breach, including warning, reprimand, suspension, and expulsion. (F. 62.) Members charged with violating the rules have been investigated and penalized, or have resigned. (F. 66, 68, 229-30, 301, 316.) The AIIC Council grants "waivers," to suspend a particular rule to a specific individual. (F. 56-57.)

2. Enforcement and Understanding

AIIC and its members understood that all of the price-fixing rules applied in the United States. (F. 26, 52, 362.) From 1972 until 1982, and again from 1988 through 1991, AIIC published rates specifically applicable in the United States. (F. 93, 516-21.) AIIC stated that "members all know what the local rate is and any bargaining with clients can only be upwards and not downwards." (F. 108.) Respondents successfully pressured the 1984 Los Angeles Olympics to meet AIIC rates and terms in the United States. (F. 108, 344-60.)[11]

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[9] Applicants for membership in AIIC follow AIIC's rules for 200 working days prior to application. (F. 44-47.) Members can object to applicants' membership for not following AIIC's rules. (F. 46, 359.) Applicants must sign a pledge that they will continue to abide by the AIIC Code of Ethics and Standards. (F. 44.)

[10] "Members of the Association shall neither accept nor, a fortiori, offer for themselves or for other conference interpreters recruited through them, be they members of this Association or not, any working conditions contrary to those laid down in this Code or in the Professional Standards." (CX-1-Z-39.)

[11] Enforcement is not an element of conspiracy. *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 488 (1950).

Wilhelm Weber was threatened because of the terms on which he recruited interpreters to work at the 1984 Olympics (F. 359), and for working without charging phantom travel charges. (F. 228-29.) Jeannine Lateiner was investigated for hiring permanent interpreters rather than local freelancers. (F. 285.) AIIC attempted to expel U.S. Region member Marc Moyens for violating the professional address rule and failing to charge for travel expenses, in connection with work in Europe, and reprimanded him when the expulsion vote failed to obtain a two-thirds majority. (F. 230.)

AIIC also used rumor and blacklisting to secure members' adherence to the rules. Interpreters feared being labeled as undercutters. (F. 72, 106.) When interpreters deviated from the AIIC rules, they kept their agreement secret, for fear of retaliation by other interpreters. (F. 73, 106, 148.) Conference interpreters rely on their colleagues for referrals. Interpreters fear being blacklisted by colleagues because much of their referral work comes from other interpreters. (F. 71-72, 106.) In 1989, AIIC's U.S. Region and AIIC warned their members about three intermediaries who did not follow AIIC rules, hinting that some regions have actually decided to refuse work from these agencies. (F. 88.) The U.S. Region also "remind[ed] AIIC in general that it never had the petite equipe. . . . It is determined to expose all outside interpreters who accept this practice in our region." (CX-405-C.) AIIC leaders warned U.S. members against moonlighting. (F. 283.)

In 1987, AIIC's then-president stated, in a speech about work rules that if AIIC no longer had a "universally valid Code of working conditions," clients would benefit by playing interpreters against each other "in a poker game of undercutting." (CX-245-D.) Interpreters cite the rules in negotiating with clients. (F. 54-55, 59.)

AIIC's members, including AIIC's U.S. members, agreed to join AIIC and be bound by its rules. They met to discuss prices and price-related agreements, and voted on those prices and agreements and set minimum daily rates. (F. 98, 100, 516-19.)[12] They adhered to the prices published by AIIC 90% of the time. (F. 319.) Such simultaneous price moves indicate conspiracy. (*United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 182

[12] The meetings and votes on rates took place at TAALS meetings (F. 307) and AIIC meetings. (F. 98, 100.) Intermediaries observed that in the 1980's, the "going" rate represented the TAALS/AIIC rate, charged by all interpreters, ragardless of the affiliation. (F. 328-34.)

(3d Cir. 1970) ("American Standard"), *cert. denied,* 401 U.S. 948 (1971).)

B. U.S. Region's Participation

AIIC is a professional association comprised of regions. (F. 444-45.) The U.S. Region nominated officers to serve as members of AIIC's governing Council. (F. 447.) The AIIC Council recommends amendments to AIIC's Basic Texts for ratification by vote of the entire membership at its triennial General Assemblies. (F. 39.) The Council issues interpretations of respondent's rules, and institutes disciplinary proceedings against interpreters who violate respondent's Basic Texts or any other rule. (F. 39, 61-62.)

AIIC members in the United States adhere to the rules. (F. 58-59, 85-89.) The U.S. Region delegates vote at the AIIC General Assemblies and Councils that created the AIIC fees, standards and codes of ethics. (F. 80.) It has also reminded U.S. members of their obligations to follow the AIIC rules. (F. 82.) The U.S. Region's members adopted a "gentlemen's agreement" providing that members should not charge below a stated price. (F. 77, 516.) The U.S. Region threatened to "expose all outside interpreters" who did not follow its staffing strength rules. (F. 171.) The U.S. Region enforces AIIC's rules. (F. 83.)

The U.S. Region participated in the anticompetitive conduct in this case.

II. ANTITRUST LAW AND AGREEMENTS AMONG COMPETITORS

Antitrust law prohibits agreements among competitors that "unreasonably" restrain trade, "either from the nature of the contract or act or where the surrounding circumstances were such as to justify the conclusion" that they are unreasonable. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911). AIIC's restraints are unreasonable restraints of trade by their nature.

A. Per Se Violations

The *per se* rule against price fixing condemns agreements among competitors intended to affect prices, and "the machinery employed by a combination for price-fixing is immaterial." *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 (1940). The restraints in

this action were adopted as part of AIIC's price fix, and have the tendency to support that price fix.

CDA rejected a reading of Mass. Board that price fixing *per se* violations of the antitrust laws can be defended by efficiencies. Slip op. at 38 n.26. CDA makes clear that *per se* unlawful conduct may not be defended on the basis that it is reasonable, efficient, procompetitive or harmless. Slip op. at 15-16.

Price fixing, output fixing and market allocations can be categorically condemned:

> In sum, price-fixing cartels are condemned *per se* because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public.

7 P. Areeda, Antitrust Law ¶ 1509, at 412-13 (1986); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434 n.16 (1990) ("SCTLA").

1. Combined Effect

Respondents prevented competition on conference interpreting by agreements that required: minimum daily rates; all interpreters at a conference paid the same; an "indivisible day" to prevent lower remuneration for shorter meetings; standard team sizes and length of day rules to equalize the work performed for the daily rate; same pay for travel, rest, briefing, non-working days (to equalize payments to interpreters); uniform per diem allowances and travel expenses, rather than actual cost; and uniform cancellation and recording fees. Respondents' "professional address" rule, with prescribed fees, fixed prices and divided markets, as did AIIC's rules on pro bono services and moonlighting. Respondents' rules extended AIIC's rules to all interpreters working with an AIIC member, and respondents coordinated its agreement with TAALS.

In order to understand the combined effect from all practices used by respondents to aid a price fix:

> plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. "[T]he character and effect of a conspiracy are not to be judged by

dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States v. Patten*, 226 U.S. 525, 544. "[I]n a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it."

American Tobacco Co. v. United States, 147 F.2d 93, 106 (6th Cir. [1944]); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *Fort Howard Paper Co. v. FTC*, 156 F.2d 899, 905 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946). Acts in aid of the price fix include agreements to specify product quantity or quality, *National Macaroni Manufacturers Ass'n v. FTC*, 345 F.2d 421, 426 (7th Cir. 1965); reporting to detect cheaters, *American Column & Lumber Co. v. United States*, 257 U.S. 377, 399, 410 (1921); and boycotts aimed at obtaining a higher price. *SCTLA*, 493 U.S. at 422-23.

2. Monetary Rules

a. Fees

The core of this case is the agreement between AIIC's members not to charge less than a daily rate. This falls squarely within the *per se* rule against price-fixing. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (per curiam).

(1) Minimum rates

AIIC required its members working in the U.S. private sector to charge the daily rate. (F. 90, 92-93.) From 1972 until 1981, and again from 1988 until 1992, respondents set rates for the United States. (F. 92.) Since the AIIC Code requires AIIC members to "respect local conditions" (CX-409-A), the U.S. Region decided in 1977 that AIIC's rates would be identical to TAALS' rates (F. 100) -- as they were whenever AIIC published rates from then until 1992. (F. 93.)

AIIC began calling its rate sheet a "Market Survey." In 1982, to escape antitrust scrutiny, the U.S. Region members adopted a "gentlemen's agreement" to adhere to rates not published by AIIC. (F. 516.) Since 1992, when AIIC ceased publishing rates, there continues to be a "going rate," and U.S. Region members continue to adhere to a rate that rose $25 a year in 1992, 1993 and 1994. (F. 533.)

AIIC's agreements with "Agreement Sector" consumers also include rates and other terms. (F. 492-97.) These include the International Trade Secretariats. (F. 494.) These agreements are illegal *per se. NCAA*, 468 U.S. at 106-107, 113.[13]

(2) Same team, same rate

Until 1992, AIIC's rules provided that "any member of the Association asked to work in a team of interpreters shall only accept the assignment if all the freelance members of that team are contracted to receive the same rate of remuneration." (F. 150.) U.S. Region members observed this rule. (F. 153.) Intermediaries understood the AIIC rate to mean that everyone is charged that rate. (F. 329, 339.) They paid interpreters -- whether AIIC members or not -- AIIC's rate.[14]

The "same rate" rule prohibits an individual interpreter from competing on price for a place on a team. AIIC requires more than one interpreter for any simultaneous interpretation assignment in the United States exceeding 40 minutes (F. 86, 180, 423), and an individual interpreter cannot offer a lower fee than the fee acceptable to the rest of the team. The rule also prevents individual interpreters from charging more than their team-mates. (F. 156.) This rule removes the incentives an interpreter might have to strengthen skills and compete on quality. (F. 152, 154, 157.) It impedes entry, making novices as expensive as seasoned interpreters. (F. 154, 157, 250.) By comparison, the United Nations pays beginners less than experienced interpreters, providing an opportunity to gain experience. (CX-220-M.)

AIIC's same team, same rate rule is illegal *per se. Sugar Institute v. United States*, 297 U.S. 553, 601-02 (1936) It constitutes an agreement to provide the same rewards to all practitioners "regardless of their skill, their experience, their training." *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982) ("Maricopa").

(3) Non-working days

[13] Complaint counsel do not contend that the Commission's jurisdiction extends to enforcement of the antitrust laws against agreements to which the United Nations or other intergovernmental organizations are parties. (Proposed Findings at p.44, n.31.)

[14] If one AIIC member is on a team with non-AIIC members all team members must be paid the same. (F. 150-51, 155, 339.)

Since 1972, AIIC's rules have specified when interpreters would be paid for travel time (F. 133), briefing days (F. 135), rest days after travel (F. 134), and weekends or other days off during a conference. (F. 132, 136.) Different interpretations of these rules resulted in competition among AIIC members. (F. 143.) At a 1980 NAS meeting, the chairman called for a rule to "avoid the disastrous effect of this sort of bargaining." (CX 223-L.)

In 1981, a complaint against a member concerning non-working days was found to be "without foundation because the member concerned succeeded in amending the contracts." (F. 145.) Another AIIC member, Alain Misson, asked a client to amend his contract. Mr. Misson had inadvertently failed to charge an extra day's fee for time spent traveling, and he did not want to undercut his AIIC colleagues; the client agreed. (F. 148.)

In 1984, the Los Angeles Olympic Organizing Committee ("LAOOC") sought to reduce the costs for interpreters at the Olympic Games by not paying interpreters fees for non-working days. (F. 146, 344.) AIIC secretary general Patricia Longley wrote to Mr. Weber instructing him that contracts did not conform to AIIC's rules on rest and travel days. (F. 352.)[15] Mr. Weber told the LAOOC that it was "part of our code of professional conduct and that it was also current practice in the profession," and the Committee agreed to pay for non-working days. (F. 146, 345, 356-58.)

Intermediary Joseph Citrano testified that interpreters insist on being paid a half day's travel in each direction, on top of their full day's interpretation fee, when they work and travel on the same day. (Citrano, Tr. 552-53.) Interpreters viewed the rules "like a bible. That was how the business was conducted." (F. 147, 335.)

AIIC's rules requiring payment for non-working days are horizontal agreements to fix prices. *Catalano*, 446 U.S. at 647-48.

(4) Per diem

AIIC required that interpreters charge their clients a per diem for the period away from the interpreter's professional domicile. (F. 110-16, 536.) The rule prevents discounting: AIIC was concerned that interpreters working for two clients holding consecutive conferences

[15] TAALS and AIIC coordinated their efforts to pressure Mr. Weber and the LAOOC. (F. 349, 351, 355.)

might try to split expenses as a "sales argument," which would "constitute unfair competition"; AIIC's freelance interpreters wanted to avoid the "disastrous effect" of "bargaining" away the per diem. (F. 118.)

Fixing any element of price, including per diem, is *per se* illegal price-fixing. *Catalano,* 446 U.S. at 648.

(5) Travel

AIIC's rules required that "every contract signed with a member of the Association for a conference . . . must include payment for travel. . . ." (F. 287.) AIIC specified first class air travel and unrestricted tickets. In lieu of first class airfare, the interpreter was "entitled to" rest days, "equated to non-working days and remunerated at the same rate." (CX-2-Z-47.) "For travel by air . . . business or club class, or, in its absence economy/tourist, may be accepted for journeys of less than nine hours." (CX-2-Z-48.)

By agreeing on travel expense, AIIC and its members have fixed prices in violation of the antitrust laws. *Catalano*, 446 U.S. at 645.

(6) Cancellation

AIIC's rules require "that once a commitment has been made to an interpreter . . . full payment is due in the case of a cancellation." (Weber, Tr. 1235.) A cancellation clause is in the standard AIIC contract. (CX-1-Z-41.) AIIC members consider an oral offer and acceptance to be a basis for collecting cancellation fees. (F. 243.)

The negotiations for the 1984 Olympics demonstrate the use of AIIC's cancellation clause. (F. 242.) When Mr. Weber first began organizing interpretation teams for the Olympics, "negotiations were still going on with the Eastern Bloc countries about a possible boycott . . . this is why [the LAOOC] did not want to commit to a 100% cancellation clause this early." (Weber, Tr. 1235.) Mr. Weber and LAOOC agreed on a staggered cancellation clause as a compromise. (F. 356.) Albert Daly, AIIC's president, wrote to Weber to say that he would hold Weber "personally responsible" for all the fees due AIIC interpreters if any contracts were canceled. (F. 354.) Mr. Weber ultimately did persuade the LAOOC to conform its contracts to AIIC's rules, including the cancellation clause, and was congratulated for

that by Jean Neuprez, AIIC's U.S. Region council member. (F. 356-57.)

AIIC's agreement to use a standard cancellation clause is price-fixing, illegal *per se*. The clause prevents competition on cancellation fees among interpreters who might be willing to take greater risks of cancellation. (Wu, Tr. 2114-16.) Like the credit terms in Catalano, AIIC's rule on cancellations is an agreement to place on the purchaser a cost (or risk) of the transaction.

(7) Recording

AIIC and its members have agreed to charge fees for recordings: 100% of the daily fee, per interpreter per day, if the recording is to be sold; 25% of the daily fee if the recording is for internal, non-commercial purposes. (CXT-261-S.) AIIC reaffirmed the mandatory nature of the fee in March 1994, almost two years after AIIC purportedly abandoned fixing prices. An amendment proposed by the Canadian Region, aimed at replacing the rule's "must" with "should," was rejected at the 1994 Assembly. (CXT-279-K-O.)

This rule is an agreement to charge for recording, and constitutes per se illegal price fixing. *Catalano*, 446 U.S. at 647-48.

(8) Ban on commissions

AIIC's Guidelines for Recruiting Interpreters prohibit members from accepting or paying commissions. (F. 251.) The rule prevents jobs from going to interpreters willing to pay the most commissions. (F. 252.) A 1981 meeting between AIIC members and representatives of the conference industry concluded that an intermediary's organizing fee must be charged to the conference sponsors, and must be "clearly shown as distinct from the interpreters fees and never deducted from the interpreters fees." (F. 253.) In March 1994, AIIC advised members to explain to hotel employees and technicians who usually receive commissions "that AIIC members do not do it because they would be obligated to raise their price" -- rather than absorb the commissions -- "and everyone would lose." (CXT-279-Z-2 to Z-5, p.2.)

AIIC's ban on the payment of commissions is an agreement to refrain from giving discounts from the fixed minimum rate, *per se* illegal. *Catalano*, 446 U.S. at 649.

(9) Restrictions on pro bono work

AIIC's rules required interpreters donating their services to pay their own travel and subsistence expenses. (F. 247-48.) Student interpreters worked at the 1984 Olympics without fee. They violated the AIIC rule because "the LAOOC paid the student interpreters' air fare from Monterey to Los Angeles." (Weber, Tr. 1232-33.) AIIC officers warned Mr. Weber about these student interpreters. (CX-236-G.) Jean Neuprez, then AIIC's U.S. Region Council Member, also wrote to Mr. Weber; warning that his actions "would go against a number of principles and rules of our profession." (F. 249.)

This rule prevents AIIC members from discounting their services by accepting "gifts" in lieu of payment (at the mandatory minimum rate), and from discounting their services unless they also pay their expenses. By prohibiting discounts and free services, the rule is a *per se* violation of the antitrust laws. *Catalano*, 446 U.S. at 647-48.

The rule also deters entry by discouraging new interpreters from working away from their professional address without charge. (F. 250.) Like the professional address rule, the pro bono rule divides markets and protects local interpreters, and is a *per se* violation of the antitrust laws. *Palmer v. BRG*, 498 U.S. 46, 49-50 (1990).

b. Unit of output -- a day's work for a day's fee

AIIC rules specify the unit of output for the daily rate, preventing AIIC members from competing by working harder, longer, in smaller teams. These output restrictions are unlawful *per se*. *NCAA*, 468 U.S. at 100. Output fixing is price fixing: "This constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered. . . . The horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output." *SCTLA*, 493 U.S. at 423.

(1) Indivisible day

AIIC's rules provided that "remuneration shall be on an indivisible daily basis." (F. 120.) This rule requires an interpreter to charge a full daily rate regardless of the time worked. (F. 120-22.) The rule and

the "normal working day," and team size rules fix the unit of output for which the minimum daily rate is to be paid.

This indivisible day rule has been followed in the United States. (F. 338.) Intermediaries understood that the AIIC rate was a rate for a day's services, regardless of the actual time required. (F. 127.) In 1987, the U.S. Region voted not to seek a waiver that would have allowed interpreters to charge 80% of a day's rate for a short meeting. (F. 125.) The rule is *per se* price fixing. *Catalano*, 446 U.S. at 645.

(2) Hours and team size

AIIC's rules detail team size, setting the minimum number of interpreters in simultaneous, consecutive, and whispered interpretation for conferences using specified numbers of languages. (F. 159-64, 171-75.) AIIC also defines the interpreter's "normal working day" and shorter maximum working days when teams are smaller, the interpreter is using portable electronic equipment, or for video conferencing. (F. 158, 271, 36.) These rules define the unit of output for which an interpreter charges a daily fee.

When AIIC adopted the current team size tables in 1991, the tables set the number of interpreters at AIIC's "standard rate." (F. 159-62, 165, 169, 175.) When working alone, for example, the interpreter was instructed to impose a surcharge. (F. 170.) According to AIIC's current team size table, a two-language conference requires three interpreters, and a three-language conference requires five interpreters. For conferences in four languages or more, AIIC's rule requires two interpreters per conference language. (F. 160, 163, 177.)

AIIC's rules define a "normal working day" of not more than two sessions a day of 2 1/2 to 3 hours. (F. 158, 165.) "Shorter meetings" -- defined by the U.S. Region to be no more than four hours (F. 174, 177) -- may need one fewer interpreter than required for the two or three-language conference. (F. 160, 174.) AIIC allows interpreters in the United States to work alone for up to 40 minutes. (F. 86, 177.) Thus, for a bilingual meeting in the United States, AIIC specifies that one interpreter may work alone for up to 40 minutes, two interpreters may work the same meeting for up to four hours, and three interpreters can work up to six hours. (F. 86, 122, 177.) Interpreters using portable equipment are instructed not to work more than two hours and those involved in video conferencing not more than three hours. (F. 36, 271.) Under AIIC's rules, the interpreter tends to work

less than half time, since interpreters take turns and since the floor language typically is not interpreted by that language's booth. At a six-hour bilingual meeting staffed with three interpreters, each interpreter will work two hours. (F. 176.) When a "short" bilingual meeting (up to four hours in the United States) is staffed with two interpreters, each is working on the microphone for two hours. (F. 176-77.) In conferences in four languages, each interpreter spends no more than three hours a day at the microphone. (F. 176.)

From 1972 until 1991, AIIC maintained two rates of remuneration for two team size tables. The rate paid to each member of the smaller team was higher than the rate paid to each member of the larger team, since the small team's workload is divided among fewer interpreters. The small team rate was 160% of the large team rate. (F. 170.) Under these complex team size tables and rates consumers received offers for different numbers of interpreters (and different costs). (F. 172.) In the 1970's, the U.S. Region voted to ban small teams in the United States. (F. 171.) AIIC's Council proposed in 1974 to adopt a single universal team size/rate, to eliminate competition and market deterioration. (F. 173.) The 1979 General Assembly was unable to reach a consensus to increase the staffing on the two-into-two language conference (CXT-20, p.19), but standardized the length of the work day by adopting the current six-hour rule. (F. 158.) In 1981, AIIC adopted a new rate and team size table. (F. 174.) The new table increased the minimum number of interpreters for a bilingual meeting from two to three, and for a three-language conference from four to five interpreters. However, the "standard rate" was set to equal the former "small team" rate -- rather than the lower, large team rate. Under the new AIIC team size table for a bilingual meeting, consumers had to pay for a third interpreter at the "standard" rate when it formerly had paid for only two interpreters. Most of the regions had abolished the old small team size by 1991. (F. 175.) AIIC dropped the larger base rate team over the objections of the U.S. and Canadian Regions, who continued to require six interpreters for a three language conference, one more interpreter than the standard team size table required. (CX-250-E-F.)

The history of team size and hours shows that AIIC revised its rules to eliminate competition and to increase interpreters' incomes. Until 1994 the team size tables specified the daily rate charged for each interpreter on the team. The work rules set the threshold for

collecting overtime. Interpreters can work longer hours and on smaller teams than prescribed by AIIC, charging more. (F. 166-68, 170.) AIIC members relied upon the team size tables and length of day rules to charge additional fees when they worked longer hours or on smaller teams. (F. 165-68.)

AIIC members lodged complaints involving alleged violations of the team size and length of day rules against Jeannine Lateiner, Wilhelm Weber, Marc Moyens and Janine Hamann-Orci. (F. 181-82, 306.) These complaints were published among AIIC members and other interpreters, and could have a chilling effect on anyone considering violating AIIC's team size and length of day rules. (F. 181-82, 306.)

AIIC's team size and hours rules are *per se* violations of the antitrust laws. They are agreements to charge additional fees when work exceeds specified amounts. *Catalano*, 446 U.S. at 647-49. They are agreements intended to affect price. Socony-Vacuum, 310 U.S. at 223. And they are agreements fixing units of output. *SCTLA*, 493 U.S. at 423.

(3) Other services ban

Since 1972, AIIC Codes have stated that "members of the Association . . . shall not perform any other duties except that of conference interpreter at conferences for which they have been taken on as interpreters." (CX-1-Z-39.) There is slight evidence that members follow this rule. (F. 277; Luccarelli, Tr. 1672; CX-301-Z-26.) Perhaps not surprisingly, interpreters use it to avoid mundane, after-hours tasks. Joseph Citrano testified that AIIC members are a little more rigid about not making themselves available for extra services, such as helping a delegate check into the hotel or attending a cocktail party. (Citrano, Tr. 523-24; F. 279.) The State Department's Harry Obst, however, testified that "in the diplomatic environment situations arise when unexpectedly a text has to be drafted and translated on the spot for passing to the media or . . . another government wants to see it in their language. And if no translators are present we would expect those of our conference interpreters who also can handle written translations well to help with that chore and they usually do." (Obst, Tr. 301; F. 278.)

The allegation concerning a conspiracy to prevent interpreters from providing other services should therefore be dismissed.

(4) Double-dipping

AIIC's Code provides that "members of the Association shall not accept more than one assignment for the same period of time." (F. 292.) At least part of the intent behind this rule was to avoid overbooking, leading to client deception and leaving a team shorthanded. (F. 294.) The evidence shows that the rule against double-dipping is generally ignored. (F. 295-96.) The allegation that respondents have conspired to prevent double-dipping should therefore be dismissed.

c. Market allocation

(1) Professional address

AIIC rules require that members declare a single professional address, keep that address for at least six months, and provide three months advance notice before changing their professional address. (F. 212.) The professional address determines fees for travel, per diem subsistence, and transportation (F. 217) -- whether or not that travel is taken or those expenses incurred:

--Margareta Bowen charged the New York Stock Exchange for travel from Vienna, Austria to New York and back, even though she only traveled from Washington to New York and back. (F. 223.)
--Wilhelm Weber was accused of violating the professional address rule for failing to charge for travel between Geneva, Switzerland and San Francisco, even though he only traveled from Monterey, California to San Francisco. (F. 229.)
--U.S. Region member Marc Moyens worked for two different employers in Europe without charging each for transatlantic travel from Washington. Mr. Moyens was reprimanded, and resigned from AIIC. (F. 230.)

The professional address rule divides markets. (F. 224.) Thus:

--Claudia Bishopp, then U.S. Region Council member, told one member that he was violating AIIC's rules by working in New York without "officially notify[ing] AIIC" of his change of address. The member was working in New York "for about a year" without charging each client for travel from his professional address in Washington. (F. 231.)
--Ms. Bishopp advised another member, who wanted to work for the World Bank after she had moved to Washington from Paris but before her professional address "officially change[d]," that she should either seek permission from AIIC or, "failing

this, . . . telephone all other colleagues with your language combination in the Washington area, to verify that they were all indeed working on that date." (CX-1471.)

This agreement to divide markets is *per se* unlawful under the Sherman Act. *Palmer v. BRG*, 498 U.S. at 49-50. AIIC's rules regarding travel, per diem and payment for travel days, restrain interpreters from competing by absorbing travel costs or foregoing payment for travel days, or -- as in the case of Mr. Moyens -- splitting travel costs between clients. Charging "phantom freight" to coordinate prices is an unfair method of competition. *FTC v. Cement Institute*, 333 U.S. 683, 722 (1948).

(2) Moonlighting

AIIC's "Staff Interpreters' Charter" provides that "staff interpreters should . . . act as interpreters outside their organization only with the latter's consent, in compliance with local working conditions, and without harming the interests of the free-lance members of AIIC." (F. 281.) The rule requires AIIC members, when recruiting interpreters, to "bear in mind the following priorities: . . . freelance interpreters rather than permanents having regular jobs as such." (F. 280.) The moonlighting rule protects the interests of freelance interpreters. (F. 287.)

AIIC's rules regarding moonlighting mean that permanent staff interpreters should not perform freelance work unless no freelance interpreter is available. (F. 281.) AIIC enforced the rule, suspending three members in Switzerland in 1984. (F. 285.)[16] AIIC members in fact adhered to the anti-moonlighting rules, and attempted not to compete with AIIC's freelance members who were unemployed. (F. 289.)

AIIC's moonlighting rules constitute an agreement between staff interpreters and freelancers that staff interpreters will not compete with freelancers. This agreement by staff interpreters not to compete in the freelance market, like the professional address rule, is a *per se* violation of the antitrust laws.

d. Price advertising

[16] AIIC protects freelance members by discouraging international associations from hiring their own retired staff members on a freelance basis. (CS-230-M.)

Article 4(b) of the Code of Ethics provides that AIIC members "shall refrain from any act which might bring the profession into disrepute." (CX-1-Z-38.) Although Article 5 permits members to "publicize the fact that they are conference interpreters and members of the Association,"[17] that article "exclude[s] activities such as commercial forms of one-upmanship." (F. 297.) The article prohibits AIIC members from advertising that their services are less expensive than those of other AIIC members. (F. 301-02.)

In 1994, an AIIC committee of inquiry concluded that a Canadian member of AIIC committed a "flagrant violation" of the Code by writing to a potential client that it would be less expensive to hire non-AIIC members for which the interpreter received a warning. (F. 301.) That same year, AIIC suspended another member for writing to an international organization and offering to work for a salary -- according to AIIC's president, an act that might bring the profession into disrepute. (F. 301.)

AIIC's Code of Ethics prohibits comparative price claims. Restrictions on price advertising are "naked attempt[s] to eliminate price competition and must be judged unlawful *per se*." CDA, slip op. at 19.

B. Rule of Reason

While most of the challenged restraints are *per se* violations, some, with a less obvious effect on competition, should be judged under the rule of reason. The issue here is whether the challenged restraint promotes or suppresses competition. *Professional Engineers*, 435 U.S. at 691. Its effect on other objectives (safety, quality, prevention of ruinous competition) is irrelevant.[18]

1. Competitive Effects

a. Portable equipment

[17] Until 1991, AIIC prohibited any advertising by members. (F. 300.)

[18] *Professional Engineers*, 435 U.S. at 695; *NCAA*, 468 U.S. at 116-17; *IFD*, 476 U.S. at 462-63; contra, *United States v. Brown University*, 5. F.3d 658, 672 (3d Cir. 1993) (Economic impact on consumers less predictable when professional association adopts restraints motivated by ethical or public service norms; not applicable, however, where the parties have strong economic self-interest, 5 F.3d at 667.)

Since 1972, AIIC prohibited the use of portable equipment ("bidule"),[19] except "visits to factories, hospitals and similar establishments or remote field visits." (F. 270-71.) The rule limits the use of portable equipment to short meetings of no more than two hours, with no more than twelve participants. (F. 271.) In 1990, AIIC's NAS agreed that "while the 'bidule' serves a purpose in exceptional circumstances, its use must be strongly discouraged." (CX-259-U.) Portable equipment is much less expensive than using a booth, partly because no technician is required. (F. 273.)

Limiting the use of portable equipment is a direct restraint on output. (F. 275.) The limitations forbid the use of the technology from potential users of portable equipment with more than twelve conference delegates. (F. 271.) AIIC's rules restricting the use of portable equipment constitute anticompetitive restrictions on the "package of services offered to customers." *IFD*, 476 U.S. at 459. "Absent some countervailing procompetitive virtue . . . such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' . . . cannot be sustained under the Rule of Reason." *Id.*

[19] The bidule is a non-booth, conference interpretation system consisting of headsets for the conference delegates and microphones for the interpreters. (F. 269.)

b. Ban on firms

AIIC imposed restraints that prevent integration of interpreters into commercial firms. Three of those restraints are challenged here: AIIC's prohibitions of exclusivity arrangement, trade names and package deals.

The Guidelines for Recruiting Interpreters, including the rules on exclusivity, trade names and package deals, were designed to prevent intermediaries from "establish[ing] themselves in the field." (CX-206-C; F. 257.) Those Guidelines prohibit exclusive relationships between interpreters and intermediaries. (CX-1-Z-49; F. 262.) The Guidelines also prohibit members from selling interpretation services as part of a package deal. (F. 255.)

AIIC's prohibitions of trade names, exclusivity and package deals prevent interpreters and intermediaries from integrating into commercial firms. (F. 264.) Those prohibitions are motivated by a fear that competition among intermediaries will reduce AIIC's control of the market, and thereby reduce interpreter revenues. (F. 259.) The formation of firms could improve interpreters' abilities to differentiate themselves in the minds of consumers. (F. 264.) These restrictions on commercial practice reduce product heterogeneity, which makes it easier for members to reach and maintain pricing agreements. (F. 264.) By keeping interpreters from adopting what may be more economically efficient business formats the restraints have an adverse effect on competition. *AMA*, 94 FTC at 1018.

Respondents did not proffer any efficiency justification for these practices; therefore, these AIIC restraints on trade names, exclusivity and package deals violate Section 5.

c. Advertising ban

The AIIC rules prohibit AIIC members from claiming that they are better interpreters than other AIIC members. Members believed that this provision means that interpreters cannot disparage their colleagues in order to get work. (F. 298.)

Prohibitions against non-price advertising can be unlawful under the rule of reason. CDA, slip op. at 38-39. Analysis can be "simple and short." *Id.* at 25. The Commission "evaluates comparative advertising in the same manner as it evaluates all . . . industry codes

and interpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims. . . ."[20] AIIC's bans on comparative quality (and other) advertising are not limited to prohibiting false or misleading advertising. AIIC's rules prohibit truthful quality claims -- even those claims that could be substantiated. The breadth of AIIC's rule, the likely anticompetitive effects of the advertising restraints, and the absence of any proffered justification demonstrate that this advertising restraint violates Section 5.

2. Efficiency Justification

Not all conceivable justifications for agreements among competitors are "efficiencies." *Professional Engineers*, 435 U.S. at 695. Public safety, interpreter health, or quality of interpretation, are not efficiencies. *SCTLA*, 493 U.S. at 423-24; *IFD*, 476 U.S. at 463. The argument that shorter hours make better car salesmen was held implausible in *Detroit Automobile Dealers*, 111 FTC 417, 498 n.22 (1989), aff'd in part and remanded, 955 F.2d 457 (6th Cir. 1990), cert. denied, 506 U.S. 973 (1992). Moreover, the proffered justification must be tailored to the restraint. CDA, slip op. at 33.

a. Workload

Respondents argue that their rules limiting interpreters' workloads (hours, team size, double-dipping and moonlighting) promote interpreters' health and the quality of their interpretation.

(1) History

The rule-of-reason analysis directs us to look at the "history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Historical examination may help us predict the restraint's consequences.

Respondents' expert Dr. Moser-Mercer, noted a 1957 memorandum of the UN Medical Health Officer and claimed that the six-hour work rule arose from practice at the United Nations.

[20] CDA, slip op. at 35.

However, that memorandum recommends against any uniform workload rules for interpreters, and urges instead that workload be handled on an individual basis. (RX-668 at 2.)

At the 1994 AIIC General Assembly, members resisted "deregulation" of team size tables and length of day rules even after AIIC's president acknowledged that the working conditions may involve antitrust problems. (F. 511-12.) The members feared loss of "our most precious professional attainments," including minimum team strengths. In 1994, AIIC rewrote its rules to survive antitrust scrutiny, and adopted the self-serving preambles on which it now relies. (F. 191.)

(2) Quality and health

The U.S. State Department has not found a decline in quality when interpreters are working more than six hours and expects interpreters to work as long as needed at the conference. (F. 198.) The European Commission of the European Union -- the world's largest user of conference interpretation services (Moser-Mercer, Tr. 3540/12-15) -- allows interpreters to work up to ten hours a day. (F. 196.) Other international organizations require interpreters to work more than AIIC's "normal working day." (F. 195.) Dr. Moser-Mercer testified that the length of day rules and team size tables in all of these AIIC agreements assure health and quality. (Moser-Mercer, Tr. 3540-41.) If the heavier workload rules found in AIIC's agreements with these international organizations do not jeopardize quality or impair health,[21] respondents' lighter workload rules for the non-agreement sector cannot be reasonably necessary to maintain quality and protect interpreter health.

(3) Science

There are no studies showing that performance falls during a working day or when interpreters work outside the team strength tables. (F. 192.) No studies show a link between adverse health affects and working longer than six hours a day as a conference interpreter. (F. 192.) AIIC's members were not aware of any studies

[21] European members (constituting most AIIC members) work more than 60% of the time in the Agreement Sector; members in the United States and Canada work in the Agreement Sector 45% of the time. (CX-285-G.)

supporting their health and quality claims other than the UN Medical Officers' 1957 memorandum. (F. 194.) As noted at a 1995 AIIC Budget Committee meeting, the health evidence supporting AIIC's claims in the FTC proceeding is "flimsy, to say the least." (CX-1658-G.)

Interpreters should be able to work longer hours and in small teams, so long as the interpreter has an opportunity for occasional breaks. Dr. Parasuraman found that air traffic controllers and commercial pilots performed more demanding tasks than conference interpreters, and can perform those tasks for eight to ten hours without a decline in performance or injury to their health.[22] (F. 207-08.) Based upon those studies, Dr. Parasuraman concluded that interpreters should be able to work at least eight to ten hour a days without risk of substantial declines in quality or risk to their health. (F. 209.)

(4) Connection

Respondents have failed to demonstrate a connection between workload and quality or health. Even if such a connection were shown, AIIC's workload rules are broader than needed to advance that purpose. There is a wide range of interpreters and markets that affect interpreter performance and health. One rule cannot fit all. (F. 199-200.) AIIC's team size table and length of day rules are not set for the "fittest" but for the great majority of interpreters. (Moser-Mercer, Tr. 3538-39.) The restraints restrict a more able interpreter from exploiting competitive advantage.

(5) Cognizability

"Quality" is not recognized as a valid efficiency under the antitrust laws. *Professional Engineers*, 435 U.S. at 695-96; *NCAA*, 468 U.S. at 116-17.

b. Portable equipment rules

[22] Reputable scientific studies, published in peer reviewed journals, have shown that air traffic controllers and commercial pilots can work eight to ten hour shifts per day, without performance decline or ill health. (F. 253.)

Respondents argue that their portable equipment rules prevent a decrease in quality and a risk of detriment to the health and welfare of interpreters from the use of inferior equipment.

AIIC allows portable equipment to be used on visits to factories, hospitals and similar establishments or remote field visits, but not in a conference room. (F. 271.) If quality decreases as the ambient noise increases, the rule should forbid all use of portable equipment. Portable equipment is reliable for the State Department, the White House, the World Bank, the International Monetary Fund and cost-conscious conference organizers. (Hamann-Orci, Tr. 48-49; Davis, Tr. 848; Obst, Tr. 303-04.)

Consumers are willing to tolerate lower quality, in exchange for lower prices. (Clark, Tr. 634-35.) Claims that the market will seek a lower level of quality are not cognizable efficiencies. *IFD*, 476 U.S. at 463-64. The rules do not take into account variables that affect whether portable equipment is practical for a job, or differences in ambient noise, or interpreters' abilities or hearing, and therefore are not reasonably tailored to their goals. *NCAA*, 468 U.S. at 119.

3. Effects and Market Power

a. Anticompetitive effects

Proof that conspirators achieved their purposes proves market power. For example, market power can be proven by a group of sellers raising prices over competitive levels for a significant period of time. (Silberman, Tr. 3172/19-23.) Here, AIIC's members followed AIIC's rules, and intermediaries had to obtain conference interpretation on AIIC's terms. Intermediaries learned of the TAALS/AIIC rates from TAALS or AIIC members (F. 328), understood that all AIIC and TAALS members charged that rate (F. 329), observed that the rates went up at the beginning of every year (F. 330-31), and almost invariably paid the TAALS/AIIC rate rather than attempt to negotiate lower rates. (F. 332, 334.) Intermediaries found that AIIC and TAALS members -- and other interpreters -- would not accept offers that did not conform to AIIC rules. (F. 335.) AIIC's rules on per diem, travel, the indivisible day, the same rate for all team members, and fees for recording, were all followed by interpreters and accepted by clients. (F. 336-40.) Some AIIC members

were willing to work in smaller teams, or longer days -- for more money. (F. 341-43.)

In 1975, AIIC's U.S. Region caused the Pan American Health Organization to raise its rates. (F. 364.) In 1976, AIIC members boycotted the Organization of American States, causing a 25% increase in OAS's rates (from $83 to $105 per day). (F. 365.) In 1984, AIIC and TAALS pressured the Los Angeles Olympic Organizing Committee to meet AIIC's rates (F. 356), cancellation clauses (F. 356-57), non-working days, same team-same rate, and recordings. (F. 356.) AIIC achieved this by sending a "warning" ("mise en garde") to the Olympics' chief interpreter, Mr. Weber, and published that warning to all AIIC members (F. 348); coordinating its efforts with TAALS (F. 355) and writing threatening letters to Mr. Weber and to the LAOOC. (F. 353-54.) As AIIC's then-U.S. Region Council member observed to AIIC's then-Secretary General, "I think that the pressure AIIC put to bear is getting results." (CX-1266-B; F. 357.) The results were that LAOOC had higher costs. (F. 358.)

AIIC and TAALS members demanded and received the rates and rules specified in their agreements, more than 90% of the time during 1988 through 1991. (F. 319.) In each of those four years, the most frequently charged price was the AIIC "suggested minimum" rate. (F. 318-20.) AIIC's members usually charged at least the "suggested minimum" rate. AIIC's rules affected these prices. AIIC could not have affected these prices without having market power. AIIC had market power. "'[P]roof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for actual anticompetitive effects.'" *IFD*, 476 U.S. at 460-61.

b. Market share

The relevant product markets in this case are conference interpretation language pairs in the United States. (F. 366.) Market shares for AIIC and TAALS members in these markets range from 24% to 60%. (F. 379-80.)[23] Taking a "quick look," because AIIC was able to secure its members' adherence to the rules these market shares support the finding that consumers' ability to look elsewhere is

[23] Only 17% of the professional engineers in the United States were members of the National Society of Professional Engineers (55,000 of 325,000). *Professional Engineers*, 389 F. Supp. 1193, 1202 (D.D.C. 1974.)

limited. (F. 381.) These facts establish anticompetitive effects of respondents' conduct. CDA, slip. op. at 29.

c. Entry barriers

Entry into conference interpreting is slow and difficult. Conference interpreters need extensive training in the techniques of simultaneous and consecutive interpretation and in the subjects of international conferences, such as medicine, economics, law and politics. (F. 387-88, 390.) The AIIC members who testified had formal training in interpretation, often for four years or more. (F. 388.) Intermediaries will not hire untrained conference interpreters. (F. 387.) Interpretation schools in the United States produce very few graduates (F. 386), and more interpreters have been leaving the profession than entering it. (F. 385.) AIIC has been able to maintain its practices without new entry eroding its market power.

III. JURISDICTION

A. Nonprofit

Respondents each argue that it is not a "corporation" organized to carry on business for its own profit or that of its members within the meaning of Section 4 of the FTC Act.[24]

AIIC and the U.S. Region are each associations that exist for the profit of their members. (F. 453-97.) AIIC's purpose is "to define and represent the profession . . . [and] to safeguard the interests of its members." (F. 454.) This statement of purpose alone is sufficient to invoke jurisdiction over respondents. *FTC v. National Commission on Egg Nutrition*, 517 F.2d 485, 487 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976). In addition:

[24] Section 5 of the FTC Act directs the Commission to prevent unfair methods of competition by "persons, partnerships, or corporations." 15 U.S.C. 45(a)(2). Section 4 of the Act provides in relevant part that a "corporation" is, among other things, "any association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. 44 and 45(a)(2). The legislative history of the FTC Act suggests that the "profit of its members" language was included to confer Commission jurisdiction over trade associations. *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1017-18 (8th Cir. 1969.)

-- AIIC mailed schedules of rates for interpreters to charge in the United States. (Stip. 22-3; F. 93-96.)[25] AIIC exists for the profit of its members; whether or not those rates were mandatory in the United States, mailing the rate sheets and market surveys is for the profit of its members.[26]
-- AIIC's minimum rate was the standard. (F. 320.)
-- AIIC members, and other interpreters, are paid on an indivisible daily basis in the United States. (F. 338.)
-- All members of interpretation teams, except for Japanese and some other Asian interpreters, typically were paid the same rate. (F. 339, 150-53.)
-- AIIC mandates payment for non-working days, travel, rest and briefing days, and payment of fees on cancellation. (F. 147-48, 243.) AIIC officers insisted that AIIC's non-working days and cancellation rules be adhered to in recruiting interpreters for the 1984 Los Angeles Olympics. (F. 356-57.)
-- AIIC disseminates its membership lists to prospective employers to get employment for its members. (F. 467-68, 470.)
-- AIIC refers members for employment to people organizing conferences. (F. 471, 473.) The AIIC Directory "provides valuable information to users or potential users of interpretation services." (Stips. 61-62.)
-- AIIC holds meetings and seminars discussing employment issues and sales techniques, and sponsors lectures discussing the practice of interpretation. (Stip. 73.)
-- AIIC "educates the public." (CX-2490-D-E; Luccarelli Decl. at 10; Weber, Tr. 1153.)
-- AIIC represents interpreters in negotiations over wages, hours, and working conditions with governments and private organizations. (F. 493-97.)
-- AIIC offers pension and insurance plans to its members, and maintains a "solidarity fund" for its members. (Stip. 81; F. 484-86.)

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[25] Even if these rates sheets were mrely "market surveys," distributed to advise members of prevailing rates that they might expect to be paid, their dissemination was for the pecuniary benefit of AIIC's members, to assist them in deciding what fees to demand. The "market surveys" were in fact the minimum mandatory rate sheets. (F. 519.)

[26] *Egg Nutrition*, 517 F.2d at 487-88; *Community Blood Bank of Kansas City v. FTC*, 405 F.2d at 1017.

The Commission has jurisdiction over a nonprofit trade or professional association when its "activities engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." *AMA*, 94 FTC at 983; accord CDA, slip op. at 5; *Michigan State Medical Soc'y*, 101 FTC 191, 284 (1983). AIIC was established to protect the pecuniary interests of its members. (F. 454-56.) Thus, it comes within Section 4 of the Act. *FTC v. National Commission on Egg Nutrition*, 517 F.2d at 487. Respondents engage in activities to improve members' incomes and working conditions. (F. 457-61.) That has always been AIIC's purpose, and AIIC's first actions were directed to raising interpreters' pay. (CX-203-C.) AIIC's members are themselves profit seekers. AIIC's members are all professional conference interpreters who provide their interpretation services for pay. (F. 453.) AIIC promotes members' economic interests, including members' remuneration and work conditions. (F. 453-97.) Respondents fall within FTC jurisdiction as "corporations" within the meaning of the statute. CDA, slip op. at 6-7.

B. Personal Jurisdiction Over AIIC

The Commission has jurisdiction to investigate and regulate activities of foreign corporations that affect U.S. commerce. *FTC v. Compagnie de Saint-Gobain-Point-a-Mousson*, 636 F.2d 1300, 1322 (D.C. Cir. 1980). The FTC may exercise jurisdiction subject to the interstate commerce limitation and the limits imposed by due process. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). If the defendant is not present within the forum, due process requires that it have "minimum contacts" with the United States. *Id.* at 316. Minimum contacts are found, in antitrust cases, when the defendant's activity, directed toward the United States, has effects in the United States. AIIC has sufficient contacts with the United States for the Commission to exercise specific jurisdiction.[27] (F. 419-40.)

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[27] "When the cause of action sued on does not arise from the defendant's contacts with the forum state, general jurisdiction must be predicated on contacts sufficiently continuous and systematic to justify haling the defendant into court. Special [specific] jurisdiction is asserted when the defendant's forum contacts are sporadic, but the cause of action arises out of those contacts." 4 C. Wright & A. Miller, Federal Practice & Procedure, Section 1067 at 295-96 (1987); *cf. Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415-16 (1984).

AIIC's conduct was intended to affect the prices charged by AIIC members for conference interpretation, and the terms under which they worked in the United States. (F. 412-13, 419-40.) AIIC has members in the United States (Stip. 27); AIIC adopted its workload and other rules (Stip. 9, 83-87), and AIIC expects those workload rules to be followed in the United States. (Silberman, Tr. 3132-33.) AIIC adopted rules specifically for the United States (F. 451-52), including price schedules for interpreters' daily fees and per diem (F. 419-21). AIIC's promulgating a schedule of fees, in United States dollars, for interpreters to charge when working in the United States, is sufficient conduct, purposefully directed toward the United States, to support jurisdiction over claims arising from that conduct. *Burger King v. Rudzewicz*, 471 U.S. 462, 479-80 (1985). AIIC adopted rules specifically to be adopted in the United States, including rules on staffing that were more stringent than the European rules (F. 171, 421-22), and a waiver permitting interpreters to work alone for 40 minutes. (F. 423.) AIIC conducted surveys and studies of the U.S. market (F. 426-27), mailed documents into the United States to promote its anticompetitive agreements (F. 439-40), and held meetings to promote its restrictions in the United States. (F. 436-38.) AIIC has a director working in the United States (the United States Region representative to AIIC, who as such is a member of the AIIC Council, Stip. 27, 43, 44, 46), who explains AIIC's rules to members in this country. (F. 431-34.)

As a result of these contacts with the United States arising out of AIIC's conduct, the Commission has specific personal jurisdiction over AIIC. *Consolidated Gold Fields, P.L.C. v. Anglo American Corp.*, 698 F. Supp. 487, 494-96 (S.D.N.Y. 1988), *aff'd in part and rev'd and remanded in part on other grounds sub nom. Consolidated Gold Fields, P.L.C. v. Minorco, SA*, 871 F.2d 252 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989); *Pillar Corp. v. Enercon Indus. Corp.*, 1989-1 Trade Cas. ¶ 68,597 (E.D. Wis. 1989).

Respondents are not charged with untargeted negligence. Rather, their actions were expressly aimed at the United States, and give rise to jurisdiction. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984).[28] AIIC has "purposefully avail[ed] itself of the privilege of conducting

[28] *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995); *Haisten v. Grass Valley Medical Reimbursement Fund*, 784 F.2d 1392, 1399 (9th Cir. 1986).

activities within the [United States]," and is therefore subject to its jurisdiction. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).[29]

C. Personal Jurisdiction Over the U.S. Region

Section 5 of the FTC Act broadly provides that the Commission can bring actions and issue orders against "corporations." Section 4 defines "corporation" to include "associations, incorporated or unincorporated." The Commission has proceeded against unincorporated associations.[30] The Supreme Court has defined "associations" to include: "a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise." *Hecht v. Malley*, 265 U.S. 144, 157 (1924). The issue, therefore, is whether the U.S. Region is "a body of persons united without a charter," with "methods and forms used by incorporated bodies" for "the prosecution of some common enterprise."

AIIC's Basic Texts and AIIC Statutes expressly provide for the creation, recognition, representation, and governance of AIIC regions. (F. 5, 444.) The U.S. Region has adopted its own rules of procedure, including rules for its members' participation in the U.S. Region activities, establishing the U.S. Region's officers, setting down meeting schedules, and providing for budgetary disciplines. (F. 445-46.) The U.S. Region elects its officers and holds regular meetings where official minutes are taken. (F. 446-47.) The U.S. Region manages its own budget and has control over its own expenses. (F. 446-49.)

Members of the U.S. Region are united together to "prosecute a common enterprise." The U.S. Region was created by U.S. AIIC

[29] Respondents rely on *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987), as holding that "a defendant's mere awareness that its products will enter the forum is insufficient as a matter of law to support personal jurisdiction." (Respondent Br. at 118.) That was the position of Justice O'Connor and three other Justices, 480 U.S. 112, in a portion of the opinion that five Justices (Brennan, White, Marshall, Balckmun, Stevens, JJ.) rejected. 480 U.S. at 116-20 (Brennan, J., concurring in part); 480 U.S. at 121 (Stevens, J., concurring in part).

Cases in which courts did not find general personal jurisdiction (as different from specific jurisdiction) over defendants with few contacts with the forum include: *Donatelli v. National Hockey League*, 893 F.2d 459, 470-71 (1st Cir. 1990); *Health Care Equalization Committee v. Iowa Medical Soc'y*, 851 F.2d 1020, 1030 (8th Cir. 1988). *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1119 (6th Cir. 1994) involved an application of association rules in Europe to events taking place in Europe.

[30] *SCTLA*, 107 FTC 510, 516-17, 564-65 (1986), rev'd on other grounds, 856 F.2d 226 (D.C. Cir. 1988), rev'd, 493 U.S. 411 (1990); *IFD*, 101 FTC at 74, 159.

members to represent conference interpreters in the United States and to safeguard the interests of U.S. members. (F. 450-51.) The U.S. Region has advanced these goals that unite its members when it has recommended rates of remuneration, set per diem formulas, and issued team size tables for the United States. (F. 448, 451-54.) The Region prosecutes a common enterprise by negotiating rates with the OAS, urging members to respect AIIC working conditions in the United States, and enforcing the AIIC code against alleged violators in the United States. (F. 451.)

The evidence shows a series of acts committed by the U.S. Region, as a group, including: a "gentlemen's agreement" on rates (F. 77); decisions to take rate-making activities underground (F. 77, 79); efforts to increase team sizes in the United States and "expose" interpreters who violated the U.S. Region's team size and rate rules (F. 171); intercession by AIIC's U.S. Region council member in AIIC's efforts to conform rates and conditions at the 1984 Olympics to AIIC's rules (F. 83, 242, 146); efforts by another U.S. Region council member to have AIIC members conform to the professional domicile rule (F. 231); and the U.S. Region's agreement to cause AIIC to resume publishing "suggested minimum" rates for the United States. (F. 78.)

The United States Region holds meetings twice a year, which are attended by nearly half of the Region's AIIC members. (F. 446.) The United States Region has an elected treasurer, a regional secretary, and a regional representative serving on the AIIC Council. (F. 447-48.) The AIIC Basic Texts include a "General Document on Regions" and Articles 34-36 of the AIIC Statutes, which provide for the creation, recognition, representation, and governance of AIIC regions. (F. 444.) Pursuant to these documents, the United States Region has its own rules of procedure (Stip. 38), which govern its members' participation in the U.S. Region activities, identify the U.S. Region's officers, set down meeting schedules, and provide for budgetary disciplines. (Stip. 38, 43-44, 46; F. 445.) The U.S. Region maintains its own funds in a bank account in the United States, over which it has independent authority, and it collects and receives AIIC membership dues. (Stip. 49-50; F. 449.)

The Commission may, therefore, proceed against the U.S. Region as an unincorporated association. *Hecht v. Malley*, 265 U.S. at 157. The Commission also has jurisdiction to join U.S. Region as part of AIIC. *AMA*, 94 FTC at 1032.

D. Labor Exemptions

Respondents' "labor exemption" defense is rejected. It was not timely asserted.[31] Further, respondents have not shown that AIIC is a union or that its members are employees. They bear the burden of establishing their right to the exemption. Rule 3.43(a), 16 CFR 3.43(a).

The statutory labor exemption is available for unilateral union conduct. *United States v. Hutcheson,* 312 U.S. 219, 232 (1941). But respondents do not claim that AIIC is a labor union. Respondents do not qualify as a "labor organization" under the National Labor Relations Act's definition, since respondents are not employees.[32]

AIIC negotiates collective bargaining agreements for AIIC members employed by intergovernmental organizations. (F. 506.) But AIIC decided not to be a union. (F. 505.) AIIC's agreements specify terms and working conditions for freelance interpreters. (F. 501.) AIIC freelance interpreters are independent contractors. (F. 504.) Freelance interpreters are thus not employees entitled to the protection of the exemption. "A party seeking refuge in the statutory exemption must be a *bona fide* labor organization, and not an independent contractor or entrepreneur." *H.A. Artists & Associates v. Actors' Equity Ass'n,* 451 U.S. 704, 717 n.20 (1981).[33]

Respondents are ineligible for the nonstatutory labor exemption. That exemption is available only for union-employer agreements. *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100,* 421 U.S. 616, 623-25 (1975); *HBO,* 531 F. Supp. at 604 ("the

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[31] Respondents' answer did not contain "a concise statement of facts constituting [this] ground of defense," Rule 3.12(b)(1)(i), 16 CFR 3.12(b)(1)(i).

[32] The Act defines "labor organization" as "any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. 152(5)(1973).

[33] In *Home Box Office, Inc. v. Directors Guild of America,* the court described the defendant Directors Guild of America as a "collective bargaining representative." 531 F. Supp. 578, 581 (S.D.N.Y. 1982), aff'd mem., 708 F.2d 95 (2d Cir. 1983 ("HBO"). The HBO court noted, 531 F. Supp. at 589:

> not all combinations of unions with entrepreneurs or independent contractors fall ourside the statutory exemption. . . . Even though a challenged combination includes independent contractors or entrepreneurs, it may come within the statutory exemption if the non-employee parties to the combination are in job or wage competition with the employee parties, or in some other economic interrelationship that substantially affects the legitimate interests of the employees.

Here the non-agreement sector AIIC members and the agreement sector AIIC members do not compete by specific AIIC rule. (F. 280.)

nonstatutory exemption . . . protects the terms of collective bargaining agreements").

IV. RELIEF

A. Fashioning a Remedy

The Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices. *Jacob Siegel v. FTC*, 327 U.S. 608, 611-13 (1946). In fashioning a remedy, it is appropriate to go "beyond a simple proscription against the precise conduct previously pursued." *Professional Engineers*, 435 U.S. at 698.

The substantive provisions of the order are based on orders issued by the Commission against TAALS and the American Society of Interpreters ("ASI"). The American Association of Language Specialists, C-3524 (Aug. 31, 1994) (consent order); American Society of Interpreters, C-3525 (Aug. 31, 1994) (consent order).

B. Abandonment

Respondents contend no order should issue against their "removed" "monetary conditions." Their argument is rejected. Respondents have a history of knowingly concealing antitrust violations; respondents have not in fact abandoned their price fixing; and the minimal actions respondents took were only taken after they knew they were under investigation.

AIIC violated the antitrust laws for years before they claim to have removed the "monetary conditions" from their Basic Texts. (F. 513-21.) In 1991, despite advice from lawyers, AIIC again voted to codify its many anticompetitive rules. (F. 520-21.) Respondents do not acknowledge wrongdoing for any period. The likelihood of recidivism is great. *Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1471-72 (M.D. Ala. 1993).

AIIC modified its Basic Texts by changing mandates to advice, trusting members to continue to adhere to the rules. (F. 523, 527-28.) The 1992 resolution "removing" the "monetary conditions," stated that AIIC remained "DEEPLY ATTACHED to the principles of universality and solidarity upon which AIIC, since its inception, has based its actions in organizing the profession. . . ." (F. 509.) AIIC never told its members to stop agreeing on prices or terms. (F. 509-10, 524.) AIIC exhorted members to defend their individual "rights" to charge for per diem, non-working days, travel days, and "fees that are a fair reflection of the difficulty and importance of his work." (F. 512.) In March 1994, AIIC recommended that interpreters tell their clients, "interpreters' fees are unchanging." (F. 531.)[34]

AIIC's continues to ensure understanding about all of its rules:

-- AIIC maintains team size and hours rules (F. 175, 184-86);
-- AIIC still provides to its members its standard form contract, which shows interpreters how they can adhere to AIIC's monetary conditions. (F. 530.)
-- In "removing" monetary conditions AIIC issued a vademecum to enumerate AIIC's price fixing rules, explaining what an interpreter's cost estimate "should" include. (F. 526.)

[34] An agreement to adhere to previously announced prices is *per se* price fixing. *Sugar Institute*, 297 U.S. 553, 601-02 (1936).

-- AIIC continues to collectively agree on rates and other terms to be applied in its Agreement Sector which include organizations in the U.S. private sector. (F. 534-36.)
-- Members use AIIC's Agreement Sector terms to model their behavior in the remainder of the private sector. (F. 536.)

The AIIC or "going rate" is still in force. (F. 532-33.) The pricing practices of AIIC members in the United States continue. (F. 533.) AIIC's efforts do not constitute an abandonment of this unlawful conspiracy.[35] The antitrust laws look to substance, not to form, *United States v. Line Material Co.*, 333 U.S. 287, 357 (1948), and cannot be satisfied by cosmetic changes to "basic texts."

Changes to AIIC's Basic Texts came after antitrust inquiries in Germany, Canada, and the United States. (F. 541.)[36] AIIC failed to remove the "monetary conditions" at its January 1991 assembly. (F. 520-22.) In August 1992, when AIIC did vote to remove monetary conditions, it had known for over a year that Commission staff was investigating TAALS, and had subpoenaed and taken testimony from AIIC members in this country. (F. 538.) Abandonment depends on the *bona fides* of the intent to comply with the law in the future, the effectiveness of the discontinuance, and the character of the past violations. *Mass. Bd.*, 110 FTC 549, 616 (1988), citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953); *Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984).

AIIC argues that, as an international organization, it is outside of the Commission's jurisdiction. Although aware for nearly two decades before this investigation began that its rules were illegal in the United States AIIC did not change any of its rules until after it became aware of the FTC investigation. A claim of abandonment is rarely sustainable as a defense when discontinuance occurred "only after the Commission's hand was on the respondent's shoulder." *Zale Corp.*, 78 FTC 1195, 1240 (1971); *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). Without a Commission order there will be nothing to prevent AIIC from continuing in its old ways of publicly regulating competition as to the price, output and marketing of interpretation services within the United States.

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[35] AIIC members continue to adhere to AIIC's travel, recordings, cancellation, indivisible day, same team-same rate, team size and hours rules. (F. 509-12, 523-33.)

[36] AIIC continued its price-fixing in Canada as well as the United States. (F. 301, 541.)

CONCLUSION

Respondents have violated Section 5 of the Federal Trade Commission Act, and an appropriate order must issue.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over respondents International Association of Conference Interpreters, a/k/a Association Internationale des Interpretes de Conference ("AIIC") and United States Region of the International Association of Conference Interpreters ("U.S. Region").

2. Each respondent is a corporation, within the meaning of Section 4 of the Federal Trade Commission Act (the "Act"), 15 U.S.C. 44, as amended. Respondent AIIC is an incorporated association organized for the profit of its members. Respondent U.S. Region is an unincorporated association organized for the profit of its members.

3. Each respondent is properly joined.

4. Respondents engaged in agreements, combinations, and unfair methods of competition by rules and practices fixing the prices for conference interpretation in the United States, reducing output and competition among themselves and with other conference interpreters, by *per se* unlawfully agreeing:

(a) To charge minimum rates; the same rate for all members of a team of interpreters at a conference; fees for travel, briefing, rest and non-working days; per diem allowances; travel expenses; fees for recordings; cancelled contracts; not to pay or receive commissions; and not to work without compensation but with travel and subsistence expenses paid.

(b) To refuse to sell conference interpretation services except on an indivisible daily basis; and to specify the number of interpreters required and the maximum number of hours worked for a daily fee.

(c) To allocate markets and protect local freelance interpreters from competition from other members of AIIC and other interpreters, by requiring members to declare a professional address and to base charges for travel, per diem allowances, and non-working days (including travel and rest days) from the professional address; and by

preventing staff interpreters from competing with freelance interpreters.

(d) Not to advertise or promote conference interpretation services by comparing the price or cost of members' services.

5. Further, respondents engaged in agreements, combinations and unfair methods of competition by rules and practices fixing prices for conference interpretation in the United States, reducing output and eliminating competition among themselves and with other conference interpreters, by agreeing to deter the formation of firms of interpreters (by rules prohibiting exclusive agency relationships, trade names, and package deals of interpretation services); and by agreeing not to use portable equipment nor to advertise conference interpretation services.

6. None of the agreements in the foregoing paragraph is supported by cognizable or demonstrated efficiency or other procompetitive justifications; under a rule of reason analysis, each agreement is an unreasonable restraint of trade.

7. The practices challenged in the complaint have had anticompetitive effects in the United States, and demonstrate the exercise of substantial market power in the United States in markets for conference interpretation.

8. Each effective agreement identified herein is part of an scheme to fix prices, and all are therefore unlawful *per se*.

9. Respondents have engaged in unfair methods of competition, in violation of Section 5 of the Act, 15 U.S.C. 45.

10. This order is necessary and appropriate to remedy the violation of law.

ORDER

I.

It is ordered, That, for purposes of this order, the following definitions shall apply:

A. *"AIIC"* means the International Association of Conference Interpreters (also known as Association Internationale Des Interpretes De Conférence), officers, members, agents, employees, successors, and assigns; "U.S. Region of AIIC" means the United States Region of the International Association of Conference Interpreters (also

known as Association Internationale Des Interpretes De Conférence), officers, members, agents, employees, successors, and assigns; "respondent" or "respondents" means either AIIC or the U.S. Region of AIIC.

B. *"Fees"* means any cash or non-cash charges, rates, prices, benefits or other compensation received or intended to be received for the rendering of services, including but not limited to, salaries, wages, transportation, lodging, meals, allowances (including subsistence and travel allowances), reimbursements for expenses, cancellation fees, recording fees, compensation for time not worked, compensation for travel time, compensation for preparation or study time, and payments in kind.

C. *"Cancellation fee"* means any fee intended to compensate for the termination, cancellation or revocation of an understanding, contract, agreement, offer, pledge, assurance, opportunity, or expectation of a job.

D. *"Interpretation"* means the act of expressing, in oral form, ideas in a language different from the language used in an original spoken statement.

E. *"Translation"* means the act of expressing, in written form, ideas in a language different from the language used in an original writing.

F. *"Other language service"* means any service that has as an element the conversion of any form of expression from one language into another or any service incident to or related to interpretation and translation, including briefing or conference preparation, equipment rental, conference organizing, teleconferencing, précis writing, supervision or coordination of interpreters, reviewing or revising translations, or providing recordings of interpretations.

G. *"Interpreter"* means one who practices interpretation.

H. *"Translator"* means one who practices translation.

I. *"Language specialist"* means one who practices interpretation, translation, or any other language service.

J. *"Person"* means any individual, partnership, association, company, or corporation, and includes any trustee, receiver, assignee, lessee, or personal representative of any person herein defined.

K. *"Exclusive employment arrangement"* means an employment arrangement in which interpreters or other language specialists are available for hire only through a particular individual or firm or in

which interpretation teams of fixed composition are controlled by a particular individual or firm.

II.

It is further ordered, That respondents, directly or indirectly, or through any person, corporation, or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. Creating, formulating, compiling, distributing, publishing, recommending, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees applicable in the United States for interpretation, translation, or any other language service, including but not limited to fee reports, fee guidelines, suggested fees, proposed fees, fee sheets, standard fees, or recommended fees;

B. Entering into, adhering to, participating in, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to construct, fix, stabilize, standardize, raise, maintain, or otherwise interfere with or restrict fees applicable in the United States for interpretation, translation, or other language services;

C. Suggesting, urging, encouraging, recommending, or attempting to persuade in any way interpreters or other language specialists to charge, pay, offer, or adhere to, for transactions within the United States, any existing or proposed fee, or otherwise to charge or refrain from charging any particular fee;

D. Continuing a meeting of interpreters or other language specialists after 1) any person makes a statement, addressed to or audible to the body of the meeting, concerning the fees, applicable in the United States, charged or proposed to be charged for interpretation, translation, or any other language service and failing to dismiss such person from the meeting, or 2) two persons make such statements;

E. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any form of price competition in the United States, including but not limited to offering to do work for less remuneration than a specific competitor, undercutting a competitor's actual fee, offering to work for less than a customer's announced fee, advertising discounted rates, or accepting any particular lodging or travel arrangements;

F. Discouraging, restricting, or prohibiting interpreters or other language specialists from accepting hourly fees, half-day fees, weekly fees, or fees calculated or payable on other than a full-day basis for services performed within the United States;

G. Discouraging, restricting, or prohibiting interpreters from performing interpretation, translation, or other language services within the United States free of charge or at a discount, or from paying their own travel, lodging, meals, or other expenses; and

H. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any forms of advertising within the United States, including but not limited to comparative advertising by interpreters or other language specialists.

Provided that, nothing contained in this paragraph II shall prohibit respondents from:

* Compiling or distributing accurate aggregate historical market information concerning past fees actually charged in transactions completed no earlier than three (3) years after the date this order becomes final, provided that such information is compiled and presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions;
* Collecting or publishing accurate and otherwise publicly available fees paid by governmental and intergovernmental agencies, if such publication states the qualifications and requirements to be eligible to receive such fees;
* Continuing a meeting following statements concerning historical, governmental, or intergovernmental fees that are made in order to undertake the activities permitted in paragraphs II.A and II.B of this order; or
* Formulating, adopting, disseminating to its organizational subdivisions and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to advertising, including unsubstantiated representations, that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

III.

It is further ordered, That respondents, directly or indirectly, or through any person, corporation, or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from entering into, adhering to, participating in, promoting, assisting, enforcing or maintaining any agreement, understanding, plan, program, combination, or conspiracy to limit, restrict, or mandate, within the United States:

A. The length of time that interpreters or other language specialists work in a given period, or for which they are paid for preparation or study;

B. The number of interpreters or other language specialists used for a given job or type of job;

C. The reimbursement of or payment to interpreters or other language specialists for travel expenses or time spent traveling, or the use of any terms, conditions, limitations or restrictions that would prevent consumers from receiving any advantages based on interpreters' or other language specialists' actual travel arrangements or geographic location;

D. The number or duration of residences, domiciles or professional addresses of members;

E. Any discounts, costs, or other advantages or disadvantages to consumers based on actual travel arrangements or geographic location;

F. The equipment used in performing interpretation, translation, or other language services;

G. The number or types of services offered or performed by interpreters, or other language specialists within a given period of time;

H. Exclusive employment arrangements or the use of trade names by interpreters or other language specialists;

I. The recruitment of interpreters, or other language specialists on the basis of whether or not they are permanently employed;

J. The payment or receipt of commissions; or

K. Package deals, lump sum payments, or any arrangements whereby payment or charges for more than one good or service are included in a single sum.

IV.

It is further ordered, That respondents shall, within thirty (30) days after the date this order becomes final, amend the Basic Texts and all sub-parts and appendices to conform to the requirements of paragraphs II and III of this order and amend the rules and bylaws to require each member, region, sector, chapter, or other organizational subdivision, to observe the provisions of paragraphs II and III of this order.

V.

It is further ordered, That each respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute to each member, affiliate, region, sector, chapter, organizational subdivision, or other entity associated directly or indirectly with respondent, copies of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, (4) and any document that respondent revises pursuant to this order; and

B. Distribute to all new officers, directors, and members of respondent, and any newly created affiliates, regions, sectors, chapters, or other organizational subdivisions of respondent, within thirty (30) days of their admission, election, appointment, or creation, a copy of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that respondent revises pursuant to this order.

VI.

It is further ordered, That each respondent shall:

A. Within sixty (60) days after the date this order becomes final, and annually for five (5) years thereafter on the anniversary of the date this order becomes final, file with the Secretary of the Federal Trade 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 any instances in which respondent has taken any action within the scope of the proviso in paragraph II of this order;

B. For a period of ten (10) years after the date this order becomes final, collect, maintain and provide upon request to the Federal Trade

Commission: records adequate to describe in detail any action taken in connection with the activities covered in this order; all minutes, records, reports or tape recordings of meetings of the Council, General Assembly, and all committees, subcommittees, working groups, or any other organizational subdivisions of respondent; and all mailings of respondent to membership;

C. For a period of ten (10) years after the date this order becomes final, provide copies to the Federal Trade Commission, within thirty (30) days of its adoption, of the text of any amendment to the Basic Texts or Appendices thereto, and any new rule, regulation or guideline of respondent applicable in the United States;

D. For a period of ten (10) years after the date this order becomes final, permit any duly authorized representative of the Commission: (1) Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, minutes, memoranda, and other records and documents in the possession or under the control of respondent relating to any matters contained in this order, and (2) Upon five (5) days notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent; and

E. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution or reorganization of itself or of any proposed change resulting in the emergence of a successor corporation or association, or any other change in the corporation or association that may affect compliance obligations arising out of this order.

VII.

It is further ordered, That the U.S. Region of AIIC shall cease and desist for a period of one (1) year from maintaining or continuing respondent's affiliation with any organization of interpreters or other language specialists within thirty (30) days after respondent learns or obtains information that would lead a reasonable person to conclude that said organization has engaged, after the date this order becomes final, in any act or practice that if engaged in by respondent would be prohibited by paragraphs II or III of this order; unless prior to the expiration of such thirty (30) day period said organization informs respondent by verified written statement of an officer of the organization that the organization has ceased and will not resume

such act or practice, and respondent has no grounds to believe otherwise.

VIII.

It is further ordered, That this order shall terminate twenty (20) years from the date this order becomes final.

APPENDIX A

[DATE]

ANNOUNCEMENT

The Federal Trade Commission, an agency of the government of the United States of America, has determined that certain rules and practices of the International Association of Conference Interpreters ("AIIC") violate the antitrust laws of the United States.

Members are advised that agreements between competitors on rates and fees violate the antitrust laws of the United States, and may violate the laws of other countries. Other agreements between competitors on matters other than rates and fees may also violate the antitrust laws of the United States. Individuals who enter into such agreements may be subject to criminal penalties and fines under the laws of the United States of America. 15 U.S.C. 1, 18 U.S.C. 3571. Individuals who enter into such agreements may also be subject to civil liabilities to persons injured in their business or property as a result of violations of the antitrust laws. 15 U.S.C. 15.

AIIC and its United States Region are now subject to an order issued by the United States Federal Trade Commission. The order prohibits AIIC, including its members, regions, or organizational subdivisions, from engaging in various practices that would lessen competition in the United States. Copies of this order are attached to this Announcement.

OPINION OF THE COMMISSION

BY VARNEY, *Commissioner*:

Respondents International Association of Conference Interpreters ("AIIC," as it is known by its French acronym) (IDF 1)[1] and its United States Region ("U.S. Region") are charged with violating Section 5 of the Federal Trade Commission Act ("FTC Act") by adopting and enforcing rules that govern how their members compete. We find that respondents' price-fixing practices and market allocation rules are *per se* unlawful agreements in restraint of trade and a violation of the FTC Act. We further find that the rules governing non-price terms and conditions of employment, business arrangements, and advertising must be analyzed under the rule of reason. Because the record evidence is insufficient to demonstrate a violation of law under the rule of reason, we dismiss the complaint allegations that those rules unlawfully restrain trade. In reaching these conclusions, we also find that AIIC's actions, which form the basis for this lawsuit, affect interstate commerce in the United States and are sufficient to confer specific personal jurisdiction; that respondents do not qualify for the "not-for-profit" exemption to the FTC's jurisdiction; and that respondents do not qualify for either the statutory or non-statutory labor exemption.

The order we enter prohibits respondents for a period of twenty (20) years from imposing any price-related or market allocation restraints in the United States.

I. BACKGROUND

The Commission's complaint in this matter, issued on October 25, 1994, charges the respondents with restraining competition among conference interpreters in the United States in violation of Section 5 of the FTC Act, 15 U.S.C. 45 (1994), by conspiring with their

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[1] The following abbreviations are used in this opinion:

ID -- Initial Decision of the ALJ
IDF -- Numbered Findings in the ALJ's Initial Decision
CX -- Complaint Counsel's Exhibit
CXT -- Complaint Counsel's Exhibit -- English Translation
RX -- Respondents' Exhibit
Tr. -- Transcript of Trial before the ALJ
Stip. -- ALJ's order setting forth joint stipulations of Fact

members to fix the price and output of interpretation services in the United States. After pretrial discovery, 26 days of trial testimony, and pre- and post-trial motions, the record closed on May 16, 1996. Administrative Law Judge ("ALJ") James P. Timony issued a decision and proposed order on July 26, 1996.

The ALJ found that for more than forty years, AIIC regulated the employment of its members by adopting and enforcing an elaborate series of work rules governing, *inter alia*, the minimum daily rates to be charged in the United States, length of the working day, number of interpreters to be hired at a conference, ability of out-of-town and staff interpreters to compete with local freelance interpreters, advertising, and payment for travel expenses, per diem, rest days and non-working days depending on whether the interpreter was away from a "professional address." ID at 95.

The ALJ found that each restraint was part of a scheme to raise the price of conference interpretation services and that these restraints had anticompetitive effects. Although the ALJ found that the "evidence obviates [the need for] extensive inquiry into market power, market definition or market share," ID at 95, he nevertheless went on to determine that some of the restraints are also unlawful under the rule of reason, specifically finding that the respondents have market power. ID at 122-23.

The ALJ concluded that respondents endeavor to improve interpreters' working conditions and income and therefore exist for the profit of their members. ID at 95. The ALJ noted that although some of respondents' actions resemble union activity, they are not exempt from antitrust scrutiny under the statutory or nonstatutory labor exemption because AIIC specifically chose to be a professional association -- not a union. ID at 95-96; IDF 505. The ALJ further found that "respondents waived the [labor exemption] defense by failing to raise it in pleadings or during the presentation of evidence." ID at 96. The ALJ also found that the Commission has specific jurisdiction over AIIC for acts performed, or with effects, in the United States and that the Commission may proceed against the U.S. Region, an unincorporated association, as part of AIIC. ID at 96.

Finally, the ALJ rejected respondents' arguments that they have abandoned all of the rules that were arguably unlawful (ID at 131), finding that respondents continue to maintain rules on fees and working conditions despite their attempts "to conceal price-fixing

agreements in 'gentlemen's agreements' and 'market surveys,' 'unpublished' rates and a [draft pamphlet] called a 'Vademecum.'" ID at 96. The ALJ was unpersuaded that respondents' removal of some offending rules from their Basic Texts after the commencement of this investigation made an order unnecessary. ID at 131-33.

The respondents filed their appeal from the ALJ's Initial Decision on August 28, 1996. The respondents appeal all of the ALJ's jurisdictional findings, including his findings that the Commission has specific *in personam* jurisdiction over AIIC and that neither the statutory nor the nonstatutory labor exemption is available as a defense. Brief for Respondents-Appellants at 77-82. Respondents also appeal from the ALJ's finding that an order is necessary as to the monetary conditions that were contained in respondents' Basic Texts, arguing that the rules governing monetary conditions never applied to the U.S., were not enforced in the U.S., and were abandoned altogether in 1992. *Id*. at 1, 23-27. Finally, the respondents argue on appeal that the rules governing working conditions must be analyzed under the rule of reason and cannot be found unlawful because complaint counsel have not proven that respondents had power in the market for conference interpretation in the U.S. or that the rules had any anticompetitive effect in the U.S. *Id.* at 18-22, 36-61.

II. RESPONDENTS

Respondent AIIC is an association of professional conference interpreters organized under French laws, with its Secretariat located in Geneva, Switzerland. Stips. 6-7. AIIC's rules are in its "Basic Texts," which include AIIC's Statutes, Code of Professional Ethics, and Professional Standards (also referred to as Standards of Professional Practice). Stip. 9; CX-1; CX-2; Brief for Respondents-Appellants at 9.

AIIC's supreme body, the Assembly, consists of all Association members and meets once every three years. IDF 2; Stip. 10. AIIC's Assembly is responsible for setting policy, including voting on Basic Texts and expelling members for rule violations. IDF 37-38. AIIC has a "Council," consisting of the president, three vice presidents, a treasurer, and representatives from each of the Association's regions, each nominated by their regions and elected by the Assembly. IDF 2; Stip. 11. The Council implements Assembly decisions, investigates disciplinary matters, approves the rates and per diems published by

AIIC, grants waivers from AIIC rules, and adopts the annual budget. IDF 2, 39-41; *see also* Stip. 12. AIIC also has a "Bureau," consisting of the president, the three vice presidents, and the treasurer, that exercises the Council's functions between meetings. IDF 2; Stip. 13. AIIC has approximately 2,500 members worldwide and 141 in the United States. Brief for Respondents-Appellants at 6; Stip. 36; *see also* CX-600-K; IDF 2; Luccarelli, Tr. 1626-32.

AIIC publishes a Bulletin for members (IDF 3; Stip. 67), which is sent to the United States to report on the business of AIIC, including matters relating to the rates of remuneration and work rules. IDF 3; Stip. 17. Proposed amendments to AIIC's Basic Texts are published in the Bulletin. IDF 3; Stip. 18.

Organizationally, AIIC is divided into two sections known as sectors. The "Agreement Sector" negotiates agreements for freelance interpreters with international and intergovernmental organizations. These agreements address a variety of issues of importance to AIIC's freelance interpreter members, including issues related to rates and working conditions. CX-2085-E; IDF 492-97; Brief for Respondents-Appellants at 6. The Agreement Sector currently has negotiated agreements with: 1) the United Nations, 2) Interpol, 3) the European Union, 4) Coordonnées, and 5) various international trade secretariats. IDF 492; Stip. 77; Respondents' Post -Trial Brief at 7. The "Non-Agreement Sector," or "NAS," meets twice each year to address "issues of interest to members who have private sector, governmental or intergovernmental clients with which AIIC does not have an agreement." CX-278-Z-2; CX-245-F; CX-242-E; Brief for Respondents-Appellants at 6; IDF 42.

Members of AIIC in any country with 15 or more members may form a "region," the membership of which consists of the AIIC members then having their professional address in that region. Stips. 32-33. AIIC has 22 regions, including the respondent U.S. Region. IDF 5; Stip. 35.

III. JURISDICTION

A. The Commission Has Specific Personal Jurisdiction Over Respondent AIIC

Respondent AIIC contends that the Commission lacks *in personam* jurisdiction over it.[2] As explained below, we conclude otherwise. At the outset it should be noted that counsel for AIIC stated at oral argument and in a subsequent written submission that it would not appeal any order that the Commission might issue, provided that such order would not constrain respondent's ability to retain four of the challenged restraints (*viz.*, the length of day, team size, professional address, and portable equipment rules). Oral Argument Tr. 7; *see also id*. at 8-10; Supplemental Brief for Respondents-Appellants at 6 (Oct. 26, 1996). Further, during argument and in its supplemental brief, respondent's counsel acknowledged its earlier proffer of a consent order encompassing all but four challenged restraints. *Id.* Such conduct may constitute a waiver of respondent's *in personam* jurisdiction objections in light of the Commission's decision to issue an order that does not enjoin those four rules (albeit for reasons other than respondent's offer). *Cf. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 703-05 (1982) (party can waive its personal jurisdiction defense and "actions of the defendant may amount to a legal submission to . . . jurisdiction . . . whether voluntary or not").[3] Nevertheless, in an abundance of caution, we address the issue of *in personam* jurisdiction.

1. Legal Standard for Exercise of *In Personam* Jurisdiction Over Foreign Respondent

The Supreme Court in *International Shoe Corp. v. Washington*, 326 U.S. 310 (1945), presented a two-pronged test that established and continues to underlie the due process requisites for *in personam* jurisdiction. First, "minimum contacts" must be shown.[4] Second, the

[2] Neither the agency's exercise of personal jurisdiction over the U.S. Region, nor the Commission's subject matter jurisdiction under Section 5 with respect to either respondent, has been challenged in respondents' appeal. We adopt the ALJ's conclusions with respect to each of these issues. *See* ID at 134.

[3] *See also English v. 21st Phoenix corp.*, 590 F.2d 723, 728 n.5 (8th Cir.) (*in personam* jurisdiction may be obtained by actions of a party amounting to a waiver, and a court has jurisdiction to enter an order finding a waiver), *cert. denied*, 444 U.S. 832 (1979); *Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974) (stipulation and agreement to settle that were filed in federal court constituted a consent to the personal jurisdiction of the court); *Joseph V. Edeskuty & Assocs. v. Jacksonville Kraft Paper Co.*, 702 F. Supp. 741, 745 (D. Minn. 1988) (statements of counsel at hearing deemed tantamount to consent to personal jurisdiction).

[4] Because the claims against respondents are based on federal antitrust laws, as opposed to state law, the inquiry is whether respondent AIIC has sufficient contacts with the United States, rather than with any one state. *See Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974); *Dooley v. United*

court must find that "fair play and substantial justice" would not be offended by the assertion of jurisdiction. *International Shoe*, 326 U.S. at 316, 320. Both prongs of this test must be satisfied. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

The "minimum contacts" prong of the analysis focuses on whether the connection between the defendant, the forum, and the litigation is such that "[the defendant] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 288, 297 (1980); *see also Burger King*, 471 U.S. at 472 (Due Process Clause requires that individuals have "fair warning" that a particular activity may subject them to the jurisdiction of a foreign sovereign, quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)). That requirement is met if, for example, the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *World-Wide Volkswagen*, 444 U.S. at 297 (a defendant that "purposefully avails itself of the privilege of conducting activities within the forum[,]" quoting *Hanson v. Denckla*, has "clear notice that it is subject to suit there").

If the defendant's conduct satisfies the "minimum contacts" requirement, the courts then consider whether the assertion of personal jurisdiction would comport with fair play and substantial justice. *See, e.g., Burger King*, 471 U.S. at 476. Under this prong of the International Shoe analysis, the courts evaluate the "reasonableness" of asserting personal jurisdiction under the particular circumstances of the case, and may consider not only the defendant's contacts with the forum, but also "other factors" (*e.g.*, the respective interests of the plaintiff and the forum, judicial efficiency). *Id.* at 477; *see also Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987) (outlining factors to be considered in

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Technologies Corp., 786 F. Supp. 65, 71 (D.D.C. 1992); *Consolidated Gold Field, PLC v. Anglo Am. Corp. of So. Africa*, 698 F. Supp. 487, 493 (S.D.N.Y. 1988), *aff'd in part and rev'd in part sub nom. Consolidated Gold Fields, PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989). Respondent's reliance on *Friends of Animals, Inc. v. American Veterinary Medical Ass'n*, 310 F. Supp. 620 (S.D.N.Y. 1970), is inapposite in this analysis. Constitutional due process for *in personam* jurisdiction requires only "minimum contacts" with the forum. The Clayton Act venue provision, challenged in Friends of Animals, focused on a requirement of substantiality, which was a component of the "transacting business" test applicable only to analysis of the venue provision. *See* 310 F. Supp. at 624.

reasonableness determination, where personal jurisdiction over foreign entities was at issue).

2. Specific Jurisdiction

As the case law implementing these basic principles of jurisdiction has developed, two species of *in personam* jurisdiction over foreign respondents have emerged: "specific" jurisdiction and "general" jurisdiction. Specific jurisdiction attaches if there is a sufficiently close relationship between the cause of action and the nonresident's activities within the forum.[5] General jurisdiction requires a higher degree of involvement with the forum than does specific jurisdiction, and allows a plaintiff to sue a defendant on virtually any cause of action, including those that do not arise from the defendant's contacts with the forum. Thus, normally, there would be no reason to determine whether general jurisdiction exists if the cause of action at issue and the forum are sufficiently related to trigger specific jurisdiction.

In determining whether specific jurisdiction exists in this instance, we must ask: (a) whether the conduct was "purposefully directed" to the forum, *Burger King*, 471 U.S. at 471 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)); (b) whether the cause of action "arise[s]" from or relates to that conduct, *Burger King*, 471 U.S. at 472 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)); and (c) whether the assertion of specific jurisdiction is reasonable as a matter of due process, *Burger King*, 471 U.S. at 471; *see also Asahi*, 480 U.S. at 113. As set forth below, we affirm the ALJ's conclusion that the agency may properly exercise specific jurisdiction over respondent AIIC.

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[5] *Electro-Catheter Corp. v. Surgical Specialties Instrument Co.*, 587 F. Supp. 1446, 1449 (D.N.J. 1984). In the specific jurisdiction analyisis, the tribunal must inquire whether the relationship between the transaction at issue and the forum justifies the forum's assertion of jurisdiction over the defendant. *Id.* Specific jurisdiction is asserted when the defendant's forum contacts are sporadic, but the cause of action arises out of those contacts. In determining whether there are sufficient minimum contacts to satisfy due process requirements, we focus upon the relationship among the defendant, the forum and the cause of action. *Burger King*, 471 U.S. at 471, 475; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Shaffer v. Heimer*, 433 U.S. at 204.

a. Conduct Purposefully Directed Toward the United States

With respect to the first aspect of specific jurisdiction analysis, we find that respondent AIIC intentionally engaged in conduct that caused consequences in the United States market for interpretation services. In so finding, we focus primarily on AIIC's conduct, not on that of its members. The conduct of AIIC's U.S. members is relevant only to the extent that the members were acting as agents of AIIC. Specifically, AIIC engaged in four courses of conduct that were intended to affect both the prices charged by AIIC members for conference interpretation and the terms under which they worked.

First, respondent published rates of remuneration for interpretation services performed in the United States and prepared schedules of *per diem* charges with entries unique to this country. *See generally* CX-71, 75, 76, 79, 81 to 84; CX-2446-C; CX-301-Z-42 (Bishopp); CX-305-Z-49 to 51 (Sy); CX-55 to -65; CX-247-Z-2, Z-5; CX-124-E; CX-125-E; CX-130; CX-301-Z-152.41 to Z-152.42 (Bishopp); CX-268-E; CX-300-Z-72 to Z-76, Z-128 to Z-129 (Motton). Similarly, AIIC tailored its work and monetary rules, and waivers for such rules, for application in the United States. *See generally* CX-71 to -73, 75 to 77, 79, 81 to 84 (rates); CX 55 to 65 (rates); CX-124-E (per diem); CX-125-E (per diem); CX-130 (per diem); CX-247-Z-2, Z-5 (per diem); CX-301-Z-152.41 to Z-152.42 (Bishopp) (per diem); CX-268-E (per diem); CX-300-Z-72 to Z-76, Z-128 to Z-129 (Motton) (per diem); CX-245-I, F (indivisible day waiver); CX-405-C (team size); CX-407-F to G (team size); CX-50 (team size); CX-56 (team size); CX-1384-A (solo interpreter waiver applicable to U.S.); CX-268-F (solo waiver); CX-301-Z-152.43 (Bishopp) (solo waiver); CX-300-Z-33 to Z-36, Z-128 to Z-129 (Motton) (solo waiver); CX-432-G to H (solo waiver). AIIC also adopted its workload and other rules with the expectation that those rules would be followed in the United States. *See generally* Stips. 9, 83-87; Silberman, Tr. 3132-33.

Second, respondent AIIC sought, in conjunction with efforts of the U.S. Region, to ensure the uniform application of the AIIC Code and its Annexes in the United States. For example, the U.S. Region discussed and sent to AIIC in Geneva a document called "AIIC Working Conditions for Interpreters in USA (Provisional Paper)." *See* CX-439-A, D to F; CX-1408-A, C to E. In addition, AIIC

investigated complaints against U.S. Region members for violations of its rules. *See generally* CX-1693-A to C; CXT-1693-A to C; CX-1300-A; CXT-1320-A to C; CXT-239-I; CX-304-Z-128 to Z-131 (Motton); CX-1066-A to E; CX-1086; CX-1090; CX-1100; CX-1138-A to B; CX-1256-B; CX-236-C. AIIC also solicited complaints from the U.S. Region concerning members who violated AIIC's moonlighting rules, including the names of such members and copies of contracts demonstrating such violations. *See* CX-432-G to H, M. The U.S. Region representative to the AIIC Council also advised U.S. members how to comply with AIIC rules and issued warnings to members regarding noncompliance with association rules. *See* CX-1471; CX-1470-A. U.S. Region members also serve as agents of AIIC when serving on the bodies responsible for creating and enforcing AIIC rules. *See* CX-300-O to Q (Motton); CX-2490-A to G; CX-1-G to H (1994 AIIC Statutes Article 24(6)); CX-2-G to H (1991 AIIC Statutes Article 24(6)).[6]

Third, AIIC cooperated with The American Association of Language Specialists ("TAALS") with respect to conduct in the United States challenged in the complaint. *See generally* CX-409-A; CX-218-J; CX-266-Z-6 (coordination of AIIC and TAALS activities); CX-405-C (in 1975 AIIC agreed to work with TAALS to examine issue of U.S. antitrust laws); CX-1728-B (appointment of official liaison from TAALS to AIIC, with eight-year term). In particular, AIIC and TAALS worked together to enforce their overlapping rules in the U.S. *See generally* CX-1066-A; CX-1090; CX-1138-A to B; CX-237-H; CX-239-B; CXT-1731-B. Further, TAALS and AIIC shared information on enforcement and on their mutual efforts to effect changes in the terms of the contracts for interpretation services at the 1984 Olympic Games. *See* CX-1248; CX-1266-B; CX-1310; CX-1696; CX-1708; CX-1714-A; CX-1728-B; CX-1733; CX-1735.

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[6] We find unpersuasive respondent's reliance on cases in which an association failed to exercise substantial influence over the members' activities in the forum. *See* Brief for Respondents-Appellants at 77-78. Two of the cited cases involved general jurisdiction analysis, which calls for a heightened degree of contact with the forum. *See Donatelli v. National Hockey League*, 893 F.2d 459, 468-72 (1st Cir. 1990); *Rhodes v. Tallarico*, 751 F. Supp. 277, 279 (D. Mass. 1990) (citing "minimum contacts" test applied in Donatelli). Further, the court in Rhodes concluded that the defendant organization lacked minimum contacts with the forum because there was no evidence that the organization lacked minimum contacts with the forum because there was no evidence that the organization exercised any influence over its members' decision to perform services in the forum. In contrast, AIIC's professional address rule required its members to remain at a professional address for a minimum of six months. In addition, AIIC's conduct described above in the text had a substantial influence over its members' conduct in providing interpretation services in this country.

Fourth, respondent AIIC held its General Assembly in New York City in 1979 and voted there to adopt several of the provisions challenged in the complaint, including rules prescribing equal remuneration for all members of an interpretation team and limiting the length of the working day. *See* CX-6-A to M; CXT-6-E to M; CX-219-P to R; CXT-221-A-Z-20, pp. 18-19; CX-221-D. In addition, AIIC mailed draft proposals of its Codes of Ethics and Standards of Practice to the United States for review and comment before other General Assembly meetings. *See* CX-1406-B to C; CX-266-Z-5; CX-260-A to B.

b. Claims Against Respondent AIIC Arising From U.S. Activities

With respect to the second aspect of specific jurisdiction analysis, it is settled that "[a]n action will be deemed not to have arisen from the defendant's contacts with the forum state only when they are unrelated to the operative facts of the controversy." *Creech v. Roberts*, 908 F.2d 75, 80 (6th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991). In this case, the cause of action arose from the very same conduct conferring jurisdiction. The Commission's complaint alleges that respondent AIIC and its United States affiliate members conspired to fix the fees that they could charge for interpretation services performed in the United States, and that they imposed a variety of restrictions that illegally restrained competition among U.S. interpreters. Specifically, AIIC and its U.S. Region allegedly enforced fee schedules, work rules and other restrictions on members operating in the United States.

The alleged price-fixing herein includes minimum rates that members must charge within the United States: for performance of interpretation services; for cancellations; for recording of interpretations; as compensation for travel time, rest, and conference recesses; for performing whispered interpretation or working alone; and as reimbursement for travel, lodging and other expenses. The complaint also challenges the respondents' work rules in the U.S. requiring that all interpreters on the same job obtain the same pay regardless of skill level or experience; that interpretation fees be paid on a full-day basis; and that member interpreters must pay their own subsistence and travel when they do volunteer work. The following additional restrictions imposed on U.S. interpreters by AIIC and its

U.S. Region were also challenged in the complaint: specified minimums as to the number of interpreters per job; limitations on the number of hours members may work per day; limits on member use of portable equipment; a requirement that interpreters declare a single professional address that they can change only once every six months with three months' notice; a prohibition against accepting non-interpreter duties at a conference where members are performing interpretation services; a prohibition on comparative advertising; restrictions against certain exclusive employment arrangements; a prohibition on offering package deals of interpretation and other services; a ban on commissions; a requirement that members selecting an interpretation team give preference to freelance interpreters over interpreters with permanent positions; limits on accepting multiple assignments within a period of time; and prohibitions on the use of trade names by members who coordinate interpreters.

We therefore find that the claims in the Commission's complaint arise from, or are related to, the foregoing AIIC contacts with the United States.

c. Reasonableness

The third aspect of specific jurisdiction analysis is to determine whether, under the particular circumstances of the case, the exercise of jurisdiction is reasonable as a matter of constitutional due process. We conclude that the Commission's exercise of personal jurisdiction here would satisfy that standard.

Asahi Metal Industry Co. is the Supreme Court's most recent pronouncement on *in personam* jurisdiction over foreign defendants. The Court explained that determining "reasonableness" of the exercise of jurisdiction in a given case depends on an evaluation of several factors, which the Court had previously articulated in World-Wide Volkswagen (a case involving personal jurisdiction over domestic defendants):

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Asahi, 480 U.S. at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

As to "the burden on the defendant," we recognize that AIIC is a foreign association, organized under French law and having its only office in Geneva, Switzerland. Nonetheless, the Commission does not believe that requiring AIIC to appear through counsel in the present action imposes on AIIC an unusually severe or unreasonable burden.[7] In any event, "when minimum contacts have been established," as they have been here, "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even . . . serious burdens placed on the alien defendant." *Asahi*, 480 U.S. at 114.

As to the "interests of the forum" and the "plaintiff's interest in obtaining relief," we find that the interests of the forum and the plaintiff in the assertion of jurisdiction over AIIC are substantial. The objective of the present action is to ensure that respondents' anticompetitive restraints in this country will cease. Although much of respondent AIIC's conduct occurred outside this country, the intended effect of its actions in establishing work rules, including rules having unique application to this country, was to restrain competition in the United States. *See supra* at 6-8. This agency was established to enforce federal antitrust laws to protect competition in this country, and we therefore assert a strong interest in challenging respondents' alleged anticompetitive conduct.[8]

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[7] In Asahi, the Court found that litigation in California would severely burden the Japanese defendant (and that there was no showing that litigation in California, rather than Japan or Taiwan, would be more convenient for the Taiwanese plaintiff). In the present case, by contrast, litigation in the United States offers some convenience due to AIIC's relationship with the U.S. Region. Indeed, the interests of AIIC and its U.S. Region are sufficiently parallel that they are represented by the same counsel. The feasibility of common representation substantially mitigates the severity of the burdens imposed on AIIC by litigation in a foreign forum.

[8] A Plaintiff's interest in relief may sometimes be satisfied by the availability of redress in a foreign tribunal. Here, there is no reason to believe that a foreign sovereign will act to protect the market for interpretation services in the United States, and the Commission is unaware of any pending action by a foreign sovereign to remedy the competitive injury alleged in this case. Further, even were it shown that a foreign sovereign had some enforcement interest in this matter, that consideration, while relevant, *see infra* note 9 (discussing Asahi), is only one of several factors to be weighed in determining whether personal jurisdiction would be "reasonable." *See, e.g., Caruth v. International Psychoanalytical Ass'n*, 59 F.3d 126, 129 (9th Cir. 1995) (declining to find that personal jurisdiction over membership association organized under Swiss law and based in Argentina was unreasonable, even though plaintiff failed to demonstrate that effective remedy was unavailable in alternative forum); *Roth v. Garcia Marquez*, 942 F.2d 617, 624-25 (9th Cir. 1991) (declining to find that personal jurisdiction over Spanish defendants was unreasonable, even though interests of foreign sovereignty weighed slightly in favor of defendants, and plaintiff did not show that he could not litigate in alternative forum); *Sinatra v. National Enquirer*, 854 F.2d 1191, 1199-1201 (9th Cir. 1988) (finding personal jurisdiction over Swiss clinic to be reasonable, even though plaintiff failed to show that alternative forum was

Finally, the "interest in obtaining the most efficient resolution of controversies" also strongly favors the resolution in the United States of questions respecting AIIC's conduct. The Commission is exercising jurisdiction over AIIC's United States Region, and, in any event, the challenged conduct by AIIC is closely related to that region.[9]

On balance, in this case, we conclude that the Commission's interest in protecting competition within the United States, and considerations of efficiency, are sufficient to outweigh the burdens that may be placed on AIIC to defend itself in this forum. Thus, we conclude that the assertion of personal jurisdiction over AIIC here is reasonable under the Due Process Clause.

Accordingly, because AIIC's unlawful conduct was purposefully directed towards the United States, because the claims alleged in this case arose from such activities, and because the assertion of jurisdiction here would be reasonable under the Due Process Clause, we hold that the Commission may lawfully exercise *in personam* jurisdiction over AIIC in this case.

B. The Not-for-Profit Exemption Is Inapplicable

We disagree with respondents' claim that they are entitled to the not-for-profit exemption. Respondents claim that "[n]either AIIC nor the U.S. Region is 'organized to carry on business for its own profit or that of its members' under Section 4" of the FTC Act, 15 U.S.C. 44 (1994), as interpreted by the Commission in its opinion in College Football Ass'n, D. 9242 (July 8, 1994), 5 Trade Reg. Rep. (CCH) ¶ 23,631 ("CFA"). Respondents' Post Trial Brief at 126-27. In *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969), the Eighth Circuit rejected the notion that a corporation's nonprofit organizational form alone places it beyond the Commission's jurisdiction. The Eighth Circuit explained that the FTC

unavailable); *Taubler v. Giraud*, 655 F.2d 991, 994-96 (9th Cir. 1981) (finding personal jurisdiction over French wine maker to be reasonable, citing as factors but not specifically discussing foreign authorities' interests or availability of altemative forum, instead noting that "[s]tate and federal antitrust violations should not go without a domestic remedy").

[9] Nor would assertion of personal jurisdiction here impinge adversely upon the values reflected in the last Asahi "reasonableness" element relating to "the shared interest of the several States in furthering fundamental substantive social policies." *See Asahi*, 480 U.S. at 115 (acknowledging the need to weigh procedural and substantive policies of other nations whose interests are affected by the U.S. court's assertion of jurisdiction). To the extent that concerns about efficiency and substantive social policies are relevant here, our analysis considers other national interests, as discussed *supra* note 8.

Act's Section 4 nonprofit exemption extends only to corporations that are "in law and in fact charitable." *Id.* at 1019. We applied this standard in *American Medical Ass'n*, 94 FTC 701 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) ("AMA"), and have since adhered to that formulation of the reach of our jurisdiction over nonprofit organizations, most recently in our opinion in California Dental Ass'n, D. 9259 (Mar. 25, 1996), 5 Trade Reg. Rep. (CCH) ¶ 24,007 ("CDA"). *See also Michigan State Med. Soc'y*, 101 FTC 191, 283-84 (1983).

Nonetheless, AIIC argues that it is "a *bona-fide* tax-exempt, non-profit association under French law" and that this case is even stronger than in CFA because, "[u]nlike in CFA, AIIC does not obtain revenues or profits on behalf of its members and distribute those profits to them." Respondents' Post-Trial Brief at 126-27. Our decision in CFA does not afford immunity to respondents in this case. CFA addressed whether a nonprofit organization, all of whose members are not-for-profit entities, is subject to the Commission's jurisdiction when it engages in commercial activity and distributes the income earned from that activity to its members. Our jurisdictional analysis in CFA did not call the holding in AMA into question. *See* CFA, slip op. at 20-26, 5 Trade Reg. Rep. (CCH) at 23,361-64; CDA, slip op. at 6, 5 Trade Reg. Rep. (CCH) at 23,782.

AIIC falls within our jurisdiction for many of the same reasons the AMA and CDA did. *See generally* CDA, slip op. at 6-7, 5 Trade Reg. Rep. (CCH) at 23,782-83; *AMA*, 94 FTC at 986-88. AIIC and the U.S. Region exist and engage in activities to improve members' incomes and working conditions. AIIC and the U.S. Region adopted minimum daily rates for use in the U.S. and adopted other rules governing the working conditions for interpreters. AIIC publishes a directory of AIIC members, which AIIC sends to AIIC members and purchasers of interpretation services to facilitate the hiring of AIIC members. IDF 467, 468; Stips. 61-62. AIIC also negotiates member discounts for such items as airfare, hotels, and publications. IDF 483. AIIC also provides its members with insurance plans for health, loss of earnings, and retirement, and manages two retirement plans for members. IDF 484, 485. AIIC has contacted various governmental entities, including a U.S. Senator, to improve the financial situation of its members. IDF 487, 488. The ALJ found numerous other

examples of how AIIC serves the pecuniary benefits of its members, and we agree with his findings in this regard. *See generally* IDF 453-97. Finally, because AIIC and U.S. Region members are themselves profit seekers, this case is more akin to CDA and AMA and unlike CFA, where the members were not-for-profit educational institutions.

C. AIIC Does Not Qualify for the Labor Exemption

Respondents argue that "the statutory labor exemption immunizes all challenged Basic Texts provisions from antitrust liability [and] the nonstatutory labor exemption so immunizes AIIC's agreements." Brief for Respondents-Appellants at 82 n.84. The statutory labor exemption is designed to protect union conduct, and the Supreme Court has said that "a party seeking refuge in the statutory exemption must be a *bona fide* labor organization, and not an independent contractor or entrepreneur." *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 n.20 (1981) (citing *Meat Drivers v. United States*, 371 U.S. 94 (1962), and *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942)). The nonstatutory labor exemption protects from antitrust liability certain labor agreements that are part of, or result from, the collective bargaining process. *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116, 2121 (1996).

AIIC is an association of professional interpreters who have, through the association, promulgated a series of rules and regulations governing competition among themselves concerning the provision of conference interpretation services. As the ALJ found, the association members have expressly declined to organize AIIC as a labor organization (IDF 504-05), and we find that the weight of the evidence shows that the freelance AIIC members, for whom the pay and working conditions have the most relevance, are self-employed entrepreneurs and not employees. For example, AIIC members individually arrange their jobs and have complete discretion as to which jobs they will take and which they will decline. IDF 503. Moreover, the respondents, who carry the burden of proof with respect to establishing the applicability of this exemption, have offered no evidence to support the position that freelance AIIC members are employees. In fact, respondents have stipulated that 68 percent of "AIIC members in the United States are self-employed (*i.e.*, freelance) interpreters." Stips. 57, 60. Moreover, Mr. Luccarelli, one of respondents' key witnesses, testified that outside of the

permanent employees of various international organizations, interpreters are generally not considered employees. Luccarelli, Tr. 1694; *see also* IDF 504.

We therefore find that AIIC is an organization of competing self-employed professionals and not a *bona fide* labor organization. Accordingly, we reject AIIC's argument that its Basic Texts are shielded by the statutory labor exemption. *See H.A. Artists & Assocs.*, 451 U.S. at 717 n.20. *See generally* 1 Phillip E. Areeda & Donald F. Turner, Antitrust Law ¶ 229c (1978); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 229'c (Supp. 1996).

Respondents also argue that they have negotiated several collective bargaining agreements on behalf of AIIC members with institutions that employ freelance AIIC members alongside their regular employees. Stips. 75, 78, 81. AIIC asserts that its agreements are immunized from antitrust challenge by the nonstatutory labor exemption. Because we are not challenging the agreements that AIIC relies upon for the nonstatutory exemption, we do not have to reach the question whether those agreements are in fact the product of a collective bargaining process or are something else, such as employment contracts or contracts for the provision of services.[10]

IV. LEGALITY OF RESTRAINTS OF TRADE

Restraints of trade are unlawful under Section 5 of the Federal Trade Commission Act, as well as Section 1 of the Sherman Act, 15 U.S.C. 1 (1994), when they are *per se* illegal or when they are unreasonable under the rule of reason. The law does not condemn some practices that restrain trade in a literal sense -- as, for instance, all contracts do to varying degrees -- when those practices have no significant anticompetitive effect or even promote competition. In each case "the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition." CDA, slip op. at 14, 5 Trade Reg. Rep. (CCH) at 23,786; *see also National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984) ("NCAA"); *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 691 (1978). Recent

[10] While the ALJ incorrectly said that the nonstatutory labor exemption "is available only for union-employer agreements" (ID at 131), *cf., e.g., Brown v. Pro Football, Inc.*, 116 S. Ct. at 2123-24, we think it clear that the only agreements that the nonstatutory labor exemption reaches are those that grew out of the collective bargaining process, *see id.*

Supreme Court decisions continue the distinction between *per se* and rule of reason analyses. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) ("SCTLA").[11]

Although respondents do not specifically appeal from the ALJ's finding that their rules resulted from a conspiracy, before examining respondents' restraints and the analysis to be accorded each, we address this element of a Section 5 case. As we noted recently in CDA, it is well-established that "professional associations are 'routinely treated as continuing conspiracies of their members.'" CDA, slip op. at 9, 5 Trade Reg. Rep. (CCH) at 23,783 (quoting 7 Areeda, Antitrust Law, *supra* note 11, ¶ 1477, at 343, and citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988)). *See also National Soc'y of Prof'l Engineers*, 435 U.S. at 692 (Court noted, in declaring a professional association's ethics rule a violation of Sherman Act Section 1, that "[i]n this case we are presented with an agreement among competitors"); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 455 (1986) ("IFD") (members of IFD had "conspired among themselves" by promulgating a policy restricting the information its members would provide insurance companies); *NCAA*, 468 U.S. at 99.

Respondents herein, as in CDA, clearly promulgated their Basic Texts, which "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." CDA, slip op. at 10, 5 Trade Reg. Rep. (CCH) at 23,784 (citing *AMA*, 94 FTC at 998 n.33). Moreover, as in CDA, respondents herein require both members and candidates for membership to expressly pledge to abide by AIIC's Basic Texts. IDF 43-45; CX-1-Z-30; CX-2-Z-30; CX-300-Z-8 to Z-10 (Motton). AIIC's Council also interprets and enforces AIIC's Basic Texts. *See* IDF 39-41.

We therefore affirm the ALJ's finding that the restraints at issue in this case are the result of an agreement among competitors -- namely, the members of AIIC, acting through their Assembly and other representative entities. *See* ID at 101-04. We turn to the specific

[11] We note that some earlier Supreme Court cases had suggexted the merging of the *per se* and rule of reason analyses. *See, e.g., Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ("BMI"); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461 (1986) ("IFD"). Areeda also has suggested that there may have been some convergence of the *per se* category (*see, e.g.*, the willingness to look beyond a horizontal price agreement in BMI) and a full blown rule of reason (*see, e.g.*, the "quick look" approach of IFD) so that at times the two antitrust approaches do not differ significantly. *See* 7 Phillip E. Areeda, Antitrust Law ¶ 1508c, at 408 (1986).

restraints imposed by respondents and analyze each under the appropriate antitrust standard to determine whether it is an unreasonable restraint of trade.[12]

A. Restraints on Price Competition -- Per Se Unlawful

Per se categories of unlawful conduct consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial procompetitive justifications. The law accords *per se* treatment to certain kinds of behavior that longstanding experience has shown to be beyond justification, and courts generally will not consider arguments that such conduct is harmless or procompetitive. Thus, the courts have concluded that such agreements are illegal without further examination of the particular circumstances under which they arise or the effects thereof -- "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982) (footnote omitted). *See also Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985). As we recently made clear in CDA, "[e]xamples of such practices are horizontal price fixing," citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and SCTLA; "territorial divisions among competitors," citing *United States v. Topco Assocs.*, 405 U.S. 596 (1972); "and certain group boycotts," citing Northwest Wholesale Stationers. CDA, slip op. at 15, 5 Trade Reg. Rep. (CCH) at 23,786 (also citing *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

It is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws. *See, e.g.*, *Maricopa*, 457 U.S. at 344-48; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).[13] Thus, any alleged "reasonableness" of an

[12] Because AIIC made numerous changes to its rules between 1991 and 1994, we discuss both versions where necessary to provide a complete understanding of the practices challenged in this proceeding. In general, we discuss the 1991 version of the rules in the text and the 1994 version in footnotes, noting whether we have concerns with the revised rules.

[13] But *see* BMI (price agreement that was essential to the market availability of the product reivewed under the rule of reason); U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care (Aug. 28, 1996) (Statements 8 & 9), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,153 (price agreements that are ancillary to the formation of an integrated joint venture

agreement to fix prices will not justify the resulting interference with competition. *See Trenton Potteries Co.*, 273 U.S. at 397-98; *United States v. Addyston Pipe & Steel*, 85 F. 271, 291 (6th Cir. 1898) (dictum), *aff'd as modified*, 175 U.S. 211 (1899). Lack of market power to effect the agreement is not a defense to the *per se* illegality of the agreement. *SCTLA*, 493 U.S. at 430-31; *Socony-Vacuum*, 310 U.S. at 224-25 & n.59.

1. Facts

AIIC and the U.S. Region adopted a wide variety of rules that affected and eliminated price competition among AIIC members in the United States. Since AIIC was founded in 1953, it has established binding rules governing its conference interpreter members, including rules concerning the remuneration charged. AIIC rules are found in its Basic Texts, which include Governing Statutes (CX-2-A (1991); CX-1-A to M(1994)), a Code of Professional Ethics (CX-2-Z-37 to 39(1991); CX-1-Z-37 to 39(1994)), Standards of Professional Practice (CX-2-Z-40 to 49 (1991); CX-1-Z-40 to 46 (1994)), a Staff Interpreters' Charter (CX-2-Z-54) (1991)), and various Annexes to the Basic Texts, including the Guidelines for Recruiting Interpreters. CX-2-Z-50 to 53 (1991); CX-1-Z-47 to 52 (1994). For the reasons discussed *infra* at 25-29, we find that the following rules are individually and collectively part of an overall price-fixing scheme and we declare each of them *per se* unlawful under Section 5.

a. Minimum Daily Rates

From 1953 until 1973, AIIC published universal minimum daily rates applicable world-wide, with certain exceptions for particular countries where the mandatory minimum rate was higher. In 1973, when the U.S. dollar and other currencies were no longer traded at fixed exchange rates, AIIC began a program to establish individual rates for each country on the basis of recommendations from AIIC members in those countries. IDF 99; Weber, Tr. 1142-44, 1147. However, in 1983 AIIC became aware that certain countries were applying their antitrust laws to rules adopted by professional associations and began to send out lists of minimum daily rates under the title "Market Survey," which was widely understood to reflect a

analyzed under the rule of reason).

"gentleman's agreement" on the minimum rate to be charged.[14] IDF 516. In 1982 the U.S. Region became particularly concerned about the application of U.S. antitrust laws and asked AIIC to stop publishing a minimum daily rate for the United States. *See* CX-1226-A ("gentleman's agreement not to ask for less than" $250 per day; antitrust lawyers advised U.S. Region not to have fixed rate appear on the rate sheet). From approximately 1982 until 1988, there was a tacit "gentleman's agreement" to abide by minimum daily rates for the U.S. Region. IDF 77; ID at 106. However, in 1988 AIIC again began publishing, at the U.S. Region's request, minimum daily rates for the U.S. *See* IDF 78.

Article 8 of the 1991 AIIC Basic Texts, Standards of Professional Practice, stated:

> The rate of daily remuneration shall be the standard rate applicable in the region concerned and, more precisely in the appropriate cases, in the country concerned. All the standard rates must be approved by the Council, which shall inform all members. In those countries where it is impossible to apply a standard rate, the Council shall adopt whichever alternative provisions it deems necessary and shall also inform all members.
>
> The base rate, which shall equal two-thirds of the standard rate, shall be applied in the cases provided for in Articles 12 and 14 below.[15]

AIIC became aware of the FTC investigation of interpreter associations in June 1991, when two U.S. Region members responded to a Commission document request sent to TAALS. IDF 538; CX-608-Z-77; CX-935-B. At its General Assembly meeting in 1991, AIIC's membership voted on whether to remove the monetary conditions from its Basic Texts, but the vote failed to achieve the required two-thirds majority. IDF 520-21; CX-270-K. AIIC then decided to hold an Extraordinary Assembly in 1992 to reconsider eliminating the monetary rules. One day before its 1992 Extraordinary Assembly, the Non-Agreement Sector held an off-the-record meeting to examine how, in light of the antitrust laws, it was

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[14] In 1977, in order to standardize rates for the U.S., AIIC's U.S. Region decided to adopt the minimum daily rate established and voted on by TAALS and transmit that rate to AIIC's headquarters for publication as the official rate applicable in the United States. *See* ID at 106; IDF 308, 100. The Commission issued a consent order against TAALS on August 31, 1994. Docket No. C-3524, 5 Trade Reg. Rep. (CCH) ¶ 23,537.

[15] CX-2-Z-43. Article 4 of the 1994 version of the Professional Standards states: "Except for those cases where the Association has signed an Agreement, members are free to set their level of remuneration." We have no objection to this formulation of the rule.

possible to "operate in another way."[16] IDF 510; CX-271-C, F; CX-273-U. The next day the Assembly voted on the following resolution:

> DEEPLY ATTACHED to the principles of universality and solidarity upon which AIIC, since its inception, has based its action in organizing the profession, for the benefit of both the interpreters and the users of interpretation, FULLY AWARE of the gradual implementation of anti-trust legislation in the various parts of the world, DECIDES on the following principles:
>
> 1. To remove all mention of monetary conditions (*e.g.* rates, subsistence and travel allowances, payment of non-working days) from our basic texts. . . .

CX-273-G; IDF 509. The Council subsequently decided that "[a]ll provisions of the Basic Texts that refer to financial conditions are immediately withdrawn. . . .The Basic Texts shall be amended consequently at the next ordinary Assembly." CX-279-I (March 1994 Bulletin); *see also* CX-273-O; CXT-273-O, p.1. Subsequently, at the 1994 Assembly, necessary changes to remove the monetary conditions were incorporated into the Basic Texts. IDF 97; CX-970-A.

b. Indivisible Daily Rates

Article 6(a) of the 1991 AIIC Standards provided that "[r]emuneration shall be on an indivisible daily basis." CX-2-Z-42.[17] AIIC's rules meant that "you charge per day no matter how long you work." CX-303-Z-109 (Moggio-Ortiz); *see also* CX-886-D; Saxon-Forti, Tr. 2696; CX-305-Z-89, Z-97, Z-110 (Sy).

Even where interpreters received a waiver from AIIC allowing them to work alone for meetings lasting 40 minutes or less in the U.S., they were nonetheless required to charge the full daily rate. CX-301-Z-152.1 (Bishopp); CX-432-G. The June 1993 Bulletin presented sales arguments interpreters could use in light of the deregulation of AIIC's Basic Texts, noting that they should argue that with respect to "conferences of short duration . . . one cannot take

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[16] The June 1992 AIIC Bulletin set forth the agenda for the Extraordinary Assembly. It contained this message from AIIC's president:

> We urge as many members as possible to attend this meeting on cartels which has been proposed by the NAS and will be attended in the morning by a lawyer. Colleagues from Canada and Germany will explain how, in practice, it is possible to "operate in another way." Since there will be neither minutes nor recording of the proceedings, your presence is essential if you wish to fully informed. . . . On the basis of this information, you will be able to take the relevant decisions which will enable the Assembly to achieve its aims.

CX-271-F.

[17] There is no provision specifying that remuneration shall be for an indivisible day in the 1994 Basic Texts.

other assignments in the course of a free half-day." CXT-276-E-G, pp.1-2.

U.S. Region interpreters charge indivisible daily fees, regardless of the number of hours worked. IDF 126; Swetye, Tr. 2826-28, 2830-31; CX-300-Z-143 (Motton); Weber, Tr. 1264. Intermediaries understood the AIIC rate to mean an indivisible daily rate, which they paid. IDF 127, 126; Neubacher, Tr. 763, 765-66; Citrano, Tr. 552-53.

c. Fees for Non-Working Days

Article 12 of the 1991 Standards of Professional Practice stated:

> a) When an interpreter is recruited to work in a place other than that of her or his professional address she or he shall receive a remuneration for each day required for travel and rest as well as for Sundays, public holidays and non-working days in the course of a conference or between conferences. This remuneration shall be at least equal to the base rate.
>
> b) When an interpreter is recruited to work in the place of her or his professional address she or he shall receive a remuneration for each non-working day in the course of the conference (up to a maximum of two). This remuneration shall be at least equal to the base rate.

CX-2-Z-46. As noted above, the "base rate" was defined in Article 8 of the 1991 Basic Texts as being at least two-thirds of the standard minimum daily rate. CX-2-Z-43 (Article 8). Article 14 specified, *inter alia*, that for journeys of more than nine hours, the interpreter was "entitled to" rest days, which "equated to non-working days and remunerated at the same rate." In lieu of rest days, the interpreter could accept first class airfare. CX-2-Z-47.[18]

d. Same Team, Same Rate

[18] Article 8 of the 1994 Standards provides: "The remuneration for non-working days occurring during a conference as well as travel days, days permitted for adaptation following a long journey and briefing days that may be compared to normal working days shall be negotiated by the parties." Article 10 of the 1994 Standards further provides: "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey. This means that journeys lasting a long time or involving a major shift in time zone call for the scheduling of rest days (generally one rest day for journeys of between nine and sixteen hours, and two rest days for journeys of 16-21 hours and three for journey[s] in excess of 21 hours)." CX-1-Z-45. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to set remuneration for non-working days and to specify the forms of travel, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to payments and travel arrangements, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

Article 6(c) of the 1991 AIIC Standards of Professional Practice provided that "[a]ny member of the Association asked to work in a team of interpreters shall only accept the assignment if all the freelance members of that team are contracted to receive the same rate of remuneration." CX-2-Z-42.[19] The rule further stated that "[a]ny interpreters recruited separately for a language which is not one of the normal working languages of the organization concerned may be regarded as not being members of the teams." *Id.* Thus, the rule did not apply when interpreters were recruited for an "exotic" language, such as Russian, Japanese, or German, or another language for which "there is difficulty finding interpreters." IDF 151; CX-301-Z-33, Z-35 to Z-36 (Bishopp); CX-300-Z-82 (Motton).

e. Travel Arrangements

Article 15(a) of the 1991 Standards provided:

> Every contract signed with a member of the Association for a conference, or a number of immediately consecutive conferences, away from the place of her or his professional address must include payment for travel by the shortest possible return (or circular) route between the place of her or his professional address and the conference venue (or venues).

CX- 2-Z-48. The rule further specified that payment for travel by air shall be for first class, business class, or club class and that tickets are not to be restricted to a particular carrier nor can an interpreter be forced to travel by charter flight. *Id.* Article 15(b) further required that for successive conferences away from the interpreter's professional address, unless there is "full and separate payment of the return travel from each [conference], the interpreter shall receive a fee and a subsistence allowance for every day" between conferences. *Id.*

AIIC's rules governing travel arrangements were binding in the U.S. IDF 239. In fact, the 1991 paper, "Working conditions for interpreters in USA," the purpose of which was to ensure the uniform application in the U.S. of the AIIC rules, states that "[i]n addition to professional fees, each interpreter shall be entitled to: . . . return economy air fare for trips under 8 hrs. Restricted tickets are not acceptable. For trips longer than 8 hrs. interpreters are entitled to

[19] There is no provision specifying that remuneration shall be the same for all members of a team in the 1994 Basic Texts.

business class or first class tickets. When train service is more convenient, first class tickets." CX-439-E, ¶ 6; IDF 239.[20]

f. Per Diem

Article 13 of the 1991 Standards of Practice provided:

> a) For the whole of the period spent away from the place of her or his professional address the interpreter shall receive a subsistence allowance, calculated per night of absence.
>
> b) The Association shall regularly publish a list of subsistence allowances for the various countries. They shall reflect the prices charged by first-class hotels.
>
> c) The interpreter may agree to the conference organizers paying up to half the subsistence allowance in kind by providing a hotel room, including breakfast, or up to eighty percent by providing full-board.
>
> d) One half of the subsistence allowance shall be due when the interpreter's absence from the place of her or his professional address is less than twelve hours between 8:00 and 20:00 hours (which may vary slightly as a function of local custom) and when it is not necessary for the interpreter to spend the night away from the place of her or his professional address.[21]

CX-2-Z-46. The record establishes that: AIIC rules required members to charge a per diem when they worked away from their professional address (IDF 110; CX-300-Z-71 to Z-72 (Motton); CX-301-Z-67 (Bishopp));[22] AIIC's Council approved the rates (IDF 113; CX-301-Z-152.41 to Z-152.42 (Bishopp); CX-268-E; CX-300-Z-72/3 to Z-74/22 (Motton)); and AIIC published a per diem rate for the United States (CX-247-Z-2, Z-5, CX-124-E, CX-125-E). In addition, the

[20] In the 1994 Standards, Article 10 states: "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey." Article 9 further provides: "Except where the parties agree otherwise, members of the Association shall be reimbursed their travel expenses." CX-1-Z-45; IDF 238. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to specify forms of travel, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to payments and travel arrangements, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

[21] Article 11(a) of the 1994 Professional Standards revised this provision to state:

> Unless the parties agree otherwise, the interpreter required to travel to the conference shall receive a subsistence allowance, calculated per night of absence. As a general rule, this allowance shall be paid on the first day of the conference and in the currency of the country where it is being held.

CX-1-Z-45. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to specify the payment of *per diems* and formulas for calculating such *per diems*, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to payments and travel arrangements, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

[22] According to one intermediary, Berlitz, "there has always been a standard rate that all interpreters charge for per diems." Clark, Tr. 614; *see also* Neubacher, Tr. 771.

U.S. Region adopted a formula whereby the organizer pays the interpreter's hotel room, as well as a fixed percentage of the hotel rate for meals and incidentals. IDF 116; CX-301-Z-65, Z-150 to Z-152.1 (Bishopp); CX-432-F (50% of hotel rate in 1988); CX-439-F (40% of hotel rate in 1991).

g. Cancellation Fees

Article 2(c) of the 1991 Standards of Professional Practice provided:

> Any contract for the recruitment of a member of the Association must specify that in the event of the organizer cancelling [sic] all or part thereof, whatever the reason for and the date of cancellation, the interpreter shall be entitled to the payment of all fees contracted therein (working and non-working days, briefing days as well as days allowed for rest and travel) in addition to the reimbursement of any expenditure already incurred.

CX-2-Z-41; *see* IDF 241. Article 2(d) of the 1991 Standards further stated that the interpreter cannot be forced to accept an alternative job to mitigate the organizers' liability. *Id.*[23]

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[23] Article 3.2 of the 1994 Professional Standards states:

> At the time the contract is being negotiated, the interpreter may ask for the inclusion of a clause whereby, in the event of all or part of the contract being canceled by the conference organizer, the remuneration envisaged would remain payable to the interpreter and she or he would, if applicable, be refunded any out-of-pocket expenses. A specimen cancellation clause that may be used for this purpose shall be included in the general conditions appearing on the back of the standard contract for individual interpreters.

CX-1-Z-41. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to specify a standard cancellation clause that provides for the payment in full of all remuneration contemplated to be paid under the contract, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to such payments in the event of cancellation, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

h. Recording

Article 2(b) of both the 1991 and 1994 Standards of Professional Practice provides:

> Any contract for the employment of a member of the Association must stipulate that the interpretation is intended solely for immediate audition in the conference room. No one, including conference participants, shall make any tape recording without the prior consent of the interpreters involved, who may request appropriate remuneration for it, depending on the purpose for which it is made and in accordance with the provisions of international copyright agreements.

CX-2-Z-41 and CX-1-Z-40. The ALJ found that "AIIC's rule on recordings is binding in the United States." IDF 244; Weber, Tr. 1251. Moreover, members at a NAS meeting held in Dublin in January 1989 voted that recordings not for resale should be charged at 25% of the daily rate, and recordings for resale at 100% the daily rate. The results of the vote were published in AIIC's Bulletin. CX-253-D (Apr. 5, 1989 AIIC Bulletin); CXT-251-W at 2-3; IDF 245.[24]

i. Pro Bono Work

Article 7 of the 1991 Basic Texts, Standards of Professional Practice, titled "Non-Remunerated Work," stated:

> Members of the Association may provide their services free of charge, especially for conferences of a charitable or humanitarian nature, provided they pay their own travel expenses and subsistence (subject to the granting of a waiver by the Council beforehand). All the other conditions laid down in the Code of Professional Ethics and in these Standards of Professional Practice must be observed.

CX-2-Z-42. *See also* CX-9-F; CXT-6-E to M, p. 4 (1979 Code); Weber, Tr. 1232.[25]

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[24] The only testimonial evidence regarding the actions taken at the Dublin meeting was provided by Claudia Bishopp in her investigational hearing testimony. CX-301-Z-152.7 - 152.11. Ms. Bishopp stated with respect to the rates for recordings: "I don't think this was ever agreed. It has certainly never been put into practice. There is no agreement among members of what would be acceptable to each one." *Id.* at 152.8. Thus, there is no additional evidence as to whether this agreement was ever adhered to, or whether it is still in place or was disavowed as a result of the 1992 Assembly vote to eliminate all monetary conditions from AIIC's rules.

[25] Article 5 of the 1994 Professional Standards states that "[w]henever members of the Association provide thier service free-of-charge for conferences of a charitable or humanitarian nature, they shall respect the conditions laid down in the Code of Professional Ethics and in these Professional Standards." CX-1-Z-41 (1994). We have no objection to this rule as currently written.

j. Commissions

Paragraph (c)4 of the AIIC Guidelines for Recruiting Interpreters (appended to the 1991 and 1994 Basic Texts),[26] under "Duties Towards the Profession," provides that "Members of the Association shall not accept or give commissions or any other rewards in connection with team recruitment or the provision of equipment." Article 6(d) of the 1991 Standards of Professional Practice further stated: "Remuneration shall be net of any commission." CX-2-Z-42 (1991).[27]

AIIC members discussed the issue of commissions at a meeting in the early 1980s. An AIIC Bulletin subsequently reported: "There is no reason why an intermediary, AIIC member or otherwise, should not request a fee from the organizers for expenses incurred in recruiting a team, but this must be charged to the organizer and clearly shown as distinct from the interpreters fees and never deducted from the interpreters fees." CX-227-J (March 1981 Bulletin); IDF 253.

2. Legal Analysis

Based on the extensive history and publication of minimum daily rates, the record evidence of the price-fixing agreement, and the expert testimony, we conclude that there was an unlawful agreement among AIIC members as to the minimum price to be charged for conference interpretation in the U.S. We further find that respondents engaged in restraints that prevented price competition on virtually all aspects of conference interpreting, including minimum daily rates; an "indivisible day" that prevented lower remuneration for shorter meetings; specified payment for travel, rest, briefing, and nonworking days; a mandate that all interpreters at a conference be paid the same; standardized payments for full fare travel expenses; uniform per diem

[26] There is some contradictory information in the record as to whether the Recruiting Guidelines continued as an Annex to the 1994 Basic Texts. The Guidelines are appended to CX-1-Z, which is the full set of 1994 Basic Texts. However, according to a letter dated October 21, 1994 from respondents' counsel to complaint counsel transmitting the then-current Basic Texts, the respondents had not yet completed revised Guidelines for Recruiting Interpreters, and the draft that was included eliminated all mention of commissions. The testimony is also contradictory: Mr. Luccarelli testified that the Guidelines were no longer in existence (Luccarelli, Tr. 1676-77) and Mr. Weber testified that as far as he knew, AIIC never announced to the membership that the Guidelines were repealed. Weber, Tr. 1156.

[27] The 1994 Professional Standards contain no similar provision mentioning that remuneration shall be net of commissions or any other references to commissions.

allowances; cancellation and recording fees; and restrictions on *pro bono* work and the payment of commissions. These restraints constitute a comprehensive price-fixing scheme and, individually and collectively, are *per se* unlawful.

The reason for condemning price fixing categorically was articulated by Professor Areeda in language quoted by the Supreme Court:

> In sum, price-fixing cartels are condemned *per se* because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public.

7 Areeda, Antitrust Law, *supra* note 11, ¶ 1509, at 412, quoted in *SCTLA*, 493 U.S. at 434 n.16.

Agreements between AIIC and its U.S. members to promulgate and follow AIIC's rates constitute illegal agreements on price and are classic *per se* antitrust violations. It is irrelevant whether AIIC's rates are reasonable or unreasonable. *SCTLA*, 493 U.S. at 421 (although "[w]e may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants[,]" the boycott and price fix are illegal *per se*); *Trenton Potteries Co.*, 273 U.S. at 396. The *per se* rule against price fixing applies fully to professionals. *SCTLA*, 493 U.S. at 422, 427, 434; CDA, slip op. at 21-23, 5 Trade Reg. Rep. (CCH) at 23,789-90.

Although the core agreement is the one among AIIC's members not to charge less than an agreed-upon daily rate, the *per se* rule against price fixing is far broader. The *per se* rule embraces any agreement that has a substantial impact upon price, whether or not the agreement directly specifies prices to be charged. The conduct condemned in Socony-Vacuum was a concerted effort by oil companies to increase prices by buying up surplus gasoline. As the Supreme Court stated in Socony-Vacuum, "the machinery employed by a combination for price-fixing is immaterial." 310 U.S. at 223.

In *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (*per curiam*), the Supreme Court held that an agreement to terminate the availability of free credit in connection with the purchase of goods is "tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price-fixing." *Id.* at

648. Even if the price of the underlying product is not fixed (as it was not in Catalano, but is here), an agreement substantially impacting the price to be charged is unlawful. *Id.* at 647; *Sugar Institute v. United States*, 297 U.S. 553, 600-02 (1936) (agreement to adhere to announced prices and terms of sale unlawful, even though the specific prices and terms were not agreed upon). Similarly, the courts have held *per se* unlawful other methods of affecting price competition that fall short of fixing the actual price of the product. *See, e.g., Plymouth Dealers' Ass'n of N. Cal. v. United States*, 279 F.2d 128, 134 (9th Cir. 1960) (uniform trade-in allowances and standard requirements for cash down payments); *cf. United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 185-88 (3d Cir. 1970) (sufficient evidence to support jury finding that defendants illegally agreed to limit discounts), *cert. denied*, 401 U.S. 948 (1971).

The AIIC rule providing that remuneration be on an indivisible daily basis required interpreters to charge the full rate regardless of the amount of time worked. This rule prevented interpreters from discounting by charging an hourly rate or a discounted or *pro rata* fee for a meeting lasting less than a full day. This rule is a *per se* unlawful price-fixing restraint under *Catalano*, 446 U.S. at 645.

The provisions related to "same team, same rate" set the rate of compensation for every team member at or above the AIIC rate, regardless of the interpreters' varying levels of skill, experience, or specialized knowledge of the subject matter of a particular conference. Although a showing of adherence is not necessary to establish the antitrust illegality of the type of horizontal agreement that courts have uniformly condemned *per se*, several witnesses in this case testified about interpreters' general adherence to this rule. Swetye, Tr. 2819-20; CX-303-Z-110-11 (Moggio-Ortiz); Hamann-Orci, Tr. 40; but *see* Saxon-Forti, Tr. 2681 (some instances in which interpreters did not adhere to rule). Moreover, during the 1984 Los Angeles Olympics, several interpreters raised concern that they not be required to work with student interpreters who were working for free because they would be in violation of this rule. *See* IDF 351; CX-1246-A; CX-1283-B. The Supreme Court has held that the *per se* rule is violated by agreements tending to provide the same economic rewards to all practitioners "regardless of their skill, their experience, [or] their training[.]" *Maricopa*, 457 U.S. at 348. We find that the "same team, same rate" agreement is an agreement to charge the same price and is thus *per se* unlawful.

We find that AIIC's 1991 rules setting the rate of remuneration for non-working, travel, rest, and briefing days constitute unlawful price fixing. These rules, by setting forth specific pricing formulas, are also similar to other *per se* unlawful pricing schemes that have used multiple-base-point systems and phantom freight systems. *See FTC v. Cement Institute,* 333 U.S. 683 (1948) (agreement among cement manufacturers to use a multiple-base-point system for freight charges an unfair method of competition in violation of Section 5); *cf. In re Plywood Antitrust Litigation,* 655 F.2d 627, 634 (5th Cir. 1981) (discussing evidence from which reasonable jury could find that phantom freight formula, whereby West Coast freight prices were used regardless of where the shipment originated, was *per se* illegal), *cert. dismissed,* 462 U.S. 1125 (1983).[28] The price-fixing formula used here also prevented interpreters from competing with one another by discounting their rates for non-working days. *See Catalano,* 446 U.S. at 644-45 (discussing role of discounts in competition among wholesalers).

The travel rules prevent conference organizers from realizing considerable economies by planning ahead and taking advantage of special offers.[29] More significant, absent the travel rules, competing interpreters or intermediaries could use savings on travel expenses as a term of price competition. By agreeing to forego competition on this element of price, AIIC and its members have fixed prices in violation of the antitrust laws. *See Catalano,* 446 U.S. at 645; *cf. In re Plywood Antitrust Litigation,* 655 F.2d at 634. We also agree with the ALJ's finding that "AIIC's travel rules help its members maintain their agreement by deterring cheating." IDF 240; Wu, Tr. 2093-94.

Similarly, we find that respondents' agreement contained in the 1991 Basic Texts to charge per diems and to standardize per diem charges, through the use of formulas or otherwise, is an agreement affecting price that is *per se* unlawful. *See Catalano,* 446 U.S. at 648 (agreement to terminate credit discounts that affected price);

[28] This case is distinguishable from *Vogel v. American Society of Appraisers,* 744 F.2d 598, 602-04 (7th Cir. 1984), in which Judge Posner, writing for the court, held an appraising society rule barring fees based on a flat percentage of appraisals to be lawful. Unlike the rules involved in the present case, the rule at issue in Vogel did not prescribe the charge to be made, but only prohibited a particular pricing formula.

[29] For instance, in the case of the 1984 Olympic Games, United Airlines had provided free air travel to the Los Angeles Olympic Organizing Committee ("LAOOC"), so the LAOOC wanted to use United for interpreters' transportation. Weber, Tr. 1247. AIIC advised that this effort by the LAOOC to reduce its costs was "usually unacceptable." CX-1283-A.

Northwestern Fruit Co. v. A. Levy & J. Zentner Co., 665 F. Supp. 869 (E.D. Cal. 1986) (fixing of standardized component charges was *per se* illegal price fixing).

We further find that the agreement to abide by a standard cancellation clause, requiring a conference organizer to pay an interpreter his or her full fee in the event the conference does not take place, eliminates another form of price competition and as such is *per se* unlawful price fixing. The clause prevents competition on cancellation fees among interpreters, some of whom might be willing to take greater risks of cancellation.[30] Thus, AIIC's rule on cancellation is an agreement to place on the purchaser a cost of the transaction and is analogous to the agreements on credit terms in Catalano and on freight costs in *FTC v. Cement Institute*. *Cf. American Radiator*, 433 F.2d at 185-88 (evidence of conspiracies to limit maximum discounts and to eliminate a low-priced product line sufficient for jury to find illegal price fixing).

AIIC's rules, in combination with agreements reached at the NAS meeting in 1989, set the amount to charge for recordings and constitute another form of *per se* unlawful price fixing. *See, e.g., Catalano*, 446 U.S. at 647-48; *Northwestern Fruit Co.*, 665 F. Supp. at 871-72.

Complaint counsel's economic expert testified that the ban on commissions helped AIIC members reach and maintain their cartel agreement by preventing discounts on the minimum fee charged. Wu, Tr. 2150-51. Moreover, at a NAS seminar on sales techniques and negotiations held in January 1994, members were instructed to "[s]peak openly about the subject with hotel employees and technicians who usually get commissions and explain that AIIC members do not do it because they would be obliged to raise their price and everyone would lose." CX-279-Z-3; CXT-279-Z-2 to 5, p.2.

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[30] For example, the situation that arose during the 1984 Los Angeles Olympics illustrates the application and impact of this rule. Wilhelm Weber, who organized interpretation services for the 1984 Los Angeles Olympics, initially did not offer the standard AIIC cancellation clause to interpreters. IDF 242; Weber, Tr. 1235-36, 1244-45; CX-1300-A to B. The LAOOC wanted a staggered cancellation clause to mitigate potential financial outlays because of concern about the threatened (later actual) boycott by the Soviet Bloc countries. AIIC warned Mr. Weber about his breach of the rules and stated that if the contract were not renegotiated to include the standard cancellation clause, Mr. Weber would be held personally liable for any money due to interpreters in the event of a cancellation. IDF 354, 242; Weber, Tr. 1243-48, 1255-56. As a result of the pressure by AIIC, an "acceptable" cancellation clause was included in the Olympics' contracts and Mr. Weber received a warning from AIIC for his actions. IDF 354, 356, 242; Weber, Tr. 1226-29; *see also* CX-1741-A (Nov. 26, 1984 letter from AIIC to Weber). The change in the cancellation clause substantially raised the costs to the LAOOC as a result of the Soviet Bloc boycott of the Olympics. *See* IDF 354; Weber, Tr. 1256-57.

Respondents' only defense of their ban on commission payments (*i.e.*, that it serves to inform customers of the respective earnings of the interpreter and the intermediary (Brief for Respondents-Appellants at 35)) is unpersuasive. Particularly when viewed in the context of AIIC's other efforts to set minimum rates, we find that AIIC's ban on commission payments is in effect an agreement to refrain from giving discounts from the fixed minimum rate and as such is *per se* illegal. *See Catalano*, 446 U.S. at 649; *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688, 691 (7th Cir. 1961) (agreement not to give trading stamps and other premiums to retail gas customers was *per se* illegal); *cf. American Radiator*, 433 F.2d at 185-86. The ban on commissions may also serve to deter entry by preventing new interpreters from paying commissions to intermediaries to help them gain experience, even if at a discounted fee. *See* IDF 254.

Similarly, the ALJ found that "AIIC's restrictions on *pro bono* work deter entry by novice interpreters working without charge. Absent the rule, student or novice interpreters could seek to work without charge in order to gain experience and make contacts in the profession." IDF 250; *see also* Wu, Tr. 2109. For example, this provision became an issue when student interpreters at the 1984 Olympics violated the Code by allowing the LAOOC to pay their airfare from Monterey, California to Los Angeles, California. IDF 249. AIIC's Council, as well as the U.S. Region, warned the organizer (Weber) that his actions "go against a number of principles and rules of our profession." CXT-1320-A to C, p.1.; IDF 249; *see generally* Weber, Tr. 1232-33, 1271-72. Thus, we find that AIIC's 1991 rule on *pro bono* work operated as a prohibition on discounts and is *per se* illegal under Catalano. Alternatively, AIIC's restraints on *pro bono* work can be viewed as setting a minimum price because AIIC members would have to charge some amount for their services in order to receive reimbursement for travel and other expenses associated with charitable work. Minimum price setting in the sale of services, as well as goods, is *per se* illegal price fixing. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 782-83 (1975) (state bar association's minimum fee schedule held to be a naked restraint and unlawful price fixing).

B. Market Allocation -- Per Se Unlawful

Agreements among competitors to divide or allocate markets are illegal *per se*. *See Palmer v. BRG*, 498 U.S. at 49-50; *Topco*, 405 U.S. at 608 (citing cases). The Supreme Court has held such horizontal market divisions *per se* illegal, even when unaccompanied by price fixing, *Topco*, 405 U.S. at 609 n.9, or when the market division was between potential, not actual, competitors, *see Palmer v. BRG*, 498 U.S. at 47 (non-competition agreement between former competitors). For reasons discussed *infra* at 30-31, we find that the respondents' moonlighting rules constitute market allocation and are *per se* illegal.

1. Facts

Paragraph b(2) of AIIC's 1991 "Guidelines for Recruiting Interpreters" required AIIC members to hire "freelance interpreters rather than permanents having regular jobs." CX-1-Z-48. Paragraph 6 of AIIC's "Staff Interpreters' Charter" states that staff interpreters should act as interpreters outside their organization "only with the latter's consent, in compliance with local working conditions, and without harming the interests of the free-lance members of AIIC." CX-1-Z-53; CX-2-Z-54; IDF 281.

AIIC members understood these provisions to mean that staff interpreters with permanent jobs should not perform freelance work unless no freelance interpreter is available. IDF 283; CX-301-Z-106 to Z-107 (Bishopp); CX-300-Z-121 to Z-122 (Motton); Lateiner, Tr. 907. The U.S. Region agreed with AIIC's rules that staff interpreters should not work in the private sector unless no freelance interpreters were available. IDF 284; CX-405-C; CX-407-F. The U.S. Region, at a 1988 meeting, admonished its members: "[O]ur permanent colleagues are reminded that if they are offered a contract outside their organization they should check first whether there are any free-lance interpreters available with the required language combination. They have a permanent, steady job and freelancers don't. Therefore they should show some 'restrain' [sic] in accepting work on the private market." CX-432-M; IDF 283.

2. Legal Analysis

We concur in the ALJ's findings that AIIC's moonlighting rules constitute an agreement that staff interpreters will not compete with freelance interpreters. *See* IDF 280-291; CX-300-Z-114 to Z-115, Z-

121 (Motton); CX-301-Z-95 to Z-97 (Bishopp); *see generally* Hamann-Orci, Tr. 14-15; Van Reigersberg, Tr. 363-64; but *see* Lateiner, Tr. 905. This agreement is in effect a market allocation because it promotes and protects the economic interests of local, freelance interpreters from competition from permanently employed "staff" interpreters. Thus, the agreement effectuates a market division and is a *per se* violation of the antitrust laws.

Judge Posner's opinion for the Seventh Circuit in *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 594-95 (7th Cir. 1984), makes clear that horizontal market divisions have the same anticompetitive effects -- and are as unlikely to have efficiency rationales -- as price fixing and output restraints. In General Leaseways, the defendant was an association of local truck leasing firms that, *inter alia*, allowed the local firms to compete with national truck leasing firms by providing for reciprocal service agreements among the local companies across the United States. Other rules, however, limited competition among the member truck leasing firms by limiting the geographic area in which they could compete and restricting their ability to affiliate with the national truck leasing firms. The Seventh Circuit found these latter rules to amount to a *per se* unlawful market division. 744 F.2d at 595.

In 1990, the Supreme Court unanimously reconfirmed the vitality of the *per se* rule against horizontal market allocations in a case involving companies that offered competing bar review courses:

> Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which they both do business or whether they merely reserve one market for one and another for the other.

Palmer v. BRG, 498 U.S. at 49-50 (citing *Maricopa*, 457 U.S. at 344 n.15 (market division is *per se* offense)); *see also Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994) (complaint allegations sufficient to survive motion to dismiss because, if proved at trial, the allocation of customers among competitors via a call forwarding scheme from phantom dealers would be *per se* unlawful). We therefore find that AIIC's rules to protect freelance interpreters from competition by staff interpreters are *per se* unlawful.

C. Rules Governing Non-Price Terms and Conditions of Employment, Business Arrangements, and Advertising -- Rule of Reason Analysis

The Supreme Court is generally reluctant to utilize a *per se* approach to review professional associations' codes of conduct and has admonished lower courts not to expand the *per se* category "until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged." *Maricopa*, 457 U.S. at 349 n.19. In fact, we recognized and applied this approach in our recent decision in CDA. *See* slip op. at 24-25, 5 Trade Reg. Rep. (CCH) at 23,790-91. AIIC's restrictions on the non-price terms and conditions of employment, business arrangements, and advertising are not in the categories of restraints traditionally considered *per se* illegal. Moreover, we cannot say that they appear "to be one[s] that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979) ("BMI"). We believe it would be imprudent to expand the *per se* rule to these restrictions and, therefore, we apply the rule-of-reason analysis instead.

Under the rule of reason, a court will examine the restraint in the totality of the material circumstances in which it is presented in order to assess whether it impairs competition unreasonably. Although many courts have elaborated on the details of this test, Justice Brandeis' classic formulation remains the touchstone for rule-of-reason analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918).

The Supreme Court has made clear that the rule of reason contemplates a flexible inquiry, examining a challenged restraint in the detail necessary to understand its competitive effect. *See, e.g.*,

NCAA, 468 U.S. at 103-10. Thus, the inquiry need not be conducted in great depth and elaborate detail in every case, for sometimes a court may be able to determine the anticompetitive character of a restraint easily and quickly by what has come to be known as a "quick look" review. *See IFD*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 106-10 & 109 n.39. As the cases make clear, however, a variety of factors go into conducting an appropriate rule-of-reason analysis, depending upon the particular facts of the case. Generally, a court will look to the following: product and geographic market definition; market power; anticompetitive effects; barriers or impediments to entry; and any plausible efficiency justifications. Because the rules at issue here are not plainly anticompetitive and complaint counsel has not established anticompetitive effects or respondents' market power, we dismiss the complaint as to the rules governing length of day, team size, professional address, portable equipment, advertising, package deals, exclusivity, trade names, double-dipping and other services.

1. Market Definition

In defining the relevant product market, the courts and the Commission generally examine what products are reasonable substitutes for one another. In the context of monopolization cases under Section 2 of the Sherman Act, the Supreme Court has stated:

> The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchange ability for the purposes for which they are produced -- price, use and qualities considered.

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956) (although du Pont had a 75 percent share of the cellophane market, cellophane was in the same product market as other flexible packaging materials and du Pont did not have monopoly power in this larger market).

In defining the relevant product market in connection with analyzing mergers, the antitrust agencies examine what products would be substitutes in the event of a "small but significant and nontransitory" increase in price. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines Section 1.11 (Apr. 2, 1992),

reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104. We look to what possible alternatives a consumer would have if, for example, the price of conference interpretation from English into French increased by five or ten percent.

The ALJ found that the "relevant product markets include conference interpretation of language pairs (English to Spanish, Spanish to English . . .)." IDF 366. Both parties have suggested that because an interpreter who interprets only from English into German could not substitute for the English into French interpreter, the appropriate product market is conference interpretation by language pair. *See, e.g.*, Complaint Counsel's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law, at 43 n.35 and Appendix C, p.1; Wu, Tr. 2057, 2391; Respondents' Proposed Findings, ¶ 113; Silberman, Tr. 2985; Oral Argument, Tr. 18-19. Based on the evidence in this record, as well as the admissions by both sides, it is likely that the proper product market definition is conference interpretation by language pair.

In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Supreme Court discussed its approach to defining the relevant geographic market, noting that it was essentially the same as the approach taken to define the relevant product market and that "[t]he geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant." 370 U.S. at 336-37 (footnote omitted). Thus, we generally look to the geographic area in which sellers of a service operate and to which purchasers can reasonably turn for those services. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

The Department of Justice and the FTC have set forth their approach to defining the relevant geographic market in the 1992 Merger Guidelines as that area within which a hypothetical monopolist could impose a "small but significant and nontransitory" increase in price that would not be offset by a loss in sales. Horizontal Merger Guidelines Section 1.21. Thus, for example, we would look to whether conference interpreters from outside the United States would offer their services in the United States and whether customers in the United States would seek the services of foreign interpreters if faced with a price increase of five to ten percent.

The ALJ found that the "relevant geographic market is the United States." IDF 366; *see also* Wu, Tr. 2193-94. Respondents initially

argued that the geographic market should include interpreters who reside in Mexico and Canada, as well as foreign interpreters who reside in the United States part of the year. Respondents' Proposed Findings of Fact, ¶¶ 142-45. Respondents, however, have not challenged the ALJ's conclusion on appeal. Although there is some evidence that employers and intermediaries may include foreign interpreters on the lists from which they attempt to hire, the rules related to travel and per diem leave us unpersuaded that foreign interpreters function as a constraint on price increases by interpreters domiciled in the United States. Thus, our review of the record provides no reason to overrule the ALJ's finding in this regard.

2. Competitive Effects and Market Power

As we recently stated in CDA:

> Market power is part of a rule of reason analysis, but it is important to remember why market power is examined. We consider market power to help inform our understanding of the competitive effect of a restraint. Where the consequences of a restraint are ambiguous, or where substantial efficiencies flow from a restraint, a more detailed examination of market power may be needed.

CDA, slip op. at 28, 5 Trade Reg. Rep. (CCH) at 23,792 (footnote omitted). Similarly, the Supreme Court has indicated that when a court finds actual anticompetitive effects, no detailed examination of market power is necessary to judge the practice unlawful. *See IFD,* 476 U.S. at 460-61; *NCAA*, 468 U.S. at 109-10.

Complaint counsel and the ALJ place substantial reliance on evidence that AIIC's members adhered to the price-fixing agreement to prove that AIIC had market power. More specifically, the ALJ found that the Wu Data Set established that the AIIC members "charged at least the 'suggested minimum'" 90 percent of the time. IDF 318.[31] The ALJ also found that the fact "[t]hat AIIC members charged the agreed rates over four years indicates that AIIC had market power in U.S. conference interpretation in the years 1988 through 1991. (Wu, Tr. 2052-53, 2055.) The anticompetitive effects

[31] *See* IDF 317-27; ID at 122-23; Complaint Counsel's Proposed Findings of Fact, Conclusions of Law, Brief in Support Thereof, and Orders, Volume II, at 115-22. Dr. Wu analyzed the contracts of 42 AIIC members over a seven-year period, finding that the "suggested minimum" was charged 90 percent of the time during the four years 1988 through 1991.

in the United States show that AIIC has market power, since market power is the ability to raise price or restrict output." IDF 327.

We disagree with the ALJ's finding that AIIC had market power because AIIC members charged the agreed-upon price. The fact that AIIC members charge and receive a set price does not necessarily mean that they have market power. It could simply mean that they have made an ill-advised decision to set a price that some market participants accept but that in reality lowers overall demand for their services, or it could mean that the price fixed was set exactly equal to the competitive price. There is no evidence in this record to show, for example, what non-AIIC members charged or received or the percentage of overall private sector conference interpretation work that AIIC versus non-AIIC members perform. Thus, in this case, we do not believe that it is appropriate to attribute market power to AIIC by the mere fact that its members found it in their interest to adhere to a price-fixing agreement. Moreover, if there were evidence of the amount being charged by interpreters who were not members of AIIC, that would not necessarily be dispositive proof of whether AIIC had market power. It is precisely the danger that business persons will find it in their economic interest to go along with a price-fixing agreement that makes price fixing so pernicious and a *per se* offense requiring no showing of market power.

Thus, to determine whether AIIC has market power, we look first to market share evidence. While the parties, as well as the ALJ, agree that the market is properly defined by language combination, there is no evidence in the record from which to determine market shares by language combination. *See, e.g.*, Reply Brief for Respondents-Appellants at 20; Complaint Counsel's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law, Vol. I, at 43 n.35; Wu, Tr. 2391. The briefs, findings of fact, Initial Decision, and oral argument discuss at length the market shares held by AIIC members, but the shares discussed are all defined by singular languages or the overall number of interpreters working in the United States. For example, the ALJ found that AIIC (in combination with TAALS) has 24 percent of the estimated number of Portuguese conference interpreters and 44 percent of the French conference interpreters (with percentages for other languages between these extremes). IDF 379. Respondents, on the other hand, argue that their market shares for the five Western European languages focused on by the ALJ are "at most from the low to mid-teens to the low twenties." Reply Brief for

Respondents-Appellants at 24 (emphasis in original). Without delving into the particulars of the different versions of market shares, we conclude, assuming that the product market is defined as language pairs, that neither the ALJ's, complaint counsel's, nor respondents' calculations can serve as the basis for a finding of market shares. Thus, complaint counsel has failed to carry the burden of proof concerning respondents' market shares by language combination, making it impossible to determine market power.

Even without a showing of market power, if the anticompetitive effects of the rules were clear, we still would be able to make a finding of liability under a rule-of-reason analysis. The competitive effects of the rules at issue here, however, are not obvious from the rules alone, and the record in this case is virtually devoid of evidence of anticompetitive effects flowing from the non-price restraints. *See generally* IDF 317-65. With the exception of three findings (IDF 341-43), all of the effects discussed by the ALJ stem from the price-related restraints. Two findings address "Team Size" and demonstrate that AIIC members generally abide by AIIC's rules with respect to team size, and that to the extent they deviate from the recommended team strength, they receive additional compensation. IDF 341-42. However, it is not clear that this is an anticompetitive result. Almost all of the witnesses testified that AIIC's team size rules reflected the way conference interpretation works best and that they therefore generally utilize the same team sizes AIIC advocates in its rules. The third finding addresses the length-of-day rule and suggests that interpreters sometimes insist on receiving extra compensation if the conference "exceeds a normal workday." IDF 343. As discussed *infra* at 37-39, the evidence suggests that not all interpreters insist on overtime pay and, for the ones that do charge, the amount they charge varies. Moreover, many of the witnesses at trial testified that the length of day specified in AIIC's rules generally coincides with the reality of the time period after which interpreters begin to experience mental fatigue, which can affect the quality of the interpretation services being provided. *See* discussion *infra* at 37-38. Thus, in our view, the ALJ's findings in this regard are not sufficient to make a finding of anticompetitive effects flowing from the non-price restraints.

3. Efficiencies

Over the past few decades both the Commission and the courts have increasingly recognized the role of efficiencies in assessing the competitive impact of restraints of trade under the rule of reason. *See* CDA, slip op. at 32-37, 5 Trade Reg. Rep. (CCH) at 23,794-96. *See generally* 1 Federal Trade Comm'n Staff, Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace, ch. 2 (May 1996). The Supreme Court relied extensively on an analysis of the efficiencies of certain vertical contractual restraints in upholding such restrictions in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). The Court's decision in BMI is another example of the role of efficiencies: the Court found that BMI's issuance of blanket licenses was not a *per se* violation of the antitrust laws because the activity appeared on its face to "increase economic efficiency and render markets more, rather than less, competitive." 441 U.S. at 20 (quoting *U.S. v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)); *see also NCAA*, 468 U.S. at 114 (citing district court's conclusion that restrictions on television rights to be offered to broadcasters were not justified by any "procompetitive efficiencies which enhanced the competitiveness of college football television rights").

Lower courts have also taken certain efficiencies into account when reviewing the activities of professional associations. *See, e.g., Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1491-92 (D.C. Cir. 1984) ("public service" argument); *Wilk v. American Med. Ass'n*, 719 F.2d 207, 221-22 (7th Cir. 1983) ("patient care" motive), *cert. denied*, 467 U.S. 1210 (1984).[32] Thus, in the examination of an industry standard or a professional standard under the rule of reason, efficiencies are part of the analysis. *See* CDA, slip op. at 32-37, 5 Trade Reg. Rep. (CCH) at 23,794-96.

Respondents argue that the restraints at issue in this case are justified by various efficiencies, to wit, that they ensure the quality of the interpretation services provided; maintain the health and safety of interpreters; and provide needed information to consumers about the appropriate way to staff conferences requiring interpretation services. Although our decision with respect to the issues of market power and

[32] This does not mean that an otherwise *per se* violation such as price fixing could be justified as quality enhancing; our discussion *supra* at 14-16, 25-31, makes it clear that it cannot. *Cf. National Soc'y of Prof'l Engineers*, 435 U.S. at 693-96.

anticompetitive effects negates the need to assess the adequacy of these justifications, at least some are not facially without merit.

4. Conclusion

For the reasons discussed, we cannot condemn under the rule of reason any of the non-price rules disputed below.[33] Those rules include length of day, team size, professional address, portable equipment, advertising, package deals, exclusivity, trade names, double-dipping and other services.[34]

5. Rules Being Dismissed

a. Length of Day

The 1991 (Article 4) and 1994 (Article 7) Standards of Professional Practice state that "the normal duration of an interpreter's working day shall not exceed two sessions of between two-and-a-half and three hours each." CX-2-Z-42; CX-1-Z-45. The ALJ found that AIIC's rules allow members to work beyond the hours specified by AIIC as long as they are paid for overtime, and that many AIIC members charge overtime when working beyond six hours. IDF 166-68. The ALJ further found that one intermediary paid interpreters "about 20% more than the standard rate when interpreters worked more than six hours a day (Neubacher, Tr. 804-05)," while another paid interpreters an additional $100-200 for anything over a seven-hour day. IDF 343; Citrano, Tr. 543-45. Some complaint counsel witnesses testified that AIIC members occasionally work longer days without charging overtime. Davis, Tr. 881 (interpreters do not always request additional compensation for working beyond the standard day -- it depends on how much additional time is being required); Lateiner, Tr. 973 (half-hour grace period). Other intermediaries testified that interpreters have refused work for hours that exceed the normal working day. IDF 178. Finally, complaint counsel's expert testified that "[s]ometimes, the overtime charge would be another half

[33] Our decision in this regard obviates the need to discuss issues related to entry or enforcement of the rules.

[34] Because the ALJ dismissed the complaint allegations challenging the rules on double-dipping and other services, we do not discuss these rules. However, we note that while we are upholding the dismissal, we disagree with the ALJ's analysis. He found the rules *per se* illegal but dismissed them for lack of enforcement; on the other hand, we believe the rules should be analyzed under the rule of reason and dismiss them because complaint counsel has not met its burden of proof.

day of remuneration, sometimes there would be hourly charges." Wu, Tr. 2120.

The only arguable enforcement of this rule dates back to the 1984 Olympic Games, when AIIC wrote Wilhelm Weber a letter warning him to conform his contracts to AIIC's Code. An AIIC member had objected to a contract offered by Weber that provided for a seven-hour work day. IDF 181; CX-1300-A; Weber, Tr. 1252-53; *see generally* CXT-1693-A to C.

The rules themselves contain no mention of overtime or the appropriate level of remuneration for sessions that exceed AIIC's recommended length of day. Moreover, the evidence suggests that individual interpreters applied this rule in a wide variety of ways. Finally, many of the interpreter and intermediary witnesses (called by both respondents and complaint counsel) testified that this rule helped to maintain the quality of interpretation and the health of the interpreters because working beyond the "normal" working day often results in mental fatigue and interpreting mistakes. Hamann-Orci, Tr. 84-85; Davis, Tr. 871-73; Weber, Tr. 1187, 1292, 1297; Luccarelli, Tr. 1661. Since the evidence does not show that AIIC specified that overtime must be paid, that interpreters uniformly charged for overtime, or that uniform rates were charged for overtime, this does not constitute independent price fixing.[35] Moreover, this rule differs from the *per se* unlawful price-fixing rules, such as those on commissions and *pro bono* work, because, unlike the latter two, the length of day rule has no price aspect on its face and there are some plausible justifications for setting forth what a "normal" day is. For example, even Wilhem Weber, one of complaint counsel's key witnesses, testified that the rules with respect to length of day and team strength ensure the health of the interpreters and the quality of the interpretation services. Weber, Tr. 1278-79, 1296-97.

Complaint counsel argue and the ALJ found that the length of day rule was an output restraint and therefore *per se* unlawful. We agree that if this rule were a strict limitation on output, it would likely be

[35] We note, however, that as recently as 1989 AIIC issued a document entitled "Conditions Governing Recruitment and Work at Intergovernmental Meetings Outside the Agreement Section," which could be used under certain specified circumstances "[i]n lieu of the corresponding rates and conditions laid down in Annex I to the AIIC Code of Professional Conduct and Practice." This document specified the compensation to be paid to interpreters who were required to work in excess of the daily or weekly workload levels set forth in the document. CX-2064-A to D. Because there is no testimony or other evidence in the record explaining this document, how it was developed, whether it was adopted by agreement among AIIC's membership, and in what countries it was applicable, a decision as to its legality is not before us.

condemned as *per se* unlawful because output restrictions have the same basic economic effect as an agreement to increase prices. *See SCTLA*, 493 U.S. at 423; *NCAA*, 468 U.S. at 100. However, because the rule itself merely sets forth the "normal" length of day, does not prohibit interpreters from working overtime, and does not set any overtime pay, and because the evidence shows that interpreters work overtime (with and without additional compensation), the rule is not a strict limitation on output and we cannot say with confidence that it is a restraint that will always or almost always have anticompetitive effects.[36]

We believe AIIC's rule specifying the "normal" work day is somewhat similar to the standardization of products. As Areeda observed:

> Product standardization might impair competition in several ways. For example, producers of automobile tires might agree to produce only five tire varieties for which they adopt common specifications. Such standardization might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices.

7 Areeda, Antitrust Law, *supra* note 11, ¶ 1503a, at 373. In examining the sufficiency of the evidence from which to infer the existence of a conspiracy, courts have recognized that "standardization of a product that is not naturally standardized facilitates the maintenance of price uniformity." *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952) (citing *Milk and Ice Cream Can Inst. v. FTC*, 152 F.2d 478, 492 (7th Cir. 1946)). The courts there said that some standardization is understandable, but too much leads to evidence that can be drawn upon to reach a conclusion of the existence of a conspiracy.

Standardization does not, in our view, fall under the *per se* rule, but should be examined under the rule of reason. For example, it hardly is *per se* illegal to sell gasoline by the gallon, although that unquestionably aids horizontal price fixing among gas stations. Here, the length of work-day rule by itself does not enable members to fix price or output; the problem is primarily with the fixing of the price

[36] This flexibility, combined with evidence supporting AIIC's proffered justifications, distinguishes this rule from the absolute ban on operating automobile salesrooms during certain periods that we condemned in *Detroit Automobile Dealers Ass'n*, 111 FTC 417 (1989), *aff'd in relevant part*, 935 F.2d 457 (6th Cir.), *cert. denied*, 506 U.S. 703 (1992).

itself. We believe that this rule must therefore be examined under the rule of reason. Therefore, for the reasons set forth *supra* at 33-36, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

b. Team Size

Articles 9, 10, and 11 of the 1991 Basic Texts, Standards of Professional Practice, set forth team size tables for consecutive, whispered, and simultaneous interpretation. CX-2-Z-43 to 46.[37] In the case of simultaneous interpretation, the rule is absolute, providing that "[t]he team strength indicated . . . must be respected." CX-2-Z-46 (Art. 11). Although AIIC at one point maintained two different team size tables with corresponding prices for simultaneous interpretation, that dual system was not used in the United States. Thus, the U.S. Region always had only the absolute written prohibition. *See* IDF 171.[38]

There is some evidence of adherence to the team strength rules. Some interpreters have refused work with intermediaries under working conditions that do not conform to staffing requirements (Davis, Tr. 869-70; Clark, Tr. 614-15 (Berlitz was expected to meet AIIC's working conditions)); intermediaries who have deviated from staffing requirements have paid interpreters extra compensation (Citrano, Tr. 539; Neubacher, Tr. 767-69); and individual interpreters have said that they adhere to the staffing requirements (Luccarelli, Tr. 1669; *see also* IDF 179-81). Nonetheless, the fact that interpreters adhere to the team size tables does not answer the question as to anticompetitive effects. Many witnesses testified that they adhere to the team size rules because they reflect the reality of how best to staff a conference and avoid excessive fatigue and maintain the quality of interpretation services. *See, e.g.*, Luccarelli, Tr. 1663-65, 1667-70; Davis, Tr. 885.

[37] Although little discussion in the briefs or at oral argument addressed this issue, two provisions of the team size tables set the remuneration for use of smaller numbers of interpreters at 125 percent of the remuneration for the larger team size. For consecutive and whispered interpretation, the 1991 Basic Texts rule provided that if fewer interpreters are recruited than the number recommended by AIIC (which should only occur "under exceptional circumstances"), the remuneration for each interpreter "should be at least equal to 125% of the standard rate." CX-2-Z-43. To the extent that this rule was applied to the United States, we find this aspect of the 1991 rule *per se* unlawful.

[38] Article 6 of the 1994 Professional Standards contains AIIC's current rules governing team strength for whispered, consecutive, and simultaneous interpretation. CX-1-Z-42-44. The current rules do not reference any rates of remuneration either for the recommended team strengths or for team strengths of fewer than the recommended number of interpreters.

Complaint counsel argue and the ALJ found that the team size rule was an output restraint and therefore *per se* unlawful. Although the team size rule is closer to an output restraint than the length of day rule, as with the rule on length of day, the team size rule differs from the *per se* unlawful price-fixing rules, such as those on commissions and *pro bono* work, because, unlike the latter two, this rule as currently written has no price aspect on its face and there are some plausible justifications for setting forth optimal team strength. This rule appears akin to a standard with respect to setting forth optimal staffing to maintain the quality of conference interpretation services, and this similarity to standard setting leads us to conclude that the team size rule should be examined under the rule of reason. Moreover, since we are condemning as *per se* unlawful all of the price-related agreements and prohibiting the implementation of price-related agreements in the future, we believe that once AIIC members begin to compete on price, it is unlikely that there will be anticompetitive effects from this rule. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

c. Professional Address Rule

Article 1 of AIIC's 1991 Standards of Professional Practice required that members declare a single professional address that they must maintain for at least six months and can change only upon three months' notice. CX-2-Z-40. The 1991 rules also explicitly required that all contracts be based only upon the official professional address of the AIIC member. *Id.* Under the 1991 rules, the professional address also provided the basis for remuneration for non-working days (Article 12), subsistence allowance (Article 13), travel days (Article 14), and travel expenses (Article 15). In addition, rule b(2)(b) of AIIC's Recruitment Guidelines suggested that organizers "bear in mind" selecting conference interpreters with a professional address at, or nearest, the conference venue. CX-2-Z-51; *see also* IDF 212-36.[39]

[39] Article 1 of the 1994 Professional Standards sets forth the rules governing the declaration of a professional address, requiring that

> . . . in order to ensure that members are able to exercise their voting rights at statutory regional meetings and that the rules pertaining to dues are respected, any change in professional address from one region to another shall not be permitted for a period of less than six months. Any such change must be notified to the secretariat at least three months before the intended change in order to ensure that it can be published in the Association's list of members in good time. The secretariat shall inform the members of the Council and the regional secretaries of the two regions concerned.

Under the 1991 rule, even if interpreters actually lived away from their declared professional addresses, they would charge their clients for travel to and from their professional addresses only, even when travel originated from their residences. IDF 221. *See also* CX-302-Z-140 to Z-141, Z-438 (Luccarelli); CX-2-Z-40; CX-301-Z-20 (Bishopp); but *see* CX-302-Z-140 (Luccarelli) (interpreters would sometimes declare their professional addresses to be away from their homes so they could get more work "because it would mean that they wouldn't charge for travel"). Thus, an interpreter with a professional address in Brussels would charge a client in the United States for a round trip ticket between Brussels and the U.S. Hamann-Orci, Tr. 45; IDF 222. *See also* CX-301-Z-21 to Z-22 (Bishopp).

One AIIC member traveled round-trip between Washington and New York to work for the New York Stock Exchange, but charged the client for round trip travel between Vienna and New York because Vienna was her professional domicile. Bowen, Tr. 1011-12; IDF 223. Another member was offered a job in Washington on November 15, 1991, but her professional address did not change from Paris to Washington until December 20. The U.S. Region Representative suggested that she either seek permission from AIIC in Geneva, or "telephone all other colleagues with [her] language combination in the Washington area, to verify that they were all indeed working on that date." CX-1471; IDF 225.

The ALJ found that AIIC members follow the professional address rule, unless they obtain a waiver, and that the AIIC Council enforces this rule. IDF 227; *see also* CX-300-Z-38 (Motton); CX-284-L; Bowen, Tr. 1029-30; CX-237-H to I; CXT-237-H to I. On November 30, 1991, the U.S. Region Representative admonished one member that he was in violation of the AIIC rules because he had been working in the New York area although he had a Washington, D.C. professional address "without officially notifying AIIC of his change of address." IDF 231; CX-1470-A; *see also* CX-608-Z-221 (1991 AIIC Membership Directory). Wilhelm Weber, the intermediary who helped organize interpreters for the 1984 Los Angeles Olympics, was accused of violating the professional address rule for failing to charge for travel between Geneva, Switzerland, his professional domicile, and San Francisco, even though he only traveled from Monterey, California, where he resided. IDF 229; Weber, Tr. 1264-65.

CX-1-Z-40 (emphasis added).

We believe that the professional address rule, as reflected in the 1991 Standards, has been used by AIIC and its members to provide the reference point for the *per se* unlawful price fixes of per diem, non-working days, and travel arrangements. Nonetheless, once we have struck down respondents' unlawful price-fixing agreements that were tied to the professional address rule, we believe that the professional address rule itself, which requires that AIIC members give three months' notice before changing their professional address and that they retain the address for at least six months, is better analyzed under the rule of reason because there is nothing in the rule itself that suggests it will have anticompetitive effects and there are plausible efficiency justifications for the rule (*i.e.*, facilitates ability to ensure member is voting in and paying dues to the appropriate region), particularly as it is currently written and tied to the regional structure of AIIC. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

d. Portable Equipment

Article 7 of AIIC's 1991 and 1994 Code of Professional Ethics prohibits members from simultaneous interpretation without a booth "unless the circumstances are exceptional and the quality of interpretation work is not thereby impaired." CX-2-Z-37; CX-1-Z-38. Portable equipment costs less than standard booths. IDF 273; *see also* CX-270-G; CX-302-Z-282 to Z-283, Z-804 (Luccarelli); Clark, Tr. 632-33; Obst, Tr. 303, 307. In addition, unlike working with a soundproof booth, a technician is not required for the operation of the portable equipment. IDF 273; Hamann-Orci, Tr. 47; Neubacher, Tr. 777-78.

The ALJ, citing to IFD, found that the rule on portable equipment was a restriction "on the package of services offered" (ID at 117) and should be analyzed under the rule of reason. We agree that this rule must be analyzed under the rule of reason. This rule is akin to a typical professional standard, declaring the use of certain equipment to be inferior and recommending against its use except in certain limited circumstances. In fact, numerous witnesses testified that although the use of portable equipment is acceptable under certain limited circumstances, which AIIC's rules recognize, its use would not be appropriate for large or long conferences because the lack of a soundproof booth subjects the interpreter to environmental noise, compromises the quality of the interpretation services, and increases the interpreter's mental fatigue. *See, e.g.*, Respondents' Proposed Findings of Fact, ¶ ¶ 351-355, citing to Hamann-Orci, Tr. 49-50; Neubacher, Tr. 707; Luccarelli, Tr. 1701-02; Clark, Tr. 632, 643-44; Obst, Tr. 304 (State Department tries to avoid use of portable equipment). We also note that there are in fact international standards for built-in (permanent) booths (ISO 2603 (1983)), portable booths (ISO 4043 (1981)), and other equipment (IEC 914 (1988)). *See* CX-2064-D; CX-2062-G. We therefore reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

e. Advertising

Both the 1991 and 1994 versions of AIIC's Code of Professional Ethics contain the following provisions:

Article 4 (b): They [Members] shall refrain from any act which might bring the profession into disrepute.
Article 5: For any professional purpose, members may publicize the fact that they are conference interpreters and members of the Association, either as individuals or as part of any grouping or region to which they belong.

CX-1-Z-38, CX-2-Z-38. The "Recruitment Guidelines" further state that "Article 5 of the Association's Code allows members to provide factual information to users about the nature and availability of interpreters' services, but is intended to exclude activities such as commercial forms of one-upmanship." CX-2-Z-52. The ALJ found that "[m]embers understand 'commercial forms of one-upmanship' to be about comparative claims" and that interpreters should not "disparage their colleagues in order to get work." IDF 298; CX-2-Z-52; CX-301-Z-103 (Bishopp); Luccarelli, Tr. 1682-83.

The ALJ found that AIIC's advertising rules and two 1994 instances of disciplinary action against AIIC members amounted to a prohibition of comparative price claims and thus were "naked attempts to eliminate price competition [that] must be judged unlawful *per se*." ID at 116 (citing CDA, slip op. at 19, 5 Trade Reg. Rep. (CCH) at 23,788). We disagree with the ALJ. We do not believe that the language of these rules is sufficient to support a finding that AIIC prohibited price advertising and therefore committed a *per se* violation. Moreover, the two instances of enforcement the ALJ cites do not support a finding that the rules were interpreted or enforced to prohibit price advertising.[40] Any restrictions on nonprice advertising and promotion must be analyzed under the rule of reason. *See* CDA, slip op. at 24-25, 5 Trade Reg. Rep. (CCH) at 23,790-91. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

f. Package Deals

The AIIC Guidelines for Recruiting Interpreters, attached as an annex to the 1991 Basic Texts, in paragraph (b)7, "Duties Towards

[40] One of the instances had no relationship to the United States -- it involved an incident in Canada. *See* CX-305-Z-332 (Sy); CXT-501-W. Moreover, there was testimony that the disciplinary action taken in that case resulted from the member's failure to use the internal AIIC grievance procedures, rather than because of the alleged advertising rule violation. *See* Luccarelli, Tr. 1683-86; *see also* CXT-501-W, p. 2. The second incident involved a member who had written a letter to an international organization offering to reduce the cost of language services through her own full-time employment. CXT-502-Z-53 to 54; RX-815.

Colleagues," provide that "Members of the Association acting as coordinators shall not make 'package deals' grouping interpretation services with other cost items of the conference and shall in particular avoid lump-sum arrangements concealing the real fees and expenses due to individual interpreters." CX-1-Z-49; IDF 255. Paragraph (c)1 states: "The provision of professional interpretation services is always kept clearly separate from the supply of any other facilities or services for the conference, such as equipment." *Id.* Paragraph (b)5 states that "[i]nterpreter's fees shall be paid directly to each individual interpreter by the conference organiser." *Id.*

In 1990 and 1991, the U.S. Region prepared and discussed a provisional paper on AIIC working conditions for interpreters in the United States. The paper stated: "All contracts shall be concluded directly between the conference and the interpreter; the conference shall make payment directly to the interpreter." CX-439-D; *see also* CX-435-A; IDF 256.

The ALJ found that "clients prefer contracting through intermediaries because intermediaries can more readily be held financially liable if the conference is unsuccessful and provide quicker response time to requests for services than individual interpreters." IDF 260; CX-227-J; CX-1633-B. Nonetheless, the ALJ concluded that the competitive effect of this rule is less obvious than some of the others and that it therefore should be analyzed under the rule of reason. We agree and note that there is some evidence that some intermediaries who are AIIC members do occasionally offer lump sum payment arrangements and package deals, with no repercussions from AIIC. *See* Lateiner, Tr. 976. We therefore reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

g. Exclusivity

The AIIC Guidelines for Recruiting Interpreters state: "The conference interpreter makes it clear that she or he does not 'provide' interpreters . . . [and] avoids creating the impression that certain interpreters are available only through her or him, or that she or he controls teams of fixed composition." CX-2-Z-52. The ALJ found that, in compliance with AIIC's rules, coordinating interpreters in the United States do not exclusively represent interpreters and no AIIC member has established a commercial interpretation firm with

interpreters as employees. IDF 263; Luccarelli, Tr. 1693-94; CX-2-Z-52 (1991); CX-301-Z-105 (Bishopp). The ALJ concluded that the competitive effect of this rule is less obvious than some of the others and that it therefore should be analyzed under the rule of reason. *See* ID at 117-18. We agree that this rule is of the type adopted by professional associations that is traditionally analyzed under the rule of reason. In fact, there is evidence that some intermediaries have lobbied against laws in states that were considering whether subcontractors (such as freelance interpreters) should be considered employees of the companies with which they contract because the intermediaries apparently believed that it would be economically detrimental to them if the interpreters were considered employees. Luccarelli, Tr. 1693-96. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

h. Trade Names

The AIIC Guidelines for Recruiting Interpreters state that a coordinating interpreter "acts under her or his own name and does not seek anonymity behind the name of a firm or organization, although co-operative services may be offered by a group of interpreters who carry on business under a group name." CX-2-Z-52. The ALJ found that "there are no such 'cooperatives' of interpreters in the United States" and that this rule was a prohibition on the use of trade names. IDF 266, 268; CX-301-Z-104 (Bishopp). Nonetheless, there is testimony that several intermediaries called by complaint counsel have firms that operate under a trade name. *See* Weber, Tr. 1123 (started his own firm, Language Services International); Lateiner, Tr. 976 (operated under the name Lateiner International Associates since 1980); Neubacher, Tr. 761 (started own firm, Linx Interpretation Service). There are also other large intermediaries such as Berlitz and Brahler, both of which recruit freelance interpreters for conferences. *See* Neubacher, Tr. 760-62; Davis, Tr. 836-38 (worked for both Berlitz and Brahler). The ALJ concluded that the competitive effect of this rule is less obvious than some of the others and that it therefore should be analyzed under the rule of reason. *See* ID at 117-18. We agree that this rule is of the type adopted by professional associations that is traditionally analyzed under the rule of reason and

in light of this, and of the fact that so many interpreters and intermediaries practice under trade names, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

V. NEED FOR AN ORDER

Respondents argue that an order is inappropriate and unnecessary because their rules affecting price never extended to the United States and, even if they did, respondents abandoned the monetary conditions worldwide in 1992. The Commission has identified the following factors as relevant to the question whether to issue an order when a respondent professes to have ceased the complained-of activities: the *bona fides* of the respondent's expressed intent to comply with the law in the future; the effectiveness of the claimed discontinuance; and the character of the past violations. *Massachusetts Bd. of Registration in Optometry*, 110 FTC 549, 616 (1988) (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). *Cf. Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984) (citing W.T. Grant in discussion of proof necessary for relief against allegedly discontinued conduct). These factors all argue strongly in favor of placing respondents under order.

The facts do not support respondents' assertions that AIIC's rules did not apply in the United States and that, even if they did, AIIC has abandoned all monetary rules. The record shows that AIIC's rules were adhered to and enforced in the United States and that AIIC's members agreed to follow, and did follow, AIIC's price-fixing and market allocation rules in the United States. *See* discussion *supra* at 15-31.[41] Despite AIIC's adoption of a "resolution" in 1992 to remove all monetary conditions and a commitment to change its Basic Texts in 1994, there continued to be widespread adherence to a standard rate. Dr. Lawrence Wu, complaint counsel's economic expert, found that many AIIC members continued to set their fees with reference to the AIIC rate even after AIIC stopped publishing a rate for the U.S. Region in 1992. Wu, Tr. 2205-06; IDF 533. For 1992 to 1994 the rates continued to be clustered near the AIIC rate, and through 1993 the most frequently charged rate continued to increase yearly by $25.

[41] Dr. Lawrence Wu, complaint counsel's economic expert, examined conference interpreting contracts of freelance interpreters in New York and Washington, D.C., and found that from 1988 to 1991 two-thirds of the contracts examined were at or $50 above the published AIIC rate. Wu, Tr. 2016-17; IDF 104.

Although in 1994 and 1995 there was no increase in the most frequently charged rate and there was a greater distribution of prices, most prices for a day's work were still in the $500-550 range, and the clustering found suggests that AIIC's "discontinuance" of the price-fixing agreement was not particularly effective, at least through 1995. Wu, Tr. 2204-05, 2207; *see also* Clark, Tr. 614.

Moreover, many of AIIC's other "repealed" rules are still contained in AIIC's Basic Texts (phrased in less mandatory language) and in the standard form contracts AIIC provides for its members' use. Although the evidence in the record is insufficient to determine whether AIIC and its members actually agreed to the terms in its standard form contracts, the standard form contract nevertheless contains many of the same (or similar) provisions we are declaring unlawful. Thus, the continued use of these provisions in the standard form contract seems inconsistent with AIIC's expressed intent to comply with the law in the future.[42]

For example, AIIC's standard form contract provides for fees for non-working days. CX-2059-A; CX-2060-A; IDF 139; Weber, Tr. 1221. In addition, although the 1994 rules eliminate any ties between the professional address and payments for travel, subsistence, and non-working days, the standard form contract continues to tie travel reimbursement to the professional address. The "General Conditions of Work," which are part of the form contract, state:

> Unless both parties have agreed otherwise, the interpreter shall have the free choice of route and dates of travel. He/she is not bound to use chartered flights. He/she shall however only be refunded the costs for the mode(s) of transport laid down in clause VII.1 for direct return travel between his/her professional address and the conference venue . . . As a general rule and unless the parties have agreed otherwise, the interpreter shall travel first class on air journeys of long duration and in business class for a journey of less than 9 hours.[43]

The standard contract also provides for the appropriate remuneration in the event of cancellation in two separate clauses. CX-2059-B. The relevant portions of the contract state that the conference organizer shall be obliged to pay an interpreter the amount

[42] The Recruiting Guidelines appended to the Basic Texts and Statutes state that AIIC's model contract "should normally be used" and any other contract used "must at least embody the standard conditions specified by the Council." CX-1-Z-49; IDF 139.

[43] CX-2059-B, ¶ 7. Clause VII.1 of the contract provides for the "cost of a first-class return ticket by rail/air/sea from. . . at the current tariff." CX-2059-A.

provided for in the contract regardless of the reasons for cancellation and whether they were beyond the control of the organizer. CX-2059-B, ¶ ¶ 6&9. Paragraph 6 of the General Conditions of Work further provides in relevant part that "[t]he remuneration shall be paid net of commission."

With respect to the "character of respondents' past violations," respondents engaged in *per se* unlawful price fixing and attempted to hide their price-fixing agreements in the past: during the 1980s in the United States, rates were unpublished but no less binding.[44] As one AIIC Council member wrote in a 1995 AIIC Bulletin: "At Brussels [in 1992] we deregulated our monetary conditions and trusted our members to keep the faith. Now why on earth can we not trust our members today to maintain the other working practices even though they may not be mandatory . . . . ?" CX-285-S. *See also* IDF 509-12.

A claim of abandonment is rarely sustainable as a defense to a Commission complaint where, as here, the alleged discontinuance occurred "only after the Commission's hand was on the respondent's shoulder." *Zale Corp.*, 78 FTC 1195, 1240 (1971); *see also Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). In light of all of the circumstances of this case, an order prohibiting respondents from continuing to engage in price fixing is necessary and in the public interest. The remedy we impose has a "reasonable relation to the unlawful practices found to exist" and therefore is within our authority. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946).

VI. FINAL ORDER

Paragraph I of the order sets forth the applicable definitions. Paragraphs II and III of the order prohibit respondents from agreeing, *inter alia*, to provisions governing: fees, including minimum daily rates; indivisible daily rates; rates for nonworking days, including travel, briefing, and rest days; per diem rates or formulas; reimbursement for travel expenses; standard cancellation clauses; recording fees; commissions; and the recruitment of interpreters

[44] *See, e.g.*, CX-1238 (letter from AIIC's Secretary General to Wilhelm Weber in connection with the Los Angeles Olympics, stating how it was inconceivable that anyone could read the standard form contract to mean that rates could be negotiated downward: "[M]embers all know that [sic] the local rate is and any bargaining with the client can only be upwards and not downwards. It was inserted in this way because of the 'cartel' pricefixing laws in some countries, but members know very well that they must not undercut.").

based on whether or not they are permanently employed. The order applies only to conduct that would affect activities in the United States.

Paragraph IV of the order requires respondents to discipline individuals who at their meetings engage in discussions about fees applicable in the United States. The required discipline includes warning a participant or participants to refrain from engaging in the prohibited discussions and, if the warning is not effective, removing the person or persons from the meeting. If such disciplinary actions prove unsuccessful, the meeting must be adjourned.

Paragraph V of the order clarifies that nothing in our order prohibits respondents from performing under or entering into any negotiated agreement, as that term is defined in paragraph I (L). Paragraph VI requires respondents to amend, *inter alia*, AIIC's Basic Texts to conform to the requirements of the order. Because of the longstanding nature of many of respondents' price-related restraints, paragraph VIII requires respondents to distribute to their members, officers, directors, and affiliates an announcement about the Commission's action, a copy of the complaint and order, and any of respondents' documents that are amended pursuant to the order.

Paragraph VII of the order is a "fencing-in" provision and requires respondents for a period of five years to eliminate from their Basic Texts and standard form contracts provisions related to certain payments and travel arrangements. In light of the longstanding and comprehensive nature of respondents' price-fixing agreements, fencing-in relief is particularly warranted. As the Supreme Court has observed, "[t]he purpose of relief in an antitrust case is 'so far as practicable, [to] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'" *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (quoting *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950)). The Court further found in National Society of Professional Engineers that a district court is "empowered to fashion appropriate restraints on . . . future activities both to avoid a recurrence of the violation and to eliminate its consequences," even if that entails "curtail[ing] the exercise of liberties that [respondent] might otherwise enjoy." 435 U.S. at 697. The same is true when the Commission, as opposed to a federal court, fashions the remedial order. *See FTC v. National Lead Co.*, 352 U.S. 419 (1957).

Thus, the Commission can proscribe unlawful activity that the respondent has not yet undertaken, as well as activity that would itself be considered lawful but for the fact that it threatens to perpetuate or revive a violation of law. For example, in National Lead Co., the Commission prohibited the individual adoption of zoned pricing plans because it had found *per se* unlawful horizontal collusion on zoned pricing plans. The Court upheld a temporary and conditional prohibition of individually adopted zoned pricing plans aimed at "creating a breathing spell during which independent pricing might be established without the hang-over of the long-existing pattern of collusion." 352 U.S. at 425. Since the plan could easily be subject to unlawful manipulation and had been used for nearly 25 years, and since the respondents had been found to have violated the antitrust laws, the provision bore a reasonable relation to the underlying unlawful practice. *Id.* at 421, 429. In light of the temporary nature of this provision, the order was upheld.

Similarly, respondents here have engaged in a longstanding, comprehensive scheme to eliminate price competition on virtually all aspects of conference interpreting. The Commission finds that it is necessary to prohibit respondents, for a period of five years, from maintaining any provisions in their Basic Texts or form contracts, even if phrased in non-mandatory language, that relate to: payment in the event of cancellation of a contract; payment of commissions or a requirement that remuneration shall be paid net of any commissions; payment for travel, specification of specific modes of travel, connecting payment or tickets for travel to an interpreter's professional address, or specification of rest days for travel; payment for non-working days, travel days, or rest days; payment for a subsistence allowance while on travel; and payment for recordings of conference interpretation.

Finally, the order contains standard reporting and record keeping requirements that will allow the Commission to monitor respondents' compliance with the order, as well as a 20-year sunset provision.

VII. CONCLUSION

The International Association of Conference Interpreters and its U.S. Region adopted a comprehensive price-fixing scheme that restrained competition among conference interpreters in the U.S. in violation of Section 5 of the FTC Act. We find that AIIC's contacts

with the U.S. are related to this cause of action and are sufficient to allow the Commission to exercise specific personal jurisdiction over AIIC. Moreover, we find that respondents provide their members with sufficient pecuniary benefits to bring them within our jurisdiction. We further find that AIIC is not entitled to either the statutory or the non-statutory labor exemption for the conduct we find unlawful and hereby enjoin. The respondents' restrictions on all forms of price competition cannot be justified on any grounds, and we condemn these restrictions as *per se* unlawful. The rules governing certain non-price terms and conditions of employment, business arrangements, and advertising, however, are entitled to an examination under the rule of reason. Because complaint counsel has not carried its burden of proof under the rule of reason, we dismiss the complaint as to those rules. The findings and Initial Decision of the ALJ are upheld in part and reversed in part, consistent with our opinion and final order.

OPINION OF COMMISSIONER ROSCOE B. STAREK, III, CONCURRING IN PART AND DISSENTING IN PART

In an opinion issued just about a year ago, the Commission held that respondent California Dental Association ("CDA") committed a *per se* violation of the antitrust laws by promulgating and enforcing restrictions on members' advertising of prices for dental services in California.[1] Although I agreed with my colleagues that CDA's restraints on both price and non-price advertising merited antitrust condemnation, I disagreed with their *per se* approach, which in my view applied -- by its language and its logic -- not only to CDA's particular price advertising restraints but also to "all agreements among competitors to restrain truthful, nondeceptive price advertising."[2] I pointed out in CDA that *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988) ("Mass. Board") -- frequently and fruitfully relied on until CDA, then cast aside (if not explicitly overruled) by the CDA majority for reasons never clearly

[1] California Dental Ass'n, Docket No. 9259, 5 Trade Reg. Rep. (CCH) ¶ 24,007 (Mar. 25, 1996) ("CDA"), appeal pending, No. 96-70409 (9th Cir., filed May 20, 1996). The Commission also concluded that CDA's restrictions on both price and non-price forms of advertising were unlawful under the antitrust rule of reason. CDA, slip op. at 37-39 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,796-97].

[2] CDA, Opinion of Commissioner Roscoe B. Starek, III, Concurring in Part and Dissenting in Part, at 1 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,815].

spelled out -- still provides a dependable framework for the analysis of horizontal restraints.[3]

Once again I agree with the result reached by my colleagues but disagree with elements of their analytical methodology. I concur in the Commission's determinations that (1) the Commission has personal jurisdiction over respondent International Association of Conference Interpreters; (2) the Federal Trade Commission Act's not-for-profit exemption is unavailable to respondents; and (3) neither the statutory nor the nonstatutory labor exemption immunizes respondents' conduct. I also have no objection to the order appended to the majority's opinion, because in my view the majority reached the correct determination as to which restraints should be declared unlawful. I simply do not share the majority's eagerness to replace Mass. Board's prudent approach to horizontal restraints with a system in which reference to categories of conduct -- some condemned *per se*, others judged under the rule of reason -- supplants discerning analysis.[4]

In one footnote in its opinion, the majority makes passing reference to a point that I emphasized in CDA -- that the Supreme Court's horizontal restraints jurisprudence of the late 1970s and early 1980s established the foundation for an analytical methodology like that laid down in Mass. Board.[5] Nevertheless, judging from the juxtaposition of that footnote with the majority's observation (in the accompanying text) that "[r]ecent Supreme Court decisions continue the distinction between *per se* and rule of reason analyses,"[6] my

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[3] "[I]f the majority considers Mass. Board beyond repair, why has it not overruled the case? If the majority has identified specific weaknesses in Mass. Board analysis that might be remedied, why not apply Mass. Board in this and other appropriate cases so that the process of case-by-case adaptation and improvement can occur?" *Id.* at 9 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,818].

[4] The fact that my colleagues and I agree here -- as we did in CDA -- on which restraints are illegal does not mean that our disagreement over analytical methodology lacks practical significance. Some future cases will likely involve alleged restraints whose competitive ramifications are more ambiguous than those at issue in the present case. Whether the Commission applies a Mass. Board analysis or adheres to the more mechanical approach established in CDA (and followed today) could obviously make a difference to the outcome.

[5] "We note that some earlier Supreme Court cases had suggested the merging of the *per se* and rule of reason analyses. *See, e.g., Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ('BMI'); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461 ('IFD'). Areeda also has suggested that there may have been some convergence of the *per se* category (*see, e.g.*, the willingness to look beyond a horizontal price agreement in BMI) and a full blown rule of reason (*see, e.g.*, the 'quick look' approach of IFD) so that at times the two antitrust approaches do not differ significantly. *See* 7 Phillip E. Areeda, Antitrust Law ¶ 1508c, at 408 (1986)." Slip op. at 14 n.11.

[6] *Id.* at 14.

colleagues apparently believe that the Supreme Court decided for reasons unexplained to forsake the approach of IFD and BMI and has instead endorsed the use of categories whose legality falls on one side or the other of a supposedly bright *per se*/rule of reason line.

Obviously, I do not assert that the Supreme Court and the lower courts have never found a practice to be *per se* illegal. Naked price-fixing, bid-rigging, market or customer allocation, and certain types of boycotts are condemned *per se* upon proof of the existence of an agreement -- that is, they are conclusively presumed to restrain trade unreasonably. But over the last 20 years, Supreme Court jurisprudence pertaining to restraints of trade -- both horizontal and vertical -- has steadily evolved into a heightened sensitivity to the economic implications of the conduct at issue and a reluctance to base condemnation of a particular practice on a superficial resemblance to price-fixing.

The Supreme Court decisions on which the majority relies (*Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), and *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) ("SCTLA")) do not undermine my point that the consistent thrust of the Court's decisions since the late 1970s has been to eschew antitrust decision making on the basis of labels, categories, and mechanical line-drawing. It is hardly surprising that the Court found *per se* violations in Palmer and SCTLA, both of which involved conduct long viewed as plainly anticompetitive; nor is there any doubt that such cases will continue to arise as long as there is antitrust enforcement. But the Supreme Court has not signaled a retreat from the "presumption in favor of a rule-of-reason standard"[7] for analyzing restraints. BMI, IFD, and NCAA[8] still represent the general direction of the Court's thinking in this area; Palmer and SCTLA simply illustrate, against the backdrop of this overall trend, that anticompetitive conduct can occasionally be condemned *per se*.

The approach of the majority does nothing to mitigate -- and in fact perpetuates -- the principal weakness of CDA: that over simplistic analogizing to traditional *per se* categories is not a satisfactory substitute for the cautious analysis mandated by the

[7] *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988).

[8] *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984).

Supreme Court.[9] By contrast, Mass. Board, with whatever imperfections it had, distilled the essential elements of the Supreme Court's teaching: that seeming restraints of trade may not be what they first appear to be; that it is necessary to devote adequate scrutiny to an alleged restraint's competitive effects unless one can say, with a very high degree of confidence, that it is unmistakably anticompetitive; and that this whole exercise should not be conducted through the use of labels and categories. As I observed above, if the Mass. Board analysis needs improvement, the instant case presents (as did CDA) an opportunity to accomplish that. What I cannot accept is the majority's unwarranted abandonment of the Mass. Board precedent.

[9] NCAA, *supra* n.8; BMI, *supra* n.5.

FINAL ORDER

I.

It is ordered, That, for purposes of this order, the following definitions shall apply:

A. *"AIIC"* means respondent International Association of Conference Interpreters, also known as Association Internationale des Interprètes de Conférence, its directors, trustees, general assemblies, councils, committees, working groups, boards, divisions, sectors, regions, chapters, officers, representatives, delegates, agents, employees, successors, and assigns.

B. *"U.S. Region"* means respondent United States Region of AIIC, its directors, trustees, general assemblies, councils, committees, working groups, boards, divisions, sectors, regions, chapters, officers, representatives, delegates, agents, employees, successors, and assigns.

C. *"Fees"* means any cash or non-cash charges, rates, prices, benefits or other compensation received or intended to be received for the rendering of services, including, but not limited to, salaries, wages, transportation, lodging, meals, allowances (including subsistence and travel allowances), reimbursements for expenses, cancellation fees, recording fees, compensation for time not worked, compensation for travel time, compensation for preparation or study time, and payments in kind.

D. *"Cancellation fee"* means any fee intended to compensate for the termination, cancellation or revocation of an understanding, contract, agreement, offer, pledge, assurance, opportunity, or expectation of a job.

E. *"Interpretation"* means the act of expressing, in oral form, ideas in a language different from the language used in an original spoken statement.

F. *"Translation"* means the act of expressing, in written form, ideas in a language different from the language used in an original writing.

G. *"Other language service"* means any service that has as an element the conversion of any form of expression from one language into another or any service incident to or related to interpretation and translation, including briefing or conference preparation, equipment

rental, conference organizing, teleconferencing, précis writing, supervision or coordination of interpreters, reviewing or revising translations, or providing recordings of interpretations.

H. *"Interpreter"* means one who practices interpretation.

I. *"Translator"* means one who practices translation.

J. *"Language specialist"* means one who practices interpretation, translation, or any other language service.

K. *"Intergovernmental Organization"* refers to any organization to which privileges and immunities have been extended pursuant to the International Organizations Immunities Act, 22 U.S.C. 288 *et seq.*, as amended.

L. *"Negotiated Agreement"* means any contract or other agreement negotiated between AIIC and any user of interpretation, translation or other language service setting forth, *inter alia*, the rates and working conditions for interpreters, translators or other language specialists working on a freelance basis for that user.

M. *"Person"* means any individual, partnership, association, company, or corporation, and includes any trustee, receiver, assignee, lessee, or personal representative of any person herein defined.

N. *"Basic Texts"* means the various governing and policy documents of AIIC, including, but not limited to, AIIC's Statutes, Code of Professional Ethics, Professional Standards, and Appendices to any of these documents.

II.

It is further ordered, That respondents, directly or indirectly, or through any person, corporation, or other device, in or in connection with their activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. Creating, formulating, compiling, distributing, publishing, recommending, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees applicable in the United States for interpretation, translation, or any other language service, including, but not limited to, fee reports, fee guidelines, suggested fees, proposed fees, fee sheets, standard fees, or recommended fees;

B. Entering into, adhering to, participating in, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to construct, fix, stabilize, standardize, raise, maintain, or

otherwise interfere with or restrict fees applicable in the United States for interpretation, translation, or other language services;

C. Suggesting, urging, encouraging, recommending, or attempting to persuade in any way interpreters, translators, or other language specialists to charge, pay, offer, or adhere to, any existing or proposed fee for transactions within the United States, or otherwise to charge or refrain from charging any particular fee in the United States;

D. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any form of price competition in the United States, including, but not limited to, offering to do work for less remuneration than a specific competitor, undercutting a competitor's actual fee, offering to work for less than a customer's announced fee, offering discounted rates, or accepting any particular lodging or travel arrangements;

E. Discouraging, restricting, or prohibiting interpreters, translators, or other language specialists from accepting hourly fees, half-day fees, weekly fees, or fees calculated or payable on other than a full-day basis for services performed within the United States; and

F. Discouraging, restricting, or prohibiting interpreters from performing interpretation, translation, or other language services within the United States free of charge or at a discount, or from paying their own travel, lodging, meals, or other expenses.

Provided that, nothing contained in this paragraph II shall prohibit respondents from:

1. Compiling or distributing accurate aggregate historical market information concerning fees actually charged in transactions in the United States that were completed no later than one (1) year before the date of such compilation, provided that such compilation or distribution begins no earlier than three (3) years after the date this order becomes final, and provided further that such information is compiled and presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions; or

2. Collecting or publishing accurate and otherwise publicly available fees paid by governmental and intergovernmental agencies or pursuant to a Negotiated Agreement, if such publication states the qualifications and requirements for a person to be eligible to receive such fees.

III.

It is further ordered, That respondents, directly or indirectly, or through any person, corporation, or other device, in or in connection with their activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from entering into, adhering to, participating in, promoting, assisting, enforcing, or maintaining any agreement, understanding, plan, program, combination, or conspiracy to limit, restrict, or mandate, within the United States:

A. The reimbursement of or payment to interpreters, translators, or other language specialists for travel expenses or time spent traveling; or any discounts, costs, or other advantages or disadvantages to consumers based on actual travel arrangements or geographic location;

B. The recruitment of interpreters, translators, or other language specialists on the basis of whether or not they are permanently employed; or

C. The payment or receipt of commissions.

IV.

It is further ordered, That respondents, directly or indirectly, or through any person, corporation, or other device, in or in connection with their activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall, in connection with any meeting being held, first warn and, if the warning is not heeded, dismiss from any meeting any person or persons who make a statement, addressed to or audible to the body of the meeting, concerning the fees applicable in the United States, charged or proposed to be charged for interpretation, translation, or any other language service. If the aforementioned disciplinary actions are not effective in stopping the prohibited discussion, then respondents must adjourn the meeting until such time as it may be conducted without such prohibited discussion.

V.

It is further ordered, That nothing herein shall prohibit respondents or their members from:

A. Performing pursuant to any existing agreement entered into between AIIC and any Intergovernmental Organization or any other existing Negotiated Agreement, unless such agreement is repudiated by such Intergovernmental Organization or other user of interpretation, translation, or other language service; or

B. If requested to do so in writing in advance by such Intergovernmental Organization or other user of interpretation, translation, or other language service, negotiating a new or renewed agreement or Negotiated Agreement with any Intergovernmental Organization or other such user, concerning the wages, hours, and working conditions of freelance interpreters, translators, or other language specialists working for such Intergovernmental Organization or other user.

VI.

It is further ordered, That respondents shall, within ninety (90) days after the date this order becomes final:

A. Amend the Basic Texts, including all subparts and appendices, to conform to the requirements of paragraphs II, III, and IV of this order; and

B. Amend their rules and bylaws to require each member, region, sector, chapter, or other organizational subdivision to observe the requirements of paragraphs II, III, and IV of this order.

VII.

It is further ordered, That respondents shall, within ninety (90) days after the date this order becomes final, amend the Basic Texts, including all subparts and appendices, and their standard form contracts, to eliminate, for a period of five (5) years, all provisions related to:

A. Payments in the event of cancellation of a contract;

B. The payment of commissions or the requirement that remuneration be paid net of any commissions;

C. Payment for travel, specification of specific modes of travel, connecting payment or tickets for travel to an interpreter's professional address, or specification of rest days for travel;

D. Payment for non-working days, travel days, or rest days;

E. Payment for a subsistence allowance while on travel; and

F. Payment for recordings of conference interpretation.

VIII.

It is further ordered, That respondents shall:

A. Within ninety (90) days after the date this order becomes final, distribute to each member, affiliate, region, sector, chapter, organizational subdivision, or other entity associated directly or indirectly with respondents, copies of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that respondents revise pursuant to this order; and

B. Distribute to all new officers, directors, and members of respondents, and any newly created affiliates, regions, sectors, chapters, or other organizational subdivisions of respondents, within thirty (30) days of their admission, election, appointment, or creation, a copy of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that respondents revise pursuant to this order.

IX.

It is further ordered, That respondents shall:

A. Within ninety (90) days after the date this order becomes final, and annually for five (5) years thereafter on the anniversary of the date this order becomes final, file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which respondents have complied and are complying with this order, and any instances in which respondents have taken any action within the scope of the provisos to paragraph II of this order;

B. For a period of ten (10) years after the date this order becomes final, collect, maintain, and provide upon request to the Federal Trade Commission: records adequate to describe in detail any action taken in connection with the activities covered in this order; all minutes,

records, reports, or tape recordings of meetings of the Council, General Assembly, and all committees, subcommittees, working groups, or any other organizational subdivisions of respondents; and all general mailings by respondents to their membership;

C. For a period of ten (10) years after the date this order becomes final, provide copies to the Federal Trade Commission, within thirty (30) days of its adoption, of the text of any amendment to the Basic Texts or appendices thereto, and any new rule, regulation, or guideline of respondents applicable in the United States;

D. For a period of ten (10) years after the date this order becomes final, permit any duly authorized representative of the Commission: (1) access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, minutes, memoranda, and other records and documents in the possession or under the control of respondents relating to any matters contained in this order, and (2) upon five (5) days' notice to respondents and without restraint or interference from them, to interview officers, directors, or employees of respondents; and

E. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in either respondent, such as dissolution or reorganization of itself or any proposed change resulting in the emergence of a successor corporation or association, or any other change in either respondent that may affect compliance obligations arising out of this order.

X.

It is further ordered, That respondent U.S. Region shall cease and desist for a period of one (1) year from maintaining or continuing its affiliation with any organization of interpreters, translators, or other language specialists within thirty (30) days after the U.S. Region learns, or obtains information that would lead a reasonable person to conclude, that said organization has engaged, after the date this order becomes final, in any act or practice that would be prohibited by paragraph II or III of this order if engaged in by the U.S. Region unless, prior to the expiration of such thirty (30) day period, said organization informs the U.S. Region by verified written statement of an officer of the organization that the organization has ceased and

will not resume such act or practice, and the U.S. Region has no grounds to believe otherwise.

XI.

It is further ordered, That this order shall terminate twenty (20) years from the date this order becomes final.

APPENDIX A

[DATE]

ANNOUNCEMENT

The Federal Trade Commission, an agency of the government of the United States of America, has determined that certain rules and practices of the International Association of Conference Interpreters ("AIIC") violate the antitrust laws of the United States.

Members are advised that agreements between competitors on rates and fees violate the antitrust laws of the United States and may violate the laws of other countries. Other agreements between competitors on matters other than rates and fees may also violate the antitrust laws of the United States or of other countries. Individuals who enter into such agreements may be subject to criminal penalties and fines under the laws of the United States of America. 15 U.S.C. 1; 18 U.S.C. 3571. Individuals who enter into such agreements may also be civilly liable to persons injured in their business or property as a result of violations of the antitrust laws. 15 U.S.C. 15.

AIIC and its United States Region are now subject to an order issued by the United States Federal Trade Commission. The order prohibits AIIC, including its regions and organizational subdivisions, from engaging in various practices that would lessen competition in the United States. Copies of this order are attached to this Announcement.

IN THE MATTER OF

SCHWEGMANN GIANT SUPER MARKETS, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3584. Consent Order, June 2, 1995--Modifying Order, Feb. 24, 1997

This order reopens a 1995 consent order -- that required the Louisiana-based corporation to divest several supermarkets in the New Orleans area -- and this order modifies the consent order by replacing a provision requiring Schwegmann to obtain prior Commission approval for certain transactions, with a prior notice provision for any acquisition of retail supermarkets in the New Orleans area that Schwegmann makes through June 6, 2005. The Commission determined that the changed provisions are warranted and consistent with the Statement of FTC Policy Concerning Prior Approval and Prior Notice Provisions and therefore justified reopening the proceeding and modifying the order.

ORDER REOPENING AND MODIFYING ORDER

On November 21, 1996, Schwegmann Giant Super Markets, Inc. ("Schwegmann" or "respondent"), the respondent named in the consent order issued by the Commission on June 2, 1995, in docket No. C-3584 ("order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Schwegmann asks that the Commission reopen and modify the prior approval requirements of the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] The order requires Schwegmann to seek the prior approval of the Commission to acquire any supermarket in the New Orleans metro area. The thirty-day public comment period on Schwegmann's Petition expired on December 26, 1996. No comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engaged in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that Schnuck Markets, Inc. ("Schnuck") entered into an agreement with National Holdings, Inc. ("National") to acquire certain supermarkets and that Schwegmann and Schnuck had entered into an agreement for the acquisition of certain supermarkets acquired from National that, if consummated, would violate 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, by substantially lessening competition in the retail sale and distribution of food and grocery items in supermarkets in the New Orleans metro area.

The complaint alleged that a substantial lessening of competition would result from the elimination of direct competition between Schwegmann and National in the relevant market; the increase in the likelihood that Schwegmann would unilaterally exercise market power in the relevant market; and the increase in concentration and in the likelihood of collusion or coordinated interaction.

The presumption is that setting aside the prior approval requirements in this order is in the public interest. However, there has been no showing that the competitive conditions that gave rise to the complaint and the order no longer exist. Moreover, the relevant market is localized and the acquisition price of a supermarket could fall well below the HSR size-of-transaction threshold. Therefore, the record evidences a credible risk that Schwegmann could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph IV of the order to substitute a prior notification requirement for the prior approval requirement.[2]

Accordingly, *It is ordered,* That this matter be, and it hereby is, reopened; and

It is further ordered, That paragraph IV of the order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Schwegmann shall cease and desist from acquiring, without Prior

[2] Schwegmann has stated taht it has no objection to the substitution of prior notification provisions for the prior approval provisions of the order.

Notification to the Commission (as defined below), directly or indirectly, through subsidiaries or otherwise, any supermarket, including any facility that has been operated as a supermarket within six (6) months of the date of the offer by Schwegmann to purchase the facility, or any interest in a supermarket, or any interest in any individual, firm partnership, corporation or other legal or business entity that directly or indirectly owns or operates a supermarket in the New Orleans metro area.

Provided, however, that this paragraph IV(A) shall not be deemed to require Prior Notification to the Commission for the construction of new facilities by Schwegmann or the purchase or lease by Schwegmann of a facility that has not been operated as a supermarket at any time during the six (6) month period immediately prior to the purchase or lease by Schwegmann in those locations.

"Prior Notification to the Commission" required by paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification Form"), 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 Schwegmann and not of any other party to the transaction. Schwegmann shall provide the Notification Form 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, Schwegmann 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. Schwegmann shall not be required to provide Prior Notification to the Commission pursuant to this order 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.

IN THE MATTER OF

WORLD MEDIA T.V., INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3717. Complaint, Feb. 25, 1997--Decision, Feb. 25, 1997

This consent order prohibits, among other things, the California-based advertising production and distribution corporation from making pain relief or pain elimination claims in infomercials for any device without possessing competent and reliable scientific evidence to support such claims and prohibits the respondent from representing that any endorsement or testimonial represents the typical experience with the product, unless the claim is substantiated or it is accompanied by a prominent disclaimer.

Appearances

For the Commission: *Lesley Anne Fair.*

For the respondent: *Edward Glynn, Venable, Baetjer, Howard & Civiletti,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that World Media T.V., Inc. ("respondent"), a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a California corporation, with its principal office or place of business at 5205 Avenidas Encinas, Suite A, Carlsbad, CA. respondent engages in the creation, production, and media placement of advertising, including but not necessarily limited to infomercials.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency, production company, and media buyer for Natural Innovations, Inc. and has directed, participated in, and assisted others in the creation and dissemination to the public of advertisements that offer for sale the Stimulator, a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. The Stimulator is a purported pain relief device that emits a weak electric spark when activated.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has prepared and disseminated or has caused to be disseminated advertisements for the Stimulator, including but not necessarily limited to the attached Exhibit A, a transcription of the program-length television commercial, or "infomercial," entitled "Saying No To Pain." This advertisement contain the following statements:

A. LINDA ANTHONY (Consumer Endorser): [My husband] started telling me about [the Stimulator], you know, and I am like having one of the worst headaches because I have an osteoma right up here. That's a non-malignant tumor that's just going to be there forever unless I have it surgically removed. And I get pressure headaches from it. You just feel like your whole head is just going to explode. They get so bad that I can take Darvocets and it doesn't relieve it. You know, I can be taking them for days and it doesn't relieve it. He puts the Stimulator here and here, it's gone within seconds. (Exhibit A, p. 6)

B. RUTH MINARD (Consumer Endorser): I started out with a stomach ache and I had a stomach ache for, oh, a couple, maybe three, months. It was diagnosed through my internist that it was diverticulosis. And so I had heartburn and gas like you wouldn't believe -- 24 hours, all the time. I couldn't believe, after having pain that long, and I had tried everything that I knew to try over the counter, and [the Stimulator] did the trick. I mean, I got results immediately. It's still unbelievable what it did for me. Today I have no stomach ache. (Exhibit A, p. 5)

C. RON HARTLINE (Consumer Endorser): And the lower back, it's unreal how it worked down there. Because, like, my low back on the one side has always bothered me. And I zap it and it's like it relieves it, you know? It's like taking back ten years on my body. This is something that works on me. (Exhibit A, p. 4)

D. DR. GANDEE: I've been using the Stimulator on many people for different problems, like headaches. All they have to do, wherever the pain is, stimulate the head, right around the area of pain. (Exhibit A, p. 6)

E. UNIDENTIFIED WOMAN #5 (Consumer Endorser): That was the biggest surprise to me -- that a little thing like that Stimulator could help that sinus in that day. No hot and cold packs, no bend over and feel like your eyes are going to fall out. (Exhibit A, p. 3)

F. JAMES LARIMORE (Consumer Endorser): [The Stimulator] works for me in the area of the sinus problem. (Exhibit A, p. 3)

G. DR. GANDEE: Sinuses. The Stimulator works very well with sinuses. (Exhibit A, p. 6)

H. RON HARTLINE (Consumer Endorser): It's just aches and pains. Carpal tunnel in the wrist, which I didn't think anything but surgery could take care of that. But [the Stimulator] works real well. I mean it loosens -- it's like instantly -- it loosens up the wrist. (Exhibit A, p. 4)

I. BILL RAMSELL (Consumer Endorser): I had excruciating pain in my knees. And [the Stimulator] was fantastic. I couldn't believe what it did for me. You know,

it just felt wonderful. As a matter of fact, I golfed 18 holes yesterday and walked quite a bit and it never bothered me at all. (Exhibit A, p. 5)

J. EVEL KNIEVEL: When I wake up in the morning, my wrist tends to hurt me very badly. When I put [the Stimulator] on and I click it, and use it, say, half a dozen or a dozen times on different parts of my wrist, my wrist begins to feel good. . . . [Friends] know that if I use it after all I've been through and all the things that I've tried to kill pain -- that if I use it and they don't see me taking any kind of a drug for pain -- everybody that knows me knows that I do not take drugs -- and they just absolutely know that if I've got a product and I'm using it to help me, then it must be working for me and you can keep things that do not belong in your system out of your system. (Exhibit A, pp. 7-8)

K. DR. GANDEE: But I'll tell you, when I first saw the Stimulator, I personally needed something in my office to help me. And the reason is the knuckle on the forefinger of my hand hurt so bad for the last two years I thought I was going to have to quit chiropractic. I could not work on my patients the way I wanted to. I had to change techniques. I think, seriously, if I hadn't had the Stimulator, I wouldn't be in chiropractic right now. Or I would've had to cut back dramatically on the patients I was seeing. (Exhibit A, p. 3)

L. KEVIN CULVER (Consumer Endorser): I'm up at the club there and I'm bragging about this thing and that's how I ended up here. I said, "That thing worked." You know, I haven't had any pain since. (Exhibit A, p. 8))

M. RUTH MINARD (Consumer Endorser): I got up this morning and I wasn't feeling very well. My feet were hurting me so bad. And I came to sit down to eat my breakfast and Nan got the zapper and she come and zapped me good. Before I could eat my breakfast, my feet were better. It doesn't take me too long to eat either. (Exhibit A, p. 11)

N. BILL WALTON: I had approximately 30 operations on my feet. I was in physical therapy on a constant basis. I worked with people who practiced all sorts of medicine. Orthopedists at the top. Massage therapist, chiropractors, acupuncture, acupressure, reflexology, tremendous amounts of yoga. You name it, I did it. If you have a life where you sit around and are in pain, you're going to be thinking all day long about the things that cause those pains. One of the things I try to do with my life is help people who are also in that chronic pain. That's why I recommend the Stimulator. So that they can move on and have a productive and happy life. And that smile will return to their face, the way it has to mine. (Exhibit A, p. 9)

O. JAMES LARIMORE (Consumer Endorser): Consequently, I get cramps in the hands, cramps in the arms, shoulders, across the top of the neck, back, lower back. And from crawling in and out, I get it in the knees. It's just, it just goes along with the job. Now I don't have to tolerate it anymore. If I have a cramp in my hand or something like that, I can relieve the cramp within 30 seconds. I use it in the evenings when I'm home after work. I use it on the balls of my feet, around my ankles, knees. (Exhibit A, p. 6)

P. RON HARTLINE (Consumer Endorser): When you do as much lifting like I do -- like a weight lifter -- and your wrists get swelled, your hands get swelled. The swelling in my hands is actually going down. I can't explain that but the swelling in my hands has actually gone down. My watch actually slides now whereas it's always been tight. (Exhibit A, p. 4)

Q. DR. GANDEE: Allergies, the runny eyes, the runny nose. [The Stimulator] really seems like it gives a lot of relief for that. (Exhibit A, p. 6)

R. BILL WALTON: If I had the Stimulator available to me my entire career, I would've had a better career. The short term and long term pain relief that the Stimulator provides would have helped me -- would have helped me work harder -- would've helped me play better. (Exhibit A, p. 4)

S. DR. GANDEE: You can do it wherever you have pain. The knuckle, your elbow, your shoulder, your knees, your feet, your ankles, your wrist, the calves. It does not matter. And what it does is allows the body to help itself. The Creator put us here with a body that was supposed to be healthy. I believe that and most people believe that. And this Stimulator helps the body help itself. (Exhibit A, p. 4)

T. DR. GANDEE: The Stimulator may sound too good to be true. But it is true. The Stimulator works. It helps your body help itself naturally. What you've seen here are exactly the results that people have gotten. As a matter of fact, if anything, we've understated the relief people get. (Exhibit A, p. 10)

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V. LINDA ANTHONY (Consumer Endorser): He puts the Stimulator here and here, it's gone within seconds. The pain is so excruciating and the relief is so wonderful. I mean, it's like no aspirin, no pain medication, no nothing can take that -- give you that instant relief. I mean I'm talking instant. (Exhibit A, p. 6)

W. UNIDENTIFIED MAN #2 (Consumer Endorser): It's always there. It's handy. You don't have to go make a call or set an appointment. It just helps relieve the pain instantly. (Exhibit A, p. 10)

X. JOHN TRIPPE (Consumer Endorser): I've been on Darvocets and other pain killers all this time. Darvocets and Darvons and codeines, Tylenol with codeine. And since I've been introduced to this I haven't used any of it. (Exhibit A, p. 3)

Y. UNIDENTIFIED WOMAN #4 (Consumer Endorser): Some things are addictive. You don't want to -- you end up relying on something that it causes other health problems. And I look for a natural way to deal with any health problems that I have. (Exhibit A, p. 3)

Z. GLEN MATZ (Consumer Endorser): Some of us can't just take aspirin. Some of us just can't take certain medications or anti-inflammatory drugs because they upset our stomach. This, I can relieve that pain and I don't have to swallow anything. (Exhibit A, p. 3)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that:

A. Use of the Stimulator will significantly reduce, relieve, or eliminate musculoskeletal pain, including pain in the back, feet, knees, wrists, knuckles, elbows, shoulders, ankles, joints, and calves; carpal tunnel syndrome; muscle spasms and strains; and sciatica.

B. Use of the Stimulator will significantly reduce, relieve, or eliminate abdominal pain and pain and discomfort caused by allergies, sinus conditions, diverticulosis, cramps, and menstrual cramps.

C. Use of the Stimulator will significantly reduce, relieve, or eliminate the pain caused by severe headaches, including but not limited to occipital, frontal, migraine, cluster, and stress headaches, and headaches caused by benign tumors.

D. The pain relief or pain elimination provided by the Stimulator is immediate.

E. Use of the Stimulator provides long-term pain relief.

F. For the treatment of pain, the Stimulator is as effective as, or more effective than, prescription and over-the-counter medications, including aspirin, acetaminophen, Darvon, Darvocet, and codeine.

G. For the treatment of pain, the Stimulator is as effective as, or more effective than, physical therapy, massage therapy, chiropractic treatment, acupuncture, acupressure, and reflexology.

H. Testimonials from consumers appearing in the advertisements for the Stimulator reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Respondent knew or should have known that the misrepresentation set forth in paragraph six was, and is, false and misleading.

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

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EXHIBIT A

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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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, or that the facts as alleged in such complaint, other that jurisdictional facts, are true 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 Act, 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, and having duly considered the comments received, 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. Respondent World Media T.V., Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business at 5205 Avenidas Encinas, Suite A, Carlsbad, California.

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 respondent, World Media T.V., Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any device, as "device" is defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That use of the device will significantly reduce, relieve, or eliminate musculoskeletal pain, including but not limited to pain in the back, feet, knees, wrists, knuckles, elbows, shoulders, ankles, joints, or calves; carpal tunnel syndrome; muscle spasms or strains; or sciatica;

B. That use of the device will significantly reduce, relieve, or eliminate abdominal pain or pain or discomfort caused by allergies, sinus conditions, diverticulosis, cramps, or menstrual cramps;

C. That use of the device will eliminate the pain caused by severe headaches, including but not limited to occipital, frontal, migraine, cluster, or stress headaches, or headaches caused by benign tumors;

D. That the pain relief or pain elimination provided by the device is immediate;

E. That use of the device provides long-term pain relief;

F. That, for the treatment of pain, the device is as effective as, or more effective than, prescription or over-the-counter medications, including but not limited to aspirin, acetaminophen, Darvon, Darvocet, or codeine;

G. That, for the treatment of pain, the device is as effective as, or more effective than, physical therapy, massage therapy, chiropractic treatment, acupuncture, acupressure, or reflexology; or

H. About the efficacy or relative efficacy of the product in reducing, relieving, or eliminating pain from any source;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision,

"competent and reliable scientific evidence" shall mean adequate and well-controlled clinical testing conforming to acceptable designs and protocols and conducted by a person or persons qualified by training and experience to conduct such testing.

Provided that, for any representation that any device is effective for:

(1) The temporary relief of minor aches and pains due to fatigue and overexertion, or

(2) Easing and relaxing of tired muscles, or

(3) The temporary increase of local blood circulation in the area where applied,

"competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That respondent, World Media T.V., Inc, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the health or medical benefits of any such product unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondent, World Media T.V., Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates such representation, or

B. Respondent discloses, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

(1) What the generally expected results would be for users of such product, or

(2) The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

IV.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis for such representation, including but not limited to complaints from consumers and complaints or inquiries from governmental organizations.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure, including but not limited to dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition, or any other change in the corporation that may affect compliance obligations arising out of this order.

VII.

It is further ordered, That respondent shall:

A. Within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertisements or other materials covered by this order.

B. For a period of five (5) years from the date of entry of this order, provide a copy of this order to each of its future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order who are associated with it

or any subsidiary, successor, or assign, within ten (10) days after the person assumes his or her position.

VIII.

It is further ordered, That this order will terminate on February 25, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IX.

It is further ordered, That respondent shall, within sixty (60) days after service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

NATURAL INNOVATIONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3718. Complaint, Feb. 25, 1997--Decision, Feb. 25, 1997

This consent order prohibits, among other things, the Ohio-based manufacturer and its president from making pain relief or pain elimination claims for their device without possessing competent and reliable scientific evidence to support such claims and prohibits them from representing that any endorsement or testimonial represents the typical experience with their product, unless the claim is substantiated or it is accompanied by a prominent disclaimer.

Appearances

For the Commission: *Lesley Anne Fair.*

For the respondents: *Barry Cutler* and *Julia Oas, McCutchen, Doyle, Brown & Enersen,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Natural Innovations, Inc., a corporation, and William S. Gandee, individually and as an officer and director of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Natural Innovations, Inc. is an Ohio corporation, with its principal office or place of business at 2717 South Arlington Road, Akron, Ohio.

Respondent William S. Gandee is an officer, director, and sole shareholder of Natural Innovations, Inc. Individually or in concert with others, he formulates, directs, and controls the acts and practices of Natural Innovations, Inc., including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have manufactured, advertised, labeled, offered for sale, sold and distributed the Stimulator, a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission

Act. The Stimulator is a purported pain relief device that emits a weak electric spark when activated.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Stimulator, including but not necessarily limited to the attached Exhibit A, a transcription of the program-length television commercial, or "infomercial," entitled "Saying No To Pain;" the attached Exhibit B, an instruction booklet for the Stimulator; and the attached Exhibit C, an instruction video entitled "Pain Free Today." These advertisements and promotional materials contain the following statements:

A. LINDA ANTHONY (Consumer Endorser): [My husband] started telling me about [the Stimulator], you know, and I am like having one of the worst headaches because I have an osteoma right up here. That's a non-malignant tumor that's just going to be there forever unless I have it surgically removed. And I get pressure headaches from it. You just feel like your whole head is just going to explode. They get so bad that I can take Darvocets and it doesn't relieve it. You know, I can be taking them for days and it doesn't relieve it. He puts the Stimulator here and here, it's gone within seconds. (Exhibit A, p. 6)

B. RUTH MINARD (Consumer Endorser): I started out with a stomach ache and I had a stomach ache for, oh, a couple, maybe three, months. It was diagnosed through my internist that it was diverticulosis. And so I had heartburn and gas like you wouldn't believe -- 24 hours, all the time. I couldn't believe, after having pain that long, and I had tried everything that I knew to try over the counter, and [the Stimulator] did the trick. I mean, I got results immediately. It's still unbelievable what it did for me. Today I have no stomach ache. (Exhibit A, p. 5)

C. RON HARTLINE (Consumer Endorser): And the lower back, it's unreal how it worked down there. Because, like, my low back on the one side has always bothered me. And I zap it and it's like it relieves it, you know? It's like taking back ten years on my body. This is something that works on me. (Exhibit A, p. 4)

D. DR. GANDEE: I've been using the Stimulator on many people for different problems, like headaches. All they have to do, wherever the pain is, stimulate the head, right around the area of pain. (Exhibit A, p. 6)

E. UNIDENTIFIED WOMAN #5 (Consumer Endorser): That was the biggest surprise to me -- that a little thing like that Stimulator could help that sinus in that day. No hot and cold packs, no bend over and feel like your eyes are going to fall out. (Exhibit A, p. 3)

F. JAMES LARIMORE (Consumer Endorser): [The Stimulator] works for me in the area of the sinus problem. (Exhibit A, p. 3)

G. DR. GANDEE: Sinuses. The Stimulator works very well with sinuses. (Exhibit A, p. 6)

H. RON HARTLINE (Consumer Endorser): It's just aches and pains. Carpal tunnel in the wrist, which I didn't think anything but surgery could take care of that. But [the Stimulator] works real well. I mean it loosens -- it's like instantly -- it loosens up the wrist. (Exhibit A, p. 4)

I. BILL RAMSELL (Consumer Endorser): I had excruciating pain in my knees. And [the Stimulator] was fantastic. I couldn't believe what it did for me. You know, it just felt wonderful. As a matter of fact, I golfed 18 holes yesterday and walked quite a bit and it never bothered me at all. (Exhibit A, p. 5)

J. EVEL KNIEVEL: When I wake up in the morning, my wrist tends to hurt me very badly. When I put [the Stimulator] on and I click it, and use it, say, half a dozen or a dozen times on different parts of my wrist, my wrist begins to feel good. . . . [Friends] know that if I use it after all I've been through and all the things that I've tried to kill pain -- that if I use it and they don't see me taking any kind of a drug for pain -- everybody that knows me knows that I do not take drugs -- and they just absolutely know that if I've got a product and I'm using it to help me, then it must be working for me and you can keep things that do not belong in your system out of your system. (Exhibit A, pp. 7-8)

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AA. INSTRUCTION BOOKLET: In most cases, The STIMULATOR provides almost instant relief from pain. In cases of chronic pain, it may require several treatments per day over a period of time to achieve results. It has been our experience that as your pain decreases, the frequency with which you use the STIMULATOR will decrease also, until it's only necessary to use it on an occasional basis. (Exhibit B, p. 2)

We all hurt at one time or another, and the STIMULATOR can provide relief for almost everyone. (Exhibit B, p. 3)

Painful conditions which the STIMULATOR may be helpful for: painful joints; Stiff joints; Swollen joints; Muscle spasms; Sciatica; Frontal headaches; Occipital headaches; Migraine headaches; Cluster headaches; Stress headaches; Shoulder pain; Back pain; Menstrual cramps; Carpal tunnel syndrome; Numbness and tingling; Allergies; Neck pain; Muscle strain; Foot cramps; Abdominal pain. (Exhibit B, p. 3)

Although the STIMULATOR may not work 100% of the time on 100% of your problems, we are confident that you'll find it extremely effective for the vast majority of your aches and pains as well as enabling you to provide relief for family and friends. (Exhibit B, p. 4)

BB. DR. GANDEE: Who needs the Stimulator? Basically, anyone can use the Stimulator because it's safe and effective. My grandmother is 96 years old and she uses the Stimulator every day. She's got leg cramps and feet problems and she uses it just to help her get through the day. (Exhibit C, p. 1)

CC. DR. GANDEE: Yet I'm sure that as you use the Stimulator and as I show you today how to use the Stimulator more effectively, you're going to find that you're going to be able to get relief most of the time. (Exhibit C, p. 1-2)

DD. DR. GANDEE: At first I really didn't see improvement. It felt a little bit better for a short period of time but then it would go back to what it was before. It took about a week until one day just out of the blue I noticed I had no more pain. (Exhibit C, p. 2)

EE. DR. GANDEE: As I work with the Stimulator, it is very obvious to me that soon this product will be worldwide. I believe that every household in America very soon will own a Stimulator. It might even go to the point where each individual person in the household will own a Stimulator because they'll want to keep it with them all the time. I also sincerely believe that the Stimulator will help you lead a more active, productive, and pain-free life. And as you share the Stimulator with your family and friends, which I hope you do and soon, I know that your family and friends are going to be calling you "Doc" or they're going to be asking for you to use the Stimulator on them. (Exhibit C, p. 7-8)

PAR. 5. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through C, respondents have represented, directly or by implication, that:

A. Use of the Stimulator will significantly reduce, relieve, or eliminate musculoskeletal pain, including pain in the back, feet, knees, wrists, knuckles, elbows, shoulders, ankles, joints, and calves; carpal tunnel syndrome; muscle spasms and strains; and sciatica.

B. Use of the Stimulator will significantly reduce, relieve, or eliminate abdominal pain and pain and discomfort caused by allergies, sinus conditions, diverticulosis, cramps, and menstrual cramps.

C. Use of the Stimulator will significantly reduce, relieve, or eliminate the pain caused by severe headaches, including but not limited to occipital, frontal, migraine, cluster, and stress headaches, and headaches caused by benign tumors.

D. The pain relief or pain elimination provided by the Stimulator is immediate.

E. Use of the Stimulator provides long-term pain relief.

F. For the treatment of pain, the Stimulator is as effective as, or more effective than, prescription and over-the-counter medications, including aspirin, acetaminophen, Darvon, Darvocet, and codeine.

G. For the treatment of pain, the Stimulator is as effective as, or more effective than, physical therapy, massage therapy, chiropractic treatment, acupuncture, acupressure, and reflexology.

H. Testimonials from consumers appearing in the advertisements and promotional materials for the Stimulator reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

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EXHIBIT C

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other that jurisdictional facts, are true 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 respondents have violated the said Act, 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, and having duly considered the comments received, 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. Respondent Natural Innovations, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business at 2717 South Arlington Road, Akron, Ohio.

Respondent William S. Gandee is an officer, director, and sole shareholder of Natural Innovations, Inc. He formulates, directs, and controls the policies, acts and practices of said corporation, and his office and principal place of business is located at the above stated address.

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

ORDER

I.

It is ordered, That respondents, Natural Innovations, Inc., its successors and assigns, and its officers; and William S. Gandee, individually and as an officer and director of said corporation; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, offering for sale, sale, or distribution for sale of any device, as "device" is defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That use of the device will significantly reduce, relieve, or eliminate musculoskeletal pain, including but not limited to pain in the back, feet, knees, wrists, knuckles, elbows, shoulders, ankles, joints, or calves; carpal tunnel syndrome; muscle spasms or strains; or sciatica;

B. That use of the device will significantly reduce, relieve, or eliminate abdominal pain or pain or discomfort caused by allergies, sinus conditions, diverticulosis, cramps, or menstrual cramps;

C. That use of the device will eliminate the pain caused by severe headaches, including but not limited to occipital, frontal, migraine, cluster, or stress headaches, or headaches caused by benign tumors;

D. That the pain relief or pain elimination provided by the device is immediate;

E. That use of the device provides long-term pain relief;

F. That, for the treatment of pain, the device is as effective as, or more effective than, prescription or over-the-counter medications, including but not limited to aspirin, acetaminophen, Darvon, Darvocet, or codeine;

G. That, for the treatment of pain, the device is as effective as, or more effective than, physical therapy, massage therapy, chiropractic treatment, acupuncture, acupressure, or reflexology; or

H. About the efficacy or relative efficacy of the product in reducing, relieving, or eliminating pain from any source;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean adequate and well-controlled clinical testing conforming to acceptable designs and protocols and conducted by a person or persons qualified by training and experience to conduct such testing.

Provided that, for any representation that any device is effective for:

(1) The temporary relief of minor aches and pains due to fatigue and overexertion, or

(2) Easing and relaxing of tired muscles, or

(3) The temporary increase of local blood circulation in the area where applied,

"competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That respondents, Natural Innovations, Inc., its successors and assigns, and its officers; and William S. Gandee, individually and as an officer and director of said corporation; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, offering for sale, sale, or distribution for sale of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the health or medical benefits of any such product unless, at the time of making such representation, respondents possess and rely upon

competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondents, Natural Innovations, Inc., its successors and assigns, and its officers; and William S. Gandee, individually and as an officer and director of said corporation; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation, or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

(1) What the generally expected results would be for users of such product, or

(2) The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by

persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

IV.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis for such representation, including but not limited to complaints from consumers and complaints or inquiries from governmental organizations.

VI.

It is further ordered, That respondent Natural Innovations, Inc. shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure, including but not limited to dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition, or any other change in the corporation that may affect compliance obligations arising out of this order.

VII.

It is further ordered, That respondent Natural Innovations, Inc. shall:

A. Within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertisements or other materials covered by this order.

B. For a period of five (5) years from the date of entry of this order, provide a copy of this order to each of its future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order who are associated with it or any subsidiary, successor, or assign, within ten (10) days after the person assumes his or her position.

VIII.

It is furthered ordered, That respondent William S. Gandee shall, for a period of seven (7) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business and his duties and responsibilities.

IX.

It is further ordered, That this order will terminate on February 25, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

X.

It is further ordered, That respondents shall, within sixty (60) days after service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

COMTRAD INDUSTRIES, INC.

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

Docket C-3719. Complaint, Feb. 25, 1997--Decision, Feb. 25, 1997

This consent order prohibits, among other things, the Virginia-based company from misrepresenting the ability of food storage product to cool food items or maintain proper cold storage temperatures and to hold its cooling capacity after being unplugged, or misrepresenting the effect of operating such a product off a car battery when the car is not running, and requires the respondent to substantiate any claims regarding the safety or efficacy of food storage products.

Appearances

For the Commission: *John T. Dugan.*

For the respondent: *James E. Moore, Christian, Barton, Epps, Brent & Chappell,* Richmond, VA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Comtrad Industries, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Comtrad Industries, Inc. is a Virginia corporation with its principal office or place of business at 2820 Waterford Lake Drive, Suite 106, Midlothian, Virginia.

2. Respondent has advertised, offered for sale, sold, and distributed products to the public through print advertisements and through the Internet's World Wide Web, including the Koolatron, a portable electronic food cooler and warmer also known as a thermo-electric cooler.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for the Koolatron,

including but not necessarily limited to the attached Exhibits A and B. These advertisements and promotional materials contain the following statements:

A. "500 miles from nowhere, it'll give you a cold drink or a warm burger . . . NASA space flights inspired this portable fridge that outperforms conventional fridges, replaces the ice chest and alternates as a food warmer.

Recognize the ice cooler in this picture? Surprisingly enough, there isn't one. What you see is a Koolatron, an invention that replaces the traditional ice cooler, and its many limitations, with a technology even more sophisticated than your home fridge. And far better suited to travel.

What's more, the innocent looking box before you is not only a refrigerator, it's also a food warmer.

NASA inspired portable refrigerator. Because of space travel demands, scientists had to find something more dependable and less bulky than traditional refrigeration coils and compressors. Their research led them to discover a miraculous solid-state component called the thermoelectric module."

"From satellites to station wagons. [T]hermoelectric temperature control has now been proven with more than 25 years of use in some of the most rigorous space and laboratory applications. And Koolatron is the first manufacturer to make this technology available to families, fishermen, boaters, campers and hunters -- in fact, anyone on the move.

Home refrigeration has come a long way since the days of the ice box and the block of ice. But when we travel, we go back to the sloppy ice cooler with its soggy and sometimes spoiled food. No more! Now . . . all the advantages of home cooling are available for you electronically and conveniently.

Think about your last trip. You just got away nicely on your long-awaited vacation. You're cruising comfortably in your car along a busy interstate with only a few rest stops or restaurants. You guessed it . . . the kids want to stop for a snack. But your Koolatron is stocked with fruit, sandwiches, cold drinks, fried chicken . . . fresh and cold."

. . . .

"Hot or cold. With the switch of a plug, the Koolatron becomes a food warmer for a casserole, burger or baby's bottle. It can go up to 125 degrees."

. . . .

"Just load it up and plug it in. On motor trips, plug your Koolatron into your cigarette lighter; it will use less power than a taillight. If you decide to carry it to a picnic place or a fishing hole, the Koolatron will hold its cooling capacity for 24 hours. If you leave it plugged into your battery with the engine off, it consumes only three amps of power."

. . . .

(Exhibit A).

B. "Technology combines the dependable cooling power of a refrigerator with the convenience of a cooler . . . heats food too!

Remarkable new portable cooler/warmer reduces the outside temperature by up to 40 degrees and heat[s] up to 125 degrees!"

. . . .

Imagine the versatility and convenience of a cooler that worked like a refrigerator. You could have ice-cold drinks at softball games, enjoy a picnic without soggy or spoiled food, even store insulin or other medicine that needs to be refrigerated. You could take it along when traveling and avoid the long lines and high prices of rest areas and interstate restaurants.

Now, imagine that this cooler that worked like a refrigerator could also heat food. You could warm baby formula or enjoy warm drinks at football games, camping, hunting or anywhere else. Sound like a dream? It's not -- the Koolatron cooler/warmer does it all."

"Hot or cold. One of the most innovative things about Koolatron is that it works as well to heat food as to cool it. In the cool mode, Koolatron can reduce the outside temperature by as much as 40 degrees F. With the switch of a plug, Koolatron goes from a refrigerator to a food warmer, going up to 125 degrees.

Just plug it in. Koolatron plugs directly into your vehicle's cigarette lighter and uses less power than a taillight. If you leave it plugged in while the vehicle is off, it will consume only three amps of power. Unplugged, Koolatron will hold its cooling capacity for up to 24 hours."

"Modern solution. Home refrigeration has come a long way from the "ice box" of the 1920s. But when we travel, we revert to similar methods and sloppy or spoiled food. Now, . . . the advantages of home refrigeration are available to you electronically."

. . . .

(Exhibit B).

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. The Koolatron is as effective at cooling food items and medicines as a home refrigerator.

B. The Koolatron will effectively cool down warm items and heat up cold items.

C. Once unplugged from a power source, the Koolatron will hold its cooling capacity for 24 hours.

D. Operating the Koolatron off a car battery when the car is not running will result in only a minimal power drain off the car's battery.

6. In truth and in fact:

A. The Koolatron is not as effective at cooling food items and medicines as a home refrigerator. Among other reasons, the Koolatron's internal cold storage temperature is highly dependent on outside air or room temperatures, and in many circumstances it will not maintain internal cold storage temperatures comparable to a home refrigerator.

B. The Koolatron will not effectively cool down warm items or heat up cold items. The Koolatron is primarily designed to maintain the cool or warm temperatures of items that were already cool or warm before being placed in the Koolatron. It may take up to twelve hours or more for the Koolatron to cool down a warm item or heat up a cold item.

C. In most instances, once unplugged from a power source, the Koolatron will not hold its cooling capacity for 24 hours.

D. Operating the Koolatron off a car battery when the car is not running does not result in a minimal power drain off the car's battery. Use of the Koolatron in this manner may drain the car battery of all power in as little as three hours.

Therefore, the representations set forth in paragraph five were, and are, false or misleading.

7. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. In its advertising and sale of the Koolatron, respondent has represented that the Koolatron is effective, useful, or appropriate for refrigerating or cooling food items, or for holding food items at a cool temperature, including in a wide variety of outdoor settings. Respondent has failed to disclose that the Koolatron may not keep perishable food items, such as meat, poultry, and fish, sufficiently cold to prevent the growth of bacteria when the surrounding outside temperature is greater than 80 degrees Fahrenheit, including when the Koolatron is used in hot weather, in direct sunlight, or in a hot car. Use of the Koolatron in such circumstances poses a risk of buildup of harmful or unsafe bacteria and could lead to food-borne illness. These facts would be material to consumers in their purchase or use of the product. The failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice.

10. In its advertising and sale of the Koolatron, respondent has represented that the Koolatron is effective, useful, or appropriate for

heating or warming food items, or for holding food items at a warm temperature. Respondent has failed to disclose that, because the Koolatron's maximum internal heating temperature of 125 degrees Fahrenheit is not high enough to kill or prevent the growth of certain bacteria in perishable food items such as meat, poultry, and fish, holding perishable food in the Koolatron in its warming mode poses a risk of buildup of harmful or unsafe bacteria and could lead to food-borne illness. These facts would be material to consumers in their purchase or use of the product. The failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice.

11. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

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 Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Comtrad Industries, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its offices and principal place of business located at 2820 Waterford Lake Drive, Suite 106, Midlothian, Virginia.

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

DEFINITIONS

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

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. *"Clearly and prominently"* shall mean as follows:

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In a print advertisement, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multi-page documents, the disclosure shall appear on the cover or first page.

D. In an advertisement on any electronic media received by consumers via computer, such as the Internet's World Wide Web or commercial on-line computer services, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multi-screen documents, the disclosure shall appear on the first screen and on any screen containing ordering information.

E. On a product label, the disclosure shall be in a type size, and in a location on the principal display panel, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. Unless otherwise specified, *"respondent"* shall mean Comtrad Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees.

4. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. *"Substantially similar product"* shall mean any portable device that operates off a thermo-electric unit and is intended to store or hold food at cool or warm temperatures.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in the storage of food in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

A. The comparative or absolute ability of such product to refrigerate or cool food items or medicines or to maintain proper cold storage temperatures;

B. The comparative or absolute ability of such product to heat or warm food items;

C. The comparative or absolute ability of such product to hold its cooling capacity after being unplugged from a power source; or

D. The effect of operating such product off a car battery when the car is not running, including the amount of power used by the product in such circumstances or the potential for such use to drain the car battery of power.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in the storage of food, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, efficacy, or safety of such product, unless, at the time the

representation is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

III.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Koolatron or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the cooling capacity of such product, or about the effectiveness, usefulness, or appropriateness of such product for refrigerating or cooling food items, or for holding food items at a cool temperature, unless it discloses, clearly and prominently, and in close proximity to the representation, that such product may not keep perishable food items, such as meat, poultry, and fish, sufficiently cold to prevent the growth of bacteria when the surrounding outside temperature is greater than 80 degrees Fahrenheit, including when such product is used in hot weather, in direct sunlight, or in a hot car, and that use of such product in these circumstances poses a risk of buildup of harmful or unsafe bacteria and could lead to food-borne illness.

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Koolatron or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the effectiveness, usefulness, or appropriateness of such product for heating or warming food items, or for holding food items at a warm temperature, unless it discloses, clearly and prominently, and in close proximity to the representation, that heating, warming, or holding perishable food items such as meat, poultry, and fish in such product in its warming mode may pose a risk of buildup of harmful or unsafe bacteria and could lead to food-borne illness.

V.

It is further ordered, That respondent Comtrad Industries, Inc. and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

It is further ordered, That respondent Comtrad Industries, Inc. and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

It is further ordered, That respondent Comtrad Industries, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any

acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondent Comtrad Industries, Inc. and its successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IX.

This order will terminate on February 25, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the

deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

PREMIER PRODUCTS, INC., ET AL.

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

Docket C-3720. Complaint, Feb. 26, 1997--Decision, Feb. 26, 1997

This consent order prohibits, among other things, the New Jersey-based corporations, that advertise "Miracle Thaw" food thawing trays, and their officers from misrepresenting, with respect to any product involving the storage or preparation of food, the risk of buildup of harmful or unsafe levels of bacteria on food items defrosted, thawed, prepared, or stored using the product; the amount of time it may take to defrost, thaw, or prepare food items using the product; the process by which the product achieves any claimed defrosting, thawing, or preparation times; or the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Appearances

For the Commission: *John T. Dugan.*

For the respondents: *Jeffrey Edelstein, Hall, Dickler, Kent, Friedman & Wood,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation, corporations, and Michael Sander and Issie Kroll, individually and as officers of the corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Premier Products, Inc. is a New Jersey corporation with its principal office or place of business at 23 Vreeland Road, Florham Park, New Jersey.

2. Respondent T.V. Products, Inc. is a New Jersey corporation with its principal office or place of business at 23 Vreeland Road, Florham Park, New Jersey.

3. Respondent T.V.P. Corporation is a New Jersey corporation with its principal office or place of business at 23 Vreeland Road, Florham Park, New Jersey.

4. Respondent Michael Sander is an officer of the corporate respondents. Individually or in concert with others, he formulates,

directs, or controls the policies, acts, or practices of the corporations, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporations.

5. Respondent Issie Kroll is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporations.

6. Respondents have advertised, labeled, offered for sale, sold, and distributed products to the public, including Miracle Thaw, a food defrosting or thawing tray.

7. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

8. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Miracle Thaw, including but not necessarily limited to the attached Exhibits A and B. These advertisements and promotional materials contain the following statements and depictions:

A. "After a hard day at work, it's time for a nice juicy steak. Oh, no! You forgot to defrost.

You need MIRACLE THAW, the incredible new defrosting tray that perfectly thaws any frozen food like magic in just minutes.

No chemicals. No batteries. No wires. No microwave rays. Just a space-age metal from Mother Nature that thaws frozen food faster and better than anything in the world.

Look! This thick frozen steak could take all day to defrost! But watch! Simply place it on Miracle Thaw and incredibly, in just 30 minutes, it's butcher block fresh.

[Super: Thaws Food in Minutes.]

These rock hard chicken breasts are perfectly tender in only 13 minutes!

That's frozen fish. 12 minutes later, it's the catch of the day.

Frozen pork chops are thawed, cool and juicy in just 14 minutes.

The secret is in the superconductive metal tray. It absorbs the natural heat energy in the air and then releases it directly into the frozen food.

[Super: Natural Heat Conductor. Absorbs Heat From Air.]

Now, you can defrost any frozen food, just minutes before cooking. Just watch this ice cube demonstration. The tray is cool to the touch, but the ice cube melts away like it was on a hot griddle. The Miracle Thaw defrosting tray simply speeds up the natural thawing process. Incredibly, the ice cube has melted down in just seconds. Amazing!

All day thawing could cause bacteria burgers. But with Miracle Thaw, burgers are safely defrosted in just 10 minutes.

[Visual: Six spoiled thawed hamburger patties on a plate; Six unspoiled thawed hamburger patties on Miracle Thaw.]
[Super: No Dangerous Bacteria.]
Most important, it's lab tested for product and food safety.
[Super: Miracle Thaw . . . Laboratory Tested . . . 100% Safe.]
Microwave defrosting could ruin your food. You get dry cooked edges, causing poor stale flavor. But Miracle Thaw defrosts perfectly every time. Food retains the natural juices for the best flavor.
[Super: Thaws evenly and safely.]
Miracle Thaw. Instant defrosting."
. . . .
(Exhibit A, television commercial transcript).

B. "Amazing Tray Thaws Food In Minutes!"
. . . .
"Laboratory SAFETY Tested."
. . . .
"Space-age metal thaws frozen foods safely, evenly, perfectly . . . EVERY TIME!"
. . . .
"Before . . . Rock-hard frozen chicken breasts [depiction of two frozen boneless chicken breasts being placed on tray]. . . . After . . . Perfectly thawed . . . moist and tender in as little as 7 MINUTES! [depiction of two fully thawed boneless chicken breasts being removed from tray]."
. . . .
"Up until now you really only had two choices for defrosting or thawing foods. Either in the microwave or on the counter top. . . . So what about defrosting food by leaving it on the counter top all day? This option is not highly recommended or very safe due to bacterias found in most foods which is why safe handling guidelines recommend that you keep raw meat, poultry and fish refrigerated or frozen until you're ready to cook it. The safest, most convenient choice is Miracle Thaw . . ."
. . . .
(Exhibit B, product package).

9. Through the means described in paragraph eight, respondents have represented, expressly or by implication, that laboratory testing proves that food items defrosted or thawed on Miracle Thaw will not develop harmful or unsafe levels of bacteria.

10. In truth and in fact, laboratory testing does not prove that food items defrosted or thawed on Miracle Thaw will not develop harmful or unsafe levels of bacteria. At the time respondents made the representations set forth in paragraph nine, no tests relating to bacteria buildup on food had been conducted on Miracle Thaw. Therefore, the representation set forth in paragraph nine was, and is, false or misleading.

11. Through the means described in paragraph eight, respondents have represented, expressly or by implication, that:

A. There is no risk of buildup of harmful or unsafe levels of bacteria on perishable frozen food items defrosted or thawed on Miracle Thaw.

B. Miracle Thaw will defrost or thaw frozen food items in the following times: steak in 30 minutes; chicken breasts in 7 to 13 minutes; fish fillets in 12 minutes; pork chops in 14 minutes; and hamburgers in 10 minutes.

C. Miracle Thaw achieves the accelerated defrosting or thawing depicted in the advertisements referred to in paragraph eight because it is a superconductive metal tray that transfers heat energy from the air into frozen food items, thereby speeding up the natural defrosting or thawing process.

12 In truth and in fact:

A. There is a potential risk of buildup of harmful or unsafe levels of bacteria on perishable frozen food items defrosted or thawed on Miracle Thaw. Miracle Thaw operates at room temperature, and defrosting or thawing perishable food at room temperature, even for relatively short periods of time, increases the risk of harmful or unsafe bacteria buildup.

B. In many cases, Miracle Thaw will not defrost or thaw frozen food items in the claimed time periods. Defrosting or thawing times will vary depending on several factors, including the size, shape, and thickness of the food item, the number of items placed on the tray at one time, the number of times the tray is reheated during defrosting or thawing, and room temperature. In some cases actual defrosting or thawing times may be three or more times longer than the claimed defrosting or thawing times.

C. Miracle Thaw does not achieve the accelerated defrosting or thawing depicted in the advertisements referred to in paragraph eight by superconducting or transferring heat energy from the air into frozen food items. Miracle Thaw is a Teflon-coated aluminum tray that can only achieve the accelerated defrosting or thawing depicted in the advertisements referred to in paragraph eight if it is preheated before use and reheated during use. Similar results could be achieved with any aluminum pan.

Therefore, the representations set forth in paragraph eleven were, and are, false or misleading.

13. Through the means described in paragraph eight, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph eleven, at the time the representations were made.

14. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph eleven, at the time the representations were made. Therefore, the representation set forth in paragraph thirteen was, and is, false or misleading.

15. In their advertising and sale of Miracle Thaw, respondents have represented that Miracle Thaw is effective, useful, or appropriate for defrosting or thawing frozen food items. Respondents have failed to disclose that defrosting or thawing perishable food on Miracle Thaw may pose a risk of buildup of harmful or unsafe bacteria on the food. These facts would be material to consumers in their purchase or use of the product. Respondents' failure to disclose these facts, in light of the representation made, was, and is, a deceptive practice.

16. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

Miracle Thaw TV Commercial, 120 Second, Original Version

Super: [Copyright] 1994. T.V.P. Corp. All Rights Reserved [small print].
Audio: After a hard day at work, it's time for a nice juicy steak. Oh, no! You forgot to defrost.
Super: Miracle Thaw.
Audio: You need MIRACLE THAW, the incredible new defrosting tray that perfectly thaws any frozen food like magic in just minutes.
Visual: 1 steak on tray, before and after.
Audio: No chemicals. No batteries. No wires. No microwave rays. Just a space-age metal from Mother Nature that thaws frozen food faster and better than anything in the world.
Visual: 1 whole chicken on tray, before and after.
Super: No breakable Parts. Natural Thawing Method.

Audio: Look! This thick frozen steak could take all day to defrost! But watch! Simply place it on Miracle Thaw and incredibly, in just 30 minutes, its butcher block fresh.
Visual: 1 steak on tray, before and after.
Super: Thaws Food in Minutes.
Audio: These rock hard chicken breasts are perfectly tender in only 13 minutes!
Visual: 3 breasts on tray at once, before and after.
Audio: That's frozen fish. 12 minutes later, it's the catch of the day.
Visual: 1 fish fillet on tray, before and after.
Audio: Frozen pork chops are thawed, cool and juicy in just 14 minutes.
Visual: 6 chops on tray at once, before and after.
Audio: The secret is in the superconductive metal tray. It absorbs the natural heat energy in the air and then releases it directly into the frozen food.
Super: Natural Heat Conductor. Absorbs Heat From Air.
Audio: Now, you can defrost any frozen food, just minutes before cooking. Just watch this ice cube demonstration. The tray is cool to the touch, but the ice cube melts away like it was on a hot griddle. The Miracle Thaw Defrosting Tray simply speeds up the natural thawing process. Incredibly, the cube has melted down in just seconds. Amazing!
Super: Ice Cube Demonstration.
Audio: All day thawing could cause bacteria burgers. But with Miracle Thaw, burgers are safely defrosted in just 10 minutes.
Visual: 6 spoiled thawed hamburger patties on a plate; 6 unspoiled hamburger patties on tray at once, before and after.
Super: No Dangerous Bacteria.
Audio: Most important, it's lab tested for product and food safety.
Super: Miracle Thaw . . . Laboratory Tested . . . 100% Safe.
Audio: Microwave defrosting could ruin your food. You get dry cooked edges, causing poor stale flavor. But Miracle Thaw defrosts perfectly every time. Food retains the natural juices for the best flavor.
Visual: 5 assorted cuts on tray at once, before and after.
Super: Thaws evenly and safely.
Audio: Miracle Thaw. Instant defrosting. Quick clean-up. Easy storage. Now, only $19.95.
Visual: 6 hamburger patties on tray at once, before and after.
Audio: Designed to last a lifetime, it's the incredible kitchen miracle you'll use every day.
Visual: 1 whole chicken on tray, before and after.
Super: Miracle Thaw. Only $19.95. Risk-Free Money Back Guarantee.
Audio and Super: [ordering information].

EXHIBIT B

EXHIBIT B

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Premier Products, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 23 Vreeland Road, Florham Park, New Jersey.

Respondent T.V. Products, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 23 Vreeland Road, Florham Park, New Jersey.

Respondent T.V.P. Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 23 Vreeland Road, Florham Park, New Jersey.

Respondent Michael Sander is an officer of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations, and his office or principal place of business is located at the above stated address.

Respondent Issie Kroll is an officer of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations, and his office or principal place of business is located at the above stated address.

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

ORDER

DEFINITIONS

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

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. *"Clearly and prominently"* shall mean as follows:

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In a print advertisement, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

D. On a product label, the disclosure shall be in a type size, and in a location on the principal display panel, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears.

E. On a product insert, the disclosure shall be in a type size that is sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears, and it shall appear before all written text, other than the name of the product or product slogans.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any product label or insert.

3. Unless otherwise specified, *"respondents"* shall mean Premier Products, Inc., T.V. Products, Inc., T.V.P. Corporation, corporations, their successors and assigns and their officers; Michael Sander and Issie Kroll, individually and as officers of the corporations; and each of the above's agents, representatives and employees.

4. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product involving the preparation or storage of food in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

A. The existence, contents, validity, results, conclusions or interpretations of any test, study, or research;

B. The risk of buildup of harmful or unsafe levels of bacteria on food items defrosted, thawed, prepared, or stored using such product;

C. The amount of time it may take to defrost, thaw, or prepare food items using such product; or

D. The process by which such product achieves any claimed defrosting, thawing, or preparation times.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in the preparation or storage of food in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, efficacy or safety of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

III.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Miracle Thaw or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the effectiveness, usefulness, or appropriateness of such product for defrosting or thawing frozen food items, unless it discloses, clearly and prominently:

A. In any advertisement, promotional material, and product label for Miracle Thaw or any substantially similar product:

"SEE INSTRUCTIONS FOR IMPORTANT INFORMATION ABOUT POTENTIAL FOOD SAFETY RISKS ASSOCIATED WITH THAWING FOOD AT ROOM TEMPERATURE"; and

B. In a product insert enclosed in each product package for Miracle Thaw or any substantially similar product:

"CAUTION: THERE IS A POTENTIAL RISK OF HARMFUL OR UNSAFE BACTERIA BUILDUP ON PERISHABLE FOOD THAWED AT ROOM TEMPERATURE. For more information about thawing food safely, please contact the U.S. Dept. of Agriculture's Meat and Poultry Hotline at 1-800-535-4555, or the FDA's Seafood Hotline at 1-800-332-4010."

IV.

It is further ordered, That respondents Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation, and their successors and assigns, and respondents Michael Sander and Issie Kroll shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

V.

It is further ordered, That respondents Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation, and their successors and assigns, and respondents Michael Sander and Issie Kroll shall:

A. Send a copy of this order by first class mail, return receipt requested to:

1. Each purchaser for resale of Miracle Thaw or any substantially similar product who purchased from respondents since January 1, 1992, and each licensee who sells Miracle Thaw or any substantially similar product under any licensing agreement with respondents entered into prior to the date of service of this order. Such copy shall be sent within thirty (30) days after the date of service of this order; and

2. For a period of three (3) years following service of this order, each purchaser for resale of Miracle Thaw or any substantially similar product who purchases from respondents after the date of service of this order and who has not already received a copy of this order, and each licensee who sells Miracle Thaw or any substantially similar

product under any licensing agreement with respondents entered into after the date of service of this order and who has not already received a copy of this order. Such copy shall be sent within thirty (30) days of the initiation of any business transaction with the purchaser for resale or licensee;

B. In the event respondents receive any evidence that subsequent to its receipt of a copy of this order any purchaser for resale or licensee is using or disseminating any advertisement or promotional material that contains any representation prohibited by this order or that fails to disclose any information required by this order, respondents shall immediately notify the purchaser for resale or licensee that respondents will terminate their business arrangement with said purchaser for resale or licensee if it continues to use such advertisements or promotional materials; and

C. Terminate their business arrangement with any purchaser for resale or licensee if respondents receive any evidence that such purchaser for resale or licensee has continued to use advertisements or promotional materials that contain any representation prohibited by this order or that fail to disclose any information required by this order after receipt of the notice required by subparagraph B of this part.

VI.

It is further ordered, That respondents Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation, and their successors and assigns, and respondents Michael Sander and Issie Kroll shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

It is further ordered, That respondents Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondents Michael Sander and Issie Kroll, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

IX.

It is further ordered, That respondents Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation, and their successors and assigns, and respondents Michael Sander and Issie Kroll shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the

Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

X.

This order will terminate on February 26, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

J.C. PENNEY COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3721. Complaint, Feb. 28, 1997--Decision, Feb. 28, 1997

This consent order requires, among other things, J.C. Penney and Thrift Drugs, its wholly-owned subsidiary, to divest by March 21, 1997, to a Commission-approved acquirer, a total of 161 drug stores in North and South Carolina. The consent order settles allegations that J.C. Penney's proposed acquisition of Eckerd Corporation, and 190 Rite Aid drug stores in these two states, violated antitrust laws by substantially reducing drug store competition.

Appearances

For the Commission: *George S. Cary, Michael Moiseyev, Ann Malester* and *William Baer.*

For the respondents: *Peter Standish, Weil, Gotshal & Manges,* New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that J.C. Penney Company, Inc., through two wholly-owned subsidiaries, Omega Acquisition Corporation and Thrift Drug, Inc., all subject to the jurisdiction of the Commission, has agreed to acquire Eckerd Corporation and certain assets of Rite Aid Corporation, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITION

1. For the purposes of this complaint, "MSA" means Metropolitan Statistical Area as defined by the United States Department of Commerce, Bureau of the Census.

II. RESPONDENTS

2. Respondent J.C. Penney Company, Inc. ("J.C. Penney") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6501 Legacy Drive, Plano, Texas.

3. Respondent Thrift Drug, Inc. ("Thrift Drug") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania.

4. For purposes of this proceeding, respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANIES

5. Eckerd Corporation ("Eckerd") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 8333 Bryan Dairy Road, Largo, Florida.

6. Rite Aid Corporation ("Rite Aid") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 30 Hunter Lane, Camp Hill, Pennsylvania.

7. For purposes of this proceeding, Eckerd and Rite Aid are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITIONS

8. On October 11, 1996, J.C. Penney's wholly-owned subsidiary, Thrift Drug, entered into an Asset Purchase Agreement to acquire certain assets of Rite Aid, and on November 2, 1996, J.C. Penney's

wholly-owned subsidiary, Omega Acquisition Corporation, entered into an Amended and Restated Agreement and Plan of Merger to acquire Eckerd (collectively "the Acquisitions").

V. THE RELEVANT MARKETS

9. For purposes of this complaint, the relevant line of commerce in which to analyze the effect of the Acquisitions is the retail sale of pharmacy services to third-party payors.

10. For purposes of this complaint, the relevant sections of the country in which to analyze the effect of the Acquisitions are:

a. The state of North Carolina;

b. The Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina MSA;

c. The Greensboro-Winston Salem-High Point, North Carolina MSA;

d. The Raleigh-Durham-Chapel Hill, North Carolina MSA; and

e. The Charleston-North Charleston, South Carolina MSA.

11. The relevant markets set forth in paragraphs nine and ten are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

12. Entry into the relevant markets is difficult or unlikely to occur at a sufficient scale to deter or counteract the effect of the Acquisitions described in paragraph fourteen.

13. Thrift Drug, Eckerd and Rite Aid are actual competitors in the relevant markets.

VI. EFFECT OF THE ACQUISITIONS

14. The effect of the Acquisitions may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between Thrift Drug, Eckerd and Rite Aid;

b. By increasing the likelihood that Thrift Drug will unilaterally exercise market power; and

c. By increasing the likelihood of collusion in the relevant markets.

15. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

VII. VIOLATIONS CHARGED

16. The acquisition agreements described in paragraph eight constitute violations of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

17. The Acquisitions described in paragraph eight, if consummated, would constitute violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Eckerd Corporation ("Eckerd") and of certain assets of Rite Aid Corporation ("Rite Aid") by J.C. Penney Company, Inc. ("J.C. Penney") and Thrift Drug, Inc. ("Thrift Drug"), and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have 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 he procedure described in Section 2,34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent J.C. Penney Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6501 Legacy Drive, Plano, Texas.

2. Respondent Thrift Drug, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania.

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

ORDER

I.

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

A. *"J.C. Penney"* means J.C. Penney Company, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by J.C. Penney Company, Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. *"Thrift Drug"* means Thrift Drug, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries (including Kerr Drug, Inc.), divisions, groups, and affiliates controlled, directly or indirectly, by Thrift Drug,

Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. *"Rite Aid"* means Rite Aid Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Rite Aid Corporation and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

D. *"Respondents"* means J.C. Penney and Thrift Drug.

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

F. *"Acquisitions"* means the acquisitions of Eckerd by Omega Acquisition Corporation, a wholly-owned subsidiary of J.C. Penney, and of certain assets of Rite Aid by Thrift Drug, an indirect, wholly-owned subsidiary of J.C. Penney, pursuant to an agreement dated November 2, 1996 and an agreement dated October 11, 1996, respectively.

G. *"Retail drug store"* means a full-line retail store that carries a wide variety of prescription and nonprescription medicines and miscellaneous items, including, but not limited to, drugs, pharmaceuticals, patent medicines, sundries, tobacco products, and other merchandise.

H. *"MSA"* means Metropolitan Statistical Area as defined by the United States Department of Commerce, Bureau of the Census.

I. *"Rite Aid Retail Business"* means Rite Aid's retail drug store business located in the states of North Carolina and South Carolina.

J. *"Rite Aid Retail Assets"* means all assets constituting the Rite Aid Retail Business, excluding those assets pertaining to the Rite Aid trade name, trade dress, trade marks and service marks, and including, but not limited to:

1. Leases and properties;

2. Zoning approvals and registrations, at the Acquirer's option;

3. Books, records, reports, dockets and lists relating to the Rite Aid Retail Business;

4. Retail drug store inventory and storage capacity;

5. Lists of stock keeping units ("SKUs"), *e.g.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales;

6. Lists of all customers, including, but not limited to, third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;

7. All pharmacy files, documents, instruments, papers, books, computer files and records and all other records in any media relating to the Rite Aid Retail Business;

8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and all names of prescription drug manufacturers and distributors under contract with Rite Aid;

9. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property; and

10. Goodwill, tangible and intangible, utilized in retail drug stores.

Provided, however, that Rite Aid Retail Assets shall include only such assets as are being acquired in the Acquisitions.

K. *"Rite Aid North Carolina/Charleston Retail Assets"* means Rite Aid's Retail Assets located in the state of North Carolina and in the Charleston-North Charleston, South Carolina MSA.

L. *"Thrift Retail Business"* means Thrift Drug's retail drug store business located in the Charlotte-Gastonia-Rock Hill, North Carolina MSA, and Thrift Drug's retail drug store business identified in Schedule A of this Agreement.

M. *"Thrift Retail Assets"* means all assets constituting the Thrift Retail Business, excluding those assets pertaining to the Thrift Drug or Kerr trade name, trade dress, trade marks and service marks, and including, but not limited to:

1. Leases and properties;

2. Zoning approvals and registrations, at the Acquirer's option;

3. Books, records, reports, dockets and lists relating to the Thrift Retail Business;

4. Retail drug store inventory and storage capacity;

5. Lists of stock keeping units ("SKUs"), *e.g.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales;

6. Lists of all customers, including, but not limited to, third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;

7. All pharmacy files, documents, instruments, papers, books, computer files and records and all other records in any media relating to the Thrift Retail Business;

8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and all names of prescription drug manufacturers and distributors under contract with Thrift Drug;

9. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property; and

10. Goodwill, tangible and intangible, utilized in retail drug stores.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission, within four (4) months of the date the Agreement Containing Consent Order in this matter was signed by respondents; provided, however, that respondents shall not acquire any of the Rite Aid North Carolina/Charleston Retail Assets until respondents have entered into an agreement that has received the prior approval of the Commission to divest the Rite Aid North Carolina/Charleston Retail Assets.

B. If respondents do not divest the Thrift Retail Assets pursuant to paragraph II.A., respondents shall divest the Thrift Retail Assets to an acquirer that receives the prior approval of the Commission, and

only in a manner that receives the prior approval of the Commission, within five (5) months of the date the Agreement Containing Consent Order in this matter was signed by the respondents.

C. The purpose of the divestiture of the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets is to ensure the continuation of the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets as ongoing viable enterprises engaged in the retail drug store business providing retail pharmacy services to third-party payors and to remedy any lessening of competition resulting from the Acquisitions as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondents have not divested absolutely and in good faith the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets pursuant to paragraph II.A of this order, the Commission may appoint a trustee to divest the Rite Aid Retail Assets and the Thrift Retail Assets; or if the respondents have not divested absolutely and in good faith the Thrift Retail Assets pursuant to paragraph II.B of this order, the Commission may appoint a trustee to divest the Thrift Retail Assets. In the event that the Commission brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission from seeking civil penalties or any other relief available to it, including a court-appointed trustee pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall serve as an agent of the Commission and shall have the exclusive power and authority to divest the Rite Aid Retail Assets and the Thrift Retail Assets.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture 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 this period only two (2) times for up to twelve (12) months each time.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Rite Aid Retail Assets and the Thrift Retail Assets or to any other relevant information, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the trustee's fiduciary duty to the Commission and to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that the trustee receives *bona fide* offers from more than one acquiring entity, the trustee shall submit all such bids to the Commission, and if the Commission determines to approve more than one such acquiring entity for the Rite Aid Retail Assets and the Thrift Retail Assets, the trustee shall divest to the

acquiring entity selected by respondents from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, and at reasonable fees, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the 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 respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Rite Aid Retail Assets and the Thrift Retail Assets.

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

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

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

11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Rite Aid Retail Assets and the Thrift Retail Assets.

12. The trustee shall have no obligation or authority to operate or maintain the Rite Aid Retail Assets and the Thrift Retail Assets.

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

IV.

It is further ordered, That:

A. Pending divestiture of the Rite Aid Retail Assets and the Thrift Retail Assets, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Rite Aid Retail Assets and the Thrift Retail Assets consistent with paragraphs II. and III. of this order and to prevent the destruction, removal, wasting, deterioration, or impairment of the Rite Aid Retail Assets and the Thrift Retail Assets except in the ordinary course of business and except for ordinary wear and tear.

B. Respondents shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as respondents have complied with the divestiture requirements of the order.

V.

It is further ordered, That within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of proposals for divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties concerning divestiture.

VI.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation to respondents, or the creation or dissolution of subsidiaries or any other change in respondents that may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representative of the Commission:

A. Upon five days' written notice to respondents, 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 respondents relating to any matters contained in this order; and

B. Upon five days' written notice to respondents and without restraint or interference from respondents, to interview respondents or officers, directors, or employees of respondents in the presence of counsel.

SCHEDULE A

Kerr Store Number 8549
Lakewood Shopping Center
2000 Chapel Hill Road
Durham, NC 27704

Kerr Store Number 8556
Erwin Square
737 Ninth Street
Durham, NC 27705

Kerr Store Number 8566
University Mall
201-10 Estes Drive
Chapel Hill, NC 27514

Kerr Store Number 8550
North Duke Mall
3600 North Duke Street
Durham, NC 27704

Kerr Store Number 8935
Cary Village Mall
1105 Walnut Street
Cary, NC 27511

Kerr Store Number 8933
South Square Shopping Center
4001 Chapel Hill Boulevard
Durham, NC 27707

Kerr Store Number 8531
Northridge Shopping Center
8140 Falls of the Neuse Road
Raleigh, NC 27689

Kerr Store Number 8943
Harvest Plaza
9650 Strickland Road
Raleigh, NC 27615

Kerr Store Number 8541
Longview Shopping Center
2116 East New Bern Avenue
Raleigh, NC 27610

Kerr Store Number 8537
Eastgate Shopping Center
4025 Old Wake Forest Road
Raleigh, NC 27609

Kerr Store Number 8553
Loehman's Plaza
1821 Hilandale Road
Durham, NC 27705

Kerr Store Number 8929
Crabtree Valley Mall
4325 Glenwood Avenue
Raleigh, NC 27612

Kerr Store Number 8538
South Hills Mall
1255 Buck Jones Road
Raleigh, NC 27606

Kerr Store Number 8595
North Hills Mall
Six Forks Road
Raleigh, NC 27609

Kerr Store Number 8539
Mission Valley Shopping Center
2233-113 Avant Ferry Road
Raleigh, NC 27605

Kerr Store Number 8534
Tower Shopping Center
Newbern Avenue
Raleigh, NC 27610

Kerr Store Number 8602
Triangle East Centre
134 Wakelon Street
Zebulon, NC 27597

Kerr Store Number 8530
Towne North Plaza
8385 Creedmoor Road
Raleigh, NC 27612

Kerr Store Number 8904
Preston Corners Shopping Center
920 High House Road
Cary, NC 27513

Kerr Store Number 8547
The Village Shopping Center
613 Wellons Village
Durham, NC 27703

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between J.C. Penney Company, Inc. ("J.C. Penney"), a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of

business located at 6501 Legacy Drive, Plano, Texas; Thrift Drug, Inc. ("Thrift Drug"), a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware,. with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq*. (collectively "the Parties").

PREMISES

Whereas, J.C. Penney (through a wholly-owned subsidiary, Omega Acquisition Corporation) agreed to acquire Eckerd Corporation ("the Eckerd Acquisition"), pursuant to an agreement dated November 2, 1996, and J.C. Penney (through a wholly-owned subsidiary, Thrift Drug, Inc.) agreed to acquire certain assets of the Rite Aid Corporation ("the Rite Aid Acquisition"), pursuant to an agreement dated October 11, 1996, respectively (collectively "the Acquisitions"); and

Whereas, the Commission is now investigating the Acquisitions to determine if they would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Rite Aid Retail Assets and the Thrift Retail Assets as described in the Agreement Containing Consent Order ("Assets") during the period prior to their divestiture, any divestiture resulting from any administrative proceeding challenging the legality of the Acquisitions might not be possible, or might produce a less than effective remedy; and

Whereas, if the Commission accepts the consent order or a modified consent order, and J.C. Penney and Thrift Drug have not divested the Assets or such other assets as are specified in the consent order or in a modified consent order, in accordance with the consent order or modified order respectively, the Commission may appoint a

trustee to divest the Assets and such additional assets as are identified in the consent order or in a modified consent order; and

Whereas, the Commission is concerned that prior to divestiture to an acquirer approved by the Commission, it may be necessary to preserve the continued viability and competitiveness of the Assets; and

Whereas, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestiture to an acquirer approved by the Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisitions; and

Whereas, J.C. Penney and Thrift Drug entering into this Agreement shall in no way be construed as an admission by J.C. Penney or Thrift Drug that the Acquisitions are illegal; and

Whereas, J.C. Penney and Thrift Drug understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, in consideration of the Commission's agreement that at the time it accepts the consent order for public comment it will grant early termination of the Hart-Scott-Rodino waiting periods, the Parties agree as follows:

TERMS OF AGREEMENT

1. J.C. Penney and Thrift Drug agree to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Unless the Commission brings an action to seek to enjoin the proposed Rite Aid Acquisition or the proposed Eckerd Acquisition pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed Rite Aid Acquisition or the proposed Eckerd Acquisition, J.C. Penney and Thrift Drug will be free to close the Rite Aid Acquisition after December 8, 1996, subject to the terms of the order, and the Eckerd Acquisition after December 6, 1996.

3. J.C. Penney and Thrift Drug agree that from the date this Agreement is signed until the earlier of the dates listed in

subparagraphs 3.a - 3.b, they will comply with the provisions of this Agreement:

a. Three business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. On the day the divestitures set out in the consent order have been completed.

4. J.C. Penney and Thrift Drug shall maintain the competitiveness of the Assets. This includes, but is not limited to, the maintaining of promotions and discount policies as well as the continuation of specific store services (*i.e.*, hours of operation and operation of specific departments).

5. Until J.C. Penney and Thrift Drug have divested the Assets or other assets pursuant to paragraphs II and III of the consent order or such assets as are specified pursuant to a modified consent order, J.C. Penney and Thrift Drug shall continue to offer those Thrift Drug customers who receive third-party pharmacy services at Thrift Drug the same type of pharmacy service at any retail drug store that constitutes a part of the Thrift Retail Assets.

6. Should the Commission seek in any proceeding to compel J.C. Penney and Thrift Drug to divest themselves of the Assets or such other assets as specified in the consent order or in a modified consent order or to seek any other injunctive or equitable relief, J.C. Penney and Thrift Drug shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the Acquisitions. J.C. Penney and Thrift Drug also waive all rights to contest the validity of this Agreement.

7. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with five (5) days' notice to J.C. Penney or Thrift Drug and to their principal offices, J.C. Penney and Thrift Drug shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of J.C. Penney or Thrift Drug, 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 J.C. Penney or Thrift Drug relating to compliance with this Agreement; and

b. To interview officers or employees of J.C. Penney or Thrift Drug, who may have counsel present, regarding any such matters.

8. This Agreement shall not be binding until approved by the Commission.

IN THE MATTER OF

J.C. PENNEY COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3722. Complaint, Feb. 28, 1997--Decision, Feb. 28, 1997

This consent order requires, among other things, J.C. Penney and Thrift Drugs, its wholly-owned subsidiary, to divest by March 21, 1997, to a Commission-approved acquirer, a total of 161 drug stores in North and South Carolina. The consent order settles allegations that J.C. Penney's proposed acquisition of 190 Rite Aid drug stores in these two states and Eckerd Corporation, violated antitrust laws by substantially reducing drug store competition.

Appearances

For the Commission: *George S. Cary, Michael Moiseyev, Ann Malester* and *William Baer.*

For the respondents: *Peter Standish, Weil, Gotshal & Manges,* New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that J.C. Penney Company, Inc., through two wholly-owned subsidiaries, Omega Acquisition Corporation and Thrift Drug, Inc., all subject to the jurisdiction of the Commission, has agreed to acquire Eckerd Corporation and certain assets of Rite Aid Corporation, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITION

1. For the purposes of this complaint, *"MSA"* means Metropolitan Statistical Area as defined by the United States Department of Commerce, Bureau of the Census.

II. RESPONDENTS

2. Respondent J.C. Penney Company, Inc. ("J.C. Penney") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6501 Legacy Drive, Plano, Texas.

3. Respondent Thrift Drug, Inc. ("Thrift Drug") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania.

4. For purposes of this proceeding, respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANIES

5. Eckerd Corporation ("Eckerd") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 8333 Bryan Dairy Road, Largo, Florida.

6. Rite Aid Corporation ("Rite Aid") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 30 Hunter Lane, Camp Hill, Pennsylvania.

7. For purposes of this proceeding, Eckerd and Rite Aid are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITIONS

8. On October 11, 1996, J.C. Penney's wholly-owned subsidiary, Thrift Drug, entered into an Asset Purchase Agreement to acquire certain assets of Rite Aid, and on November 2, 1996, J.C. Penney's

wholly-owned subsidiary, Omega Acquisition Corporation, entered into an Amended and Restated Agreement and Plan of Merger to acquire Eckerd (collectively "the Acquisitions").

V. THE RELEVANT MARKETS

9. For purposes of this complaint, the relevant line of commerce in which to analyze the effect of the Acquisitions is the retail sale of pharmacy services to third-party payors.

10. For purposes of this complaint, the relevant sections of the country in which to analyze the effect of the Acquisitions are:

a. The state of North Carolina;
b. The Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina MSA;
c. The Greensboro-Winston Salem-High Point, North Carolina MSA;
d. The Raleigh-Durham-Chapel Hill, North Carolina MSA; and
e. The Charleston-North Charleston, South Carolina MSA.

11. The relevant markets set forth in paragraphs nine and ten are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

12. Entry into the relevant markets is difficult or unlikely to occur at a sufficient scale to deter or counteract the effect of the Acquisitions described in paragraph fourteen..

13. Thrift Drug, Eckerd and Rite Aid are actual competitors in the relevant markets.

VI. EFFECT OF THE ACQUISITIONS

14. The effect of the Acquisitions may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between Thrift Drug, Eckerd and Rite Aid;

b. By increasing the likelihood that Thrift Drug will unilaterally exercise market power; and

c. By increasing the likelihood of collusion in the relevant markets.

15. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

VII. VIOLATIONS CHARGED

16. The acquisition agreements described in paragraph eight constitute violations of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

17. The Acquisitions described in paragraph eight, if consummated, would constitute violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Eckerd Corporation ("Eckerd") and of certain assets of Rite Aid Corporation ("Rite Aid") by J.C. Penney Company, Inc. ("J.C. Penney") and Thrift Drug, Inc. ("Thrift Drug"), and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have 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 described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent J.C. Penney Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6501 Legacy Drive, Plano, Texas.

2. Respondent Thrift Drug, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania.

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

ORDER

I.

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

A. *"J.C. Penney"* means J.C. Penney Company, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by J.C. Penney Company, Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. *"Thrift Drug"* means Thrift Drug, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries (including Kerr Drug, Inc.), divisions, groups, and affiliates controlled, directly or indirectly, by Thrift Drug,

Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. *"Rite Aid"* means Rite Aid Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Rite Aid Corporation and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

D. *"Respondents"* means J.C. Penney and Thrift Drug.

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

F. *"Acquisitions"* means the acquisitions of Eckerd by Omega Acquisition Corporation, a wholly-owned subsidiary of J.C. Penney, and of certain assets of Rite Aid by Thrift Drug, an indirect, wholly-owned subsidiary of J.C. Penney, pursuant to an agreement dated November 2, 1996 and an agreement dated October 11, 1996, respectively.

G. *"Retail drug store"* means a full-line retail store that carries a wide variety of prescription and nonprescription medicines and miscellaneous items, including, but not limited to, drugs, pharmaceuticals, patent medicines, sundries, tobacco products, and other merchandise.

H. *"MSA"* means Metropolitan Statistical Area as defined by the United States Department of Commerce, Bureau of the Census.

I. *"Rite Aid Retail Business"* means Rite Aid's retail drug store business located in the states of North Carolina and South Carolina.

J. *"Rite Aid Retail Assets"* means all assets constituting the Rite Aid Retail Business, excluding those assets pertaining to the Rite Aid trade name, trade dress, trade marks and service marks, and including, but not limited to:

1. Leases and properties;

2. Zoning approvals and registrations, at the Acquirer's option;

3. Books, records, reports, dockets and lists relating to the Rite Aid Retail Business;

4. Retail drug store inventory and storage capacity;

5. Lists of stock keeping units ("SKUs"), *e.g.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales;

6. Lists of all customers, including, but not limited to, third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;

7. All pharmacy files, documents, instruments, papers, books, computer files and records and all other records in any media relating to the Rite Aid Retail Business;

8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and all names of prescription drug manufacturers and distributors under contract with Rite Aid;

9. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property; and

10. Goodwill, tangible and intangible, utilized in retail drug stores.

Provided, however, that Rite Aid Retail Assets shall include only such assets as are being acquired in the Acquisitions.

K. *"Rite Aid North Carolina/Charleston Retail Assets"* means Rite Aid's Retail Assets located in the state of North Carolina and in the Charleston-North Charleston, South Carolina MSA.

L. *"Thrift Retail Business"* means Thrift Drug's retail drug store business located in the Charlotte-Gastonia-Rock Hill, North Carolina MSA, and Thrift Drug's retail drug store business identified in Schedule A of this Agreement.

M. *"Thrift Retail Assets"* means all assets constituting the Thrift Retail Business, excluding those assets pertaining to the Thrift Drug or Kerr trade name, trade dress, trade marks and service marks, and including, but not limited to:

1. Leases and properties;

2. Zoning approvals and registrations, at the Acquirer's option;

3. Books, records, reports, dockets and lists relating to the Thrift Retail Business;

4. Retail drug store inventory and storage capacity;

5. Lists of stock keeping units ("SKUs"), *e.g.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales;

6. Lists of all customers, including, but not limited to, third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;

7. All pharmacy files, documents, instruments, papers, books, computer files and records and all other records in any media relating to the Thrift Retail Business;

8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and all names of prescription drug manufacturers and distributors under contract with Thrift Drug;

9. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property; and

10. Goodwill, tangible and intangible, utilized in retail drug stores.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission, within four (4) months of the date the Agreement Containing Consent Order in this matter was signed by respondents; provided, however, that respondents shall not acquire any of the Rite Aid North Carolina/Charleston Retail Assets until respondents have entered into an agreement that has received the prior approval of the Commission to divest the Rite Aid North Carolina/Charleston Retail Assets.

B. If respondents do not divest the Thrift Retail Assets pursuant to paragraph II.A, respondents shall divest the Thrift Retail Assets to an acquirer that receives the prior approval of the Commission, and

only in a manner that receives the prior approval of the Commission, within five (5) months of the date the Agreement Containing Consent Order in this matter was signed by the respondents.

C. The purpose of the divestiture of the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets is to ensure the continuation of the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets as ongoing viable enterprises engaged in the retail drug store business providing retail pharmacy services to third-party payors and to remedy any lessening of competition resulting from the Acquisitions as alleged in the Commission's complaint.

III.

*It is further ordered,*That:

A. If respondents have not divested absolutely and in good faith the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets pursuant to paragraph II.A of this order, the Commission may appoint a trustee to divest the Rite Aid Retail Assets and the Thrift Retail Assets; or if the respondents have not divested absolutely and in good faith the Thrift Retail Assets pursuant to paragraph II.B of this order, the Commission may appoint a trustee to divest the Thrift Retail Assets. In the event that the Commission brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission from seeking civil penalties or any other relief available to it, including a court-appointed trustee pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall serve as an agent of the Commission and shall have the exclusive power and authority to divest the Rite Aid Retail Assets and the Thrift Retail Assets.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture 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 this period only two (2) times for up to twelve (12) months each time.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Rite Aid Retail Assets and the Thrift Retail Assets or to any other relevant information, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this

paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the trustee's fiduciary duty to the Commission and to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that the trustee receives *bona fide* offers from more than one acquiring entity, the trustee shall submit all such bids to the Commission, and if the Commission determines to approve more than one such acquiring entity for the Rite Aid Retail Assets and the Thrift Retail Assets, the trustee shall divest to the acquiring entity selected by respondents from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, and at reasonable fees, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the 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 respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Rite Aid Retail Assets and the Thrift Retail Assets.

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

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

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

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

11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Rite Aid Retail Assets and the Thrift Retail Assets.

12. The trustee shall have no obligation or authority to operate or maintain the Rite Aid Retail Assets and the Thrift Retail Assets.

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

IV.

It is further ordered, That:

A. Pending divestiture of the Rite Aid Retail Assets and the Thrift Retail Assets, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Rite Aid Retail Assets and the Thrift Retail Assets consistent with paragraphs II and III of this order and to prevent the destruction, removal, wasting, deterioration, or impairment of the Rite Aid Retail Assets and the Thrift Retail Assets except in the ordinary course of business and except for ordinary wear and tear.

B. Respondents shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as respondents have complied with the divestiture requirements of the order.

V.

It is further ordered, That within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of proposals for divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties concerning divestiture.

VI.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation to respondents, or the creation or dissolution of subsidiaries or any other change in respondents that may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representative of the Commission:

A. Upon five days' written notice to respondents, 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 respondents relating to any matters contained in this order; and

B. Upon five days' written notice to respondents and without restraint or interference from respondents, to interview respondents or officers, directors, or employees of respondents in the presence of counsel.

SCHEDULE A

Kerr Store Number 8549
Lakewood Shopping Center
2000 Chapel Hill Road
Durham, NC 27704

Kerr Store Number 8556
Erwin Square
737 Ninth Street
Durham, NC 27705

Kerr Store Number 8566
University Mall
201-10 Estes Drive
Chapel Hill, NC 27514

Kerr Store Number 8550
North Duke Mall
3600 North Duke Street
Durham, NC 27704

Kerr Store Number 8935
Cary Village Mall
1105 Walnut Street
Cary, NC 27511

Kerr Store Number 8933
South Square Shopping Center
4001 Chapel Hill Boulevard
Durham, NC 27707

Kerr Store Number 8531
Northridge Shopping Center
8140 Falls of the Neuse Road
Raleigh, NC 27689

Kerr Store Number 8943
Harvest Plaza
9650 Strickland Road
Raleigh, NC 27615

Kerr Store Number 8541
Longview Shopping Center
2116 East New Bern Avenue
Raleigh, NC 27610

Kerr Store Number 8537
Eastgate Shopping Center
4025 Old Wake Forest Road
Raleigh, NC 27609

Kerr Store Number 8553
Loehman's Plaza
1821 Hilandale Road
Durham, NC 27705

Kerr Store Number 8929
Crabtree Valley Mall
4325 Glenwood Avenue
Raleigh, NC 27612

Kerr Store Number 8538
South Hills Mall
1255 Buck Jones Road
Raleigh, NC 27606

Kerr Store Number 8595
North Hills Mall
Six Forks Road
Raleigh, NC 27609

Kerr Store Number 8539
Mission Valley Shopping Center
2233-113 Avant Ferry Road
Raleigh, NC 27605

Kerr Store Number 8534
Tower Shopping Center
Newbern Avenue
Raleigh, NC 27610

Kerr Store Number 8602
Triangle East Centre
134 Wakelon Street
Zebulon, NC 27597

Kerr Store Number 8530
Towne North Plaza
8385 Creedmoor Road
Raleigh, NC 27612

Kerr Store Number 8904
Preston Corners Shopping Center
920 High House Road
Cary, NC 27513

Kerr Store Number 8547
The Village Shopping Center
613 Wellons Village
Durham, NC 27703

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between J.C. Penney Company, Inc. ("J.C. Penney"), a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6501 Legacy Drive, Plano, Texas; Thrift Drug,

Inc. ("Thrift Drug"), a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively "the Parties").

PREMISES

Whereas, J.C. Penney (through a wholly-owned subsidiary, Omega Acquisition Corporation) agreed to acquire Eckerd Corporation ("the Eckerd Acquisition"), pursuant to an agreement dated November 2, 1996, and J.C. Penney (through a wholly-owned subsidiary, Thrift Drug, Inc.) agreed to acquire certain assets of the Rite Aid Corporation ("the Rite Aid Acquisition"), pursuant to an agreement dated October 11, 1996, respectively (collectively "the Acquisitions"); and

Whereas, the Commission is now investigating the Acquisitions to determine if they would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Rite Aid Retail Assets and the Thrift Retail Assets as described in the Agreement Containing Consent Order ("Assets") during the period prior to their divestiture, any divestiture resulting from any administrative proceeding challenging the legality of the Acquisitions might not be possible, or might produce a less than effective remedy; and

Whereas, if the Commission accepts the consent order or a modified consent order, and J.C. Penney and Thrift Drug have not divested the Assets or such other assets as are specified in the consent order or in a modified consent order, in accordance with the consent order or modified order respectively, the Commission may appoint a trustee to divest the Assets and such additional assets as are identified in the consent order or in a modified consent order; and

Whereas, the Commission is concerned that prior to divestiture to an acquirer approved by the Commission, it may be necessary to preserve the continued viability and competitiveness of the Assets; and

Whereas, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestiture to an acquirer approved by the Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisitions; and

Whereas, J.C. Penney and Thrift Drug entering into this Agreement shall in no way be construed as an admission by J.C. Penney or Thrift Drug that the Acquisitions are illegal; and

Whereas, J.C. Penney and Thrift Drug understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, in consideration of the Commission's agreement that at the time it accepts the consent order for public comment it will grant early termination of the Hart-Scott-Rodino waiting periods, the Parties agree as follows:

TERMS OF AGREEMENT

1. J.C. Penney and Thrift Drug agree to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Unless the Commission brings an action to seek to enjoin the proposed Rite Aid Acquisition or the proposed Eckerd Acquisition pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed Rite Aid Acquisition or the proposed Eckerd Acquisition, J.C. Penney and Thrift Drug will be free to close the Rite Aid Acquisition after December 8, 1996, subject to the terms of the order, and the Eckerd Acquisition after December 6, 1996.

3. J.C. Penney and Thrift Drug agree that from the date this Agreement is signed until the earlier of the dates listed in subparagraphs 3.a - 3.b, they will comply with the provisions of this Agreement:

a. Three business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. On the day the divestitures set out in the consent order have been completed.

4. J.C. Penney and Thrift Drug shall maintain the competitiveness of the Assets. This includes, but is not limited to, the maintaining of promotions and discount policies as well as the continuation of specific store services (*i.e.*, hours of operation and operation of specific departments).

5. Until J.C. Penney and Thrift Drug have divested the Assets or other assets pursuant to paragraphs II and III of the consent order or such assets as are specified pursuant to a modified consent order, J.C. Penney and Thrift Drug shall continue to offer those Thrift Drug customers who receive third-party pharmacy services at Thrift Drug the same type of pharmacy service at any retail drug store that constitutes a part of the Thrift Retail Assets.

6. Should the Commission seek in any proceeding to compel J.C. Penney and Thrift Drug to divest themselves of the Assets or such other assets as specified in the consent order or in a modified consent order or to seek any other injunctive or equitable relief, J.C. Penney and Thrift Drug shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the Acquisitions. J.C. Penney and Thrift Drug also waive all rights to contest the validity of this Agreement.

7. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with five (5) days' notice to J.C. Penney or Thrift Drug and to their principal offices, J.C. Penney and Thrift Drug shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of J.C. Penney or Thrift Drug, 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 J.C. Penney or Thrift Drug relating to compliance with this Agreement; and

b. To interview officers or employees of J.C. Penney or Thrift Drug, who may have counsel present, regarding any such matters.

8. This Agreement shall not be binding until approved by the Commission.

IN THE MATTER OF

THE BOEING COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3723. Complaint, March 5, 1997--Decision, March 5, 1997

This consent order involves the Boeing Company's acquisition of Rockwell International Corporation's aerospace and defense business and the competition in the markets for high altitude endurance unmanned air vehicles ("UAVs") and space launch vehicles. The consent order, among other things, gives Teledyne Ryan, the prime contractor of one team, the opportunity to replace Boeing on that team, thereby protecting competition in the UAVs market. The consent order also establishes a "firewall" to prevent the flow of competitively sensitive information between Boeing's team and a division of Rockwell International Corporation's aerospace and defense business that is currently providing wings to the other teams, establishes a firewall that prevents Boeing from making any space launch vehicle manufacturer's non-public information available to its launch vehicle division, and allows Boeing to use such information only in its capacity as a propulsion system provider.

Appearances

For the Commission: *George S. Cary, Ann Malester* and *Steven Bernstein.*

For the respondent: *Benjamin S. Sharp* and *Susan E. Foster*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, The Boeing Company ("Boeing"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the Aerospace and Defense Business of Rockwell International Corporation ("Rockwell"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and that such an acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the FTC Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. *"High Altitude Endurance Unmanned Air Vehicle"* means any unmanned aircraft designed to perform high-altitude, broad-area reconnaissance missions and manufactured for sale to the United States Department of Defense.

2. *"Tier II Plus"* or *"Global Hawk"* means the Tier II Plus High Altitude Endurance Unmanned Air Vehicle currently being developed for the Department of Defense's Advanced Research Projects Agency.

3. *"Tier III Minus"* or *"DarkStar"* means the Tier III Minus High Altitude Endurance Unmanned Air Vehicle currently being developed for the Department of Defense's Advanced Research Projects Agency.

4. *"Tier II Plus Team"* means Teledyne Ryan Aeronautical and the group of subcontractors, including Rockwell Aerospace and Defense, which are currently developing Tier II Plus.

5. *"Tier III Minus Team"* means the team comprised of Boeing and Lockheed Martin Corporation which is currently developing Tier III Minus.

6. *"Space Launch Vehicle"* means any vehicle designed to launch satellites or persons into space.

7. *"Space Launch Vehicle Propulsion System"* means any device that is used to provide propulsion to a Space Launch Vehicle.

8. *"Respondent"* means Boeing.

II. RESPONDENT

9. Respondent is a corporation organized and existing under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 7755 East Marginal Way South, Seattle, Washington.

10. Respondent is engaged in, among other things, the research, development, manufacture and sale of High Altitude Endurance Unmanned Air Vehicles and Space Launch Vehicles.

11. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. ACQUIRED COMPANY

12. Rockwell Aerospace and Defense Business ("Rockwell Aerospace and Defense") is a division of Rockwell, a corporation organized and existing under and by virtue of the laws of the state of Delaware, with its principal office and place of business located at 2201 Seal Beach Boulevard, Seal Beach, California.

13. Rockwell Aerospace and Defense is engaged in, among other things, the research, development, manufacture and sale of wings for High Altitude Endurance Unmanned Air Vehicles, and Space Launch Vehicle Propulsion Systems.

14. Rockwell Aerospace and Defense is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

15. On or about July 31, 1996, Boeing entered into an Agreement and Plan of Merger, whereby Boeing would acquire Rockwell Aerospace and Defense for approximately $3.025 billion ("Acquisition").

V. THE RELEVANT MARKETS

16. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

a. The research, development, manufacture and sale of High Altitude Endurance Unmanned Air Vehicles;

b. The research, development, manufacture and sale of Space Launch Vehicles; and

c. The research, development, manufacture and sale of Space Launch Vehicle Propulsion Systems.

17. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in all relevant lines of commerce.

VI. STRUCTURE OF THE MARKETS

18. The market for the research, development, manufacture and sale of High Altitude Endurance Unmanned Air Vehicles is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or the two-firm and four-firm concentration ratios ("concentration ratios"). Respondent and Rockwell are members of the only two teams which produce High Altitude Endurance Unmanned Air Vehicles.

19. Respondent, through the Acquisition, would be a member of both the Tier II Plus Team and the Tier III Minus Team.

20. The market for Space Launch Vehicle Propulsion Systems is highly concentrated as measured by the HHI or concentration ratios.

21. Respondent, through the proposed Acquisition, would be engaged in the research, development, manufacture and sale of a wide range of Space Launch Vehicles and Space Launch Vehicle Propulsion Systems.

VII. BARRIERS TO ENTRY

22. Entry into the market for the research, development, manufacture and sale of High Altitude Endurance Unmanned Air Vehicles would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph twenty-six because of, among other things, the difficulty involved in developing the technology and expertise necessary to produce High Altitude Endurance Unmanned Air Vehicles.

23. Entry into the market for the research, development, manufacture and sale of High Altitude Endurance Unmanned Air Vehicles is not likely to occur to deter or counteract the adverse competitive effects described in paragraph twenty-six because of, among other things, the expense required to develop the technology and expertise necessary to produce High Altitude Endurance Unmanned Air Vehicles.

24. Entry into the market for the research, development, manufacture and sale of Space Launch Vehicle Propulsion Systems would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph twenty-six because of, among other things, the difficulty involved in developing the

technology and expertise necessary to produce Space Launch Vehicle Propulsion Systems.

25. Entry into the market for the research, development, manufacture and sale of Space Launch Vehicle Propulsion Systems is not likely to occur to deter or counteract the adverse competitive effects described in paragraph twenty-six because of, among other things, the expense required to develop the technology and expertise necessary to produce Space Launch Vehicle Propulsion Systems.

VIII. EFFECTS OF THE ACQUISITION

26. The effects of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the United States markets for High Altitude Endurance Unmanned Air Vehicles and Space Launch Vehicles in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By reducing actual, direct and substantial competition between the Tier II Plus Team and the Tier III Minus Team in the research, development, manufacture and sale of High Altitude Endurance Unmanned Air Vehicles;

b. By increasing the likelihood that the Department of Defense would be forced to pay higher prices for High Altitude Endurance Unmanned Air Vehicles;

c. By increasing the likelihood that quality and technological innovation in the High Altitude Endurance Unmanned Air Vehicle market would be reduced;

d. By allowing respondent to gain access to competitively sensitive non-public information concerning the Tier II Plus team, whereby:

(1) Actual, direct and substantial competition between the Tier II Plus Team and the Tier III Minus Team in the High Altitude Endurance Unmanned Air Vehicle market would be reduced;

(2) The likelihood that the Department of Defense would be forced to pay higher prices for High Altitude Endurance Unmanned Air Vehicles would be increased; and

(3) Quality and technical innovation in the High Altitude Endurance Unmanned Air Vehicle market would be reduced; and

e. By allowing respondent to gain access to competitively sensitive non-public information concerning other Space Launch Vehicle manufacturers, whereby:

(1) Actual competition between respondent and other Space Launch Vehicle manufacturers would be reduced; and

(2) Quality and technical innovation in the Space Launch Vehicle market would be reduced.

IX. VIOLATIONS CHARGED

27. The Acquisition described in paragraph fifteen constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

28. The Acquisition described in paragraph fifteen, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of Rockwell International Corporation's Aerospace and Defense business, and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented 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

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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The 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 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, and having duly considered the comment filed thereafter by the respondent pursuant to Section 2.34 of its Rules, and having modified the Decision and Order in certain respects, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The Boeing Company ("Boeing") is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 7755 East Marginal Way South, Seattle, Washington.

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 *"Boeing"* means The Boeing Company, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by The Boeing Company, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. Boeing also includes Rockwell Aerospace and Defense.

B. *"Rockwell"* means Rockwell International Corporation, a corporation organized, existing and doing business under the laws of the state of Delaware, with its office and principal place of business located at 2201 Seal Beach Boulevard, Seal Beach, California, its

directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Rockwell International Corporation, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

C. *"Rockwell Aerospace and Defense"* means Rockwell's Aerospace and Defense businesses, including the Autonetics and Missiles Systems Division, North American Aircraft Division, North American Aircraft Modification Division, Rocketdyne Division, Space Systems Division and Rockwell's interest in United Space Alliance, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Rockwell Aerospace and Defense, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. Rockwell Aerospace and Defense does not include any of the assets that are not included in the Acquisition and that will remain part of Rockwell after the Acquisition.

D. *"Acquisition"* means the acquisition of Rockwell Aerospace and Defense by Boeing.

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

F. *"Allegheny Teledyne"* means Allegheny Teledyne Incorporated, a corporation organized, existing and doing business under and by virtue of the laws of the state of Massachusetts, with its office and principal place of business located at 1000 Six PPG Place, Pittsburgh, Pennsylvania, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Allegheny Teledyne Incorporated, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

G. *"Teledyne Ryan"* means Teledyne Ryan Aeronautical, a division of Allegheny Teledyne, with its office and principal place of business located at 2701 Harbor Drive, San Diego, California, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Teledyne Ryan Aeronautical, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

H. *"Person"* means any natural person, corporate entity, partnership, association, joint venture, government entity, trust or other business or legal entity.

I. *"Tier II Plus"* or *"Global Hawk"* means the Tier II Plus high altitude endurance unmanned air vehicle currently being developed for the United States Advanced Research Projects Agency.

J. *"Tier II Plus Wings"* means the completed and integrated wing assemblies used for Tier II Plus.

K. *"Tier II Plus Wings Special Tooling and Special Test Equipment"* means all of the special tooling and special test equipment, as the terms special tooling and special test equipment are defined in Federal Acquisition Regulations, 48 CFR ("FAR") 45.101, used in the design, development and manufacture of Tier II Plus Wings.

L. *"Tier II Plus Wings Engineering and Design Data"* means all of the engineering and design data, in both electronic and hard copy, used in the design, development and manufacture of Tier II Plus Wings.

M. *"Tier II Plus Prime Agreement"* means Agreement No. MDA972-95-3-0013 between Teledyne Ryan and the Defense Advanced Research Projects Agency and any amendments to such agreement.

N. *"Phase II Flight & System Performance Test"* means all of the flights and tests of Tier II Plus associated with Phase II of the United States Advanced Research Projects Agency's Tier II Plus program.

O. *"Tier III Minus"* or *"DarkStar"* means the Tier III Minus high altitude endurance unmanned air vehicle currently being developed for the United States Advanced Research Projects Agency.

P. *"Space Launch Vehicle"* means any vehicle designed to launch satellites or persons into space.

Q. *"Space Launch Vehicle Propulsion System"* means any device designed, developed, manufactured or sold by Rocketdyne that is used to provide propulsion to a Space Launch Vehicle.

R. *"Rockwell NAAD"* means Rockwell International Corporation's North American Aircraft Division, an entity included within Rockwell Aerospace and Defense and as part of the Acquisition, with its principal place of business at 2201 Seal Beach Boulevard, Seal Beach, California, or any other entity within or controlled by Boeing engaged in, among other things, the research, development,

manufacture or sale of Tier II Plus Wings, and its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Rockwell NAAD, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

S. *"Rockwell NAAD Tulsa"* means Rockwell North American Aircraft Division, Tulsa, a Rockwell NAAD facility located at 2000 North Memorial Drive, P.O. Box 582808, Tulsa, Oklahoma, or any other facility within or controlled by Boeing engaged in, among other things, the research, development, manufacture or sale of Tier II Plus Wings, and its directors, officers, employees, agents and representatives, predecessors**,** successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Rockwell NAAD Tulsa, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

T. *"Rocketdyne"* means Rockwell International Corporation's Rocketdyne Division, an entity included within Rockwell Aerospace and Defense and as part of the Acquisition, with its principal place of business at 6633 Canoga Avenue, Canoga Park, California, or any other entity within or controlled by Boeing engaged in, among other things, the research, development, manufacture or sale of Space Launch Vehicle Propulsion Systems, and its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Rocketdyne, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

U. *"Boeing Tier III Minus Business"* means any entity within or controlled by Boeing that is engaged in, among other things, the research, development, manufacture or sale of Tier III Minus, and its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Boeing Tier III Minus Business, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

V. *"Boeing Space Launch Vehicle Business"* means any entity within or controlled by Boeing that is engaged in, among other things, the research, development, manufacture or sale of Space Launch

Vehicles, and its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Boeing Space Launch Vehicle Business, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

W. *"Non-Public Tier II Plus Information"* means any information not in the public domain received or developed by Rockwell in its capacity as a provider of Tier II Plus Wings. Non-Public Tier II Plus Information shall not include: (1) information known or disclosed to respondent, excluding Rockwell Aerospace and Defense, at the time respondent signs the agreement containing consent order in this matter, (2) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, falls within the public domain through no violation of this order by respondent, (3) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Rockwell or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years from the date of disclosure of such Non-Public Tier II Plus Information to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

X. *"Non-Public Tier III Minus Information"* means any information not in the public domain received by Boeing in its capacity as a designer, developer or manufacturer of Tier III Minus. Non-Public Tier III Minus Information shall not include: (1) information known or disclosed to Rockwell NAAD at the time respondent signs the agreement containing consent order in this matter, (2) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, falls within the public domain through no violation of this order by respondent, (3) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, becomes known to Rockwell NAAD from a third party not in breach of a confidential disclosure agreement, or (4) information after six (6) years from the date of disclosure of such Non-Public Tier III Minus Information to

respondent, or such other period as agreed to in writing by respondent and the provider of the information.

Y. *"Boeing Non-Public Tier III Minus Information"* means any information not in the public domain developed by Boeing in its capacity as a designer, developer or manufacturer of Tier III Minus. Boeing Non-Public Tier III Minus information shall not include: (1) information known or disclosed to Rockwell NAAD Tulsa at the time respondent signs the agreement containing consent order in this matter, (2) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, falls within the public domain through no violation of this order by respondent, (3) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, becomes known to Rockwell NAAD Tulsa from a third party not in breach of a confidential disclosure agreement, or (4) information after six (6) years from the date of development of such Boeing Non-Public Tier III Minus Information by respondent.

Z. *"Non-Public Space Launch Vehicle Information"* means (1) any information not in the public domain disclosed by any Space Launch Vehicle manufacturer, other than Boeing, to Rocketdyne in its capacity as a provider of Space Launch Vehicle Propulsion Systems and (a) if written information, designated in writing by the Space Launch Vehicle manufacturer as proprietary information by an appropriate legend, marking, stamp or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the Space Launch Vehicle manufacturer prior to the disclosure or within thirty (30) days after such disclosure; or (2) any information not in the public domain disclosed by any Space Launch Vehicle manufacturer to Rocketdyne in its capacity as a provider of Space Launch Vehicle Propulsion Systems prior to the Acquisition. Non-Public Space Launch Vehicle Information shall not include: (1) information known or disclosed to respondent, excluding Rockwell Aerospace and Defense, at the time respondent signed the agreement containing consent order in this matter, (2) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, falls within the public domain through no violation of this order by respondent, (3) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, becomes known to

respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Rockwell or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years from the date of disclosure of such Non-Public Space Launch Vehicle Information to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

II.

It is further ordered, That respondent shall not hold Teledyne Ryan liable for any damages or costs resulting from the replacement of respondent as the supplier of Tier II Plus Wings.

III.

It is further ordered, That:

A. At any time prior to six (6) months of the date this order becomes final, and if respondent and Teledyne Ryan have not reached an agreement on a new contract for respondent to provide Tier II Plus Wings to Teledyne Ryan, respondent shall, upon request from Teledyne Ryan, deliver to business locations in the United States designated by Teledyne Ryan, and assemble, the Tier II Plus Wings Special Tooling and Special Test Equipment. Respondent shall perform its obligations under this paragraph III.A as soon as practicable after receiving such request from Teledyne Ryan, but in a timeframe not to exceed ninety (90) days from the receipt of such request, or such other time period as agreed to in writing by Teledyne Ryan. Respondent shall not charge Teledyne Ryan for any costs associated with carrying out respondent's obligations under this paragraph III.A that would not be considered allowable, as the term allowable is defined in FAR Section 52.216-7, under the Tier II Plus Prime Agreement. Nothing in this paragraph shall alter respondent's or Teledyne Ryan's rights and obligations pursuant to FAR Section 52.249-6, as incorporated in any current or future Tier II Plus Wings contract between respondent and Teledyne Ryan.

B. At any time prior to six (6) months of the date this order becomes final, and if respondent and Teledyne Ryan have not reached

an agreement on a new contract for respondent to provide Tier II Plus Wings to Teledyne Ryan, respondent shall, upon request from Teledyne Ryan, deliver to business locations in the United States designated by Teledyne Ryan the Tier II Plus Wings Engineering and Design Data. Respondent shall perform its obligations under this paragraph III.B as soon as practicable after receiving such request from Teledyne Ryan, but in a timeframe not to exceed fifteen (15) days from the receipt of such request, or such other time period as agreed to in writing by Teledyne Ryan. Respondent shall not charge Teledyne Ryan for any costs associated with carrying out respondent's obligations under this paragraph III.B that would not be considered allowable, as the term allowable is defined in FAR Section 52.216-7, under the Tier II Plus Prime Agreement.

IV.

It is further ordered, That respondent shall not assert or enforce any proprietary rights in any Tier II Plus Wings Special Tooling and Special Test Equipment or Tier II Plus Wings Engineering and Design Data delivered pursuant to paragraph III of this order.

V.

It is further ordered, That:

A. At any time prior to six (6) months of the date this order becomes final, and if respondent and Teledyne Ryan have not reached an agreement on a new contract for respondent to provide Tier II Plus Wings to Teledyne Ryan, respondent shall provide, upon request from Teledyne Ryan, such assistance to personnel designated by Teledyne Ryan as is reasonably necessary to such personnel to design and manufacture Tier II Plus Wings. Such assistance shall include, but not be limited to, consultation with employees of respondent knowledgeable in the design and manufacture of Tier II Plus Wings, and training at facilities designated by Teledyne Ryan for a period of time and in a manner sufficient to satisfy Teledyne Ryan's management that the designated personnel are appropriately trained in the design and manufacture of Tier II Plus Wings. Respondent shall convey to personnel designated by Teledyne Ryan all know-how necessary to design and manufacture Tier II Plus Wings. However,

respondent shall not be required to continue providing such assistance for more than one (1) year from the date respondent begins providing such assistance, and shall not be required to provide personnel for more than the equivalent of four (4) man-years during this one (1) year period. Respondent shall not charge Teledyne Ryan for any costs associated with carrying out respondent's obligations under this paragraph V.A that would not be considered allowable, as the term allowable is defined in FAR Section 52.216-7, under the Tier II Plus Prime Agreement.

B. Upon reasonable request from Teledyne Ryan, respondent shall provide such additional technical assistance relating to the Tier II Plus Wings to personnel designated by Teledyne Ryan as is reasonably necessary to enable personnel designated by Teledyne Ryan to complete the Phase II Flight & System Performance Test. Such assistance shall include, but not be limited to, consultation with employees of respondent knowledgeable in the design and manufacture of Tier II Plus Wings, and training at facilities designated by Teledyne Ryan for a period of time and in a manner sufficient to satisfy Teledyne Ryan's management that the designated personnel have sufficient knowledge relating to Tier II Plus Wings to be able to support fully Teledyne Ryan's efforts to complete the Phase II Flight & System Performance Test requirements. However, respondent shall not be required to continue providing such assistance after the completion of the Phase II Flight & System Performance Test. Respondent shall charge Teledyne Ryan at a rate of no more than $90 per hour for providing such technical assistance.

VI.

It is further ordered, That:

A. Respondent shall not provide, disclose or otherwise make available to the Boeing Tier III Minus Business any Non-Public Tier II Plus Information.

B. Respondent shall use any Non-Public Tier II Plus Information only in respondent's capacity as a provider of Tier II Plus Wings or technical assistance, pursuant to paragraph V of this order.

VII.

It is further ordered, That:

A. Respondent shall not provide, disclose or otherwise make available to Rockwell NAAD any Non-Public Tier III Minus Information.

B. Respondent shall use any Non-Public Tier III Minus Information only in its capacity as a designer, developer or manufacturer of Tier III Minus.

VIII.

It is further ordered, That respondent shall not provide, disclose or otherwise make available to Rockwell NAAD Tulsa any Boeing Non-Public Tier III Minus Information.

IX.

It is further ordered, That:

A. Rocketdyne shall not, absent the prior written consent of the proprietor of Non-Public Space Launch Vehicle Information, provide, disclose or otherwise make available to Boeing Space Launch Vehicle Business any Non-Public Space Launch Vehicle Information.

B. Rocketdyne shall use any Non-Public Space Launch Vehicle Information only in its capacity as a provider of Space Launch Vehicle Propulsion Systems, absent the prior written consent of the proprietor of the Non-Public Space Launch Vehicle Information.

X.

It is further ordered, That respondent shall deliver a copy of this order to any Space Launch Vehicle manufacturer prior to obtaining, either from the Space Launch Vehicle manufacturer or through the Acquisition, any information outside the public domain relating to that manufacturer's Space Launch Vehicle.

XI.

It is further ordered, That respondent shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I.

XII.

It is further ordered, That within sixty (60) days of the date this order becomes final and annually for the next ten (10) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner

and form in which it has complied and is complying with paragraphs II through X of this order. Respondent shall include in its reports information sufficient to identify all Space Launch Vehicle Manufacturers with whom respondent has entered into an agreement for the research, development, manufacture or sale of Space Launch Vehicle Propulsion Systems.

XIII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or sale of any division or any other change in respondent that may affect compliance obligations arising out of the order.

XIV.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege and applicable United States Government national security requirements, upon written request, and on reasonable notice, respondent shall permit any duly authorized representative 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 it, to interview officers, directors, or employees of respondent, who may have counsel present, regarding such matters.

XV.

It is further ordered, That this order shall terminate on March 5, 2017, except as otherwise provided in this order.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between The Boeing Company ("Boeing"), a corporation organized and existing under the laws of the State of Delaware, and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

PREMISES

Whereas, Boeing has proposed to acquire Rockwell International Corporation's Aerospace and Defense business; and

Whereas, the Commission is now investigating the proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached preserving competition during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm and divestiture or other relief resulting from a proceeding challenging the legality of the proposed Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, Boeing entering into this Interim Agreement shall in no way be construed as an admission by Boeing that the proposed Acquisition constitutes a violation of any statute; and

Whereas, Boeing understands that no act or transaction contemplated by this Interim Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Interim Agreement,

Now, therefore, Boeing agrees, upon the understanding that the Commission has not yet determined whether the proposed Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Boeing agrees to execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Boeing signs the Consent Agreement.

2. Boeing agrees to deliver, within three (3) days of the date the Consent Agreement is accepted for public comment by the Commission, a copy of the Consent Agreement and a copy of this Interim Agreement to the United States Department of Defense, Teledyne Ryan Aeronautical, McDonnell Douglas Corporation and Lockheed Martin Corporation.

3. Boeing agrees to submit, within thirty (30) days of the date the Consent Agreement is signed by Boeing, an initial report, pursuant to Section 2.33 of the Commission's Rules, signed by Boeing setting forth in detail the manner in which Boeing will comply with paragraphs II through X of the Consent Agreement. Boeing agrees to include in such report a detailed description and explanation of the procedures it has implemented or will implement to comply with paragraphs II through X of the order.

4. Boeing agrees that, from the date Boeing signs the Consent Agreement until the first of the dates listed in subparagraphs 4.a and 4.b, it will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date the Commission finally issues its complaint and its Decision and Order.

5. Boeing waives all rights to contest the validity of this Interim Agreement.

6. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege and applicable United States Government national security requirements, upon written request, and on reasonable notice, to

Boeing made to its principal office, Boeing shall permit any duly authorized representative or representatives 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 Boeing relating to compliance with this Interim Agreement; and

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

7. This Interim Agreement shall not be binding until accepted by the Commission.

IN THE MATTER OF

PROGRESSIVE MORTGAGE CORPORATION, ET AL.

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

Docket C-3724. Complaint, March 10, 1997--Decision, March 10, 1997

This consent order prohibits, among other things, the Ohio-based mortgage corporation and its president from misrepresenting any terms or conditions of financing, such as, the annual percentage rate and finance charges of consumer loans; the number, amount and timing of mortgage payments; and the total number of payments to repay consumer loans.

Appearances

For the Commission: *John Mendenhall* and *Brenda Doubrava*.
For the respondents: *Leonard Wolkov,* Russell, OH.

COMPLAINT

The Federal Trade Commission, having reason to believe that Progressive Mortgage Corporation, a corporation, has violated the provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, and the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, and that Sanford Cramer, individually and as an officer of Progressive Mortgage Corporation, has violated the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, issues this complaint and alleges as follows:

PARAGRAPH 1. Respondent Progressive Mortgage Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business at 5400 Transportation Boulevard, Cleveland, Ohio.

Respondent Sanford Cramer is the President of Progressive Mortgage Corporation. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal place of business is the same as that of the corporate respondent.

PAR. 2. Respondent Progressive Mortgage Corporation has been and is now engaged in the business of offering "consumer credit" to the public and is a "creditor," as those terms are defined in the TILA and Regulation Z.

PAR. 3. The acts and practices of respondents alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in the FTC Act, 15 U.S.C. 44.

PAR. 4. Respondent Progressive Mortgage Corporation, in the course and conduct of its business, on certain occasions, has failed to include the premiums for mortgage insurance, for so long as such insurance is required, in determining the finance charge and annual percentage rate for consumer credit transactions, and, thus, has understated the annual percentage rate and finance charge in its TILA disclosures.

PAR. 5. The aforesaid practice of respondent Progressive Mortgage Corporation violates Sections 106, 107 and 128 of the TILA, 15 U.S.C. 1605, 1606 and 1638, respectively, and Sections 226.4(b)(5); 226.22; and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4(b)(5); 226.22; and 226.18(d) and (e), respectively, and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 6. Respondent Progressive Mortgage Corporation, in the course and conduct of its business, on certain occasions, has failed to disclose accurately the number, amount, and timing of payments scheduled to repay the obligation in its TILA disclosures.

PAR. 7. The aforesaid practice of respondent Progressive Mortgage Corporation violates Section 128 of the TILA, 15 U.S.C. 1638, and Section 226.18(g) of Regulation Z, 12 CFR 226.18(g), and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 8. Respondent Progressive Mortgage Corporation, in the course and conduct of its business, on certain occasions, has failed to disclose accurately the total of payments scheduled to repay the obligation in its TILA disclosures.

PAR. 9. The aforesaid practice of respondent Progressive Mortgage Corporation violates Section 128 of the TILA, 15 U.S.C. 1638, and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h), and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 10. Respondent Sanford Cramer, in the course and conduct of his business, has provided written disclosures to customers and potential customers of Progressive Mortgage Corporation relating to the TILA that state, for mortgage loans, the annual percentage rate, the finance charge, the monthly payment amount, and the total of payments scheduled to repay the obligation.

PAR. 11. Through the use of these written disclosures, respondent Sanford Cramer has represented, directly or by implication, that the figures and amounts stated therein truthfully represent the annual percentage rate, the finance charge, the monthly payment amount, and the total of payments scheduled to repay the obligation.

PAR. 12. In truth and fact, on certain occasions, the figures and amounts contained in these written disclosures were less than the actual annual percentage rate, finance charge, monthly payment amount, and total of payments scheduled to repay the obligation. Therefore, the representations set forth in paragraph eleven were, and are, false and misleading.

PAR. 13. The aforesaid acts and practices of respondent Sanford Cramer constitute unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondents, Progressive Mortgage Corporation and Sanford Cramer, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act ("TILA") and its implementing Regulation Z, and Section 5 of The Federal Trade Commission Act ("FTC Act"); and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Progressive Mortgage Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio with its principal office and place of business located at 5400 Transportation Boulevard, Cleveland, Ohio.

Respondent Sanford Cramer is president of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above address.

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

ORDER

I.

It is ordered, That respondent, Progressive Mortgage Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, division, subsidiary or any other device, in connection with any extension of consumer credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to include premiums for mortgage insurance, for so long as such insurance is required, in determining the finance charge and annual percentage rate as required by Sections 106 and 107 of the

TILA, 15 U.S.C. 1605 and 1606, and Sections 226.4(b)(5) and 226.22 of Regulation Z, 12 CFR 226.4(b)(5) and 226.22.

B. Failing to disclose accurately, where mortgage insurance is required, the finance charge and the annual percentage rate as required by Sections 106, 107 and 128 of the TILA, 15 U.S.C. 1605, 1606, and 1638, and Section 226.4, 226.22, and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4, 226.22, and 226.18(d) and (e).

C. Failing to disclose accurately, where mortgage insurance is required, the number, amount, and timing of payments scheduled to repay the obligation, as required by Section 128 of the TILA, 15 U.S.C. 1638, and Section 226.18(g) of Regulation Z, 12 CFR 226.18(g).

D. Failing to disclose accurately, where mortgage insurance is required, the total of payments scheduled to repay the obligation, as required by Section 128 of the TILA, 15 U.S.C. 1638, and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

E. Failing to make all disclosures determined in accordance with Sections 106 and 107 of the TILA, 15 U.S.C. 1605 and 1606, and Sections 226.4 and 226.22 of Regulation Z, 12 CFR 226.4 and 226.22, in the manner, form and amount required by Sections 226.17, 226.18, 226.19, and 226.20 of Regulation Z, 12 CFR 226.17, 226.18, 226.19, and 226.20.

F. Misrepresenting any term or condition of financing for any consumer credit transaction.

II.

It is further ordered, That respondent Sanford Cramer, individually and as an officer of respondent Progressive Mortgage Corporation, and his agents, representatives and employees, directly or through any corporation, division, subsidiary or any other device in connection with any extension of consumer credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting the annual percentage rate and the finance charge in written disclosures provided to consumers relating to the TILA.

B. Misrepresenting the number, amount, and timing of payments scheduled to repay the obligation in written disclosures provided to consumers relating to the TILA.

C. Misrepresenting the total of payments scheduled to repay the obligation in written disclosures provided to consumers relating to the TILA.

D. Misrepresenting any term or condition of financing for any consumer credit transaction.

III.

It is further ordered, That for six (6) years after the date of service of this order, respondent Progressive Mortgage Corporation, its successors or assigns, and respondent Sanford Cramer, individually and as an officer of Progressive Mortgage Corporation, shall maintain and upon request make available to the Commission and its employees all records that will demonstrate compliance with the requirements of this order.

IV.

It is further ordered, That respondent Progressive Mortgage Corporation, and its successors and assigns, and respondent Sanford Cramer, shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

It is further ordered, That respondent Progressive Mortgage Corporation and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale,

merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

It is further ordered, That respondent Sanford Cramer shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the date of service of this order, he shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include his business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of his duties and responsibilities in connection with the business or employment.

VII.

It is further ordered, That respondent Progressive Mortgage Corporation, its successors and assigns, and respondent Sanford Cramer shall, within sixty (60) days of the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. The report shall be forwarded to the Federal Trade Commission, Enforcement Division, Washington, D.C.

VIII.

It is further ordered, That this order shall terminate on March 10, 2017, or twenty (20) years from the most recent date that the United

States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER

TRANS UNION CORPORATION

Docket 9255. Interlocutory Order, March 12, 1997

ORDER DIRECTING GENERAL COUNSEL TO ENFORCE THIRD-PARTY SUBPOENA

In early November 1996, respondent Trans Union Corporation ("Trans Union") served a non-party, Experian Information Solutions Inc. ("Experian"), with a *subpoena duces tecum.* On January 24, 1997, Experian, which competes with Trans Union in providing services at issue in this case, filed a motion to quash this subpoena, which the Administrative Law Judge denied by order of February 19, 1997. On March 5, 1997, Trans Union filed a Motion for Enforcement of a Subpoena Duces Tecum Issued to Experian Information Solutions, Inc. On March 6, 1997, the Administrative Law Judge certified Trans Union's motion for enforcement of the subpoena to the Commission with a recommendation that the Commission seek enforcement.

The subpoena to Experian seeks documents falling into two categories: those relating to the source and makeup of Experian's target-marketing lists, and those relating to consent orders entered in 1991 and 1993 against Experian's predecessor, TRW. Trans Union and Experian have agreed, in a document signed on December 13, 1996, to limit the scope of the subpoena. The limitations agreed to reflect the objections and concerns later raised in Experian's Motion To Quash. After this agreement was reached, Experian produced certain documents in response to the subpoena.

The current dispute does not concern documents. The issue is whether, in further response to the subpoena, Experian will produce a representative for an oral deposition who can "authenticate any documents Experian produced in response to the Subpoena and . . . explain general background information that [is] either not contained in the documents or [is] not self-evident from the documents." Trans Union's Response to Motion To Quash at 7. Experian acknowledges that "negotiations ha[ve] broken down due to an impass on [the] single issue . . . whether Experian voluntarily would produce a

witness to testify regarding the documents requested in the Subpoena." Motion To Quash at 2.

The motion to quash takes the position that "an unrestrained oral deposition would endanger Experian's confidential business strategies and proprietary trade secrets. . . ." Motion To Quash at 2-3. For the most part, however, Experian's motion appears to be an effort to argue to the Administrative Law Judge issues that were largely resolved in negotiations with Trans Union over the scope of the subpoena. Although Trans Union has offered to meet with the deponent and Experian's counsel before conducting the deposition to discuss the scope of questioning, Experian has declined, arguing that unless Trans Union is willing to accept alternative discovery in the form of a sworn declaration or an oral deposition on written questions, it will not produce the requested representative in response to the subpoena.

The Administrative Law Judge refused to quash the subpoena, ruling that "Trans Union's refusal to accept the alternative discovery offered by Experian is not unreasonable, and its offer of a meeting before a deposition is conducted is acceptable." Order at 3. He also observed that "[s]ince Experian and Trans Union have agreed on the information which will be produced pursuant to the subpoena, there is no need to consider any arguments raised by Experian except that involving the proposed deposition." *Id.*

The Commission agrees with the ruling of the Administrative Law Judge on the motion to quash. In addition, the Commission has a strong interest in ensuring the integrity of its adjudicative process. In his certification, the Administrative Law Judge concludes that "[t]he information sought by Trans Union is relevant and Experian's refusal to comply with my order justifies Trans Union's request for court enforcement of the subpoena." *Id.* at 1. The Commissionn agrees that enforcement of the subpoena is warranted. The Commission notes, however, that by producing its representative in response to the subpoena, Experian, of course, would not waive its right to limit the information provided in response to questions proffered on grounds of privilege, or to request the Administrative Law Judge to issue an appropriate protective order limiting access to the information provided. Accordingly,

It is ordered, That the General Counsel be, and he hereby is directed promptly to take appropriate action to enforce Trans Union's subpoena to Experian.

IN THE MATTER OF

CIBA-GEIGY LIMITED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3725. Complaint, March 24, 1997--Decision, March 24, 1997

This consent order requires, among other things, the licensing of specified gene therapy technology and patent rights to Rhone-Poulene Rorer, Inc., to put Rhone-Poulene in a position to compete against the combined firm. The consent order also requires divestiture of the Sandoz U.S. and Canadian corn herbicide assets to BASF and its flea control business to Central Garden & Pet Company or another Commission-approved buyer.

Appearances

For the Commission: *William Baer, Howard Morse* and *Morris Bloom.*

For the respondents: *Kenneth Prince, Shearman & Sterling,* New York, N.Y. and *Michael Malina, Kaye, Scholer, Fierman, Hays & Handler,* New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the "Commission"), having reason to believe that respondents Ciba-Geigy Ltd., a corporation including its wholly-owned subsidiary, Ciba-Geigy Corporation, (collectively, "Ciba"), and Sandoz Ltd., a corporation, including its wholly-owned subsidiary, Sandoz Corporation, (collectively, "Sandoz"), corporations subject to the jurisdiction of the Commission, have agreed to merge into Novartis Ltd. ("Novartis"), a corporation, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Ciba-Geigy Limited is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Klybeckstrasse 141, CH-4002 Basel, Switzerland. Ciba operates in the United States through its wholly-owned subsidiary, Ciba-Geigy Corporation, and is engaged in the discovery, development, manufacture and sale of agricultural crop protection chemicals, proprietary and generic pharmaceutical products, and animal health products. Ciba participates in the field of gene therapy in the United States through the Chiron Corporation.

2. Respondent Ciba-Geigy Corporation, a wholly-owned subsidiary of Ciba-Geigy Limited, is a corporation organized, existing, and doing business under and by virtue of the laws of New York with its office and principal place of business located at 520 White Plains Road, Tarrytown, New York.

3. Respondent Sandoz Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Lichtstrasse 35, CH-4002 Basel, Switzerland. Sandoz operates in the United States through its wholly-owned subsidiary, Sandoz Corporation, and is engaged in the discovery, development, manufacture and sale of agricultural crop protection chemicals, proprietary and generic pharmaceutical products, and animal health products. Sandoz participates in the field of gene therapy in the United States through its wholly-owned subsidiary, Sandoz Pharmaceuticals Corporation, headquartered in New Jersey, and through its wholly-owned subsidiary, Genetic Therapy, Inc., headquartered in Maryland.

4. Respondent Sandoz Corporation, a wholly-owned subsidiary of Sandoz Ltd., is a corporation organized, existing, and doing business under and by virtue of the laws of New York with its office and principal place of business located at 608 Fifth Avenue, New York, New York.

5. Respondent Chiron Corporation ("Chiron") is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 4560 Horton Street, Emeryville, California. Ciba-Geigy Limited, together with its subsidiaries, is the largest shareholder of Chiron, holding, not solely for investment, approximately 46.5% of

the Chiron capital stock as of September 30, 1996. Chiron is engaged in the discovery, development, manufacture and sale of proprietary and generic pharmaceutical products, including gene therapy products. Ciba has agreed to fund research at Chiron and guarantee its debt, and has the right to appoint members of its board of directors and to veto specified actions of the company.

6. Respondent Novartis AG, is a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located at Centralbahnstrasse 7, CH-4010 Basel, Switzerland.

II. JURISDICTION

7. Ciba, Sandoz, Chiron, and Novartis are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE PROPOSED MERGER

8. On or about March 6, 1996, Ciba and Sandoz signed a merger agreement providing that both companies will merge with Novartis Ltd., a Swiss company jointly formed by Ciba and Sandoz to effectuate the merger of their businesses. The total value of the stock involved in the transaction is in excess of $63 billion. The merged entity, Novartis, will control worldwide assets valued at approximately $80 billion.

IV. THE RELEVANT MARKETS

9. One relevant line of commerce in which to analyze the effects of the proposed merger is gene therapy technology and research and development of gene therapies, including *ex vivo* and *in vivo* gene therapy. Specific gene therapy product markets, in which the effects of the proposed merger may be analyzed include the research, development, manufacture and sale of:

(a) Herpes simplex virus-thymidine kinase ("HSV-tk") gene therapy for the treatment of cancer;

(b) HSV-tk gene therapy for the treatment of graft versus host disease;

(c) Gene therapy for the treatment of hemophilia; and

(d) Chemoresistance gene therapy.

Gene therapy is a therapeutic intervention in humans based on modification of the genetic material of living cells. Cells may be modified *ex vivo* for subsequent administration or altered *in vivo* by gene therapy products given directly to the patient.

10. While no gene therapy product has yet been approved by the FDA, gene therapy treatments now in clinical trials offer patients the prospect of significant medical improvements or cures for diseases, particularly in oncology, transplantation and central nervous system diseases. The first regulatory approvals for commercial sales of gene therapy products, expected by the year 2000, will most likely be in the area of oncology. These oncology gene therapy products are anticipated to have sales exceeding $600 million by 2002 and will likely use the HSV-tk gene with viral vectors, the means of delivering the gene. Sales of all gene therapy products are projected to reach $45 billion by 2010, resulting from approvals for additional gene therapies using the HSV-tk gene and other gene therapies. HSV-tk gene therapy is expected to be used, *inter alia*, to treat graft versus host disease, an acute, chronic and sometimes fatal complication occurring in approximately 70 percent of all bone marrow transplantations. Gene therapy treatments for hemophilia are likely to be used prophylactically, other than in cases of trauma in which instance gene therapy products would likely be used in combination with recombinant and purified Factor VIII proteins. Cancer patients could benefit significantly from gene therapy for chemoresistance that could provide protection to patients' blood systems and allow higher, more effective doses of cancer chemotherapy to be administered. If chemoresistance gene therapy research is successful, sales are projected to exceed $1 billion by 2004. There are no economic substitutes for gene therapy products.

11. Another relevant line of commerce in which to analyze the effects of the proposed merger is the research, development, manufacture and sale of corn herbicide. Corn herbicides are chemical products designed to kill or control weeds that interfere with corn production. Separate markets for corn herbicides are distinguished by

the types of weeds, *i.e.*, broadleaf or grass, against which the herbicide is economically effective and the stage of growth of the corn crop or weed, *i.e.*, pre-emergent or post emergent, at which the herbicide is both safe for use on the corn crop and economically effective against the weeds to be controlled. Corn herbicides are essential to economic production of corn. There are no economic substitutes for corn herbicide for pre-emergent control of grasses or for corn herbicides for post emergent control of broadleaf weeds.

12. Another relevant line of commerce in which to analyze the effects of the proposed merger is the research, development, manufacture and sale of flea control products. Flea control products are chemical products designed to treat and prevent flea infestation in cats and dogs. Flea control products are sold in various forms including pills, collars, shampoos, sprays, and foggers, and are sold through various channels of distribution including veterinarians, pet specialty stores, lawn and garden centers, mass merchandisers, and grocery stores.There are no economic substitutes for flea control products for the treatment and prevention of flea infestation in cats and dogs.

13. The United States is a relevant geographic area in which to analyze the effects of the merger. U.S. Environmental Protection Agency ("EPA") and Food and Drug Administration ("FDA") regulations impose substantial barriers on the introduction of products which do not meet those agencies' regulations.

V. STRUCTURE OF THE MARKETS

Gene Therapy

14. The market for the research and development of gene therapy is highly concentrated. Ciba and Chiron together, and Sandoz, are two of only a few entities capable of commercially developing gene therapy products. Only Ciba together with Chiron, and Sandoz control the substantial proprietary rights necessary to commercialize gene therapy products and possess the technological, manufacturing, clinical, regulatory expertise and manufacturing capability to commercially develop gene therapy products. Each is either in clinical development or near clinical development for the treatment of human diseases for which there are large unmet medical needs.

15. Ciba and Chiron together, and Sandoz are the two leading commercial developers of gene therapy technologies and control critical gene therapy proprietary portfolios, including patents, patent applications, and know-how.

16. The market for the research and development of HSV-tk gene therapy for the treatment of cancer is highly concentrated. Only two companies are capable of commercially developing HSV-tk gene therapy products with viral vectors and are either in clinical development or near clinical development to treat cancer. Sandoz and Chiron are the leading commercial developers of these gene therapy technologies and control critical proprietary intellectual property portfolios, including patents, patent applications, and know-how.

17. The market for the research and development of HSV-tk gene therapy for the treatment of graft versus host disease is also highly concentrated. Only two companies are capable of commercially developing HSV-tk gene therapy products with viral vectors, and are either in clinical development or near clinical development to treat graft versus host disease. Chiron and Sandoz are the leading commercial developers of these gene therapy technologies and/or control critical proprietary intellectual property portfolios, including patents, patent applications, and know-how.

18. The market for the research and development of gene therapy for the treatment of hemophilia is highly concentrated. Only two companies are capable of commercially developing gene therapy products for the treatment of hemophilia using the Factor VIII gene with viral vectors. Chiron and Sandoz are the leading commercial developers of these gene therapy technologies and control critical proprietary intellectual property portfolios, including patents, patent applications, and know-how.

19. The market for the research and development of chemoresistance gene therapy is highly concentrated. Only three companies are capable of commercially developing gene therapy products for the treatment of chemoresistance using the MDR-1 gene and only two companies are capable of commercially developing gene therapy products for the treatment of chemoresistance using the MRP gene. Chiron and Sandoz are the leading commercial developers of these gene therapy technologies and/or control critical proprietary intellectual property portfolios, including patents, patent applications, and know-how.

Corn Herbicides

20. The market for corn herbicide, and the relevant markets included therein, herbicide for pre-emergent control of grasses and herbicide for post-emergent control of broadleaf weeds, are each highly concentrated, as measured by the Herfindahl-Hirschmann Index ("HHI") and other measures of concentration. Ciba is the leading developer, manufacturer and seller of corn herbicide in the United States with a share of over 35 percent of sales and over 40 percent of treated acres. Sandoz has approximately a 10 percent share by either measure. United States sales of corn herbicide totaled $1.4 billion in 1995. The proposed merger would increase concentration, as measured by the HHI, by approximately 700 points for dollar sales, and by approximately 1000 points for treated acres, to approximately 3000 for sales and approximately 3300 for treated acres.

21. Ciba's metholachlor herbicides, sold under the brands Dual® and Bicep®, are the leading corn herbicides for pre-emergent control of grasses in the United States. Ciba products accounted for over 40 percent of pre-emergent treatment of corn acres for grasses in 1995. In 1996, Sandoz doubled its sales of its recently introduced dimethenamid herbicides, sold under the brands Frontier® and Guardsman®, which accounted for approximately 3 percent of pre-emergent treatment of corn acres for grasses in 1995. Based on 1995 treated acres, the proposed merger would increase concentration, as measured by the HHI, by approximately 300 points to approximately 3400.

22. Sandoz's dicamba herbicides, sold under the brands Banvel®, Marksman®, and Clarity®, are the leading corn herbicides for post-emergent control of broadleaf weeds in the United States. Sandoz products accounted for over 30 percent of post emergent treatment of corn acres for broadleaf weeds in 1995. In 1996, Ciba tripled its sales of its recently introduced sulfonyl urea herbicide, sold under the brand Exceed®, which accounted for approximately 5 percent of post emergent treatment of corn acres for broadleaf weeds in 1995. Based on 1995 post emergent broadleaf treated acres, the proposed merger would increase concentration, as measured by the HHI, by approximately 1900 points to over 4000. Moreover, Ciba and Sandoz recognize that current users of Sandoz's dicamba herbicides are the

principal target for expected market share gain by Ciba's Exceed® herbicide.

23. Prior to the merger described in paragraph eight, Ciba and Sandoz each cooperated and coordinated with other producers of corn herbicide through supply agreements for corn herbicide active ingredients and through joint development and promotion of corn herbicide formulations. Ciba is the dominant supplier of atrazine, a broadleaf weed control product that is widely used as a component in premixed herbicide formulations, including Marksman®, Guardsman® and Bicep®, as well as in pre-emergent and post-emergent herbicides sold by competitors of Ciba and Sandoz. Supply agreements, joint product development agreements, and joint marketing agreements among producers of corn herbicides increase coordinated interaction and the recognition of mutual interdependence among competitors in each of the relevant markets for corn herbicide.

Flea Control Products

24. The flea control products market is very highly concentrated as measured by the HHI and other measures of concentration. Sales of flea control products in the U.S. amounted to approximately $400 million in 1995. Ciba is the leading developer, manufacturer and seller of flea control products with a share of approximately 50 percent. Ciba's Program® has a dominant share of the flea control products market. Sandoz ranks second in flea control products sales from sales of Vetkem® and Zodiac® flea control products and sales of base active methoprene. The proposed merger would increase concentration as measured by the HHI by approximately 3050 points to a level of approximately 6600. Moreover, prior to the merger described in paragraph eight, Sandoz and Ciba were developing additional flea control products, which likely would be direct and substantial competitors.

VI. ENTRY CONDITIONS

25. Entry into the relevant markets would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects of the merger. Regulations by the Food and Drug Administration ("FDA") covering gene therapy products and systemic flea control products and by the Environmental Protection

Agency ("EPA") covering corn herbicides and externally applied flea control products create long lead times for the introduction of new products. Additionally, patents and other intellectual property create large and potentially insurmountable barriers to entry.

Gene Therapy

26. Entry into the gene therapy markets requires lengthy clinical trials, data collection and analysis, and expenditures of significant resources over many years to qualify manufacturing facilities with the FDA. Entry into each gene therapy market can extend up to and beyond 10 to 12 years. The most significant barriers to entry include technical, regulatory, patent, clinical and production barriers. The FDA must approve all phases of gene therapy development, including extensive preclinical and clinical work. No company may reach advanced stages of development in the relevant gene therapy markets without: (1) clinical gene therapy expertise; (2) scientific research that requires years to complete; (3) patent rights to all the necessary proprietary inputs into the gene therapy product sufficient to provide the company with reasonable assurances of freedom to operate; and (4) clinical grade product manufacturing expertise, regulatory approvals and capacity to complete clinical development. The necessary proprietary inputs include genes, vectors and vector manufacturing technology, and cytokines, proteins necessary for many gene therapy applications.

Corn Herbicides

27. Despite the expiration of United States patents on dicamba and metolachlor, post-patent strategies pursued by Ciba and Sandoz, including product reformulation, distribution agreements, purchase and supply contracts with manufacturers, and joint product development agreements, have limited entry of generic competition to Ciba's leading pre-emergent grass herbicides and Sandoz's leading post emergent broadleaf herbicides.

28. Entry into the corn herbicide markets requires over a decade for chemical synthesis; laboratory and greenhouse testing; formulation; process development; pilot production; pilot trials; field trials; testing for acute, subchronic and chronic toxicity, carcinogenic and genetic effects, and incidence of birth defects that may be associated with the product; environmental toxicology testing; measurement of plant, animal, soil, water and air residues and testing of degradation of plant, animal, soil, and water environment; data collection; product registration and EPA review; construction of production facilities; and use optimization. Once a product is

introduced to the market, several years are often required to gain customer acceptance through demonstrated safety, performance and reliability, over a variety of weather conditions.

Flea Control Products

29. Entry into the flea control products market requires over a decade for chemical synthesis, lengthy clinical trials, data collection and analysis, and expenditures of significant resources over many years as well as qualified manufacturing facilities in order to achieve the required EPA or FDA approvals for commercial sale of these products. Once a product is introduced to the market, extensive sunk costs must be incurred for advertising and promotion to gain significant customer and pet owner acceptance.

30. Despite the expiration of United States patents on methoprene, the base active ingredient used in Sandoz's second generation flea control products, the EPA registrations and proprietary technology involved in the production of methoprene, have prevented entry of generic competition to Sandoz's flea control products.

VII. EFFECTS OF THE PROPOSED MERGER

31. The effects of the merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45. Specifically the merger will:

a. Eliminate Ciba and Sandoz as substantial, independent competitors; eliminate actual, direct, and substantial competition between Ciba and Sandoz, including the reduction in, delay of or redirection of research and development projects; and increase the level of concentration in the relevant markets;

b. Eliminate actual potential and perceived potential competition in the relevant markets;

c. Increase barriers to entry into the relevant markets;

Gene Therapy

d. Combine alternative technologies, and reduce innovation competition among researchers and developers of gene therapy products, including reduction in, delay of or redirection of research and development tracks;

e. Increase the merged firm's ability to exercise market power, either unilaterally or through coordinated interaction with Chiron, in the gene therapy markets, because the merged firm will have both complete ownership of the Sandoz gene therapy research and development and a 46.5% stock ownership interest in Chiron, the only other firm in a position to commercialize work in gene therapy;

f. Heighten barriers to entry by combining portfolios of patents and patent applications of uncertain breadth and validity, requiring potential entrants to invent around or declare invalid a greater array of patents;

g. Create a disincentive in the merged firm to license intellectual property rights to or collaborate with other companies as compared to premerger incentives;

Corn Herbicides

h. Eliminate the potential for increased actual, direct and substantial price competition and cause consumers to pay higher prices for corn herbicides;

i. Increase the merged firm's ability unilaterally to exercise market power in the market for corn herbicide for post-emergent control of broadleaf weeds, by combining the two closest substitutes in the market;

j. Increase the likelihood and degree of coordinated interaction between or among competitors in the market for corn herbicide for pre-emergent control of grasses;

Flea Control Products

k. Increase the merged firm's ability unilaterally to exercise market power in the flea control products market by combining the two closest substitutes in the market;

l. Increase the likelihood and degree of coordinated interaction between or among competitors in the flea control products market; and

m. Eliminate the potential for actual, direct and substantial price competition and cause consumers to pay higher prices for flea control products, as well as reduce innovation competition among producers of flea control products by eliminating, delaying or redirecting the introduction of new products under development.

VIII. VIOLATIONS CHARGED

32. The merger agreement described in paragraph eight constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. 45.

33. The merger, if consummated, would constitute a violation of Section 5 of the FTC Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed merger between respondent Ciba-Geigy Limited, including its wholly-owned subsidiary Ciba-Geigy Corporation, and respondent Sandoz Ltd., including its wholly-owned subsidiary, Sandoz Corporation, into respondent Novartis AG, and respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the 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 respondents 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 respondents have 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Ciba-Geigy Limited is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located at Klybeckstrasse 141, CH-4002 Basel, Switzerland.

2. Respondent Ciba-Geigy Corporation, a wholly-owned subsidiary of Ciba-Geigy Limited, is a corporation organized, existing, and doing business under and by virtue of the laws of New York with its office and principal place of business located at 520 White Plains Road, Tarrytown, New York.

3. Respondent Chiron Corporation, in whom Ciba-Geigy Limited, together with its subsidiaries, is the largest shareholder, holding as of September 30, 1996, not solely as an investment, approximately 46.5% of the Chiron capital stock, is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 4560 Horton Street, Emeryville, California.

4. Respondent Sandoz Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located at Lichtstrasse 35, CH-4002 Basel, Switzerland.

5. Respondent Sandoz Corporation, a wholly-owned subsidiary of Sandoz Ltd., is a corporation organized, existing, and doing business under and by virtue of the laws of New York with its office and principal place of business located at 608 Fifth Avenue, New York, New York.

6. Respondent Novartis AG, is a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located at Centralbahnstrasse 7, CH-4010 Basel, Switzerland.

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

ORDER

I.

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

A. *"Ciba"* means Ciba-Geigy Limited, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled, directly or indirectly, by Ciba-Geigy Limited, including, but not limited to, Ciba-Geigy Corporation, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. *"Chiron"* means Chiron Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled, directly or indirectly, by Chiron, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. *"Sandoz"* means Sandoz Ltd., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled, directly or indirectly, by Sandoz Ltd., including, but not limited to, Genetic Therapy, Inc. and Sandoz Corporation, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

D. *"Novartis"* means Novartis AG, a company jointly formed by Ciba and Sandoz to effectuate the merger of Ciba and Sandoz through the acquisition of Ciba and Sandoz by Novartis. Novartis includes Ciba and Sandoz; all of Novartis's directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled, directly or indirectly, by Novartis AG; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

E. *"BASF"* means BASF Aktiengesellschaft, a company organized under the laws of Germany with its principal office and principal place of business located at Ludwigshafen, Germany.

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

G. *"EPA"* means the United States Environmental Protection Agency.

H. *"FDA"* means the Food and Drug Administration of the United States Department of Health and Human Services.

I. *"Respondents"* means Ciba, Sandoz, or Novartis, respectively, and in paragraphs IX.A, IX.B, IX.F, IX.G, X, XIV, XV, XVI, and XVII, Chiron, or any combination thereof.

J. *"Agricultural chemical active ingredient"* means a chemical that alone or in combination with other chemicals imparts or demonstrates herbicidal, insecticidal, fungicidal, or other pesticidal properties.

K. *"Agricultural chemical formulation"* means a formulation or pre-mix containing one or more agricultural chemical active ingredients.

L. *"Agricultural chemical acquirer"* means the entity or entities to whom respondents shall divest either the Sandoz Corn Herbicide Business or the Sandoz Agricultural Chemical Business required to be divested pursuant to this order.

M. *"Agricultural chemical"* means any corn herbicides and other herbicides, insecticides, fungicides, and other pesticides developed, manufactured or sold by Sandoz in the United States or Canada or developed by Sandoz outside the United States and Canada for production or sale in the United States or Canada, other than products manufactured and sold by the Sandoz Animal Health Business.

N. *"Base active flea ingredient"* means any final or intermediate form of any chemical, that alone or in combination with other chemicals is registered or under development as a flea control product, including, but not limited to, methoprene.

O. *"Core data package"* means data and information required by regulatory authorities in the United States and Canada to register flea control products, other Dallas products, and ingredients for both.

P. *"Corn herbicides"* means all agricultural chemical active ingredients and agricultural chemical formulations used, or suitable for use, on corn crops to control weeds, including, but not limited to, dimethenamid, dicamba, and pyridate.

Q. *"Cost"* means the manufacturer's average direct per unit cost of manufacturing exclusive of any overhead expenses.

R. *"Dicamba"* means technical concentrate of dicamba, chemical name 3,6-dichloro-o-anisic acid, and salts of dicamba, *e.g.*,

dimethylamine, diglycolamine, potassium, sodium, isopropylamine, DPL, and APM salts of dicamba, and any agricultural chemical formulation containing dicamba.

S. *"Dimethenamid"* means technical concentrate of dimethenamid, chemical name 2-chloro-N-[(1-methyl-2-methoxy)ethyl]-N-(2,4-dimethyl-thien-3-yl)-acetamide or (1RS, aRS)-2-chloro-N-(2,4-dimethyl-3-thienyl)-N-(2-methoxy-1-methylethyl)-acetamide, and any agricultural chemical formulation containing dimethenamid.

T. *"FIFRA"* means the Federal Insecticide, Fungicide, and Rodenticide Act and all statutory amendments, modifications or replacements thereof.

U. *"Flea control products"* means all products used or intended to be used to treat or prevent ectoparasitic (flea) infestation in connection with canines or felines and all research and development projects to develop products to be used to treat or control ectoparasitic infestation in connection with canines and felines.

V. *"Merger"* means the merger of Ciba and Sandoz into Novartis.

W. *"Methoprene"* means (S)-Methoprene, chemical name Isopropyl (2E, 4E, 7S)-11-methoxy-3,7,11-trimethyl-2,4-dodecadienoate, and (RS)-Methoprene, chemical name Isopropyl (E,E)-11-methoxy-3,7,11-trimethyl-2,4-dodecadienoate.

X. *"Other Dallas products"* means products, other than flea control products, that are manufactured or produced at the Sandoz facility located in Dallas, Texas and are sold in the United States or Canada.

Y. *"Pyridate"* means technical concentrate of pyridate, chemical name O-(6-chloro-3-phenyl-4-pyridazinyl)-S-octyl-carbonothioate, and includes any agricultural chemical formulation containing pyridate.

Z. *"Registration data"* means all data relating to the applicable agricultural chemical active ingredient or agricultural chemical formulation that has been, or will be, submitted to the EPA, under FIFRA, or to any state or foreign regulatory agency for purposes of obtaining or maintaining any registration or authorizations for any product containing such agricultural chemical active ingredient or agricultural chemical formulation.

AA. *"Sandoz Corn Herbicide Business"* means all physical assets, properties and business located in the United States or Canada and all

goodwill, tangible and intangible assets, used by Sandoz in the research, development, manufacture, formulation, registration, distribution or sale of corn herbicides (other than pyridate) in the United States or Canada, all as specified in the Asset Purchase Agreement dated as of September 26, 1996, between Sandoz and BASF.

BB. *"Sandoz Agricultural Chemical Business"* means all physical assets, properties and business located in the United States or Canada and all goodwill, tangible and intangible assets, used by Sandoz in the research, development, manufacture, formulation, registration, distribution or sale of agricultural chemicals in the United States or Canada, or for production or sale in the United States or Canada, excluding the Sandoz Animal Health Business, including, without limitation, the following:

1. All owned or leased production facilities used in the manufacture of agricultural chemical active ingredients or agricultural chemical formulations, including, but not limited to, the following:

(a) The Dimethenamid plant and assets at Beaumont, Texas; and
(b) The Dicamba plant and assets at Beaumont, Texas;

2. All EPA, state and foreign registrations and approvals relating to the manufacture or sale of agricultural chemical active ingredients and agricultural chemical formulations in North America, including, but not limited to, EPA registrations 55947-1 (Banvel), 55947-24 (Weedmaster), 55947-28 (Banvel SGF), 55947-39 (Marksman), 55947-46 (Clarity), 55947-47 (dicamba, isopropylamine salt), 55947-140 (Frontier), 55947-141 (dimethenamid 96% technical), 55947-149 (dicamba, potassium salt), 55947-150 (Guardsman), 55947-155 (dicamba WG/70.0% wettable granule), 55947-159 (Frontier 6.0), 55947-160 (sodium dicambate technical 85% wettable granule), 55947-161 (Tough 3.75 EC), Tough 5 EC (56% EC), 55947-162 (Tough 45% WP), 55947-164 (Banvel 10G), 55947-165 (dicamba, diglycolamine salt), and 55947-166 (66% sodium salt of dicamba + 10% metribuzin);

3. All registration data, submissions and supporting data and documents, including, without limitation, all labels, label extensions, or planned or pending label extensions for any application;

4. All intellectual property located, generated, obtained, or used in the United States and Canada, including, but not limited to, trade secrets, test data, technology and know-how, and all United States and Canadian patents, patent applications, patent rights and licenses;

5. A paid-up, non-exclusive right to develop, manufacture and sell any agricultural chemical active ingredient or agricultural chemical formulation anywhere in the world under all foreign patents, patent applications, licenses, registrations, submissions and approvals and to use all other intellectual property located, generated, obtained, or used outside the United States and Canada, including a copy of all trade secrets, test data, technology and know-how;

6. All trademarks and trade names for agricultural chemical active ingredients and agricultural chemical formulations, including, without limitation, exclusive world rights to the trademarks or trade names Frontier, Guardsman, Century, Banvel, Clarity, Marksman, Dycleer, Vanquish, Weedmaster, Tough, Lentagran and Phoenix;

7. All contracts and agreements relating to formulating and packaging, including, without limitation, all toll supply agreements;

8. All owned or leased facilities, equipment, real property and other assets used in research, development, technical support, testing, or product registration in the United States and Canada, including, but not limited to, the Gilroy Research Center, the Palo Alto Research Center, the Greenville Field Station, and facilities at Des Plaines, Illinois;

9. All tangible and intangible assets associated with research and development projects, process improvement projects, production projects, and label extension projects; and all registrations, submissions and approvals, registration data, supporting data and documents, patents, patent applications, and other intellectual property relating to each such project;

10. All owned or leased offices, distribution facilities, real property and other assets used in sales or technical service of Sandoz agricultural chemicals, including, but not limited to, offices and facilities located in Englewood, Colorado, Des Plaines, Illinois and Palo Alto, California;

11. All books, records and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management

information systems, software, inventions, specifications, designs, drawings, processes and quality control data;

12. All interest in and to contracts and agreements with customers, joint venturers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and rights under warranties and guarantees, express or implied; and

13. Rights to make or sell pyridate in the United States and Canada and to make or sell, or license others to make or sell, in the United States and Canada, agricultural chemical formulations containing pyridate.

CC. *"Sandoz Animal Health Business"* means the business units of Sandoz that are engaged in the research, development, manufacture and production of flea control products and other Dallas products at the Sandoz facility in Dallas, Texas which products are distributed and sold in the United States and Canada, excluding the Sandoz Agricultural Chemical Business, and all assets, properties, business and goodwill, tangible and intangible, trademarks and trade names used, in whole or in part, in the research, development, manufacture, and production of flea control products and other Dallas products at the Sandoz facility located in Dallas, Texas which products are distributed and sold in the United States and Canada, including, but not limited to, the following:

1. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

3. Inventory and storage capacity;

4. All rights, titles and interests in and to owned or leased real property at the Sandoz facility located at 12200 Denton Drive, Dallas, Texas, together with appurtenances, licenses and permits;

5. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales

representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

6. All rights, titles and interests in and to development projects;

7. All rights under warranties and guarantees, express or implied;

8. All books, records, and files;

9. All rights, titles and interests in registrations or other governmental approvals for manufacture and sale of any flea control products and other Dallas products or research and development efforts for flea control products and other Dallas products; provided, however, respondents shall retain rights of referral to the core data package for uses outside the United States and Canada;

10. A non-exclusive license to develop, manufacture and sell any flea control products and other Dallas products, including research and development efforts for flea control products and other Dallas products, anywhere in the world under all foreign patents, patent applications, and licenses, and to use all other intellectual property (exclusive of any trademarks and trade names) located, generated, obtained, or used anywhere in the world, including all trade secrets, test data, technology and know-how; and

11. All items of prepaid expense.

Notwithstanding the foregoing, Sandoz Animal Health Business shall exclude the production facility located at Muttenz, Switzerland, operated by Sandoz to produce Methoprene and other materials, flea control products and other Dallas products that are sold outside of the United States and Canada, and assets that were part of Ciba prior to the Merger.

DD. *"Sandoz Animal Health Business Acquirer"* means the entity or entities to whom respondents shall divest the Sandoz Animal Health Business required to be divested pursuant to this order.

EE. *"Sandoz flea control products"* means all flea control products that as of November 22, 1996, are: (1) being manufactured, distributed and sold by Sandoz in the United States and Canada; and (2) all projects in research and development by Sandoz in the United States and Canada that relate to improving existing, or developing new, flea control products or base active flea ingredients therefor.

FF. *"Strategic Plan"* means a detailed plan that sets forth *inter alia* the means by which the Sandoz Animal Health Business

Acquirer will begin the manufacture and sale of Methoprene, including dates by which the Sandoz Animal Health Business Acquirer plans to have received necessary governmental approvals to manufacture and sell Methoprene in the United States and Canada.

GG. *"Anderson Patent"* means US Patent Number 5,399,346 issued March 21, 1995, and any pending divisionals, continuations, continuations in part, extensions or reissues of said original US patent application number 07/365,567.

HH. *"Anderson Patent License"* means a non-exclusive license obtained by any person under the Anderson Patent for any gene therapy product or process.

II. *"Anderson Patent Licensee"* means a person that obtains an Anderson Patent License.

JJ. *"Cytokine License"* means, as to each respondent, a non-exclusive license or sublicense under such respondent's Cytokine Patent Rights for use in any Cytokine Licensed Product as follows: (a) as to respondent Chiron, with respect to IL-2, the right to use IL-2 sold by respondent Chiron in a Cytokine Licensed Product, or if respondent Chiron ceases offering IL-2 for sale, then the right to manufacture and use IL-2 in a Cytokine Licensed Product; and (b) as to respondent Novartis with respect to IL-3 and IL-6, the right to manufacture and use IL-3 and/or IL-6 in a Cytokine Licensed Product.

KK. *"Cytokine Licensed Product"* means any research protocol or commercial product and/or service incorporating or to be used with cells that have been expanded, mobilized or cultured *ex vivo* with IL-2, IL-3 and/or IL-6 proteins.

LL. *"Cytokine Licensee"* means each and every person that requests and obtains a Cytokine License.

MM. *"Cytokine Patent Rights"* means with respect to each respondent, all worldwide patents and patent applications, issued or pending, which, as of the date this order becomes final, are owned or controlled by such respondent or licensed by a third party to such respondent with the right to sublicense, which, in the case of respondent Chiron, are directed to the manufacture, use, or sale of IL-2 in Cytokine Licensed Products, and, in the case of respondent Novartis, are directed to the manufacture, use, or sale of IL-3 and/or IL-6 in Cytokine Licensed Products. Additionally, at the option of the Cytokine Licensee, the Cytokine Patent Rights shall also include a

cross-reference right to the licensing respondent's respective drug regulatory files at the FDA with respect to IL-2 in the case of respondent Chiron, and with respect to IL-3 and/or IL-6 in the case of respondent Novartis.

NN. *"Gene Therapy"* means a therapeutic intervention in humans based on modification of the genetic material of autologous, allogeneic, or xenogeneic living cells. Cells may be modified *ex vivo* for subsequent administration or altered *in vivo* by gene therapy products given directly to the patient.

OO. *"Gene Therapy License"* means any and all of the HSV-tk License, Cytokine License, Anderson Patent License, and Hemophilia License.

PP. *"Hemophilia License"* means one (1) non-exclusive license under patents and/or patent applications to which Sandoz held rights, as of October 1, 1996, to develop a gene therapy product using the beta-domain deleted Factor VIII gene for the treatment of hemophilia, including, at the option of RPR or the Subsequent Hemophilia Licensee, all technical information, know-how or materials owned or controlled by Sandoz, as of the date on which this order becomes final, necessary for the development and manufacture of such product, including, but not limited to, hemophilia gene therapy vectors.

QQ. *"HSV-tk Gene Therapy"* means the introduction of the HSV-tk gene into a patient by *in vivo* and/or *ex vivo* transduction for the treatment of human disease.

RR. *"HSV-tk License"* means, as to each respondent, the license or sublicense granted to RPR or the HSV-tk Licensee under such respondent's HSV-tk Patent Rights, to make, use, or sell an HSV-tk Licensed Product, including, at the option of RPR or the HSV-tk Licensee, the right to sublicense in fields that are not being developed by RPR or the HSV-tk Licensee.

SS. *"HSV-tk Licensee"* means a pharmaceutical company, other than RPR, with the demonstrated plan and ability to commercialize the HSV-tk Licensed Product, including vector production facilities and clinical gene therapy experience.

TT. *"HSV-tk Licensed Product"* means an HSV-tk Gene Therapy product in development or to be developed by RPR or the HSV-tk Licensee.

UU. *"HSV-tk Patent Rights"* means the following:

1. With respect to respondent Novartis, all claims in issued U.S. and foreign patents and all claims in the pending patent applications, respectively, to make, have made, use and sell HSV-tk Licensed Products, owned by or under the control of respondent Novartis as of the date this order becomes final, including divisionals, continuations, extensions and reissues of such patents or pending patent applications, and including those which respondent Novartis has licensed from a third party as of said date and has a right to sublicense, all to the extent that such patents or patent applications are directed to the use of the HSV-tk gene in the development of any and all HSV-tk Licensed Products. The HSV-tk Patent Rights owned by or under the control of respondent Novartis are referenced in Part 1 of non-public Appendix A. Respondent Novartis HSV-tk Patent Rights shall include any and all rights obtained in the future to the patents and patent applications listed in Part 3 of non-public Appendix A under exclusive license with the right to sublicense. Respondent Novartis' HSV-tk Patent Rights may also include, at the option of RPR or the HSV-tk Licensee, all technical information, know-how or materials, owned or controlled by respondent Novartis as of the date on which this order becomes final, necessary to enable RPR or the HSV-tk Licensee to adequately and fully research and develop any and all HSV-tk Licensed Products; and

2. With respect to respondent Chiron, all claims in the issued U.S. and foreign patents which are issued from patent applications corresponding to, derived from or equivalent to those United States patent applications listed in Part 2 of non-public Appendix A, and divisionals, continuations, extensions and reissues thereof, which claims are directed specifically to the use of the HSV-tk gene in HSV-tk Gene Therapy, or would otherwise dominate such use of the HSV-tk gene. Respondent Chiron's HSV-tk Patent Rights do not include claims to proprietary manufacturing methods, methods of administration, vector constructs, packaging or producer cells lines, genes, or other compositions, methods or processes that may be useful in making, using, or selling HSV-tk Licensed Products, but which do not dominate the use of the HSV-tk gene in HSV-tk Gene Therapy. Respondent Chiron's HSV-tk Patent Rights also do not include technical information, know-how or materials. Respondent Chiron's HSV-tk Patent Rights shall include any and all rights

obtained in the future to the claims in patents and patent applications listed in Part 3 of non-public Appendix A under exclusive license with the right to sublicense, which claims are directed specifically to the use of the HSV-tk gene in HSV-tk Gene Therapy, or would otherwise dominate such use of the HSV-tk gene.

VV. *"HSV-tk Business"* means all the assets utilized by respondent Sandoz in the research and development of HSV-tk Gene Therapy products, or at the option of all respondents in the event that the requirements of paragraph IX.A have not been satisfied, all the assets utilized by respondent Chiron in the research and development of HSV-tk Gene Therapy products.

WW. *"HSV-tk Sublicensee"* means any person that receives a sublicense under the HSV-tk Patent Rights from RPR or the HSV-tk Licensee in fields not being developed by RPR or the HSV-tk Licensee.

XX. *"MDR-1"* means the multiple drug resistance-1 gene.

YY. *"MRP"* means the multiple resistance protein gene.

ZZ. *"Net sales price"* means the total amount received from the sale of royalty bearing products and/or services, less transportation charges and insurance, sales taxes, use taxes, excise taxes, value added taxes, customs duties or other imposts, normal and customary quantity and cash discounts, rebates (to the extent actually made) and disallowed reimbursements and allowances and credit on account of rejection or return of royalty bearing products or services. Royalty bearing products or services shall be considered "sold" when billed out or invoiced. The total amount received by Cytokine Licensee from the sale of Cytokine Licensed Products and/or by Anderson Patent Licensee from the sale of gene therapy products covered by the Anderson Patent Rights may or may not incorporate hospital and/or physician costs relating to the *ex vivo* gene therapy treatment (*e.g.*, physician charges related to the removal and readministration of cells).

AAA. *"Other Cytokines"* means all cytokines, other than IL-2, IL-3, and IL-6, including but not limited to, stem cell factors, interferons, colony stimulating factors, tumor necrosis factors and erythropoetins.

BBB. *"Person"* means any natural person, corporate entity, partnership, association, joint venture, non-profit organization, university, government entity, or trust.

CCC. *"RPR"* means Rhone Poulenc Rorer, Inc., 500 Arcola Road, Collegeville, PA.

DDD. *"Subsequent Hemophilia Licensee"* means any person, other than RPR, that may obtain a Hemophilia License from Novartis, or from Genetics Institute, Inc. if Novartis converts its exclusive license from Genetics Institute, Inc. to a non-exclusive license.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, as an ongoing business, the Sandoz Corn Herbicide Business to BASF pursuant to the agreement between Sandoz and BASF dated as of September 26, 1996, no later than ten (10) days after the date on which this order becomes final; or, in the event that BASF breaches that agreement, respondents shall divest, absolutely and in good faith, as an ongoing business, the Sandoz Corn Herbicide Business, at no minimum price, within sixty (60) days of the date on which this order becomes final, to an agricultural chemical acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, and shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the independence, viability and competitiveness of the Sandoz Corn Herbicide Business.

B. The purpose of the divestiture of the Sandoz Corn Herbicide Business is to ensure the continuation of the Sandoz Corn Herbicide Business as an ongoing, viable enterprise engaged in the research, development, manufacture, distribution and sale of corn herbicides independent of Ciba, Sandoz, and Novartis and able to compete with Ciba, Sandoz and Novartis and to remedy the lessening of competition alleged in the Commission's complaint.

C. Pending divestiture of the Sandoz Corn Herbicide Business, respondents shall take such actions as are necessary to maintain the viability and marketability of the Sandoz Corn Herbicide Business and the Sandoz Agricultural Chemical Business and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of the Sandoz Corn Herbicide Business or of the Sandoz

Agricultural Chemical Business, except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, as an ongoing business, within the time periods specified in paragraph III.B below, the Sandoz Animal Health Business. Respondents shall also enter into, and fulfill the terms of, a Contract Manufacturing Agreement ("CMA"), as specified in paragraph V below, and effect such arrangements as are necessary to assure the marketability, independence, viability and competitiveness of the Sandoz Animal Health Business.

B. Respondents shall divest the Sandoz Animal Health Business to Central Garden and Pet Company and/or its affiliates pursuant to the Asset Purchase Agreement dated as of October 11, 1996, among Sandoz Ltd., Central Garden and Pet Company, and Centic Acquisition Corp., as amended to conform to the terms of this order in a manner that receives the prior approval of the Commission, within thirty (30) days of the date on which this order becomes final; or, respondents shall divest the Sandoz Animal Health Business, at no minimum price, within ninety (90) days of the date on which this order becomes final, to a Sandoz Animal Health Business Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Sandoz Animal Health Business is to ensure the continued use of the assets of the Sandoz Animal Health Business in the same business in which the assets of the Sandoz Animal Health Business are engaged at the time of the proposed divestiture and to remedy the lessening of competition from the proposed merger of Ciba and Sandoz as alleged in the Commission's complaint.

C. Pending divestiture of the Sandoz Animal Health Business, respondents shall take such actions as are necessary to maintain the viability and marketability of the Sandoz Animal Health Business and shall not cause or permit the destruction, removal, wasting, deterioration or impairment of the Sandoz Animal Health Business, except in the ordinary course of business and except for ordinary wear and tear. Respondents shall maintain research and development of all

current research and development projects at the levels planned by Sandoz for such projects as of June 4, 1996.

D. The contract of divestiture shall provide that, at the option of respondent Novartis, the Sandoz Animal Health Business Acquirer shall enter into a transitional toll manufacturing agreement of up to two year's duration to produce for respondents products currently produced at Dallas, but not subject to the divestiture pursuant to this paragraph, for sale by respondents outside the United States and Canada, all at a price equal to the Sandoz Animal Health Business Acquirer's cost plus twenty percent (20%) mark-up.

IV.

It is further ordered, That:

Upon reasonable notice and request to respondents from the Sandoz Animal Health Business Acquirer, respondents shall provide information, assistance and advice with respect to the Sandoz Animal Health Business divested pursuant to this order such that the Sandoz Animal Health Business Acquirer or its designee will be capable of:

(1) Manufacturing all products currently produced by the Sandoz Animal Health Business divested pursuant to this order; and

(2) Manufacturing and/or obtaining all necessary ingredients, other than Methoprene, for products of the Sandoz Animal Health Business divested pursuant to this order,

in substantially the same manner and quality employed, achieved or planned by the respondents prior to divestiture. Such information, assistance and advice shall include reasonable consultation with knowledgeable employees of respondents for a period of time sufficient to satisfy the Sandoz Animal Health Business Acquirer's management that its personnel are appropriately trained in the research, development, manufacture, distribution and sale of the products and research and development projects of the Sandoz Animal Health Business divested pursuant to this order. Respondents shall convey all know-how necessary to manufacture or have manufactured, distribute, sell and obtain all necessary governmental approvals, including EPA approvals, and licenses to research, develop, manufacture or have manufactured, distribute and sell in the

United States and Canada the products of the Sandoz Animal Health Business divested pursuant to this order. Respondents shall provide such information, assistance and advice for one (1) year from the date respondents divest the Sandoz Animal Health Business divested pursuant to this order. Respondents may charge the Sandoz Animal Health Business Acquirer at a rate no greater than respondents' cost for providing such technical assistance.

V.

It is further ordered, That:

Respondents shall enter into a Contract Manufacturing Agreement ("CMA") with the Sandoz Animal Health Business Acquirer to contract manufacture and deliver to the Sandoz Animal Health Business Acquirer, in a timely manner, Methoprene in the volumes requested by the Sandoz Animal Health Business Acquirer. The CMA shall be effective for the shorter of six (6) years from the date respondents divest the Sandoz Animal Health Business or three (3) months after the Sandoz Animal Health Business Acquirer or its designee obtains all EPA or FDA approvals necessary to manufacture all Methoprene required for products of the Sandoz Animal Health Business. The CMA shall contain the following provisions:

A. Respondents shall make representations and warranties to the Sandoz Animal Health Business Acquirer that the Methoprene manufactured pursuant to the CMA meets all applicable EPA, FDA and other governmental requirements for the United States and Canada, and respondents shall agree to indemnify, defend and hold the Sandoz Animal Health Business Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of Methoprene manufactured pursuant to the CMA to meet such governmental specifications. This obligation shall be contingent upon the Sandoz Animal Health Business Acquirer giving respondents prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting respondents to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require respondents to be liable for any negligent act or omission of the Sandoz Animal Health Business

Acquirer or for any representations and warranties, express or implied, made by the Sandoz Animal Health Business Acquirer that exceed the representations and warranties made by respondents to the Sandoz Animal Health Business Acquirer.

B. Respondents shall agree to package and deliver the Methoprene manufactured pursuant to the CMA in a manner and form and according to a schedule reasonably requested by the Sandoz Animal Health Business Acquirer.

C. The CMA shall require that, for the first three years during which the CMA is effective, the Sandoz Animal Health Business Acquirer shall compensate respondents for all Methoprene supplied pursuant to the CMA at a rate not to exceed respondents' cost of producing such Methoprene during the period from July 1, 1995, through June 30, 1996, which cost may be adjusted for demonstrated input expenditure increases as determined by the trustee appointed pursuant to paragraph VIII of this order.

D. The contract of divestiture shall be submitted to and approved by the Commission prior to the divestiture of the Sandoz Animal Health Business required by this order. Respondents' application for approval of the divestiture pursuant to this order shall include: (1) a certification attesting to the good faith intention of the Sandoz Animal Health Business Acquirer to obtain, or to cause its designee to obtain, in an expeditious manner all FDA, EPA and other governmental approvals required in the United States and Canada to manufacture and sell Methoprene; (2) a strategic plan to obtain all FDA, EPA and other governmental approvals required in the United States and Canada to manufacture or have manufactured, and sell Methoprene; and (3) a CMA pursuant to this paragraph.

E. Respondents shall provide information, assistance, and advice to the Sandoz Animal Health Business Acquirer, or its designee, to enable the Sandoz Animal Health Business Acquirer, or its designee, to manufacture and sell Methoprene in the United States or Canada. Respondents shall convey all know-how required to manufacture, sell and obtain all necessary EPA, FDA and other government approvals to manufacture and sell Methoprene in the United States or Canada. Such information, assistance and advice shall include reasonable consultation with knowledgeable employees of respondents and training at either or both the Sandoz Animal Health Business Acquirer's facilities, or those of its designee, and the respondents'

facilities for a period of time sufficient to satisfy the Sandoz Animal Health Business Acquirer's management that its personnel, or those of its designee, are appropriately trained in the manufacture of Methoprene. Respondents shall continue to provide such information, assistance and advice until the ninetieth (90th) day following the date on which the Sandoz Animal Health Business Acquirer, or its designee, obtains EPA approval to manufacture and sell Methoprene. Respondents may charge the Sandoz Animal Health Business Acquirer at a rate no greater than respondents' direct cost for providing such technical assistance.

F. Respondents shall use best efforts to facilitate the Sandoz Animal Health Business Acquirer's ability to obtain adequate supplies of Methoprene starter material, chemical name S-(3,7-Dimethyl-7-methoxy-1-octanal) from Takasago Iwata.

VI.

It is further ordered, That for a period of six (6) years from the date on which the Sandoz Animal Health Business is divested, respondents shall not: (1) manufacture and sell, or cause to be manufactured for sale, in the United States and Canada, Methoprene to any entity other than the Sandoz Animal Health Business Acquirer, or its designee; and (2) sell any products that contain Methoprene in the United States and Canada.

VII.

It is further ordered, That for a period of six (6) years from the date this order is placed on the public record for comment, except as required to comply with the terms of this order, respondents shall not provide, disclose or otherwise make available to any other person or to any employee of Novartis, any non-public information relating to any research and development project ongoing as of March 1, 1996, at Sandoz to develop or improve any base active flea ingredient or any Sandoz flea control product, if said person or employee did not have knowledge of such non-public information as of March 1, 1996.

VIII.

It is further ordered, That:

A. The Commission may appoint a trustee to ensure that respondents and the Sandoz Animal Health Business Acquirer expeditiously perform their responsibilities required under this order with respect to the Sandoz Animal Health Business. The trustee shall also ensure that the provisions of the Agreement to Hold Separate between respondents and the Commission, dated November 26, 1996, are carried out in good faith. Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. If respondents have 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 respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. The trustee shall have the power and authority to assure respondents' compliance with the terms of this order.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the trustee all rights and powers necessary to permit the trustee to assure respondents' compliance with the terms of this order relating to the Sandoz Animal Health Business. As part of the trust agreement, the trustee shall execute confidentiality agreement(s) with respondents.

4. The trustee shall serve until the ninetieth (90th) day following the date on which the Sandoz Animal Health Business Acquirer or its designee obtains EPA approval to manufacture and sell Methoprene. If the responsibilities of the trustee are extended pursuant to the provisions of paragraph X, the trustee shall serve until such date as required by that paragraph.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Sandoz Animal Health Business or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede

the trustee's accomplishment of his or her responsibilities pursuant to this order.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as set forth in the trust agreement. The trustee shall have the authority to employ, at the cost and expense of respondents, 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 expenses incurred. The Commission shall approve the account of the trustee, including fees for his or her services.

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

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 subparagraph A of this paragraph.

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 this order.

B. The agreement pursuant to which respondents divest the Sandoz Animal Health Business shall require the Sandoz Animal Health Business Acquirer to submit to the trustee appointed pursuant to this paragraph, periodic written reports setting forth in detail the efforts of the Sandoz Animal Health Business Acquirer to obtain all FDA, EPA and other governmental approvals required in the United States and Canada to continue the research, development, manufacture and sale of the products and projects of the Sandoz Animal Health Business. The first report shall be submitted within sixty (60) days after the date on which the Commission approves the

Sandoz Animal Health Business Acquirer and every ninety (90) days thereafter until the Sandoz Animal Health Business Acquirer has obtained all FDA, EPA and other governmental approvals required in the United States and Canada to continue the research, development, manufacture and sale of the products and projects of the Sandoz Animal Health Business.

C. Respondents shall comply with all reasonable directives of the trustee regarding respondents' obligations to comply with this order.

IX.

It is further ordered, That:

A.1. On or before September 1, 1997, each respondent shall (i) grant a non-exclusive license to RPR to make, use and sell HSV-tk Licensed Products under such respondent's HSV-tk Patent Rights, in a manner that has received prior Commission approval and, except as provided in this order, is consistent with the Letter of Intent dated November 20, 1996 between RPR and Sandoz Ltd., which contains licensing terms concerning Sandoz and Chiron HSV-tk Patent Rights, hemophilia gene rights, and the Anderson Patent; or (ii) grant a non-exclusive license to make, use and sell HSV-tk Licensed Products under such respondent's HSV-tk Patent Rights to an HSV-tk Licensee that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, in perpetuity and in good faith, at no minimum price. In consideration for the HSV-tk License, each respondent may request from the HSV-tk Licensee compensation in the form of royalties and/or an equivalent cross-license.

2. At the option of RPR or the HSV-tk Licensee, Novartis shall, in good faith, within one (1) year of execution of said HSV-tk License, or within one (1) year of the execution of any sublicense to the HSV-tk Patent Rights by RPR or the HSV-tk Licensee, provide to RPR or the HSV-tk Licensee, or the HSV-tk Sublicensee(s), technical information, know-how or material owned or controlled by Novartis as of the date on which this order become final, as is necessary to develop the HSV-tk Licensed Products. Such technical assistance may include reasonable consultation with knowledgeable employees of Novartis and training at RPR or the HSV-tk Licensee's facilities, or the HSV-tk Sublicensee's facilities, or at such other place

as is mutually satisfactory to Novartis and RPR or the HSV-tk Licensee or the HSV-tk Sublicensee(s), such consultation to be for a period of time within the one-year period reasonably sufficient to satisfy RPR or the HSV-tk Licensee or the HSV-tk Sublicensee(s).

3. RPR or the HSV-tk Licensee may sublicense, to any HSV-tk Sublicensee, fields that are not being developed by RPR or said HSV-tk Licensee.

4. The purpose for the HSV-tk License is to ensure the continuation of HSV-tk gene therapy research and development for an HSV-tk Gene Therapy product to be approved by the FDA for sale in the United States and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

5. Pending licensing of the HSV-tk Patent Rights, each respondent shall take such action as is necessary to maintain the viability and marketability of the HSV-tk Patent Rights and the HSV-tk Licensed Products, including, but not limited to, maintaining in the ordinary course the research and development of HSV-tk products.

B. For the purpose of ensuring continuation of *ex vivo* gene therapy research and development, and to ensure the availability of cytokines for Gene Therapy, and to remedy the lessening of competition and research and development of Gene Therapy resulting from the Merger as alleged in the Commission's complaint, commencing within thirty (30) days of the date this order becomes final, respondents shall perform the following obligations:

1. Respondent Novartis shall grant to each person who so requests a Cytokine License, in perpetuity and in good faith. In payment for such license, respondent Novartis shall receive a royalty, or its equivalent, of no greater than three percent (3%) of the net sales price of Cytokine Licensed Products, paid from the date of first commercial sale of royalty bearing products or services until a time no later than the expiration of the last to expire patent. Respondent Novartis may also request certain non-exclusive rights to obtain and use safety and efficacy data generated by said Cytokine Licensee to support its own regulatory filings.

2. Respondent Chiron shall grant to each person who so requests a Cytokine License, in perpetuity and in good faith. In payment for such license, respondent Chiron shall receive a royalty, or its

equivalent, of no greater than three percent (3%) of the net sales price of Cytokine Licensed Products, paid from the date of first commercial sale of royalty bearing products or services until a time no later than the expiration of the last to expire patent; provided, however, that if respondent Chiron's grant of a Cytokine License includes the right to manufacture, then respondent Chiron shall receive a royalty of no greater than one percent (1%) above the royalty due from respondent Chiron to all third party IL-2 licensors of respondent Chiron. Respondent Chiron may also request certain non-exclusive rights to obtain and use safety and efficacy data generated by said Cytokine Licensee to support its own regulatory filings.

3. In the event that royalties are to be paid by any such Cytokine Licensee under a Cytokine License described in subparagraphs 1 or 2 to a party who is not an affiliate of such Cytokine Licensee for royalty bearing products or services, then the royalties to be paid to respondents shall be reduced by up to one-half of the negotiated royalty rate of said Cytokine License, but in no event shall any royalties under subparagraphs 1 and/or 2 be reduced by more than fifty percent (50%). These stacking provisions shall also apply if at any time in the future it becomes scientifically advantageous to combine IL-2, IL-3, and IL-6, or any combination thereof, into a single Cytokine Licensed Product so that the royalty payable to all respondents shall be no more than three percent (3%). However, if respondent Chiron's grant of a Cytokine License includes the right to manufacture, this subparagraph IX.B.3 shall not apply to reduce the Cytokine Licensee's obligations to pay royalties owed to third party IL-2 licensors of Chiron.

4. If a person seeking a Cytokine License has patent rights and/or drug regulatory files on other Cytokines for use in *ex vivo* cell expansion, the licensing respondent may require equivalent cross licenses for such other Cytokines from such person.

C. For the purpose of ensuring continuation of *ex vivo* gene therapy research and development, and to ensure the availability of Anderson Patent Licenses, and to remedy the lessening of competition in research and development of Gene Therapy resulting from the Merger as alleged in the Commission's complaint, commencing within thirty (30) days of the date this order becomes final, respondent Novartis shall grant to each person who requests an

Anderson Patent License a non-exclusive license or sub-license under any and all Anderson Patent Rights, in perpetuity and in good faith, in the United States. In payment for such license, respondent Novartis shall be entitled to receive: (i) a one-time payment of Ten Thousand Dollars ($10,000) and (ii) a royalty based on the net sales price of any gene therapy product covered by the Anderson Patent Rights of no greater than one percent (1%) above the royalty due from respondent Novartis to the United States National Institutes of Health. Such royalty shall be paid from the date of first commercial sale of royalty bearing products or services in the United States, provided that the Anderson Patent is valid and enforceable, until the expiration of the last to expire patent.

D. Respondent Novartis shall by no later than September 1, 1997, either (i) convert its exclusive rights to the beta-domain deleted Factor VIII hemophilia gene from Genetics Institute to a non-exclusive license; or (ii) grant a Hemophilia License to RPR in a manner that has received prior Commission approval and in a manner consistent with the Letter of Intent dated November 20, 1996 between RPR and Sandoz Ltd.; or (iii) grant a Hemophilia License to a Subsequent Hemophilia Licensee that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, at no minimum amount. In consideration for the Hemophilia License, respondent Novartis may request from RPR or the Subsequent Hemophilia Licensee compensation in the form of royalties and/or an equivalent cross-license. At the option of RPR or the Subsequent Hemophilia Licensee, respondent Novartis shall, in good faith, within one (1) year of the execution of the Hemophilia License provide to RPR or the Subsequent Hemophilia Licensee, such technical information, know-how or materials, owned or controlled by Genetic Therapy, Inc. as of the date on which this order become final, necessary for the development of a gene therapy product using the beta-domain deleted Factor VIII gene for the treatment of hemophilia.

E. Respondent Novartis shall not acquire from Ingenex, Inc. or the United States National Institutes of Health exclusive rights in intellectual property related to the gene sequence for MDR-1 or MRP.

F. Respondents shall include in each license granted pursuant to this paragraph a provision that ensures respondents have no access to

any Licensee's Net Sales Price information. Respondents shall, in each license granted pursuant to this paragraph, provide for:

1. The appointment of an independent auditor agreed upon among the respective parties who shall: (a) enter into appropriate confidentiality agreements; (b) have full and complete access to the pertinent personnel, books, records, technological information, or any other information as to which the auditor may reasonably require; and (c) be authorized to collect, audit, aggregate and distribute the respective aggregated royalties on an annual basis. Respondents shall notify the Commission of the appointment of any independent auditor.

2. A binding arbitration clause to resolve any and all disputes regarding the royalties or any other License terms. Respondents shall notify the Commission of the institution of any arbitration.

G. There will be no limitations upon the rights of any respondent or any licensee or sublicensee hereunder to license or sublicense its own patents or patent applications to other third parties. Nothing in this order requires any respondent to guarantee freedom of operation under any third party patents not included within such respondent's HSV-tk Patent Rights, Cytokine Patent Rights, Anderson Patent Rights or the patent rights subject to the Hemophilia License.

X.

It is further ordered, That:

A. If respondent Novartis has not divested, absolutely and in good faith and with the Commission's prior approval, the Sandoz Corn Herbicide Business within the time required by paragraph II of this order, the Commission may appoint a trustee, or direct the trustee appointed pursuant to paragraph VIII of this order, to divest the Sandoz Agricultural Chemical Business.

B. If respondent Novartis has not divested, absolutely and in good faith and with the Commission's prior approval, the Sandoz Animal Health Business within the time required by paragraph III of this order, the Commission may appoint a trustee, or direct the trustee appointed pursuant to paragraph VIII of this order, to divest the Sandoz Animal Health Business.

C. If respondents have not complied with the requirements of paragraph IX.A of this order within the time required by paragraph IX.A of this order, the Commission may appoint a trustee or direct the trustee appointed pursuant to paragraph VIII of this order to divest the HSV-tk Business to a buyer that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission, at no minimum price. If respondent Novartis has not complied with the requirements of paragraph IX.D of this order within the time required by paragraph IX.D of this order, the Commission may appoint a trustee or direct the trustee appointed pursuant to paragraph VIII of this order to convert respondent Novartis' exclusive rights to the beta-domain deleted Factor VIII gene from Genetics Institute to a non-exclusive license.

D. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment or extension of responsibilities of a trustee nor a decision not to appoint or extend the responsibilities of a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

E. If a trustee is appointed or directed by the Commission or a court pursuant to subparagraph A of this paragraph to divest the Sandoz Agricultural Chemical Business, or pursuant to subparagraph B of this paragraph to divest the Sandoz Animal Health Business, or pursuant to subparagraph C of this paragraph to divest the HSV-tk Business, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have 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 respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. If a trustee is directed under subparagraph A of this paragraph to divest the Sandoz Agricultural Chemical Business, the Commission may extend the authority and responsibilities of the trustee appointed under paragraph VIII of this order to include divesting the Sandoz Agricultural Chemical Business.

3. If a trustee is directed under subparagraph B of this paragraph to divest the Sandoz Animal Health Business, the Commission may extend the authority and responsibilities of the trustee appointed under paragraph VIII of this order to include divesting the Sandoz Animal Health Business.

4. If a trustee is directed under subparagraph C of this paragraph to divest the HSV-tk Business, the Commission may extend the authority and responsibilities of the trustee appointed under paragraph VIII of this order to include divesting the HSV-tk Business. If a trustee is directed under subparagraph C of this paragraph to convert respondent Novartis' exclusive rights to the beta-domain deleted Factor VIII gene from Genetics Institute to a non-exclusive license, the Commission may extend the authority and responsibilities of the trustee appointed under paragraph VIII of this order to include converting respondent Novartis' exclusive rights to the beta-domain deleted Factor VIII gene from Genetics Institute to a non-exclusive license.

5. Subject to the prior approval of the Commission and consistent with paragraphs II through IX, the trustee shall have the exclusive power and authority to divest the assets identified in the Commission's appointment or extension of the trustee's authority and responsibilities.

6. Within ten (10) days after the appointment of the trustee or the extension of the trustee's authority and responsibilities, respondents shall execute a trust agreement, or shall amend the existing trust agreement in a manner that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

7. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement or the amended trust agreement, described in subparagraph E of this paragraph, to accomplish the divestiture or divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the applicable twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such 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 each divestiture period only two (2) times.

8. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Sandoz Agricultural Chemical Business, the Sandoz Animal Health Business, the HSV-tk Business, the license to hemophilia patents and/or patent applications granted to respondent Novartis by Genetics Institute, or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondents shall extend the time for 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.

9. The trustee shall make every reasonable effort to negotiate the most favorable price and terms available in each contract submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the Agricultural Chemical Acquirer as set out in paragraph II of this order, or to the Animal Health Business Acquirer as set out in paragraph III of this order, or to the acquirer of the HSV-tk Business as set out in paragraph X.C of this order, as applicable; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity for the Sandoz Agricultural Chemicals Business, or for the Sandoz Animal Health Business, or for the HSV-tk Business, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities

selected by respondents from among those approved by the Commission.

10. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, 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 respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Sandoz Agricultural Chemical Business, the Sandoz Animal Health Business, or the HSV-tk Business, as applicable.

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

12. 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 VIII or this paragraph of this order.

13. 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.

14. In the event that the trustee determines that he or she is unable to divest the Sandoz Agricultural Chemical Business, if directed to divest pursuant to subparagraph A of this paragraph, in a manner consistent with the Commission's purpose as described in paragraph

II of this order; or in the event that the trustee determines that he or she is unable to divest the Sandoz Animal Health Business, if directed to divest pursuant to subparagraph B of this paragraph, in a manner consistent with the Commission's purpose as described in paragraph III of this order; or in the event that the trustee determines that he or she is unable to divest the HSV-tk Business, if directed to divest pursuant to subparagraph C of this paragraph, in a manner consistent with the Commission's purpose as described in paragraph IX.A.2 of this order, the trustee may divest additional assets ancillary to the Sandoz Agricultural Chemical Business, ancillary to the Sandoz Animal Health Business, or as applicable, ancillary to the HSV-tk Business, and effect such arrangements as are necessary to satisfy the requirements of this order.

15. The trustee shall have no obligation or authority to operate or maintain the Sandoz Agricultural Chemical Business, the Sandoz Animal Health Business, or the HSV-tk Business.

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

XI.

It is further ordered, That, respondents shall comply with all terms of the Agreement to Hold Separate attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until (a) with respect to the Sandoz Corn Herbicide Business, such time as respondents have divested the Sandoz Corn Herbicide Business and (b) with respect to the Sandoz Animal Health Business, such time as respondents have divested the Sandoz Animal Health Business pursuant to paragraphs II and III of this order; or, if a trustee is appointed or the trustee's authorities and responsibilities have been extended pursuant to paragraph X of this order, the Agreement to Hold Separate shall continue in effect until such time as respondents or the trustee have divested all of the Sandoz Animal Health Business and, as applicable, the Sandoz Corn Herbicide Business or the Sandoz Agricultural Chemical Business pursuant to this order.

XII.

It is further ordered, That, for a period of ten (10) years after the date the order becomes final, respondents 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-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition, the research, development, manufacture, distribution or sale of flea control products or other products containing Methoprene in the United States; or

B. Acquire any assets currently used, or used in the previous two years (and still suitable for use for) for the research, development, manufacture, distribution or sale of flea control products or other products containing Methoprene in the United States. Provided, however, that this paragraph XII shall not apply to the acquisition of equipment, machinery, supplies or facilities constructed, manufactured or developed by or for respondents.

The prior notifications required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended, (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and Notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating 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, respondents 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.

XIII.

It is further ordered, That, respondent Ciba and/or respondent Novartis shall not, without prior notice to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise acquire common stock of Chiron such as to increase by more than one percent (1%) or more the percentage of Chiron stock that Ciba owns as of the date this order becomes final, until the receipt by the Commission of a certification by RPR, the trustee, or respondents, that respondents have complied with the requirements of paragraphs IX.A and IX.D of this order; provided, however, in no event shall this provision apply later than five (5) years from the date this order becomes final.

The prior notifications required by this paragraph XIII shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended, (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, 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 Novartis and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating 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 Novartis 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.

XIV.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II, III, and IX.A and IX.D of this order requiring, respectively, divestiture of the Sandoz Corn Herbicide Business, divestiture of the Sandoz Animal Health Business, and granting of the HSV-tk License, respondent Novartis shall submit to the Commission verified written report(s) ("compliance reports") setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II through IX of this order. After completing the divestitures required under paragraphs II, III, the licensing required under paragraph IX.A, and the requirements of paragraph IX.D of this order, and until the termination of the CMA required under paragraph V of this order, respondent Novartis shall submit such compliance reports every one hundred eighty (180) days beginning on the date of the divestiture of the Sandoz Animal Health Business. Following termination of the CMA required under paragraph V of this order, respondent Novartis shall submit to the Commission annual compliance reports on the anniversary of the date this order became final, until and including the tenth anniversary date of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II through IX of the order, including a description of all substantive contacts or negotiations for the divestiture or relating to the Gene Therapy License obligations. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent Novartis shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs XII and XIII of this order.

XV.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, sale resulting in the emergence of 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.

XVI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondents shall permit any duly authorized representative 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 respondents relating to any matters contained in this order; and

B. Upon five days' notice to respondents and without restraint or interference from them, to interview officers, directors, or employees of respondents.

XVII.

It is further ordered, That this order shall terminate on March 24, 2007.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between Sandoz Ltd. ("Sandoz"), a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business at Lichtstrasse 35, Basel, Switzerland, 4002; Ciba-Geigy Limited ("Ciba"), a corporation, organized, existing, and doing business under and by virtue of the laws of Switzerland with its principal place of business

located at Klybeckstrasse 141, Basel, Switzerland 4002; and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on March 6, 1996, Ciba and Sandoz entered into an Agreement providing for the merger (hereinafter the "Merger") of Ciba and Sandoz into Novartis AG ("Novartis"); and

Whereas, Sandoz, through its subsidiary Sandoz Agro, Inc., operates, *inter alia*, (a) an agricultural chemical business as defined in an Agreement Containing Consent Order ("the "consent order"); and (b) an animal health business as defined in the consent order; and

Whereas, Ciba, through its subsidiary Ciba-Geigy Corporation, operates *inter alia*, (a) an agricultural chemical business, and (b) an animal health business; and

Whereas, the Commission is now investigating the Merger to determine whether it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the consent order, which would require the divestiture of certain assets, the Commission must place the consent order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Sandoz Agricultural Chemical Business and the Sandoz Animal Health Business as defined in paragraph I of the consent order during the period prior to the final acceptance and issuance of the consent order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Merger might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Merger is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Sandoz Agricultural Chemical Business, as described in paragraph I.BB of the consent order, and the

Sandoz Animal Health Business, as described in paragraph I.CC of the consent order, and the Commission's right to have the Sandoz Agricultural Chemical Business and the Sandoz Animal Health Business continue as viable competitors independent of Ciba, Sandoz and Novartis; and

Whereas, even if the Commission determines to finally accept the consent order, it is necessary to hold separate the Sandoz Agricultural Chemical Business and the Sandoz Animal Health Business to protect interim competition pending divestiture or other relief; and

Whereas, the purpose of the Hold Separate and the consent order is:

1. To preserve the Sandoz Agricultural Chemical Business and the Sandoz Animal Health Business as viable and competitive, independent businesses pending the divestitures required by the consent order;

2. To remedy any anticompetitive effects of the Merger; and

3. To preserve the Sandoz Agricultural Chemical Business and the Sandoz Animal Health Business as ongoing and competitive entities engaged in the same businesses in which they are presently employed until divestiture is achieved; and

Whereas, Sandoz and Ciba's entering into this Hold Separate shall in no way be construed as an admission by Sandoz or Ciba that the Merger is illegal; and

Whereas, Sandoz and Ciba understand that no act or transaction contemplated by this Hold Separate shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Hold Separate.

Now, therefore, the respondents, upon understanding that the Commission has not yet determined whether the Merger will be challenged, and in consideration of the Commission's agreement at the time it accepts the consent order for public comment that, unless the Commission determines to reject the consent order, the Commission will not seek a temporary restraining order, preliminary injunction, or permanent injunction to prevent consummation of the Merger, and will grant early termination of the Hart-Scott-Rodino waiting period, the Parties agree as follows:

1. Ciba and Sandoz agree that from the date this Hold Separate is signed by Sandoz and Ciba until the earliest of the dates listed in paragraphs 1.a or 1.b they each will comply with the provisions of this Hold Separate:

a. Twenty (20) days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after each of the divestitures required by the consent order has been completed.

2. Ciba and Sandoz agree to execute and be bound by the attached consent order and to comply, from the date this Hold Separate is accepted, with the provisions of the consent order as if it were final.

3. The terms capitalized herein shall have the same definitions as in the consent order.

4. To ensure the complete independence and viability of the properties to be divested and to ensure that no competitive information is exchanged between the properties to be divested and Sandoz, Ciba or Novartis, Sandoz and Novartis shall hold the properties to be divested as they are presently constituted separate and apart on the following conditions:

a. The held separate businesses shall be held separate and apart and shall be operated independently of Ciba, Sandoz and Novartis (meaning here and hereinafter, Ciba, Sandoz and Novartis excluding the properties to be divested and excluding all personnel connected with the properties to be divested as of the date this Hold Separate was signed) except to the extent that Ciba, Sandoz or Novartis must exercise direction and control over the held separate businesses to assure compliance with this Hold Separate or the consent order.

b. The properties to be divested shall be staffed with sufficient employees to maintain the viability and competitiveness of the properties to be divested. Neither Sandoz, Ciba nor Novartis shall employ, or make offers of employment to, any person employed by Sandoz in connection with the properties to be divested or whose principal duties, during the year prior to the date of the signing of this Hold Separate, related to the management, operation, research, development, regulatory registration, sales or marketing activities of the properties to be divested. Sandoz, Ciba and Novartis shall

encourage and facilitate employment by the properties to be divested of Sandoz employees who had line responsibility with respect to the properties to be divested in the year prior to the signing of this Hold Separate; shall not offer any incentive to such employees to decline employment with the properties to be divested or accept other employment in Sandoz, Ciba or Novartis; and shall remove any impediments that may deter such employees from accepting employment with the properties to be divested, including but not limited to, the payment, or transfer for the account of the employee, of all accrued bonuses, pensions and other accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of Sandoz.

c. Ciba, Sandoz or Novartis personnel connected with the properties to be divested or providing support services to the properties to be divested as of the date of this Hold Separate was signed, may continue, as employees of Sandoz or Novartis, to provide such services as they are currently providing to the held separate businesses. Such Sandoz or Novartis personnel must retain and maintain all material confidential information relating to the held separate businesses on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any Sandoz or Novartis business.

d. Sandoz, Ciba and Novartis shall not exercise direction or control over, or influence directly or indirectly, the properties to be divested, the Management Committee (as defined in subparagraph 4.f), or any of its operations or businesses; provided, however, that Ciba, Sandoz and Novartis may exercise only such direction and control over the properties to be divested as is necessary to assure compliance with this Hold Separate or with the consent order.

e. Ciba, Sandoz and Novartis shall maintain the marketability, viability and competitiveness of the properties to be divested and shall not take any action that may cause or permit the destruction, removal, wasting, deterioration or impairment of the properties to be divested, except for ordinary wear and tear, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the properties to be divested. Sandoz shall provide the properties to be

divested with sufficient working capital to operate at current rates of operation, including but not limited to, current levels of research and development activities, to perform all necessary routine maintenance to, and replacement of, plant and equipment of the properties to be divested, and to maintain the viability and competitiveness of the properties to be divested.

f. Sandoz shall appoint a three-person Management Committee for the properties to be divested (the "Management Committee"), one of whom shall be named chairman of the Management Committee. The Management Committee shall consist of persons who are, and shall remain, independent of Sandoz, Ciba and Novartis and competent to assure the continued viability and competitiveness of the properties to be divested. Sandoz shall not permit any director, officer, employee or agent of Ciba, Sandoz or Novartis also to be a director, officer, employee or agent of the properties to be divested. Each Management Committee member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions of this Hold Separate.

g. Except as required by law and except to the extent that necessary information is exchanged in the course of evaluating and consummating the Merger, defending investigations or litigation, obtaining legal advice, or complying with this Hold Separate or the consent order (including accomplishing the divestitures), neither Sandoz, Ciba nor Novartis shall receive or have access to, or the use of, any material confidential information of the properties to be divested or the activities of the Management Committee, not in the public domain. Sandoz may receive on a regular basis from the properties to be divested aggregate financial reports, tax returns and personnel reports. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("Material confidential information," as used in this Hold Separate, means competitively sensitive or proprietary information not independently known to Ciba, Sandoz or Novartis from sources other than the properties to be divested or the Management Committee, as applicable, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets).

h. All material transactions, out of the ordinary course of business and not precluded by paragraph four hereof, shall be subject to a majority vote of the Management Committee (as defined in paragraph 4.f hereof).

i. Sandoz shall not change the composition of the Management Committee unless it is necessary to do so in order to assure compliance with this Hold Separate or with the consent order. The Chairman of the Management Committee shall have the power to remove members of the Management Committee for cause and to appoint replacement members of the Management Committee. Sandoz shall not change the composition of the management of the properties to be divested except that the Management Committee shall have the power to remove management employees for cause. If the Chairman ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraph 4.f. The Management Committee shall circulate to the management employees of the properties to be divested and appropriately display a notice of this Hold Separate and the consent order at a conspicuous place at all offices and facilities of the properties to be divested.

j. All earnings and profits of the properties to be divested shall be retained separately in the properties to be divested.

k. Subject to the direction of the Management Committee, Sandoz and Novartis shall cause the properties to be divested to continue to expend funds for the advertising and trade promotion of such businesses at levels not lower than those budgeted for 1995 and 1996, and shall increase such spending as deemed reasonably necessary in light of competitive conditions. If necessary, Sandoz and Novartis shall provide the held separate businesses with funds necessary to accomplish the foregoing. Sandoz and Novartis shall continue to provide to the properties to be divested such support services as is reasonably necessary and was provided prior to the merger by Sandoz.

5. Should the Federal Trade Commission seek in any proceeding to compel dissolution of Novartis, to compel Sandoz or Novartis to divest any assets or businesses of Ciba that they may hold, to compel Ciba or Novartis to divest any assets of businesses of Sandoz that they may hold, or to seek any other injunctive or equitable relief,

neither Sandoz nor Ciba shall raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Merger. Sandoz and Ciba also waive all rights to contest the validity of this Hold Separate.

6. Within twenty-one (21) days after the date this Hold Separate is signed by respondents and every thirty (30) days thereafter, respondents shall each submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Hold Separate and the consent order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the terms of the consent order, including a description of all contacts and negotiations for the divestirure and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestitures.

7. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request and five day's notice, Sandoz and Ciba shall permit any duly authorized representative(s) of the Commission:

a. Access during the office hours of Sandoz or Ciba 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 Sandoz, Ciba or Sandoz Agro relating to compliance with this Hold Separate;

b. Without restraint or interference from respondents, to interview Sandoz or Ciba officers, directors or employees, or employees of the properties to be divested, who may have counsel present, regarding any such matters.

8. This Hold Separate shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND

REQUIREMENT FOR CONFIDENTIALITY

Ciba-Geigy Limited ("Ciba") and Sandoz Ltd. ("Sandoz") have entered into a Agreement Containing Consent Order and Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of certain Sandoz businesses. Until after the Commission's order becomes final and those businesses are divested, the Sandoz Agricultural Chemical Business and the Sandoz Animal Health Business must be managed and maintained as separate, ongoing businesses, independent of all other Ciba, Sandoz and Novartis businesses. All competitive information relating to the held separate businesses, must be retained and maintained by the persons involved in these businesses on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Ciba, Sandoz or Novartis business. Similarly, all such persons involved in the Ciba, Sandoz or Novartis business. Similarly, all such persons involved in the Ciba, Sandoz or Novartis Agricultural Chemical and Animal Health Business shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment involves the held separate businesses.

Any violation of the Consent Order or the Agreement to Hold Separate, incorporated by reference as part of the Consent Order, may subject Ciba, Sandoz and Novartis to civil penalties and other relief as provided by law.

SEPARATE STATEMENT OF CHAIRMAN ROBERT PITOFSKY, AND COMMISSIONERS JANET D. STEIGER, ROSCOE B. STAREK, III AND CHRISTINE A. VARNEY

We write to respond to Commissioner Azcuenaga's suggestion that the Commission erred by requiring licensing rather than divestiture in order to remedy competitive problems in the gene therapy markets.

The Commission's complaint in this matter alleges that the merger of Ciba-Geigy Ltd. ("Ciba") and Sandoz Ltd. ("Sandoz") may substantially lessen competition or tend to create a monopoly in

several gene therapy markets, including "gene therapy technologies" and "research and development of gene therapies" as well as specific gene therapy product markets.[1] No gene therapy product is currently marketed or even approved by the Food and Drug Administration, and none is expected to obtain regulatory approval until the year 2000. The complaint notes, however, that sales of gene therapy products are projected to reach $45 billion by 2010.[2] The complaint emphasizes that patent rights to proprietary inputs sufficient to provide a firm in this industry with reasonable assurances of freedom to operate are necessary for the firm to reach advanced stages of development.[3] Moreover, the complaint alleges not only that Ciba and Sandoz "are two of only a few" entities capable of commercially developing gene therapy products, but also that they "control the substantial proprietary rights necessary to commercialize gene therapy products" and "control critical gene therapy proprietary portfolios, including patents, patent applications, and know-how."[4] We are left with a post-merger picture of potentially life-saving therapies whose competitive development could be hindered by the merged firm's control of substantially all of the proprietary rights necessary to commercialize gene therapy products. Preserving long-run innovation in these circumstances is critical.

Commissioner Azcuenaga argues that the Commission should have required the divestiture of Ciba's or Sandoz's gene therapy businesses, rather than licensing, in order to "preserve the competition that existed before the merger."[5] Of course, an injunction or divestiture is often the remedy chosen to resolve competition problems arising from mergers and acquisitions. In this case, however, patent licensing not only alleviated the competitive problems but also avoided divestiture's potentially disruptive effects on the parties' ongoing research.

As the Commission explained in the Analysis to Aid Public Comment that accompanied acceptance of the proposed consent

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[1] Complaint ¶ 9.

[2] *Id.* ¶ 10.

[3] *Id.* ¶ 26.

[4] *Id.* ¶¶ 14, 15; *see also id.* ¶¶ 16-19.

[5] *See* Statement of Commissioner Azcuenaga at 1.

agreement in this case, licensing was as effective in preserving competition as the traditional remedy of divestiture:

> The Commission believes that licensing, rather than divestiture of assets, is sufficient because access to certain key intellectual property rights held by the merged firm is a crucial component of successful commercialization of many potential gene therapy products. Competitors already have (to varying degrees) the hard assets, e.g., production facilities, researchers and scientists, needed to compete. Rivals and other scientists confirm that licensing would enable them to develop gene therapy products and replace the competition lost due to the merger.[6]

Licensing was preferable to divestiture in this case because an asset divestiture "might create substantial disruption in the parties' research and development efforts."[7] Not a single comment was submitted during the public comment period questioning this analysis, despite the invitation in the statement that Commissioner Azcuenaga issued when the Commission accepted the proposed order for public comment.

Commissioner Azcuenaga asks why the Commission could not have ordered a divestiture of Sandoz's wholly-owned Gene Therapy, Inc. ("GTI") subsidiary or Ciba's partially-owned Chiron Corporation subsidiary. It may be appealing to call for divestiture of businesses acquired only two or three years ago -- as both GTI and Chiron were -- particularly when one such business is only partially owned. Ciba and Chiron, however, have numerous joint efforts that would have to be unraveled to separate the two companies. And GTI's U.S. clinical development is being closely coordinated with trials that Sandoz is conducting in Europe. Divestiture in this case would not be simple. To divest a business that would have such extensive continuing entanglements with the merged firm -- its principal competitor -- not only could hamper efficiency but also could be less effective in restoring competition if it led to coordinated interaction or left the divested business at the mercy of the merged firm.[8]

Instead of divestiture, the order requires the merged firm to license gene therapy technology and patent rights to Rhône-Poulenc Rorer Inc. ("RPR"), so as to put RPR in a position to compete against

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[6] Analysis to Aid Public Comment at 7.

[7] *Id.*

[8] Divestiture of the type that Commissioner Azcuenaga favors also might have disrupted or even ended the merging firms' ongoing collaborations with academic researchers.

the combined firm. In this way, RPR will be able to continue its research to develop HSV-tk gene therapy products for cancer and graft versus host disease. Commissioner Azcuenaga suggests that this relief only creates a potential "clone" that "may follow identical [research] tracks."[9] We can not agree. This licensing package will give RPR the intellectual property that it likely could have obtained but for this merger's effect in reducing Novartis' incentive to license, so that RPR may continue to research and develop products on its own. Given RPR's ongoing research efforts, there is no basis for the assertion that this licensing package will turn RPR's efforts into a "clone" of the merging firms.

In addition, the order mandates that the merged firm license specific patents of Ciba and Sandoz to any interested person at a reasonable royalty. The dissent seems to suggest that such relief is ill-advised because it is based on some notion of the "essential facilities" doctrine, it usurps the role of the Patent and Trademark Office, and the setting of a royalty rate puts the Commission in the position of a price regulator.

First, it is not accurate to suggest that this remedy flows from the essential facilities doctrine. The Commission is not saying that Sandoz's *ex vivo* patent and associated cytokine patents are so important that they "ought" to be shared with everyone. Instead, the remedy is a response to a *merger* in which the merging parties possessed competing technologies. Before the merger, if developers of potential gene therapies were unable to reach agreement with Sandoz to license the *ex vivo* and associated patents, in many instances they could have worked with Ciba and used other technologies that did not infringe the *ex vivo* patent.[10] The merger has eliminated that option. Granting the right to sublicense was necessary to restore access to the critical patents for other developers of many gene therapies.

Second, although the Commission alleges in its complaint that both Ciba and Sandoz control portfolios of issued patents and patent

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[9] Statement of Commissioner Azcuenaga at 3.

[10] Analysis to Aid Public Comment at 6 ("Although Ciba/Chiron and Sandoz had substantial individual intellectual property portfolios pre-merger, they had the incentive and did act as rival centers from which others could obtain needed intellectual property rights. Ciba/Chiron and Sandoz would grant limited intellectual property rights to other developers and researchers in return for receiving marketing or other valuable rights back from them.").

applications "of uncertain breadth and validity,"[11] the Commission does so not as a patent tribunal but as a body charged with evaluating how market reality -- including firms' perceptions of their own and others' positions -- affects competitive behavior. Ciba and Sandoz each controlled a variety of patents and patent applications, and their merger combined alternative technologies and approaches to research and development. Whereas before the merger third parties might have had the option of licensing one party's patents or challenging the validity of the other's, the Commission was concerned that the merger created a "killer" patent portfolio so broad as to eliminate that option. As a result, the merger created a disincentive for Novartis to license third parties.[12] Broad licensing of the *ex vivo* patent and the cytokines resolves these concerns. Simply stated, licensing of these patents preserves the innovation competition that would otherwise be lost as a result of the merger.[13]

Third, the Commission must always think long and hard before it enters an order which sets a price. But that cautionary rule should not be turned into an absolute. The Commission believes that a compulsory license was a more focused and effective remedy than divestiture. If there is to be a compulsory license, there must be a price, and that price cannot be too high.[14] In this case the price was set at a level that would not interfere with the restoration of competition, and was commensurate with similar kinds of licenses negotiated in similar situations in the free market.

In short, requiring Novartis to license the key gene therapy patent rights is the best way to maintain competition and preserve the efficiencies gained in this transaction.

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[11] Complaint ¶ 31 f.

[12] Complaint ¶¶ 15, 31 f, g. *See* W. Tom and J. Newberg, "U.S. Enforcement Approaches to the Antitrust/Intellectual Property Interface," in Competition Policy, Intellectual Property Rights, and International Economic Integration.

[13] The dissent appears to suggest that the licensing remedy called into question the decision of NIH to license the *ex vivo* patent to Sandoz on an exclusive basis. Statement of Commissioner Azcuenaga at 5. That criticism is inapt since NIH's license grants Sandoz the full authority to sublicense the patent.

[14] In previous cases the Commission has had concerns with royalty payments in licenses meant to restore competition eliminated by merger. There are two reasons for such a concern: (1) royalties can lead to information exchanges facilitating collusion, and (2) royalties can interfere with firms' incentives to compete vigorously. The order issued today minimizes the exchange of competitively sensitive information through use of an independent auditor to collect and aggregate royalty payments. Moreover, the relatively low royalty rate is unlikely to affect development of potential "blockbuster" drugs. *See* Analysis to Aid Public Comment at 8.

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA,
CONCURRING IN PART AND DISSENTING IN PART

The order in this matter seeks to remedy the alleged anticompetitive effects of the merger of Ciba-Geigy Limited and Sandoz Ltd. in several product markets, corn herbicides, flea control products, and various gene therapy markets. I concur in the requirements of the order that the merged firm, Novartis, divest the corn herbicide business and the flea control product business that belonged to Sandoz. I do not concur with the order in the gene therapy markets, in which the Commission has bypassed the obvious, simple and effective remedy of divestiture in favor of a complex regulatory concoction that promises to be less effective and more costly.

Given the allegations of the complaint, the obvious remedy in the gene therapy markets is to require the divestiture of the gene therapy business of either Ciba-Geigy or Sandoz. A divestiture of GTI[1] or of Ciba-Geigy's interest in Chiron[2] would eliminate the alleged anticompetitive overlaps in the gene therapy markets[3] and preserve the competition that existed before the merger. It is a remedy that would be simple, complete, and easily reviewable. Normally, divestiture would be the remedy of choice, and no persuasive reason for a different remedy has been presented in this case.

The order of the Commission instead imposes licensing requirements that do not necessarily preserve the competition that existed before the merger. The only explanation offered for preferring licensing over an asset divestiture is the assertion in the Analysis To Aid Public Comment that a divestiture "might create a substantial disruption in the parties' research and development efforts."[4] What this means is not clear. Any divestiture is likely to involve substantial disruption, and if concerns about "disruption" were sufficient to avert

[1] Sandoz participated in the gene therapy market through its wholly-owned subsidiary Gene Therapy, Inc. (GTI), a corporation headquartered in Maryland that Sandoz acquired in 1995.

[2] Ciba-Geigy participated in the gene therapy market through Chiron Corporation, a company headquartered in California, in which Ciba-Geigy acquired a 46.5% interest in 1994. Chiron acquired Viagene, Inc., a U.S. gene therapy firm, in 1995.

[3] *See* Complaint ¶¶ 31.d through g.

[4] Analysis To Aid Public Comment at 7. The Analysis, published with the proposed consent order, states that its "purpose . . . 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 its terms." *Id.* at 17.

a divestiture, that remedy would never be used. No doubt the parties prefer the negotiated licensing arrangement, but the preferences of the parties should not define the remedy.

The implication that divestiture in this case somehow would be counterproductive does not ring quite true. This is an industry in which cooperative research and development often is undertaken and in which innovative companies frequently change hands. Indeed, Ciba-Geigy and Sandoz only recently acquired their interests in the gene therapy field.[5] The gene therapy products at issue require years of research, and the FDA approval process also takes years. If the respective acquisitions by Ciba-Geigy and Sandoz in 1994 and 1995 of gene therapy companies did not hamper ongoing and future R&D projects, one must wonder why a divestiture in 1997 of one of those companies would be problematic.

Also, the licensing requirements imposed by the order are somewhat different from what we previously have seen. In the HSV-tk gene therapy markets, the complaint on which the order is based alleges that Ciba-Geigy and Sandoz, after the merger, could "combine alternative technologies, and reduce innovation competition"[6] and that "[o]nly two companies [presumably Ciba and Sandoz] are capable of commercially developing"[7] the HSV-tk gene therapies at issue.[8] The order permits Ciba-Geigy and Sandoz to combine their research and development projects in the HSV-tk gene therapy markets and requires them to license their combined intellectual property to an entity approved by the Commission. Instead of preserving the premerger competition between Ciba-Geigy and Sandoz, the order allows the allegedly anticompetitive combination to stand, as long as it clones its intellectual property.[9] Novartis remains free to "combine alternative technologies," as alleged in the complaint. The diversity of research projects is an element of the pre-merger competition

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[5] *See* notes 1 & 2 *supra*.

[6] Complaint ¶ 31.d.

[7] Complaint ¶¶ 16 & 17.

[8] The complaint alleges HSV-tk gene therapy markets for the treatment of cancer and for the treatment of graft versus host disease.

[9] In addition, at the option of the licensee of the intellectual property, Novartis (but not Chiron, *see* note 2 *supra*) is required to provide "technical information, know-how or materials . . . necessary to enable" the licensee to research and develop HSV-tk products. Order ¶ IX.A.2.

between Sandoz and Ciba-Geigy that is worth preserving,[10] but the order does not ensure that it is preserved.

The remedy in the market for Factor VIII gene therapy for the treatment of hemophiliacs offers two alternatives for licensing.[11] It is not clear how these alternatives will eventually work out, but neither of them necessarily preserves the competition that existed before the merger. A divestiture of either GTI or of Ciba-Geigy's interest in Chiron would have preserved the diversity of competition that existed before the merger.

The complaint also alleges a market for "the research and development of gene therapy," in which Ciba-Geigy and Sandoz are "two of only a few entities capable of commercially developing gene therapy products" and in which they control "critical gene therapy proprietary portfolios."[12] In this overall market for the research and development of gene therapy, the merger allegedly would "heighten barriers to entry by combining portfolios of patents and patent applications of uncertain breadth and validity" and "create a disincentive in the merged firm to license intellectual property rights"[13] to others. The remedy for the alleged violation is to require the licensing of intellectual property rights at a "low"[14] royalty rate stipulated in the order.[15]

Remedies that require the Commission to police prices generally are disfavored as highly regulatory, difficult to enforce and likely to distort the normal functioning of the market. They should be particularly disfavored in cases such as this in which a clean, simple divestiture of a gene therapy business is readily available and would not impede consummation of the remainder of the transaction, which is neutral or procompetitive. This agency often has been in the forefront in opposing government price controls, which makes this part of the order particularly mystifying.

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[10] *See* FTC & DOJ, Antitrust Guidelines for the Licensing of Intellectual Property ¶ 3.2.3 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132.

[11] Order ¶ IX.D requires Sandoz to convert its exclusive license to the partial Factor VIII hemophilia gene to a nonexclusive one or to license certain of its relevant intellectual property ("Hemophilia License," defined in Order ¶ I.PP).

[12] Complaint ¶¶ 14 & 15.

[13] Complaint ¶¶ 31.f & g.

[14] Analysis To Aid Public Comment, *supra* note 4, at 8.

[15] Order ¶¶ IX.B & C.

The compulsory licensing requirement applies to the so-called *ex vivo* or Anderson patent.[16] The *ex vivo* patent, issued in 1995, is owned by the National Institutes of Health (NIH) and licensed by NIH exclusively to Sandoz. To commercialize a gene therapy product, a researcher would need either a license from Sandoz under the *ex vivo* patent or a different mode of transduction.[17]

The requirement to license the *ex vivo* patent does not follow, as in the usual case, from ownership by the merger partner of competing technology. There is no substitute for the *ex vivo* patent, and Sandoz is the exclusive licensee under the patent. The question, then, is what links the compulsory licensing requirement to the violation alleged in the complaint. One possibility is that the compulsory licensing requirement reflects a judgment that the *ex vivo* patent is excessively broad. The complaint alleges that the merger will "combin[e] portfolios of patents and patent applications of uncertain breadth and validity." This is a curious allegation for a complaint under Section 7 of the Clayton Act and one that is not explained. Antitrust can provide the basis for challenging the use or combination of patents in some circumstances, but patent law, not antitrust law, customarily applies to assess the breadth and validity of patents. As far as I am aware, we have neither standards nor evidence by which we might conclude that the breadth or validity of the *ex vivo* patent provides a basis for liability under Section 7 of the Clayton Act.

One authority has identified the *ex vivo* patent as a "broad" patent that "cover[s] enormous areas of technology" and suggested that compulsory licensing would encourage follow-on invention in the field.[18] Others maintain that broad patent protection for inventions is necessary to encourage groundbreaking research and disclosure and that compulsory licensing would harm those incentives. These are

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[16] Order ¶ IX.C. As I understand it, the two modes of delivery (called "transduction") for gene therapies are *ex vivo* and *in vivo*. *Ex vivo* delivery involves removing, modifying and replacing the patient's cells and has been used in the majority of gene therapy trials. *In vivo* delivery involves delivery of genetic material directly into the patient.

[17] The need to invent around existing patents can be a significant incentive for invention. To the extent that the compulsory licensing required by the order may reduce this incentive, it may reduce the research and development of alternative means of transduction for gene therapy.

[18] John Barton, Global Hearings Tr. 3409 (Nov. 29, 1995) (suggesting at Tr. 3415 that compulsory licensing for follow-on investors is "an anathema in the United States"); *see* FTC Staff Report, "Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace," Ch. 8, at 13-14 (May 1996).

important public policy issues, but they are not elements of a violation under Section 7 of the Clayton Act.

Even if some might think the *ex vivo* patent is too broad, it was granted to NIH by the U.S. Patent and Trademark Office, also an agency of the U.S. government, and licensed by NIH to Sandoz. It would seem curious for this agency, charged with enforcing Section 7 of the Clayton Act and Section 5 of the FTC Act, to call into question the breadth and validity of a patent granted by the Patent Office to another federal agency. It also would seem curious to call into question the decision of NIH to license the patent on an exclusive basis. To the extent that such a decision entails evaluation of the potential for advancing scientific research in aid of human health, the National Institutes of Health would appear to have qualifications superior to the FTC. The fact that the respondents agreed to this remedy tells us nothing about its competitive implications. We must look elsewhere for an explanation of the requirement to license the *ex vivo* patent.

A theme running through the complaint is that the *ex vivo* patent is "essential" to commercializing a gene therapy product.[19] But the courts and the Commission consistently have held that a patent holder has no obligation to deal and is free to refuse to grant licenses,[20] even if some believe that the patent is "essential" to follow-on inventors. There being no apparent basis for the compulsory licensing of the *ex vivo* patent under Section 7 of the Clayton Act, perhaps the majority selected this remedy in the belief that it serves the public good. The patent was developed with tax dollars, it is owned by a government agency, and access to the patent could be useful to follow-on inventors. Put another way, the majority may believe it is protecting the public health or even saving lives. These are powerful arguments, but Congress heard them and decided instead to encourage the

[19] The "essential facilities" doctrine ordinarily is triggered by a refusal to deal by a monopolist and is not part of an analysis under Section 7 of the Clayton Act.

[20] *See Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 426-30 (1908); *see also Hartford-Empire Co. v. United States*, 323 U.S. 386, 432-33, *clarified*, 324 U.S. 570 (1945); *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 647 (9th Cir. 1981); *E.I. duPont de Nemours & Co.*, 96 FTC 705, 748 & n.40 (1980). *See also* FTC & DOJ, Antitrust Guidelines for the Licensing of Intellectual Property ¶ 2.2 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132 ("The Agencies will not presume that a patent . . . necessarily confers market power upon its owner. . . . If a patent . . . does confer market power, that market power does not by itself offend the antitrust laws. . . . Nor does such market power impose on the intellectual property owner an obligation to license the use of that property to others.").

patenting of inventions resulting from government-sponsored research and the licensing of the patents to private industry as an incentive for industry to make the significant investments to bring a product to market.[21]

A divestiture of the gene therapy business of either Ciba-Geigy or Sandoz would resolve the alleged anticompetitive overlap in all the gene therapy markets. It would preserve the competition in research and development that existed before the merger, without compulsory licensing under order, without the mandating by the Commission of "reasonable" fees, and without creating possible disincentives for innovative research.

I dissent from the order in the gene therapy markets.

[21] 35 U.S.C. 200-211; 15 U.S.C. 3701-3714. *See* Eisenberg, "Symposium: A Technology Policy Perspective on the NIH Gene Patenting Controversy," 55 U. Pitt. L. Rev. 633 (1994).

IN THE MATTER OF

BAXTER INTERNATIONAL INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3726. Complaint, March 24, 1997--Decision, March 24, 1997

This consent order requires, among other things, Baxter International ("Baxter"), an Illinois-based corporation, to divest its Autoplex product to a Commission-approved buyer, and to license Immuno International AG's ("Immuno") product in development to a Commission-approved licensee within four months of the date Baxter signs the consent. This would resolve antitrust concerns raised by the $463 million acquisition of Immuno by Baxter, which both manufacture a wide variety of biologic products derived from human blood plasma.

Appearances

For the Commission: *Pamela Taylor* and *George Cary*.

For the respondent: *Michael Sennett, Bell, Boyd & Lloyd*, Chicago, IL.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Baxter International Inc. ("Baxter"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the majority of the outstanding voting stock of Immuno International AG ("Immuno"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and that such an acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the FTC Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Baxter is a corporation organized, existing, and doing business under and by virtue of the laws of the state of

Delaware, with its principal place of business located at One Baxter Parkway, Deerfield, Illinois.

2. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. THE ACQUIRED COMPANY

3. Immuno is a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its principal place of business located at Zollikerstrasse 60, CH-8702, Zollikon, Switzerland.

4. Immuno is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On or about August 28, 1996, Baxter entered into a Stock Purchase Agreement with Pharminvest Ltd., Albenga Holding en Handelmaatschappij V.V. and Bio-Products and Bio-Engineering SA to purchase the majority of the voting stock of Immuno for approximately $462.8 million ("Acquisition").

IV. THE RELEVANT MARKETS

6. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

a. The research, development, manufacture and sale of Factor VIII Inhibitor Treatments approved by the United States Food and Drug Administration ("FDA") for sale in the United States; and

b. The research, development, manufacture and sale of Fibrin Sealant to be approved by the FDA for sale in the United States.

7. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

V. STRUCTURE OF THE MARKET

8. The market for the research, development, manufacture and sale of Factor VIII Inhibitor Treatments is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). Baxter and Immuno are the only two suppliers of Factor VIII Inhibitor Treatments in the United States.

9. Baxter and Immuno are actual competitors in the relevant market for the research, development, manufacture and sale of Factor VIII Inhibitor Treatments.

10. The market for the research, development, manufacture and sale of Fibrin Sealant is highly concentrated as measured by the HHI. Baxter and Immuno are two of only a small number of companies seeking FDA approval to market Fibrin Sealant in the United States.

11. Baxter and Immuno are actual competitors in the relevant market for the research, development, manufacture and sale of Fibrin Sealant in the United States.

VI. BARRIERS TO ENTRY

12. Entry into the research, development, manufacture and sale of Factor VIII Inhibitor Treatments is difficult and time consuming, requiring the expenditure of significant resources over a period of many years with no assurance that a viable commercial product will result. The existence of broad patents governing the formulations and the manufacture of such products make new entry both difficult and unlikely.

13. Entry into the research, development, manufacture and sale of Fibrin Sealant is difficult and time consuming, requiring the expenditure of significant resources over a period of many years with no assurance that a viable commercial Fibrin Sealant will result. The existence of broad patents governing the formulations and the manufacture of such products make new entry both difficult and unlikely.

VII. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between Baxter and Immuno in the relevant markets;

b. By increasing the likelihood that Baxter will unilaterally exercise market power in the relevant markets; and

c. By creating a dominant firm in the relevant markets.

VIII. VIOLATIONS CHARGED

15. The Acquisition described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

16. The Acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

Commissioner Starek recused.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of Immuno International AG, and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented 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

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, or that the facts as alleged in such complaint, other

than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The 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 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 described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Baxter International Inc. ("Baxter") is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at One Baxter Parkway, Deerfield, 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 *"Baxter"* means Baxter International Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Baxter International Inc., and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns. Baxter also includes Immuno International AG.

B. *"Immuno"* means Immuno International AG, a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its principal place of business located at Zollikerstrasse 60, CH-8702, Zollikon, Switzerland.

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

D. *"FDA"* means the United States Food and Drug Administration.

E. *"Acquisition"* means the acquisition by Baxter of the majority of Immuno voting stock.

F. *"Factor VIII Inhibitor Treatments"* means the activated prothrombin complex concentrates used to treat Factor VIII antibodies in hemophiliacs, approved by the FDA for sale in the United States.

G. *"Autoplex"* means the Factor VIII Inhibitor Treatments marketed by Baxter.

H. *"FEIBA"* means the Factor VIII Inhibitor Treatments marketed by Immuno.

I. *"Autoplex Assets"* means all of Baxter's assets and rights relating solely to the research, development, manufacture or sale of Factor VIII Inhibitor Treatments sold under the trade names Autoplex or Autoplex T, including all arrangements necessary to meet the requirements of paragraph II.A of this order. "Autoplex Assets" include, but are not limited to, all machinery, fixtures, equipment and other tangible personal property, rights to brand or trade names, formulations, inventory, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the Acquirer to use such information) and all data, contractual rights, materials and information relating to FDA and other government or regulatory approvals for the United States.

J. *"FEIBA Assets"* means all of Immuno's assets and rights relating solely to the research, development, manufacture or sale of Factor VIII Inhibitor Treatments sold by Immuno, prior to the Acquisition, under the trade name FEIBA, including all arrangements necessary to meet the requirements of paragraph IV.A of this order. "FEIBA Assets" include, but are not limited to, all machinery, fixtures, equipment and other tangible personal property, rights to brand or trade names, formulations, inventory, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for

the New Acquirer to use such information) and all data, contractual rights, materials and information relating to FDA and other government or regulatory approvals for the United States.

K. *"Divested Inhibitor Assets"* means either the Autoplex Assets or the FEIBA Assets, as applicable.

L. *"Acquirer"* means the entity to whom Baxter shall divest the Autoplex Assets pursuant to paragraph II of this order.

M. *"New Acquirer"* means the entity to whom the trustee shall divest either the Autoplex Assets or the FEIBA Assets pursuant to paragraph IV of this order.

N. *"Fibrin Sealant"* means a topical biological product, in any form, including, but not limited to, freeze-dried and frozen, used to control bleeding or seal tissues together.

O. *"Immuno Fibrin Sealant Assets"* means all of Immuno's assets and rights relating to the research, development, manufacture or sale of any Fibrin Sealant developed by Immuno, as of the date this order becomes final. "Immuno Fibrin Sealant Assets" include, but are not limited to, all formulations, patents, patent applications, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the Fibrin Sealant Licensee to use such information) and all data, contractual rights, materials and information relating to FDA and other government or regulatory approvals for the United States.

P. *"Fibrin Sealant Licensee"* means the entity to whom Baxter shall license the Immuno Fibrin Sealant Assets pursuant to paragraphs V or VII of this order.

Q. *"Contract Manufacture"* means the manufacture of Factor VIII Inhibitor Treatments or Fibrin Sealant, as applicable, by Baxter for sale to the Acquirer, the New Acquirer or the Fibrin Sealant Licensee, as applicable.

R. *"Cost"* means the manufacturer's average direct per unit cost of manufacturing Factor VIII Inhibitor Treatments or Fibrin Sealant, as applicable, plus costs of manufacturing Factor VIII Inhibitor Treatments or Fibrin Sealants, as applicable, that are directly attributable to FDA regulatory, quality control and compliance.

II.

It is further ordered, That:

A. Within four (4) months of the date Baxter signed the agreement containing consent order in this matter, Baxter shall divest, absolutely and in good faith, the Autoplex Assets, effect all arrangements, including, but not limited to, the licensing of any Baxter patents and know-how not related solely to the research, development, manufacture or sale of Factor VIII Inhibitor Treatments, necessary to enable the Acquirer to manufacture and sell a Factor VIII Inhibitor Treatment using the Divested Inhibitor Assets, and execute an agreement that includes the provisions required by paragraph II.C of this order.

B. The Autoplex Assets shall be divested only to, and the agreement executed only with, an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that the Acquirer does not choose to acquire all of the physical assets included in the Autoplex Assets because the Acquirer does not need such physical assets in order to engage in the manufacture and sale of Factor VIII Inhibitor Treatments, respondent shall not be required to divest such assets. The purpose of the divestiture is to ensure the continued competition between Autoplex and FEIBA in the United States, in the same manner in which these products would compete absent the Acquisition, and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

C. Respondent's agreement with the Acquirer or New Acquirer (hereinafter "Divestiture Agreement") shall include the following and Baxter shall commit to satisfy the following:

1. Baxter shall grant to the Acquirer the right of reference to the data contained in Baxter's Product License Application ("PLA") No. 91-0649 (or to the New Acquirer the right of reference to the data contained in Immuno's PLA No. 82-027) for the Divested Inhibitor Assets on file with the FDA. Baxter shall make all necessary filings with the FDA authorizing the FDA to refer to the applicable PLA for the data in support of the PLA of the Acquirer or New Acquirer for a Factor VIII Inhibitor Treatment, including any supplemental PLAs

or related PLAs. Provided, however, that the right of reference granted in this subparagraph does not constitute a general release of the data in Baxter's PLA No. 91-0649 (or Immuno's PLA No. 87-027), including any supplemental PLAs or related PLAs, except as it may appear in labeling.

2. Baxter shall Contract Manufacture and deliver to the Acquirer or the New Acquirer, in a timely manner and under reasonable terms and conditions, a supply of Factor VIII Inhibitor Treatments specified in the Divestiture Agreement, at Baxter's cost for a period not to exceed three (3) years from the date the Divestiture Agreement is approved, or four (4) months after the date the Acquirer or the New Acquirer obtains all necessary FDA approvals to manufacture Factor VIII Inhibitor Treatments for sale in the United States, whichever is earlier; provided, however, that the time period may be extended by the Commission in twelve (12) month increments for a period not to exceed an additional forty-eight (48) months if the trustee appointed pursuant to paragraph III of this order submits to the Commission the certification provided for in subparagraph II.C.8 of this order.

3. Baxter shall make representations and warranties to the Acquirer or the New Acquirer that the Factor VIII Inhibitor Treatments that are Contract Manufactured by Baxter for the Acquirer or the New Acquirer meet the FDA approved specifications therefor and are not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act, 21 U.S.C. 321, *et seq.* Baxter shall agree to indemnify, defend and hold the Acquirer or the New Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Factor VIII Inhibitor Treatments Contract Manufactured by Baxter pursuant to subparagraph II.C.2 of this order to meet FDA specifications. This obligation shall be contingent upon the Acquirer or the New Acquirer giving Baxter prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting Baxter to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require Baxter to be liable for any negligent act or omission of the Acquirer or the New Acquirer, or for any representations and warranties, express or implied, made by the Acquirer or the New Acquirer that exceed the representations and warranties made by Baxter to the Acquirer or the New Acquirer.

4. During the term of Contract Manufacturing, upon reasonable request by the Acquirer, the New Acquirer or the trustee appointed pursuant to paragraph III of this order, Baxter shall make available to the trustee, or its agents or representatives, all records kept in the normal course of business that relate to the cost of manufacturing the Contract Manufactured Factor VIII Inhibitor Treatments.

5. Upon reasonable notice and request from the Acquirer or the New Acquirer to respondent, respondent shall provide: (a) such assistance and advice as is reasonably necessary to enable the Acquirer or the New Acquirer to obtain all necessary FDA approvals to manufacture Factor VIII Inhibitor Treatments for sale in the United States; (b) such assistance as is reasonably necessary to enable the Acquirer to manufacture Factor VIII Inhibitor Treatments in substantially the same manner and quality employed or achieved by Baxter or, if divested to the New Acquirer, Immuno, prior to the Acquisition; and (c) consultation with knowledgeable employees of Baxter and training at a facility of the Acquirer's or the New Acquirer's choosing, for a period of time, not to exceed one (1) year, sufficient to satisfy the management of the Acquirer or the New Acquirer that its personnel are adequately trained in the manufacture of Factor VIII Inhibitor Treatments for sale in the United States. Such assistance shall include an on-site inspection of Baxter's facility that is performing the Contract Manufacturing, upon reasonable notice and request of the Acquirer or the New Acquirer. Respondent may require reimbursement from the Acquirer or the New Acquirer for all its direct out-of-pocket expenses incurred in providing the services required by this subparagraph II.C.5.

6. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission, with the divestiture application filed by respondent with the Commission requesting approval of the proposed divestiture, a certification attesting to the good faith intention of the Acquirer or the New Acquirer, including an actual plan by the Acquirer or the New Acquirer, to obtain in an expeditious manner all necessary FDA approvals to manufacture Factor VIII Inhibitor Treatments for sale in the United States.

7. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the trustee appointed pursuant to paragraph III of this order, periodic verified written reports setting forth in detail the efforts of the Acquirer or the New Acquirer to sell

Contract Manufactured Factor VIII Inhibitor Treatments in the United States and to obtain all FDA approvals necessary to manufacture its own Factor VIII Inhibitor Treatments for sale in the United States. The Divestiture Agreement shall require the first such report 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 the New Acquirer to manufacture Factor VIII Inhibitor Treatments for sale in the United States. The Divestiture Agreement shall also require the Acquirer or the New Acquirer to report to the Commission and the trustee within ten (10) days of its ceasing the sale of Contract Manufactured Factor VIII Inhibitor Treatments 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 Factor VIII Inhibitor Treatments for sale in the United States.

8. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or the New Acquirer: (a) voluntarily ceases for sixty (60) days or more the sale of Contract Manufactured Factor VIII Inhibitor Treatments in the United States prior to obtaining all necessary FDA approvals to manufacture Factor VIII Inhibitor Treatments for sale in the United States; (b) abandons its efforts to obtain all necessary FDA approvals to manufacture Factor VIII Inhibitor Treatments for sale in the United States; or (c) fails to obtain all necessary FDA approvals of its own to manufacture Factor VIII Inhibitor Treatments for sale in the United States within three (3) years from the date the Commission approves the Divestiture Agreement with the Acquirer or the New Acquirer; provided, however, that the time period may be extended by the Commission in twelve (12) month increments for a period not to exceed an additional forty-eight (48) months if the trustee appointed pursuant to paragraph III of this order certifies to the Commission that the Acquirer or the New Acquirer made good faith efforts to obtain all necessary FDA approvals for manufacturing Factor VIII Inhibitor Treatments for sale in the United States and that such FDA approvals appear likely to be obtained within such extended time period.

9. The Divestiture Agreement with an Acquirer shall provide that if it is terminated, the Autoplex Assets shall revert back to the respondent and either the Autoplex Assets or the FEIBA Assets shall

be divested by the trustee to a New Acquirer pursuant to the provisions of paragraph IV of this order.

D. While the obligations imposed by paragraphs II, III or IV 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 and sell both of the Factor VIII Inhibitor Treatments in the United States; (2) to maintain the viability and marketability of both of the Divested Inhibitor Assets as well as all tangible assets, including manufacturing facilities, needed to Contract Manufacture and sell Factor VIII Inhibitor Treatments; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of any of the Divested Inhibitor Assets or tangible assets including the manufacturing facilities needed to Contract Manufacture and sell both of the Factor VIII Inhibitor Treatments, except for ordinary wear and tear.

III.

It is further ordered, That:

A. At any time after this order becomes final, the Commission may appoint a trustee to monitor whether Baxter and the Acquirer or the New Acquirer expeditiously perform their respective responsibilities as required by the Divestiture Agreement approved by the Commission and this order. Baxter shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the trustee appointed pursuant to this paragraph:

1. The Commission shall select the trustee, subject to the consent of Baxter, which consent shall not be unreasonably withheld. If Baxter 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 Baxter of the identity of any proposed trustee, Baxter shall be deemed to have consented to the selection of the proposed trustee.

2. The trustee shall have the power and authority to monitor respondent's compliance with the terms of paragraph II of this order and with the Divestiture Agreement with the Acquirer or the New Acquirer.

3. Within ten (10) days after appointment of the trustee, Baxter shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the trustee all the rights and powers necessary to permit the trustee to monitor respondent's compliance with the terms of paragraph II of this order and monitor the efforts of the Acquirer or New Acquirer to obtain all necessary FDA approvals to manufacture and sell Factor VIII Inhibitor Treatments.

4. The trustee shall serve until such time as the Acquirer or the New Acquirer has received all necessary FDA approvals to research, develop, manufacture and sell Factor VIII Inhibitor Treatments in the United States.

5. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information relating to the research, development, manufacture or sale of Baxter's Factor VIII Inhibitor Treatments, or to any other relevant information, as the trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the cost of manufacturing Factor VIII Inhibitor Treatments. Respondent shall cooperate with any reasonable request of the trustee. Respondent shall take no action to interfere with or impede the trustee's ability to monitor respondent's compliance with paragraph II of this order and the Divestiture Agreement with the Acquirer or the New Acquirer.

6. The trustee shall serve, without bond or other security, at the cost and expense of Baxter, on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have authority to employ, at the cost and expense of Baxter, 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. The Commission shall approve the account of the trustee, including fees for his or her services.

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 subparagraph III.A.1 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 with the Acquirer or the New Acquirer.

10. The trustee shall evaluate reports submitted to it by the Acquirer or the New Acquirer with respect to the efforts of the Acquirer or the New Acquirer to obtain all necessary FDA approvals to manufacture Factor VIII Inhibitor Treatments for sale in the United States and shall report in writing to the Commission every sixty (60) days concerning compliance by the respondent and the Acquirer or the New Acquirer, with the provisions of paragraph II of this order and the efforts of the Acquirer or the New Acquirer to obtain all necessary FDA approvals to manufacture Factor VIII Inhibitor Treatments for sale in the United States.

B. If the Commission terminates the Divestiture Agreement pursuant to subparagraph II.C.8 of this order, the Commission may direct the trustee to seek a New Acquirer, as provided for in paragraph IV of this order and the Divested Inhibitor Assets shall revert back to the respondent.

IV.

It is further ordered, That:

A. If Baxter fails to comply with the terms of paragraph II of this order and to divest absolutely and in good faith the Autoplex Assets within four (4) months from the date respondent signed the agreement containing consent order, or if the Commission terminates the Divestiture Agreement pursuant to subparagraph II.C.8 of this order, then any executed Divestiture Agreement with the Acquirer shall be terminated and the Commission may appoint a trustee to: (a) divest either the Autoplex Assets or the FEIBA Assets; (b) effect all arrangements, including, but not limited to, the licensing of any

Baxter patents and know-how not related solely to the research, development, manufacture or sale of Factor VIII Inhibitor Treatments, necessary to enable the New Acquirer to manufacture and sell a Factor VIII Inhibitor Treatment using the Divested Inhibitor Assets; and (c) enter into a Divestiture Agreement with a New Acquirer that satisfies the requirements of paragraph II.C of this order. In the event that the New Acquirer does not choose to acquire all of the physical assets included in the Divested Inhibitor Assets because the New Acquirer does not need such physical assets in order to engage in the manufacture and sale of Factor VIII Inhibitor Treatments, respondent shall not be required to divest such assets. The purpose of the divestiture is to ensure the continued competition between Autoplex and FEIBA, in the same manner in which these products would compete absent the Acquisition, and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint. Neither the decision of the Commission to appoint the trustee nor the decision of the Commission not to appoint the trustee to divest either the Autoplex or the FEIBA Assets under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a trustee is appointed under paragraph IV.A of this order to divest either the Autoplex Assets or the FEIBA Assets to a New Acquirer and to enter into a Divestiture Agreement with the New Acquirer, respondent 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 Baxter, which consent shall not be unreasonably withheld. If Baxter 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 Baxter of the identity of any proposed trustee, Baxter shall be deemed to have consented to the selection of the proposed trustee. This trustee may be the same trustee as appointed pursuant to paragraph III of this order.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest either the Autoplex Assets or the FEIBA Assets to a New Acquirer and to enter into a Divestiture Agreement with the New Acquirer pursuant to the terms of paragraph II.C of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission.

3. Within ten (10) days after appointment of the trustee, Baxter shall execute a (or amend the existing) trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by paragraph IV.A of this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in subparagraph IV.B.3 of this order to divest either the Autoplex Assets or the FEIBA Assets and to enter into a Divestiture Agreement with the New Acquirer that satisfies the requirements of paragraph II.C of this order. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the twelve (12) month 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.

5. The trustee shall have full and complete access to the personnel, books, records, data, facilities and technical information related to the manufacture, distribution, or sale of Factor VIII Inhibitor Treatments or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of his or her responsibilities.

6. The trustee shall use reasonable 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 and the trustee's obligation to expeditiously accomplish the remedial purpose of the order; to assure that Baxter effects all arrangements necessary to enable the New Acquirer to produce a Factor VIII Inhibitor Treatment using the Divested Inhibitor Assets; to assure that Baxter

enters into a Divestiture Agreement with the New Acquirer to acquire the Divested Inhibitor Assets that complies with the provisions of paragraph II.C of this order; and to assure that Baxter complies with the remaining provisions of paragraph II.D of this order. The divestiture shall be made to, and the Divestiture Agreement shall be made with, the New Acquirer in the manner set forth in paragraph II.C of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. 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 shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's locating a New Acquirer and assuring compliance with this order.

8. 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.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph IV.B of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this order.

11. The trustee shall have no obligation or authority to operate or maintain the Divested Inhibitor Assets.

12. The trustee shall report in writing to respondent and the Commission every sixty (60) days concerning his or her efforts to divest either the Autoplex Assets or the FEIBA Assets as required by this order.

V.

It is further ordered, That:

A. Within four (4) months of the date Baxter signed the agreement containing consent order in this matter, Baxter shall grant a non-exclusive, royalty-free license, in perpetuity, and in good faith, of the Immuno Fibrin Sealant Assets, and shall execute an agreement that includes the provisions required by paragraph V.C of this order.

B. The Immuno Fibrin Sealant Assets shall be licensed only to a Fibrin Sealant Licensee that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the licensing of the Immuno Fibrin Sealant Assets is to ensure the continued research and development competition between Immuno's Fibrin Sealant and Baxter's Fibrin Sealant, to ensure the use of the Immuno Fibrin Sealant Assets for the research, development, manufacture and sale of a Fibrin Sealant approved by the FDA for sale in the United States, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Respondent's agreement with the Fibrin Sealant Licensee (hereinafter "License Agreement") shall not include any provision restricting the Fibrin Sealant Licensee's ability to sublicense the product. The License Agreement shall include the following and Baxter shall commit to satisfy the following:

1. Baxter shall grant to the Fibrin Sealant Licensee the right of reference to the data contained in Immuno's PLA No. 87-0509 for the Immuno Fibrin Sealant Assets on file with the FDA. Baxter shall

make all necessary filings with the FDA authorizing the FDA to refer to Immuno's PLA No. 87-0509 for the data in support of the Fibrin Sealant Licensee's PLA for a Fibrin Sealant, including any supplemental PLAs or related PLAs. Provided, however, that the right of reference granted in this subparagraph does not constitute a general release of the data in Immuno's PLA No. 87-0509, including any supplemental PLAs or related PLAs, except as it may appear in labeling.

2. Once all necessary FDA approvals are obtained by Baxter (or Immuno prior to the Acquisition) to manufacture and sell Immuno's Fibrin Sealant in the United States, Baxter shall Contract Manufacture and deliver to the Fibrin Sealant Licensee in a timely manner and under reasonable terms and conditions, a supply of Immuno's Fibrin Sealant specified in the License Agreement, at Baxter's Cost for a period not to exceed three (3) years from the date the License Agreement is approved, or four (4) months after the date the Fibrin Sealant Licensee obtains all necessary FDA approvals to manufacture Fibrin Sealant for sale in the United States, whichever is earlier; provided, however, that the time period may be extended by the Commission in twelve (12) month increments for a period not to exceed an additional forty-eight (48) months if the trustee appointed pursuant to paragraph VI of this order submits to the Commission the certification provided for in subparagraph V.C.8 of this order.

3. Baxter shall make representations and warranties to the Fibrin Sealant Licensee that the Fibrin Sealant that is Contract Manufactured by Baxter for the Fibrin Sealant Licensee meets the FDA approved specifications therefor and is not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act, 21 U.S.C. 321, *et seq.* Baxter shall agree to indemnify, defend and hold the Fibrin Sealant Licensee harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Fibrin Sealant Contract Manufactured by Baxter pursuant to subparagraph V.C.2 of this order to meet FDA specifications. This obligation shall be contingent upon the Fibrin Sealant Licensee giving Baxter prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting Baxter to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require

Baxter to be liable for any negligent act or omission of the Fibrin Sealant Licensee or for any representations and warranties, express or implied, made by the Fibrin Sealant Licensee that exceed the representations and warranties made by Baxter to the Fibrin Sealant Licensee.

4. During the term of Contract Manufacturing, upon reasonable request by the Fibrin Sealant Licensee or the trustee appointed pursuant to paragraph VI of this order, Baxter shall make available to the trustee, or its agents or representatives, all records kept in the normal course of business that relate to the cost of manufacturing the Contract Manufactured Fibrin Sealant.

5. Upon reasonable notice and request from the Fibrin Sealant Licensee to respondent, respondent shall provide: (a) such assistance and advice as is reasonably necessary to enable the Fibrin Sealant Licensee to obtain all necessary FDA approvals to manufacture Fibrin Sealant for sale in the United States; (b) such assistance as is reasonably necessary to enable the Fibrin Sealant Licensee to manufacture Fibrin Sealant in substantially the same manner and quality employed or achieved by Baxter once it begins manufacturing the Immuno Fibrin Sealant; and (c) consultation with knowledgeable employees of Baxter and training at either Immuno's or the Fibrin Sealant Licensee's facility, whichever the Fibrin Sealant Licensee chooses, for a period of time, not to exceed one (1) year, sufficient to satisfy the Fibrin Sealant Licensee's management that its personnel are adequately trained in the manufacture of Fibrin Sealant for sale in the United States. Such assistance shall include an on-site inspection of Baxter's facility that is performing the Contract Manufacturing, upon reasonable notice and request of the Fibrin Sealant Licensee. Respondent may require reimbursement from the Fibrin Sealant Licensee for all its direct out-of-pocket expenses incurred in providing the services required by this subparagraph V.C.5.

6. The License Agreement shall require the Fibrin Sealant Licensee to submit to the Commission, with the divestiture application filed by respondent with the Commission requesting approval of the proposed license, a certification attesting to the good faith intention of the Fibrin Sealant Licensee, and including an actual plan by the Fibrin Sealant Licensee, to obtain in an expeditious manner all necessary FDA approvals to manufacture Fibrin Sealant for sale in the United States.

7. The License Agreement shall require the Fibrin Sealant Licensee to submit to the trustee appointed pursuant to paragraph VI of this order, periodic verified written reports setting forth in detail the efforts of the Fibrin Sealant Licensee to sell Contract Manufactured Fibrin Sealant in the United States and to obtain all FDA approvals necessary to manufacture its own Fibrin Sealant for sale in the United States. The License Agreement shall require the first such report to be submitted 60 days from the date the Commission approves the License Agreement and every 90 days thereafter until all necessary FDA approvals are obtained by the Fibrin Sealant Licensee to manufacture Fibrin Sealant for sale in the United States. The License Agreement shall also require the Fibrin Sealant Licensee to report to the Commission and the trustee within ten (10) days of its ceasing the sale of any Contract Manufactured Fibrin Sealant 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 Fibrin Sealant for sale in the United States.

8. The License Agreement shall provide that the Commission may terminate the License Agreement if the Fibrin Sealant Licensee: (a) voluntarily ceases for sixty (60) days or more the sale of Contract Manufactured Fibrin Sealant in the United States prior to obtaining all necessary FDA approvals to manufacture Fibrin Sealant for sale in the United States; (b) abandons its efforts to obtain all necessary FDA approvals to manufacture Fibrin Sealant for sale in the United States; or (c) fails to obtain all necessary FDA approvals of its own to manufacture Fibrin Sealant for sale in the United States within three (3) years from the date the Commission approves the License Agreement with the Fibrin Sealant Licensee; provided, however, that the time period may be extended by the Commission in twelve (12) month increments for a period not to exceed an additional forty-eight (48) months if the trustee appointed pursuant to paragraph VI of this order certifies to the Commission that the Fibrin Sealant Licensee made good faith efforts to obtain all necessary FDA approvals for manufacturing Fibrin Sealant for sale in the United States and that such FDA approvals appear likely to be obtained within such extended time period. The License Agreement shall provide that if all necessary FDA approvals to manufacture Fibrin Sealant for sale in the United States are not obtained within the time frames specified by

this subparagraph V.C.8, the Commission may terminate the License Agreement.

9. The License Agreement with a Fibrin Sealant Licensee shall provide that if it is terminated, the License Agreement shall be terminated and the trustee shall grant a new non-exclusive, royalty-free license to a new Fibrin Sealant Licensee pursuant to the provisions of paragraph VII of this order.

D. While the obligations imposed by paragraphs V, VI or VII of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain and obtain all necessary FDA approvals to research, develop, manufacture and sell Immuno's Fibrin Sealant in the United States; (2) to maintain the viability and marketability of the Immuno Fibrin Sealant Assets as well as all tangible assets, including manufacturing facilities, needed to Contract Manufacture and sell Immuno's Fibrin Sealant; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of any of the Immuno Fibrin Sealant Assets or tangible assets, including manufacturing facilities, needed to Contract Manufacture and sell Immuno's Fibrin Sealant, except for ordinary wear and tear.

VI.

It is further ordered, That:

A. At any time after this order becomes final, the Commission may appoint a trustee to monitor whether Baxter and the Fibrin Sealant Licensee expeditiously perform their respective responsibilities as required by the License Agreement approved by the Commission and this order. Baxter shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the trustee appointed pursuant to this paragraph:

1. The Commission shall select the trustee, subject to the consent of Baxter, which consent shall not be unreasonably withheld. If Baxter 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 Baxter of the identity of any proposed trustee, Baxter shall be deemed to have consented to the selection of the proposed trustee. This trustee may be the same trustee appointed pursuant to paragraphs III or IV of this order.

2. The trustee shall have the power and authority to monitor respondent's compliance with the terms of paragraph V of this order and with the License Agreement with the Fibrin Sealant Licensee.

3. Within ten (10) days after appointment of the trustee, Baxter shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the trustee all the rights and powers necessary to permit the trustee to monitor respondent's compliance with the terms of paragraph V of this order and monitor the efforts of the Fibrin Sealant Licensee to obtain all necessary FDA approvals to manufacture and sell Fibrin Sealant.

4. The trustee shall serve until such time as the Fibrin Sealant Licensee has received all necessary FDA approvals to research, develop, manufacture and sell Fibrin Sealant in the United States.

5. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information relating to the research, development, manufacture or sale of Immuno's Fibrin Sealant, or to any other relevant information, as the trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the cost of manufacturing Fibrin Sealant. Respondent shall cooperate with any

reasonable request of the trustee. Respondent shall take no action to interfere with or impede the trustee's ability to monitor respondent's compliance with paragraph V of this order and the License Agreement with the Fibrin Sealant Licensee.

6. The trustee shall serve, without bond or other security, at the cost and expense of Baxter, on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have authority to employ, at the cost and expense of Baxter, 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. The Commission shall approve the account of the trustee, including fees for his or her services.

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 subparagraph VI.A.1 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 V of this order and the License Agreement with the Fibrin Sealant Licensee.

10. The trustee shall evaluate reports submitted to it by the Fibrin Sealant Licensee with respect to the efforts of the Fibrin Sealant Licensee to obtain all necessary FDA approvals to manufacture Fibrin Sealant for sale in the United States and shall report in writing to the Commission every sixty (60) days concerning compliance by the respondent and the Fibrin Sealant Licensee with the provisions of paragraph V of this order and the efforts of the Fibrin Sealant Licensee to obtain all necessary FDA approvals to manufacture Fibrin Sealant for sale in the United States.

B. If the Commission terminates the Divestiture Agreement pursuant to subparagraph V.C.8 of this order, the Immuno Fibrin Sealant Assets shall revert back to the respondent and the Commission may direct the trustee to seek a new Fibrin Sealant Licensee, as provided for in paragraph VII of this order.

VII.

It is further ordered, That:

A. If Baxter fails to comply with the terms of paragraph V of this order and enter into a License Agreement with a Fibrin Sealant Licensee within four (4) months from the date respondent signed the agreement containing consent order, the Commission may appoint a trustee to: (a) grant a non-exclusive, royalty-free license, in perpetuity, and in good faith, of the Immuno Fibrin Sealant Assets to a Fibrin Sealant Licensee; and (b) enter into a License Agreement with a Fibrin Sealant Licensee that satisfies the requirements of paragraph V.C of this order. The purpose of the licensing of the Immuno Fibrin Sealant Assets is to ensure the continued research and development competition between Immuno's Fibrin Sealant and Baxter's Fibrin Sealant, to ensure the use of the Immuno Fibrin Sealant Assets for the research, development, manufacture and sale of Fibrin Sealant approved by the FDA for sale in the United States, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. Neither the decision of the Commission to appoint the trustee nor the decision of the Commission not to appoint the trustee to license the Immuno Fibrin Sealant Assets under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a trustee is appointed under paragraph VII.A of this order to license the Immuno Fibrin Sealant Assets and enter into a License Agreement with a Fibrin Sealant Licensee, Baxter 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 Baxter, which consent shall not be unreasonably withheld. If Baxter 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 Baxter of the identity of any proposed trustee, Baxter shall be deemed to have consented to the selection of the proposed trustee. This trustee may be the same trustee as appointed pursuant to paragraphs III, IV or VI of this order.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to grant a non-exclusive, royalty-free license of the Immuno Fibrin Sealant Assets to a Fibrin Sealant Licensee and to enter into a License Agreement with a Fibrin Sealant Licensee pursuant to the terms of paragraph V.C of this order, which License Agreement shall be subject to the prior approval of the Commission.

3. Within ten (10) days after appointment of the trustee, Baxter shall execute a (or amend the existing) trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the non-exclusive, royalty-free license required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in subparagraph VII.B.3 of this order to license the Immuno Fibrin Sealant Assets and enter into a License Agreement with a Fibrin Sealant Licensee that satisfies the requirements of paragraph V.C of this order. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of licensing or believes that licensing can be achieved within a reasonable time, the twelve (12) month 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.

5. The trustee shall have full and complete access to the personnel, books, records, data, facilities, and technical information related to the Immuno Fibrin Sealant Assets, or to any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no

action to interfere with or impede the trustee's ability to accomplish the licensing of the Immuno Fibrin Sealant Assets required by this order. Any delays in licensing the Immuno Fibrin Sealant Assets required by this order caused by respondent shall extend the time under subparagraph VII.B.4 of the order for accomplishing the licensing of the Immuno Fibrin Sealant Assets required by this order in an amount equal to the delay, as determined by the Commission or, for the court-appointed trustee, by the court.

6. The trustee shall use reasonable 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 grant a license of the Immuno Fibrin Sealant Assets as required by this order at no minimum price and the trustee's obligation to expeditiously accomplish the remedial purpose of the order; to assure that Baxter enters into a License Agreement with a Fibrin Sealant Licensee to acquire the Immuno Fibrin Sealant Assets that complies with the provisions of paragraph V.C of this order; and to assure that Baxter complies with the remaining provisions of paragraph V.D of this order. The license shall be made to Fibrin Sealant Licensee in a manner set forth by this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall grant a non-exclusive, royalty-free license to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Baxter, 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 Baxter, 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 licensing 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 Baxter and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the

trustee's ability to grant a non-exclusive, royalty-free license of the Immuno Fibrin Sealant Assets.

8. 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.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph VII.B of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this order.

11. The trustee shall have no obligation or authority to operate or maintain the Immuno Fibrin Sealant Assets.

12. The trustee shall report in writing to Baxter and to the Commission every sixty (60) days concerning the trustee's efforts to grant a non-exclusive, royalty-free license of the Immuno Fibrin Sealant Assets as required by this order.

VIII.

It is further ordered, That respondent shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I.

IX.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every ninety (90) days thereafter until Baxter has fully complied with the provisions of paragraphs II, IV, V and VII of this order, Baxter shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to

comply, is complying, and has complied with these paragraphs of this order. Baxter shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with these paragraphs of this order, including a description of all substantive contacts or negotiations for accomplishing the divestiture, entering into the Divestiture Agreement and entering into a license Agreement, required by this order, including the identity of all parties contacted. Baxter shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the Divestiture Agreement required by paragraph II and the License Agreement required by paragraph V of this order.

B. One (1) year from the date this order becomes final and annually until respondent has complied with all terms of this order or until the Acquirer or New Acquirer has obtained all necessary FDA approvals to manufacture Factor VIII Inhibitor Treatments for sale in the United States and the Fibrin Sealant Licensee has obtained all necessary FDA approvals to manufacture Fibrin Sealant for sale in the United States, whichever is later, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

X.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent, respondent shall permit any duly authorized representatives 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 officers or employees of respondent, who may have counsel present, regarding such matters.

XI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

Commissioner Starek recused.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Baxter International Inc. ("Baxter"), a corporation organized and existing under the laws of the State of Delaware, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

PREMISES

Whereas, Baxter has proposed to acquire the majority of the outstanding voting common stock of Immuno International AG; and

Whereas, the Commission is now investigating the proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached preserving competition during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm and divestiture or other relief resulting from a proceeding

challenging the legality of the proposed Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, Baxter entering into this Interim Agreement shall in no way be construed as an admission by Baxter that the proposed Acquisition constitutes a violation of any statute; and

Whereas, Baxter understands that no act or transaction contemplated by this Interim Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Interim Agreement.

Now, therefore, Baxter agrees, upon the understanding that the Commission has not yet determined whether the proposed Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. That it will execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Baxter signs the Consent Agreement.

2. That it will take such actions as are necessary: (1) to maintain all necessary FDA approvals to research, develop, manufacture and sell both of the Factor VIII Inhibitor Treatments in the United States; (2) to maintain the viability and marketability of both of the Divested Inhibitor Assets as well as all tangible assets, including manufacturing facilities, needed to Contract Manufacture and sell Factor VIII Inhibitor Treatments; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of any of the Divested Inhibitor Assets or tangible assets including manufacturing facilities needed to Contract Manufacture and sell both of the Factor VIII Inhibitor Treatments, except for ordinary wear and tear.

3. That it will take such actions as are necessary: (1) to maintain and obtain all necessary FDA approvals to research, develop manufacture and sell Immuno's Fibrin Sealant in the United States; (2) to maintain the viability and marketability of the Immuno Fibrin Sealant Assets as well as all tangible assets, including manufacturing facilities, needed to Contract Manufacture and sell Immuno's Fibrin Sealant; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of any of the Immuno Fibrin Sealant

Assets or tangible assets, including manufacturing facilities, needed to Contract Manufacture and sell Immuno's Fibrin Sealant, except for ordinary wear and tear.

4. Baxter agrees that, from the date Baxter signs the Consent Agreement until the first of the dates listed in subparagraphs 4.a and 4.b, it will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date the Commission finally issues its complaint and its Decision and Order.

5. Baxter waives all rights to contest the validity of this Interim Agreement.

6. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege, and upon written request, and on reasonable notice, to Baxter made to its principal office, Baxter shall permit any duly authorized representative or representatives of the Commission:

a. Access, during the office hours of Baxter 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 Baxter relating to compliance with this Interim Agreement; and

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

7. This Interim Agreement shall not be binding until accepted by the Commission.

IN THE MATTER OF

JEANETTE L. DOUGLASS

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

Docket C-3727. Complaint, March 24, 1997--Decision, March 24, 1997

This consent order prohibits, among other things, Jeanette L. Douglass, an officer of Computer Business Services, Inc. ("CBSI"), from misrepresenting the earnings or success rate of CBSI investors; the existence of a market for CBSI's products or services; the amount of time it takes investors to recoup their investments; and from making any representation regarding the performance, benefits, efficacy or success rate of any product or service unless she possesses reliable evidence to substantiate the claims. The consent order also prohibits the use of misleading testimonials or endorsements and requires certain disclosures to investors.

Appearances

For the Commission: *C. Steven Baker, Evan Siegel, Alan Krause* and *Mary Tortorice.*

For the respondent: *Lewis Keiler, Sonnenschein, Nath & Rosenthal,* Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Jeanette L. Douglass, individually and as an officer and director of Computer Business Services, Inc. ("CBSI"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Jeanette L. Douglass is an officer and director of CBSI. Individually or in concert with others, she formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. Her principal office or place of business is at 19348 Flippen Rd., Westfield, Indiana.

2. Respondent, in concert with CBSI, has advertised, offered for sale, sold, and distributed to the public home-based business ventures. Prospective consumers who purchase home-based business ventures from CBSI come to be known by the company as "Center Owners."

A "center" ordinarily consists of computer hardware, software, training manuals, marketing materials, and available technical assistance which, together, are represented to enable the owner to create products and services that can be resold profitably to the general public.

3. Beginning no later than April 1988, and continuing through the present, respondent, in concert with CBSI, has disseminated or has caused to be disseminated magazine, newspaper and postcard advertisements, including but not necessarily limited to the attached Exhibit A, to induce consumers nationwide to call a toll-free number to order a free information kit. Respondent, in concert with CBSI, represents through these advertisements that consumers can expect to earn $4,000 per month using CBSI's "proven turnkey business." Exhibit A.

4. Respondent, in concert with CBSI, has also disseminated or has caused to be disseminated advertisements for home-based business ventures through commercial online services, including, but not limited to, Compuserve and America Online. Respondent, in concert with CBSI, represents through these advertisements that consumers can expect to earn $4,000 per month through CBSI's home-based business ventures. Exhibit B.

5. Respondent, in concert with CBSI, has disseminated or has caused to be disseminated several information packets containing brochures and an audio cassette tape recording by the co-founders of CBSI, George and Jeanette Douglass. These materials, which are sent to prospective purchasers of home-based business ventures, contain the following statements:

(a) In the last 13 years, we've identified over 30 needs and wants. Each one of them is easy to run, helps other people, and provides you a good profit. Computer Business Services has not only identified these 30 needs, but has developed the technology to perform these services easily and profitably. Along with the technology, we've developed all the strategies to perform these services, plus the ways to find the people that need these services, and you can do it all from your home.

(b) Most of the couples and individuals that we've helped start their business have been extremely successful. . . .

(c) Each one of the programs I'm about to explain to you provides a needed service to the people or organizations in your community. Each service adds value to the people's lives you serve, and you can be proud to provide these services. Each program is a proven money-maker, and is now being operated successfully by our present center owners.

(d) Once you start to advertise your CBSI center, people know about it immediately and start coming to you for your services. Every business or organization needs to contact people and you have the only way to contact people quickly, inexpensively and effectively. Once this word gets out, you'll have to expand your services very rapidly, just as we did.

(e) Now we've already helped thousands of couples and individuals turn into successful business people, and we believe we can help you, too.

(f) If you get our CBSI computer program and follow our proven strategies, I really don't believe that you can do it badly enough not to be successful. Once you get the word out that you've got these programs available, people will come to you.

(g) We right now have 30 services you can perform. We have thousands of center owners already earning good money, and I believe you can, too.

(h) Now you have 24 hours in a day. You work 8, sleep 8, and have 8 free hours. If you take 8 free hours times 7 days a week, you have 56 hours. Divide that by two, and you have 28 hours that you can use in this business. Now I realize I've not included weekends. If you use 28 hours per week to do this program, you will be extremely successful.

(i) I can't guarantee your success. I can't guarantee that you'll make $4,000 to $10,000 a month. I don't know what's inside of you. But I do know this. Our services are needed in every community in the United States. Our programs really work, and you can earn more money than you ever dreamed possible if you will work our programs.

(j) Most of the couples and individuals that we've helped start their business have been extremely successful and our relationship with them has been exhilirating.

(k) This is a business that you can build a few customers at a time and reap the profits for a long time to come. I call it stack up income. You set it up once and get paid for it every month. So after a few years, you have big money coming in every month, even if you take a month off.

(l) Each of these services is a proven money-maker in large cities, small towns and rural communities throughout the country.

(m) Now some of our center owners use the computer dialing equipment for telemarketing on the unattended mode. Some just don't like to use the computer for telemarketing at all, and in some states, there are regulations that limit the use in the unattended mode. . . . Again, you must make the decision how you use your equipment. Some center owners do very well using their computer dialing equipment for finding people who want their products. Others use the unattended mode to find qualified prospects for insurance, real estate, chimney cleaning and so forth. If they call from 9:00 a.m. to 9:00 p.m., they usually can call around 1,000 people a day.

6. Respondent, in concert with CBSI, also has disseminated or has caused to be disseminated materials containing endorsements by and photographs of purported Center Owners who convey the impression that ordinary consumers can successfully start and operate one or a combination of CBSI's home-based business ventures. These

materials include but are not necessarily limited to the attached Exhibit C. For example, these materials contain the following statements and depictions:

(a) "LEE STOUT: I am a very satisfied CBSI Center Owner. Without my involvement with CBSI the opportunities that have become realities would not have been possible. The CBSI telecommunications program has enabled me to grow my business to the point where I can make $100,000+ per year. . . . If I can be successful at this, anyone can!"

(b) "DOUG STROUD: I earned $101,865 in one year with my own CBSI business. I am running Voice Mail and Computer Home Monitor. CBSI software is the best available."

(c) "CURTIS MAPP: I now have 258 subscribers to the CBSI Computerized Monitor Service program. Each subscriber is billed at $30.00 per month, which means I'm earning over $7,700 per month with this program alone."

7. Beginning no later than January 1991, and continuing through the present, respondent, in concert with CBSI, has sold home-based business ventures to approximately 15,000 consumers. Center Owners ordinarily spent between $3,000 and $16,000 on CBSI's products and services.

Profitability

8. Through the means described in paragraphs two through seven, respondent, in concert with CBSI, has represented, expressly or by implication, that CBSI Center Owners ordinarily operate profitable businesses out of their own homes.

9. In truth and in fact CBSI Center Owners do not ordinarily operate profitable businesses out of their own homes. Indeed, it is rare for CBSI Center Owners to recoup even their initial investments.

10. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

Substantial Income

11. Through the means described in paragraphs two through seven, respondent, in concert with CBSI, has represented, expressly or by implication, that:

a. CBSI Center Owners ordinarily earn substantial income.

b. CBSI Center Owners can reasonably expect to achieve a specific level of earnings, such as income of $4,000 per month.

12. In truth and in fact:

a. CBSI Center Owners do not ordinarily earn substantial income. Indeed, the vast majority of Center Owners never even recoup their initial average investments of approximately $9,000.

b. CBSI Center Owners can not reasonably expect to achieve a specific level of earnings, such as income of $4,000 per month. Indeed, the vast majority of Center Owners not only never earn $4,000 per month, but never earn $4,000 over the duration of their businesses.

13. Therefore, the representations set forth in paragraph eleven were, and are, false or misleading.

Endorsements: Actual Experiences

14. Through the means described in paragraph six, respondent, in concert with CBSI, has represented, expressly or by implication, that CBSI Center Owner endorsements appearing in CBSI's advertisements and promotional materials reflect the actual experiences of those Center Owners.

15. In truth and in fact, in numerous instances, CBSI Center Owner endorsements appearing in CBSI's advertisements and promotional materials do not reflect those Center Owners' actual experiences.

16. Therefore, the representation set forth in paragraph fourteen was, and is, false or misleading.

Endorsements: Typicality and Ordinariness

17. Through the means described in paragraph six, respondent, in concert with CBSI, has represented, expressly or by implication, that CBSI Center Owner endorsements appearing in CBSI's advertisements and promotional materials reflect the typical or ordinary experiences of Center Owners who have attempted to use CBSI's products or services.

18. In truth and in fact, CBSI Center Owner endorsements appearing in CBSI's advertisements and promotional materials do not reflect the typical or ordinary experiences of Center Owners who have attempted to use CBSI's products or services.

19. Therefore, the representation set forth in paragraph seventeen was, and is, false or misleading.

Substantiation for Earnings Claims

20. Through the use of the statements and depictions contained in CBSI's advertisements and promotional materials referred to in paragraph eleven, respondent, in concert with CBSI, has represented, expressly or by implication, that she, in concert with CBSI, possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph eleven, at the time the representations were made.

21. In truth and in fact, respondent, in concert with CBSI, did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph eleven, at the time the representations were made. Therefore, the representation set forth in paragraph twenty was, and is, false or misleading.

Automatic Telephone Dialing Systems

22. Through the means described in paragraphs two through seven, respondent, in concert with CBSI, has represented, expressly or by implication, that consumers can successfully utilize automatic telephone dialing systems to market their businesses.

23. Respondent, in concert with CBSI, has failed to disclose in advertisements and promotional materials for the outbound telemarketing programs that federal law prohibits the use of an automatic telephone dialing system in the unattended mode to initiate a telephone call to any residential telephone line to transmit an unsolicited advertisement for commercial purposes without the prior express consent of the called party. This fact would be material to consumers in their purchase or use of CBSI's home-based business ventures. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

24. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

9355 Complaint

EXHIBIT A

EXHIBIT B

9355 Complaint

EXHIBIT C

EXHIBIT C

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 Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent, her attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 Act, 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, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Jeanette L. Douglass is an officer and director of Computer Business Services, Inc. Her principal office or place of business is at 19348 Flippen Rd., Westfield, Indiana.

2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. 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

DEFINITIONS

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

1. *"Business venture"* means any written or oral business arrangement, however denominated, whether or not covered by the Federal Trade Commission's trade regulation rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 CFR Part 436, and which consists of payment of any consideration for:

A. The right to offer, sell, or distribute goods, or services (whether or not identified by a trademark, service mark, trade name, advertising, or other commercial symbol); and

B. More than nominal assistance to any person or entity in connection with or incident to the establishment, maintenance, or operation of a new business or the entry by an existing business into a new line or type of business.

2. *"Clearly and prominently"* shall mean as follows:

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In a print or electronic advertisement, the disclosure shall be in a type size, and in a location, that is sufficiently noticeable for an ordinary consumer to see and read, in print that contrasts with the background against which it appears.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

3. Unless otherwise specified, *"respondent"* shall mean Jeanette L. Douglass, individually, and each of his [sic] agents, representatives and employees.

4. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. *"Automatic telephone dialing system"* shall mean as defined in the Telephone Consumer Protection Act, 47 U.S.C. 227(a)(1).

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any business venture, shall not misrepresent, expressly or by implication:

A. That consumers who purchase or use such business ventures ordinarily succeed in operating profitable businesses out of their own homes;

B. That consumers who purchase or use such business ventures ordinarily earn substantial income;

C. The existence of a market for the products and services promoted by respondent;

D. The amount of earnings, income, or sales that a prospective purchaser could reasonably expect to attain by purchasing a business venture;

E. The amount of time within which the prospective purchaser could reasonably expect to recoup his or her investment; or

F. By use of hypothetical examples or otherwise, that consumers who purchase or use such business ventures earn or achieve from such participation any stated amount of profits, earnings, income, or sales. Nothing in this paragraph or any other paragraph of this order shall be construed so as to prohibit respondent from using hypothetical examples which do not contain any express or implied misrepresentations or from representing a suggested retail price for products or services.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any business venture, shall not represent, expressly or by implication, the performance, benefits, efficacy or success rate of any product or service that is a part of such business venture, unless such representation is true and, at the time of making the representation,

respondent possesses and relies upon competent and reliable evidence that substantiates such representation. For purposes of this order, if such evidence consists of any test, analysis, research, study, or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if it has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any business venture or any product or service that is part of any business venture in or affecting commerce, shall not:

A. Use, publish, or refer to any user testimonial or endorsement unless respondent has good reason to believe that at the time of such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained; or

B. Represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

1. The representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates the representation; or

2. Respondent discloses, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

a. What the generally expected results would be for users of the product, or

b. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

Provided, however, that when endorsements and user testimonials are used, published, or referred to in an audio cassette tape recording,

such disclosure shall be deemed to be in close proximity to the endorsements or user testimonials when the disclosure appears at the beginning and end of each side of the audio cassette tape recording containing such endorsements or user testimonials. Provided further, however, that when both sides of an audio cassette tape recording contain such endorsements or user testimonials, the disclosure need only appear at the beginning and end of the first side and the end of the second side of the audio cassette tape recording.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any business venture utilizing, employing or involving in any manner, an automatic telephone dialing system, shall disclose, clearly and prominently, and in close proximity to any representation regarding the use or potential use of an automatic telephone dialing system to transmit an unsolicited advertisement for commercial purposes without the prior express consent of the called party, that federal law prohibits the use of an automatic telephone dialing system to initiate a telephone call to any residential telephone line using an artificial or prerecorded voice to transmit an unsolicited advertisement for commercial purposes without the prior express consent of the called party unless a live operator introduces the message. Nothing in this paragraph or any other paragraph of this order shall be construed so as to prohibit respondent from making truthful statements or explanations regarding the laws and regulations regarding the use of automatic telephone dialing systems.

V.

It is further ordered, That respondent Jeanette L. Douglass shall for a period of five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

It is further ordered, That respondent Jeanette L. Douglass, for a period of five (5) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

It is further ordered, That respondent Jeanette L. Douglass, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business addresses and telephone numbers and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondent Jeanette L. Douglass, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IX.

This order will terminate on March 24, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in fewer than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

PHILLIPS PETROLEUM COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3728. Complaint, March 28, 1997--Decision, March 28, 1997

This consent order requires, among other things, the Oklahoma-based corporation to divest approximately 160 miles of pipeline belonging to ANR Pipeline Company and Phillips in the Anadarko Basin area, and to maintain the assets in their current condition and to provide customers under the contract with ANR with gathering services at existing terms and conditions pending divestiture. The consent order also requires Phillips, for ten years, to notify the Commission before acquiring during any 18-month period more than five miles of gas gathering pipelines in the specified areas of the Oklahoma counties.

Appearances

For the Commission: *George Cary, Frank Lipson, Phillip Broyles* and *William Baer.*

For the respondent: *William Kolasky, Wilmer, Cutler & Pickering*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Phillips Petroleum Company ("Phillips"), through its subsidiary GPM Gas Corporation ("GPM"), is subject to the jurisdiction of the Commission and that Phillips' acquisition of certain gas-gathering assets of ANR Pipeline Company ("ANR"), a subsidiary of the Coastal Corporation, is in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. PHILLIPS

PARAGRAPH 1. Respondent Phillips is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at Phillips Building, Bartlesville, Oklahoma.

PAR. 2. Respondent Phillips is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE PROPOSED ACQUISITION

PAR. 3. Respondent Phillips, through its subsidiary GPM, entered into a Purchase and Sale Agreement dated January 12, 1996, with ANR to acquire the gas gathering assets currently owned by ANR.

III. THE RELEVANT MARKETS

PAR. 4. The relevant line of commerce in which to analyze the effects of the merger is natural gas gathering services *i.e.*, the transportation, for the respondent's own account or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or a natural gas processing plant.

PAR. 5. The relevant sections of the country in which to analyze the effects of the acquisition are the areas in and around the following townships:

a. T28N/R24W in Harper County, Oklahoma;
b. T5N/R28E in Beaver County, Oklahoma;
c. T29N/R21W in Woods County, Oklahoma;
d. T24N/R25W in Ellis County, Oklahoma;
e. T23N/R26W in Ellis Country, Oklahoma;
f. T1N/R26E in Beaver, Oklahoma; and
g. T23N/R18W in Woodward, Oklahoma.

PAR. 6. The relevant line of commerce is highly concentrated in the relevant geographic markets. The acquisition will significantly increase concentration in the relevant geographic markets set forth in paragraph five a-g.

PAR. 7. Respondent Phillips is an actual and potential competitor of ANR in the relevant line of commerce in the relevant geographic markets.

PAR. 8. Effective entry in the relevant line of commerce in the relevant geographic markets is unlikely.

IV. EFFECTS OF THE MERGER

PAR. 9. The effects of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in the following ways, among others:

a. Actual and potential competition between Phillips and ANR to provide natural gas gathering services to existing natural gas wells will be eliminated;

b. Actual and potential competition between Phillips and ANR to provide natural gas gathering services for new natural gas wells will be eliminated; and

c. The respondent is likely to exact anticompetitive price increases from producers in the relevant geographic market for performance of natural gas gathering services in the relevant geographic markets; and

d. Producers may be less likely to do exploratory and developmental drilling for new natural gas in the relevant geographic markets than prior to the merger.

V. VIOLATIONS CHARGED

PAR. 10. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

PAR. 11. The acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Phillips Petroleum Company ("Phillips"), through its subsidiary GPM Gas Corporation

("GPM"), of certain gas-gathering assets of ANR Pipeline Company, a subsidiary of the Coastal Corporation ("Coastal"), and it now appearing that Phillips, hereinafter sometimes referred to as "respondent," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act; and

Respondent, its attorney, 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 respondent has violated the said Acts, and that the 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 Secton 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Phillips Petroleum Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Phillips Building, Bartlesville, Oklahoma.

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. *"Phillips"* or *"respondent"* means Phillips Petroleum Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, its subsidiaries, divisions, groups and affiliates controlled by Phillips, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. *"Coastal"* means The Coastal Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, its subsidiaries, divisions, groups and affiliates controlled by Coastal, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. The *"Acquisition"* means the proposed acquisition by GPM Gas Corporation, a subsidiary of Phillips, of certain gas-gathering assets of ANR Pipeline Co., a subsidiary of Coastal, pursuant to the purchase agreement executed on January 12, 1996, by and between Phillips and Coastal as subsequently modified and amended.

D. *"Gas Gathering"* means pipeline transportation, for oneself or other persons, of natural gas over any part or all of the distance between a well and a gas transmission pipeline or gas processing plant.

E. *"Person"* means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.

F. *"Related Person"* means a person controlled by, controlling, or under the common control with, another person.

G. *"Relevant geographic area"* means all portions of Harper County, Oklahoma, within fifteen miles of the Kansas border; all portions of Beaver County, Oklahoma, within twenty miles of the Harper County border; all portions of Ellis County, Oklahoma, within eighteen miles of the northwest corner of Ellis County; and Townships T23N/R14W, T23N/R15W, T23N/ R16W, T23N/R17W, T23N/R18W, T22N/R16W, T22N/R17W, T22N/R18W, T21N/R17W, and T21N/R18W of Woodward, Major and Woods Counties, Oklahoma.

H. *"Schedule A assets"* means the whole and any part of the assets listed in Schedule A of this order.

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

II.

It is further ordered, That:

A. Following completion of the Acquisition, Phillips shall divest the Schedule A assets, absolutely and in good faith, at no minimum price, consistent with the provisions of this order.

B. The divestiture shall be made only to an acquirer or acquirers that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Pending divestiture of the Schedule A assets, Philips shall take such actions as are necessary to maintain the viability and marketability of the Schedule A assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Schedule A assets except for ordinary wear and tear.

D. Phillips shall comply with the Asset Maintenance Agreement, attached hereto and made a part hereof as Appendix I.

E. The purpose of the divestiture is to ensure the continued use of the Schedule A assets in the same type of business in which the Schedule A assets are used at the time of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If Phillips has not divested the Schedule A assets consistent with paragraph II of this order by the later of April 30, 1997, or thirty days after Phillips consummates the Acquisition, the Commission may appoint a trustee to divest the Schedule A assets.

B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Phillips 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 III shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any

other statute enforced by the Commission, for any failure by Phillips to comply with this order.

C. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A, Phillips shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Phillips, which consent shall not be unreasonably withheld. The trustee shall preferably be a person with experience and expertise in acquisitions and divestitures of gas gathering assets. If Phillips 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 Phillips of the identity of any proposed trustee, Phillips shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Schedule A assets. The trustee may, in his or her discretion, or at the direction of the Commission, effect such arrangements and divest (a) any additional gas gathering assets (including, but not limited to, gas gathering lines, compressors, surface equipment, and gas purchase and gathering contracts) of the respondent located in the relevant geographic area and (b) any additional assets necessary to connect the divested assets to the buyer's existing systems or to a third-party transmission line. The trustee may select such assets pursuant to clauses (a) and (b) of this paragraph to assure the marketability, viability, and competitiveness of the Schedule A assets so as to accomplish expeditiously the remedial purposes of this order.

3. Within ten (10) days after appointment of the trustee, Phillips shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.C.3 to accomplish the divestiture(s), which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture

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 this period only two (2) times.

5. Phillips shall provide the trustee full and complete access to the personnel, books, records and facilities related to the Schedule A assets, or to any other relevant information, as the trustee may request. Phillips shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Phillips shall take no action to interfere with or impede the trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by Phillips shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall make reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Phillips' absolute and unconditional obligation to divest at no minimum price. The divestiture(s) shall be made to an acquirer or acquirers that receive the prior approval of the Commission, provided, however, if the trustee receives *bona fide* offers for any of the assets to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest that particular assets to the acquiring entity or entities selected by Phillips from among those approved by the Commission.

7. The trustee shall serve at the cost and expense of Phillips, without bond or other security unless paid for by Phillips, 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 Phillips, such consultants, accountants, attorneys, 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 Phillips, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a

commission arrangement contingent on the trustee's divesting the Schedule A assets.

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

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

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

11. The trustee shall have no obligation to operate or maintain the Schedule A assets.

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

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Phillips shall not, without prior notification to the Commission, directly or indirectly:

A. Acquire the Schedule A assets after their divestiture, or any assets the trustee may divest pursuant to paragraph III.C.2 of this order.

B. Acquire any stock, share capital, equity, or other interest in any person engaged in gas gathering within the relevant geographic area at any time within the two years preceding such acquisition, provided, however, that an acquisition of securities will be exempt from the requirements of this paragraph (IV.B) if after the acquisition Phillips will hold cumulatively no more than two (2) percent of the outstanding shares of any class of security of such person; and

provided further, that this paragraph (IV.B) shall not apply to the acquisition of any interest in a person that is not at the time of the acquisition engaged in gas gathering within the relevant geographic area due to the sale within the preceding two years of all assets used for gas gathering within the relevant geographic area to another party who intended to operate said assets for gas gathering within the relevant geographic area; or

C. Enter into any agreements or other arrangements with any person or with two or more related persons to obtain, within any 18 month period, direct or indirect ownership, management, or control of more than five (5) miles of pipeline previously used for gas gathering and suitable for use for gas gathering within the relevant geographic area.

V.

It is further ordered, That the prior notifications required by paragraph IV of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of Part 803, 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 Phillips. In lieu of furnishing (1) documents filed with the Securities and Exchange Commission, (2) annual reports, (3) annual audit reports, (4) regularly prepared balance sheets, or (5) Standard Industrial Code ("SIC") information in response to certain items in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, Phillips shall provide a map showing the location of the pipeline whose acquisition is proposed and other pipelines used for gas gathering in the relevant geographic area and a statement showing, for the most recent 12 month period for which volume information is available, the quantity of gas that flowed through pipeline whose acquisition is proposed. Respondent shall provide the Notification to the Commission at least thirty 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 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.

Provided, however, that prior notification shall not be required by paragraph IV of this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VI.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Phillips has fully complied with the provisions of paragraphs II or III of this order, Phillips shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Phillips shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Phillips shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order is entered, and at such other times as the Commission may require, Phillips shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

VII.

It is further ordered, That Phillips shall notify the Commission at least thirty (30) days prior to any proposed change in Phillips, such as dissolution, assignment, sale resulting in the emergence of a

successor corporation, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent, respondent shall permit any duly authorized representative 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. Without restraint or interference from it, to interview officers, directors, or employees of respondent, who may have counsel present, relating to any matters contained in this order.

IX.

It is further ordered, That this order shall terminate on March 28, 2007.

SCHEDULE A

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APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between Phillips Petroleum Company ("Phillips"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at Phillips Building, Bartlesville, Oklahoma; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq*. (collectively "the Parties").

PREMISES

Whereas, Phillips through its subsidiary GPM Gas Corporation ("GPM"), agreed to acquire certain gas-gathering assets of ANR Pipeline Company ("ANR"), a subsidiary of the Coastal Corporation ("Coastal"), pursuant to an agreement dated January 12, 1996, hereinafter "Acquisition"; and

Whereas, the Commission is investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules;

Whereas, Phillips and Coastal may consummate the acquisition upon provisional acceptance by the Commission of the Agreement Containing Consent Order; and

Whereas, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the assets to be divested pursuant to the Agreement Containing Consent Order ("the Schedule A assets") during the period prior to their divestitures, that any divestiture resulting from any administrative proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

Whereas, the Commission is concerned that prior to divestiture to the acquirer, it may be necessary to preserve the continued viability and competitiveness of the Schedule A assets; and

Whereas, the purpose of this Agreement and of the Consent Order is to preserve the Schedule A assets pending the divestiture to the acquirer approved by the Federal Trade Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisition; and

Whereas, Phillips entering into this Agreement shall in no way be construed as an admission by Phillips that the Acquisition is illegal; and

Whereas, Phillips understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws, or the Federal Trade Commission Act by reason of anything contained in this Agreement;

Now, therefore, in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from the parties with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order annexed hereto and made a part thereof, and, in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Schedule A assets, the Parties agree as follows:

TERMS OF AGREEMENT

1. Phillips agrees to execute the Agreement Containing Consent Order and, upon its issuance, to be bound by the Consent Order. The Parties further agree that each term defined in the Consent Order shall have the same meaning in this Agreement.

2. Unless the Commission brings an action to seek to enjoin the proposed Acquisition pursuant to Section 13(b) of the Federal Trade Commission Act, 15. U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed Acquisition, Phillips and Coastal will be free to close the Acquisition any time after the Commission has provisionally accepted the Agreement Containing Consent Order.

3. Phillips agrees that from the date this Agreement is accepted until the earlier of the dates listed in subparagraphs 3.a - 3.b, it will comply with the provisions of this Agreement:

a. Three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. On the day the divestiture set out in the Consent Order has been completed.

4. From the later of the date of this Agreement or from the date of their acquisition, until the divestiture set out in the Consent Order has been completed, Phillips shall maintain the viability, competitiveness and marketability of the Schedule A assets and shall not cause the wasting or deterioration of the Schedule A assets, nor shall Phillips encumber or otherwise impair their viability.

5.a. From the time that Phillips acquires the Schedule A assets that are currently owned by ANR until their divestiture has been completed in pertinent part, Phillips will offer to gather gas on those Schedule A assets on the same terms and conditions offered by ANR on the date of their transfer.

b. From the time that this Agreement is accepted by the Commission until Phillips divests in pertinent part the Schedule A assets that it owns as of the date of the Agreement, Phillips will continue to purchase or gather gas from wells connected to those assets on the same terms and conditions in effect as of the date of this Agreement.

c. If a producer, operator, or shipper executes a waiver of its rights under this paragraph, Phillips may contract on such other terms and conditions as it may deem appropriate.

6. Should the Commission seek in any proceeding to compel Phillips to divest itself of the assets to be acquired from Coastal or to seek any other injunctive or equitable relief, Phillips shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the Acquisition. Phillips also waives all rights to contest the validity of this Agreement.

7. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Phillips and to their principal offices, Phillips shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Phillips, 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 Phillips relating to compliance with this Agreement; and

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

8. This Agreement shall not be binding until approved by the Commission.

IN THE MATTER OF

PRE-PAID LEGAL SERVICES, INC.

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

Docket C-3729. Complaint, April 4, 1997--Decision, April 4, 1997

This consent order prohibits, among other things, an Oklahoma-based corporation from making certain false and misleading claims concerning the benefits and appropriateness of living trusts or any legal instrument or service it offers and requires the respondent to clearly and conspicuously disclose to consumers that such trusts may be legally challenged on similar grounds as wills, that living trusts may not be appropriate in all instances, and that the transfer of an individual's assets into a living trust is not included in the price of creating the trust. In addition, the respondent must offer a $165 refund to every purchaser of an American Association for Senior Citizens trust who hasn't already received a refund and who doesn't live in certain states that have already been offered partial refunds in connection with an earlier multi-state settlement.

Apperances

For the Commission: *Elizabeth M. Palmquist.*

For the respondent: *Margaret Feinstein, Dickstein, Shapiro, Morin & Oshinsky,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Administrative Company, a corporation, Michael P. McIntyre, individually and as an officer and director of The Administrative Company, and Pre-Paid Legal Services, Inc. ("Pre-Paid"), a corporation (collectively, "respondents"), have violated the provisions of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Michael P. McIntyre's current address is 4328 Hollow Oak, Dallas, Texas.

Respondent The Administrative Company has ceased doing business. Its address is the same as that of Michael P. McIntyre.

Respondent Pre-Paid Legal Services, Inc., is an Oklahoma corporation, with its principal office or place of business at 321 E. Main Street, Ada, Oklahoma.

PAR. 2. Respondents, at all times relevant to this complaint, have advertised, promoted, offered for sale, and sold living trusts to consumers. A living trust is a trust into which an individual can place all of his or her assets during his or her lifetime and, by transferring ownership of the assets to the name of the trust, thereby remove the assets from the individual's estate.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. In the course of marketing their products to the public, respondents, directly or through commissioned sales agents, have caused to be disseminated sales literature concerning living trusts, including, but not necessarily limited to, the attached Exhibits 1 and 2. This literature contains the following statements:

(a) It is your legal right as a UNITED STATES Tax Payer to establish a Living Trust. By establishing a Living Trust, at your death your estate avoids PROBATING YOUR WILL which can COST SEVERAL THOUSANDS of dollars in legal and executor fees and TAKE SEVERAL YEARS before being transferred to your family and loved ones. YOU RETAIN FULL CONTROL OF ALL ASSETS!
YOU COULD SAVE THOUSANDS OF HARD EARNED DOLLARS!
Exh. 1.

(b) A LIVING TRUST eliminates ALL PROBATE FEES and COST. . . . With a LIVING TRUST, your family will not have to go through probate, and can avoid paying expensive probate fees and costs. Exh. 2, p. 18.

(c) A LIVING TRUST allows a quick DISTRIBUTION to your heirs. Assets in probate court are often frozen two years or more, even with a WILL. A LIVING TRUST allows these same assets to be distributed within days to your loved ones, since a LIVING TRUST avoids Probate Court. Exh. 2, p. 17.

(d) Total assets [pass through a] living trust [to] spouse or heirs [in] 1-3 days. Exh. 2, p. 24.

(e) A LIVING TRUST prevents a WILL CONTEST. . . . Through a LIVING TRUST your wishes will be carried out without interference. Exh. 2, p. 17.

(f) Membership entitles you to:

1. FREE LEGAL SERVICES FOR PREPARATION OF A REVOCABLE LIVING TRUST BY A QUALIFIED ATTORNEY IN YOUR STATE AND A FREE "POUR-OVER" WILL. Exh. 2, p. 8.

(g) AN A-B LIVING TRUST protects against catastrophic MEDICAL COSTS. . . . With an A-B LIVING TRUST, if you become seriously ill, your trustee can make gifts of your property to your heirs, and three years thereafter, can seek government benefits for your care, so that the bulk of your estate will go to your heirs. Exh. 2, p. 19.

(h) Is There Anything Bad About a Living Trust? No. There is nothing bad about a Living Trust. Exh. 2, p. 20.

PAR. 5. Through the use of the statements contained in the sales literature referred to in paragraph four, including, but not necessarily limited to, the sales literature attached as Exhibits 1 and 2, respondents have represented, directly or by implication, that:

(a) The use of a living trust avoids all probate and administrative costs.

(b) At death, a living trust allows assets to be distributed immediately or almost immediately.

(c) A living trust cannot be challenged.

(d) Living trusts are prepared by local attorneys.

(e) A living trust protects against catastrophic medical costs.

(f) A living trust is the appropriate estate planning device for every consumer.

(g) There are no disadvantages to a living trust.

PAR. 6. In truth and in fact:

(a) A living trust does not always avoid probate and administrative costs.

(b) The use of a living trust does not necessarily result in immediate distribution of assets since creditors may file claims against the trust instrument.

(c) A living trust is not immune from challenge.

(d) Most living trusts prepared for AASC members were not prepared by local attorneys. Instead, of the 3,064 living trusts prepared for AASC members in 43 states, approximately 3,000 were prepared by an Arizona attorney licensed to practice law solely in Arizona and New York.

(e) A living trust does not protect against catastrophic medical costs.

(f) A living trust is not appropriate for everyone. The determination of whether a living trust is appropriate for a particular consumer requires an examination of the assets that compose the consumer's estate, the potential tax consequences of the estate plan, and the objectives of the consumer.

(g) There are disadvantages to a living trust. For example, while probate law imposes a statutory deadline beyond which creditors can no longer file claims against a will, in some states, there is no law limiting the time that creditors may file claims against a trust instrument.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements contained in the sales literature referred to in paragraph four, including, but not necessarily limited to, the sales literature attached as Exhibits 1 and 2, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. In their advertising, promoting, offering for sale, and sale of living trusts, respondents have failed to disclose that the transfer of an individual's assets into the living trust was not included in the price paid for creating the living trust and that it would be the responsibility of the individual purchaser to transfer assets into the trust, once created, or to arrange for another individual or entity to do so. This fact would be material to consumers in deciding whether to purchase a living trust and from whom to purchase a living trust. The failure to disclose this fact was, and is, a deceptive act or practice.

PAR. 10. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT 1

EXHIBIT 2

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EXHIBIT 2

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 Denver Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Pre-Paid Legal Services, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oklahoma, with its office and principal place of business located at 321 E. Main Street, in the City of Ada, State of Oklahoma.

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.

DEFINITIONS

For purposes of this order:

a. *"Living trust"* means a trust into which an individual can place all of his or her assets during his or her lifetime and, by transferring ownership of the assets to the name of the trust, thereby remove the assets from the individual's estate.

b. *"Probate"* is the legal process that validates a will, the legal document that contains instructions to the court on how assets and liabilities are to be divided and distributed at death.

ORDER

I.

It is ordered, That respondent Pre-Paid Legal Services, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, including through any individual or entity with whom or which respondent has contracted to provide pre-paid legal services, in connection with the advertising, promoting, offering for sale, or sale of living trusts, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, orally or in writing, that:

A. The use of a living trust avoids all probate and administrative costs.
B. At death, a living trust allows assets to be distributed immediately or almost immediately.
C. A living trust cannot be challenged.
D. Living trusts are prepared by local attorneys.
E. A living trust protects against catastrophic medical costs.
F. A living trust is the appropriate estate planning device for every consumer.
G. There are no disadvantages to a living trust.

II.

It is further ordered, That respondent Pre-Paid Legal Services, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, including through any individual or entity with whom or which

respondent has contracted to provide pre-paid legal services, in connection with the offering for sale or sale of living trusts, do forthwith cease and desist from failing to disclose, clearly and conspicuously, in writing, and prior to the consummation of the sale, the following information:

A. Living trusts may be challenged on similar grounds as wills.

B. Living trusts may not be appropriate in all instances, and all estate planning options should be examined before determining which estate plan best suits a particular individual's needs and wishes.

III.

It is further ordered, That respondent Pre-Paid Legal Services, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, including through any individual or entity with whom or which respondent has contracted to provide pre-paid legal services, in connection with the offering for sale or sale of living trusts, do forthwith cease and desist from failing to disclose, clearly and conspicuously, in writing, and prior to the consummation of the sale, the following information, if true:

A. The availability of informal probate under this state's statutes allows minimal or no contact with the courts and reduces the time required to probate a will.

B. The transfer of an individual's assets into the living trust is not included in the price of creating the living trust.

C. It is the sole responsibility of the purchaser of the living trust to transfer assets into the trust.

D. Creditors have a longer period of time to file a claim against a living trust than against a probated estate.

IV.

It is further ordered, That respondent Pre-Paid Legal Services, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in

connection with the advertising, promoting, offering for sale, or sale of living trusts by any individual or entity with whom or which respondent has contracted to provide pre-paid legal services, do forthwith cease and desist from failing to take reasonable steps sufficient to determine, commencing with the beginning of such a contractual relationship and continuing throughout the relationship, whether the promotion or sale involves any acts or practices prohibited by paragraphs I, II and III of this order. Such steps shall include, but are not limited to, evaluating, on a basis independent of the individual or entity with whom or which respondent has contracted to provide pre-paid legal services, the terms or conditions of sale, the adequacy of any disclosures, the representations made and the truthfulness of these representations (for the purposes herein, evaluating may, but need not, include reviewing advertisements, sales scripts and sales manuals, interviewing officers and employees, ascertaining the number and nature of consumer complaints and blind testing of oral representations).

V.

It is further ordered, That respondent Pre-Paid and its successors and assigns shall, in accordance with the provisions of this Part, offer a refund in the amount of one hundred sixty-five dollars ($165.00) to every purchaser of a living trust, except for (1) those purchasers residing in states with which Pre-Paid has previously settled, and (2) all other purchasers who have previously received refunds from either Pre-Paid or the American Association for Senior Citizens ("AASC").

A. Within thirty (30) days of the date that this order becomes final, respondent shall compile and submit to the Commission a current mailing list containing the names and last known addresses of all AASC members for whom living trusts were prepared by Pre-Paid and who reside in states with which Pre-Paid has not previously settled. Respondent shall also compile and submit to the Commission a list of all AASC members to whom respondent has paid refunds, indicating the amount of each refund and the date the refund was issued. In compiling these lists, respondent shall search all relevant records in the possession, custody, or control of the respondent, including but not limited to its unincorporated divisions, joint ventures, partnerships, operations under other names, affiliates, and

all directors, officers, partners, employees, agents, consultants, franchisees, and any other person or entity, including independent contractors, working for or on behalf of any of the foregoing.

B. The Commission shall compile and maintain a list of consumers potentially eligible to receive refunds based on the information respondent is required to produce pursuant to V.A, above, and supplemented by such further relevant information in the Commission's possession or that comes to the Commission's attention.

C. The Commission or its designated agent shall mail a notification letter substantially in the form set out in Appendix 1 to all persons the Commission has reason to believe are eligible consumers, to advise each of: (a) the settlement with Pre-Paid, and (b) the consumer's right to receive a refund.

D. The Commission shall enclose with each notification letter described in V.C, above, a claim form substantially in the form set out in Appendix 2. Refund eligibility shall be based on submission of such form, which has been signed by either the AASC member or the beneficiary, next-of-kin or other representative of the member, if the member is deceased.

E. Any potentially eligible consumer who does not submit a completed and executed claim form in response to the Commission's notification letter by the date specified in the notification letter shall not be eligible to participate in the distribution; provided, that the Commission may in its discretion accept and process an untimely response to the notification letter.

F. The funds from any returned checks, and checks not cashed within 60 days after the distribution date, shall be redeposited into the redress fund for possible redistribution.

VI.

It is further ordered, That the consumer redress fund shall be established, administered, distributed and terminated under the direction and control of the Commission and/or its designated agent. Respondent shall be notified, upon request, as to how the consumer refunds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. Within 30 days of completing the distribution of refunds pursuant to Part V of this order, the Commission or its designated staff will provide written

notification to the escrow agent specified in the Escrow Agreement attached as Appendix 3 to return to the Commission for transmittal to Pre-Paid any funds remaining in the escrow account that were not paid to consumers or to cover administrative costs of the escrow account. Nothing in this provision shall be construed to limit Pre-Paid's obligation under Parts V and VI of this order to provide consumer refunds.

VII.

It is further ordered, That, for a period of three (3) years from the date of issuance of this order, respondent, and its successors and assigns, shall maintain and upon request make available to a representative of the Federal Trade Commission for inspection and copying all documents relating to the advertising, promoting, offering for sale, or sale of living trusts that are developed, written, reviewed, authorized, or used by respondent, its successors and assigns, its officers, and its agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, or by any individual or entity with whom or which respondent has contracted to provide pre-paid legal services.

VIII.

It is further ordered, That respondent shall notify the Federal Trade Commission, through its Denver Regional Office unless otherwise directed, at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of new corporations, subsidiaries or affiliates of the respondent, the planned filing of a bankruptcy petition, or any other corporate change that may affect compliance obligations arising out of this order.

IX.

It is further ordered, That respondent shall:

A. Within thirty (30) days of service of this order upon it, provide a copy of this order to each of respondent's current principals, officers, directors and managers and to all personnel, agents and

representatives who are or have been participating or engaging in any manner in respondent's sales activities relating to living trusts.

B. For a period of three (3) years from the date of issuance of this order, provide a copy of this order to each of respondent's principals, officers, directors and managers, and to all personnel, agents and representatives who are participating or engaging in any manner in respondent's sales activities relating to living trusts within three (3) days after the person assumes his or her position.

X.

It is further ordered, That this order will terminate on April 4, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XI.

It is further ordered, That respondent shall, within sixty (60) days of service of this order upon it, and at such other times as the Federal Trade Commission may require, file with the Commission a report,

in writing, setting forth in detail the manner and form in which it has complied with this order.

APPENDIX 1

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
DENVER REGIONAL OFFICE

1961 Stout Street, Suite 1523
Denver, CO 80294-0101
(303) 844-2271

Dear AASC Member:

The Federal Trade Commission has entered into a settlement agreement with Pre-Paid Legal Services, Inc. ("Pre-Paid"), the organization which provided living trusts to members of the American Association for Senior Citizens ("AASC"). The FTC charge AASC and Pre-Paid with making certain misrepresentations, as well as with failing to disclose important information, in the course of marketing and selling living trusts. The agreement reached between Pre-Paid and the Federal Trade Commission is for settlement purposes only and does not constitute an admission of wrongdoing on the part of Pre-Paid.

In settlement of this matter, Pre-Paid has agreed to make partial refunds to AASC members. To be eligible for this refund, you must sign and return the enclosed claim form. If you have already received a refund from Pre-Paid or AASC, you are not eligible for this refund.

Sincerely,

Federal Trade Commission

APPENDIX 2

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
DENVER REGIONAL OFFICE

1961 Stout Street, Suite 1523
Denver, CO 80294-0101
(303) 844-2271

CLAIM FORM

Name_____ _____
Address_____ _____
City/State/Zip_____ _____

This Claim Form is to be used in connection with your request for a refund from Pre-Paid Legal Services, Inc. ("Pre-Paid"). Please read the Letter enclosed with this Claim Form. **THIS CLAIM FORM MUST BE RECEIVED BY THE FTC AT THE ADDRESS SHOWN ABOVE NO LATER THAN_____, 199_. (60 day turn-around).** A self-addressed envelope is provided for your convenience. Please affix the proper postage.

INSTRUCTIONS

1. Please check the appropriate box to indicate your status:
   - [ ] As a member of the American Association for Senior Citizens ("AASC"), I received a living trust from Pre-Paid Legal Services, Inc. I have not received a refund from either AASC or Pre-Paid.
   - [ ] _____, the AASC member who received the living trust, is legally incompetent or deceased, and I am the beneficiary, next-of-kin or other representative of that person. Neither the AASC member nor myself, on behalf of that AASC member, has received a refund from either AASC or Pre-Paid.

2. If your name and/or address as they appear at the top of this form are different, or the information is otherwise incorrect, please enter the change(s) in the line(s) to the right.

PRIVACY ACT NOTICE

This information is being collected in order to make a distribution of funds paid to the Federal Trade Commission in connection with an Agreement Containing Consent Order to Cease and Desist issued to Pre-Paid Legal Services, Inc. by the Commission pursuant to 15 U.S.C. 45. In addition, this information may be disclosed for other purposes authorized by the Privacy Act, 5 U.S.C. 552a, 47 Fed. Reg. 32,622, including disclosure to other government agencies. Failure to provide the requested information could delay processing or, in some cases, make it impossible for us to process your claim.

Under penalty of perjury, I certify that the foregoing is true and correct to the best of my knowledge and belief.

_____ _____

Signature Date

APPENDIX 3

ESCROW AGREEMENT

Whereas, Pre-Paid Legal Services, Inc. ("Pre-Paid" or "proposed respondent"), has agreed with the staff of the Federal Trade Commission ("the Staff") to settle a certain proposed complaint against it; and

Whereas, as part of the settlement of the proposed complaint for alleged violations of Section 5 of the Federal Trade Commission Act ("FTC Act"), Pre-Paid and the staff have agreed that Pre-Paid will pay partial consumer refunds to those who purchased living trusts from the American Association for Senior Citizens ("AASC"); and

Whereas, the staff requires as a condition of its recommendation of the proposed settlement to the Commission that one hundred thirty thousand dollars ($130,000) be held in escrow to secure payment of the redress, pending final approval of the settlement and issuance of the order by the Commission, before being disbursed as directed by the terms of the proposed Agreement Containing Consent Order to Cease and Desist;

Now, therefore, in consideration of the premises and mutual covenants, agreements and conditions herein contained, Pre-Paid and the staff do hereby agree to and with each other as follows:

1. Gilardi & Co., in its capacity as a redress contractor (FTC contract #L-1127), shall serve as the Escrow Agent. Within forty-eight (48) hours of signing the Proposed Agreement Containing Consent Order to Cease and Desist to the Commission for final approval, the proposed respondent shall pay to Escrow Agent the amount of one hundred thirty thousand dollars ($130,000), to be held in escrow in an interest-bearing account to secure payment of the refunds in trust for consumers, by depositing the same into an account ("the escrow fund") as designated by the Escrow Agent. Pre-Paid will pay said amount by a certified or cashier's check(s) or wire transfer.

2. Except as provided in paragraphs four and five of this Agreement and Part V of the proposed Agreement Containing Consent Order to Cease and Desist, proposed respondent agrees to make no claim to or demand for the return of the escrow fund or any portiion thereof, directly or indirectly, through counsel or otherwise, and, in the event of bankruptcy of proposed respondent, proposed

respondent agrees that the funds are not part of the debtor's estate and that the estate does not have any claim or interest therein.

3. The refund amounts so held in escrow shall be disbursed in accordance with the proposed Agreement Containing Consent Order to Cease and Desist executed by the parties. The Escrow Agent shall be compensated for its management of the escrow fund by the escrow fund.

4. This Agreement shall be irrevocable, and the escrow fund shall be used for no purpose other than payment of the consumer refunds as specified in the Agreement Containing Consent Order to Cease and Desist and to compensate Escrow Agent. The parties agree, however, that this fact is not and will not be interpreted as an admission or acknowledgment by either side that any dominion, title or interest, either legal or equitable, in the principal of the escrow fund remains in Pre-Paid. The Escrow Agent shall return to the Commission for transmittal to Pre-Paid any money remaining in the escrow fund after reimbursement to all consumers who request a refund as soon as practicable after the conclusion of the process of disbursement of the consumer refunds.

5. In the event that the proposed Agreement Containing Consent Order to Cease and Desist does not receive final approval from the Commission, the Escrow Agent shall terminate the escrow account and return all funds to the Commission for transmittal to proposed respondent. The parties agree, however, that this fact is not an admission or acknowledgment by either side that any dominion, title, or interest, either legal or equitable, in the principal of the funds remains in Pre-Paid.

In witness whereof, each of the parties caused this Escrow Agreement to be executed on its behalf by its duly authorized representatives.

IN THE MATTER OF

UNO RESTAURANT CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3730. Complaint, April 4, 1997--Decision, April 4, 1997

This consent order prohibits, among other things, the Massachusetts-based pizza corporations from misrepresenting the existence or amount of fat or any other nutrient or substance in any pizza or other baked crust food products.

Appearances

For the Commission: *John T. Dugan.*

For the respondent: *Craig Fochler, Wildman, Harold, Allen & Dixon,* Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Uno Restaurant Corporation, Pizzeria Uno Corporation, and Uno Restaurants, Inc., corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Uno Restaurant Corporation is a Delaware corporation with its principal office or place of business at 100 Charles Park Road, West Roxbury, Massachusetts.

2. Respondent Pizzeria Uno Corporation is a Delaware corporation with its principal office or place of business at 100 Charles Park Road, West Roxbury, Massachusetts.

3. Respondent Uno Restaurants, Inc. is a Massachusetts corporation with its principal office or place of business at 100 Charles Park Road, West Roxbury, Massachusetts.

4. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including thin crust pizzas known as "Thinzettas," which are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

6. Respondents have disseminated or have caused to be disseminated advertisements for thin crust pizzas, including but not necessarily limited to the attached Exhibits A1, A2, and B. These advertisements contain the following statements:

A. Customer: "Me, I Like to watch what I eat."
Chef: "Then keep watching . . ."
Announcer: "Introducing great tasting low fat thin crust pizzas."
. . . .
(Exhibit A1, television commercial transcript, and Exhibit A2, television commercial videotape).

B. "Uno's menu is full of 23 new tempting items. Try our 3 new Deep Dish or 8 new Lowfat Thin Crust Pizzas."
. . . .
(Exhibit B, print advertisement).

7. Through the means described in paragraph six, respondents have represented, expressly or by implication, that their Thinzettas thin crust pizzas are low in fat.

8. In truth and in fact, in most cases respondents' Thinzettas thin crust pizzas are not low in fat. Six out of nine types of Thinzettas thin crust pizzas contained from 14 to 36 grams of fat per serving at the time of dissemination of the advertisements referred to in paragraph six. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A1

PIZZERIA UNO TELEVISION COMMERCIAL TRANSCRIPT

Customer 1:	Ok, Pizzeria Uno, you do great deep dish pizza, but what about chicken?
Chef:	Chicken, you ask? Take this . . .
Announcer:	Uno challenges your appetite with over twenty new dishes, like our chicken mushroom marsala with fettucine. [alternate version: Uno challenges your appetite with over twenty new dishes, like our grilled chicken breast sandwich with roasted red peppers].
Super:	At participating Restaurants Only.
Customer 2:	Me, I like to watch what I eat.
Chef:	Then keep watching . . .
Announcer:	Introducing great tasting low fat thin crust pizzas. We have over twenty new dishes all made the Uno way. Your way to great food.
Super:	Prices May Vary.
Customer 3:	Hey, you forgot the appetizers!
Chef:	I don't think so.

EXHIBIT A2

EXHIBIT A2 IS A VIDEO TAPE

EXHIBIT B

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Uno Restaurant Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 100 Charles Park Road, West Roxbury, Massachusetts.

Respondent Pizzeria Uno Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 100 Charles Park Road, West Roxbury, Massachusetts.

Respondent Uno Restaurants, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its offices and principal place

of business located at 100 Charles Park Road, West Roxbury, Massachusetts.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, *"respondents"* shall mean Uno Restaurant Corporation, Pizzeria Uno Corporation, and Uno Restaurants, Inc., corporations, their successors and assigns and their officers, agents, representatives and employees.

2. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of pizzas, or any other food product containing a baked crust, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, through numerical or descriptive terms or any other means, the existence or amount of total fat or any other nutrient or substance in such product. If any representation covered by this Part either expressly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

II.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and

Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

III.

It is further ordered, That respondents Uno Restaurant Corporation, Pizzeria Uno Corporation, and Uno Restaurants, Inc. and their successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IV.

It is further ordered, That respondents Uno Restaurant Corporation, Pizzeria Uno Corporation, and Uno Restaurants, Inc. and their successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, managers, and franchisees, and to all current and future employees, agents, and representatives having responsibility for the preparation of advertising or promotional materials. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

It is further ordered, That respondents Uno Restaurant Corporation, Pizzeria Uno Corporation, and Uno Restaurants, Inc. and their successors and assigns shall notify the Commission at least

thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learns less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

It is further ordered, That respondents Uno Restaurant Corporation, Pizzeria Uno Corporation, and Uno Restaurants, Inc. and their successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VII.

This order will terminate on April 4, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

THE ADMINISTRATIVE COMPANY, ET AL.

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

Docket C-3731. Complaint, April 14, 1997--Decision, April 14, 1997

This consent order prohibits, among other things, a Texas-based corporation and its officer from making certain false, misleading or unsubstantiated claims concerning the benefits and appropriateness of living trusts or any legal instrument or service they offer and requires the respondents to clearly and conspicuously disclose to consumers that such trusts may be legally challenged on similar grounds as wills, that living trusts may not be appropriate in all instances, and that the transfer of an individual's assets into a living trust is not included in the price of creating the trust.

Appearances

For the Commission: *Elizabeth M. Palmquist.*

For the respondents: *Tony Chiccio, Chiccio & Associates* Dallas, TX.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Administrative Company, a corporation, Michael P. McIntyre, individually and as an officer and director of The Administrative Company, and Pre-Paid Legal Services, Inc. ("Pre-Paid"), a corporation (collectively, "respondents"), have violated the provisions of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Michael P. McIntyre's current address is 4328 Hollow Oak, Dallas, Texas.

Respondent The Administrative Company has ceased doing business. Its address is the same as that of Michael P. McIntyre.

Respondent Pre-Paid Legal Services, Inc., is an Oklahoma corporation, with its principal office or place of business at 321 E. Main Street, Ada, Oklahoma.

PAR. 2. Respondents, at all times relevant to this complaint, have advertised, promoted, offered for sale, and sold living trusts to

consumers. A living trust is a trust into which an individual can place all of his or her assets during his or her lifetime and, by transferring ownership of the assets to the name of the trust, thereby remove the assets from the individual's estate.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. In the course of marketing their products to the public, respondents, directly or through commissioned sales agents, have caused to be disseminated sales literature concerning living trusts, including, but not necessarily limited to, the attached Exhibits 1 and 2. This literature contains the following statements:

(a) It is your legal right as a UNITED STATES Tax Payer to establish a Living Trust. By establishing a Living Trust, at your death your estate avoids PROBATING YOUR WILL which can COST SEVERAL THOUSANDS of dollars in legal and executor fees and TAKE SEVERAL YEARS before being transferred to your family and loved ones. YOU RETAIN FULL CONTROL OF ALL ASSETS!
YOU COULD SAVE THOUSANDS OF HARD EARNED DOLLARS! Exh. 1.

(b) A LIVING TRUST eliminates ALL PROBATE FEES and COST. . . . With a LIVING TRUST, your family will not have to go through probate, and can avoid paying expensive probate fees and costs. Exh. 2, p. 18.

(c) A LIVING TRUST allows a quick DISTRIBUTION to your heirs. Assets in probate court are often frozen two years or more, even with a WILL. A LIVING TRUST allows these same assets to be distributed within days to your loved ones, since a LIVING TRUST avoids Probate Court. Exh. 2, p. 17.

(d) Total assets [pass through a] living trust [to] spouse or heirs [in] 1-3 days. Exh. 2, p. 24.

(e) A LIVING TRUST prevents a WILL CONTEST. . . . Through a LIVING TRUST your wishes will be carried out without interference. Exh. 2, p. 17.

(f) Membership entitles you to:

1. FREE LEGAL SERVICES FOR PREPARATION OF A REVOCABLE LIVING TRUST BY A QUALIFIED ATTORNEY IN YOUR STATE AND A FREE "POUR-OVER" WILL. Exh. 2, p. 8.

(g) AN A-B LIVING TRUST protects against catastrophic MEDICAL COSTS. . . . With an A-B LIVING TRUST, if you become seriously ill, your trustee can make gifts of your property to your heirs, and three years thereafter, can seek government benefits for your care, so that the bulk of your estate will go to your heirs. Exh. 2, p. 19.

(h) Is There Anything Bad About a Living Trust? No. There is nothing bad about a Living Trust. Exh. 2, p. 20.

PAR. 5. Through the use of the statements contained in the sales literature referred to in paragraph four, including, but not necessarily limited to, the sales literature attached as Exhibits 1 and 2, respondents have represented, directly or by implication, that:

(a) The use of a living trust avoids all probate and administrative costs.
(b) At death, a living trust allows assets to be distributed immediately or almost immediately.
(c) A living trust cannot be challenged.
(d) Living trusts are prepared by local attorneys.
(e) A living trust protects against catastrophic medical costs.
(f) A living trust is the appropriate estate planning device for every consumer.
(g) There are no disadvantages to a living trust.

PAR. 6. In truth and in fact:

(a) A living trust does not always avoid probate and administrative costs.

(b) The use of a living trust does not necessarily result in immediate distribution of assets since creditors may file claims against the trust instrument.

(c) A living trust is not immune from challenge.

(d) Most living trusts prepared for AASC members were not prepared by local attorneys. Instead, of the 3,064 living trusts prepared for AASC members in 43 states, approximately 3,000 were prepared by an Arizona attorney licensed to practice law solely in Arizona and New York.

(e) A living trust does not protect against catastrophic medical costs.

(f) A living trust is not appropriate for everyone. The determination of whether a living trust is appropriate for a particular consumer requires an examination of the assets that compose the consumer's estate, the potential tax consequences of the estate plan, and the objectives of the consumer.

(g) There are disadvantages to a living trust. For example, while probate law imposes a statutory deadline beyond which creditors can no longer file claims against a will, in some states, there is no law

limiting the time that creditors may file claims against a trust instrument.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements contained in the sales literature referred to in paragraph four, including, but not necessarily limited to, the sales literature attached as Exhibits 1 and 2, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. In their advertising, promoting, offering for sale, and sale of living trusts, respondents have failed to disclose that the transfer of an individual's assets into the living trust was not included in the price paid for creating the living trust and that it would be the responsibility of the individual purchaser to transfer assets into the trust, once created, or to arrange for another individual or entity to do so. This fact would be material to consumers in deciding whether to purchase a living trust and from whom to purchase a living trust. The failure to disclose this fact was, and is, a deceptive act or practice.

PAR. 10. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT 1

EXHIBIT 2

104747 Complaint

EXHIBIT 2

EXHIBIT 2

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EXHIBIT 2

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Denver Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, the attorney for the individual respondent, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The Administrative Company is a corporation organized under and by virtue of the laws of the State of Texas, with its current address at 4328 Hollow Oak, in the City of Dallas, State of Texas. The Administrative Company has ceased doing business.

Respondent Michael P. McIntyre's current address is 4328 Hollow Oak, in the City of Dallas, State of Texas.

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

DEFINITIONS

For purposes of this order:

a. *"Living trust"* means a trust into which an individual can place all of his or her assets during his or her lifetime and, by transferring ownership of the assets to the name of the trust, thereby remove the assets from the individual's estate.

b. *"Probate"* is the legal process that validates a will, which is a legal document that contains instructions to the court on how an individual's assets and liabilities are to be divided and distributed at death.

ORDER

I.

It is ordered, That respondents The Administrative Company, a corporation, its successors and assigns, and its officers; Michael P. McIntyre, individually and as an officer and director of The Administrative Company; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promoting, offering for sale, or sale of living trusts, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, orally or in writing, that:

A. The use of a living trust avoids all probate and administrative costs.
B. At death, a living trust allows assets to be distributed immediately or almost immediately.
C. A living trust cannot be challenged.
D. Living trusts are prepared by local attorneys.
E. A living trust protects against catastrophic medical costs.
F. A living trust is the appropriate estate planning device for every consumer.
G. There are no disadvantages to a living trust.

II.

It is further ordered, That respondents The Administrative Company, a corporation, its successors and assigns, and its officers; Michael P. McIntyre, individually and as an officer and director of The Administrative Company; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the promoting, offering for sale, or sale of living trusts, do forthwith cease and desist from failing to disclose, clearly and conspicuously, in writing, and prior to the consummation of the sale, the following information:

A. Living trusts may be challenged on similar grounds as wills.

B. Living trusts may not be appropriate in all instances, and all estate planning options should be examined before determining which estate plan best suits a particular individual's needs and wishes.

III.

It is further ordered, That respondents The Administrative Company, a corporation, its successors and assigns, and its officers; Michael P. McIntyre, individually and as an officer and director of The Administrative Company; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the promoting, offering for sale, or sale of living trusts, do forthwith cease and desist from failing to disclose, clearly and conspicuously, in writing, and prior to the consummation of the sale, the following information, if true:

A. The availability of informal probate under this state's statutes allows minimal or no contact with the courts and reduces the time required to probate a will.

B. The transfer of an individual's assets into the living trust is not included in the price of creating the living trust.

C. It is the sole responsibility of the purchaser of the living trust to transfer assets into the trust.

D. Creditors have a longer period of time to file a claim against a living trust than against a probated estate.

IV.

It is further ordered, That respondents The Administrative Company, a corporation, its successors and assigns, and its officers; Michael P. McIntyre, individually and as an officer and director of The Administrative Company; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promoting, offering for sale, or sale of any legal instrument, service or program, do forthwith cease and desist from making, directly or by implication, orally or in writing:

A. Any statement or representation of material fact that is false or misleading; and

B. Any statement or representation about the advantages, risks or consequences of such legal instrument, service or program unless, at the time of making the statement or representation, they possess and rely upon a reasonable basis.

V.

It is further ordered, That, for a period of five (5) years from the date of issuance of this order, respondents, and their successors and assigns, shall maintain and upon request make available to representatives of the Federal Trade Commission for inspection and copying all documents relating to living trusts or the preparation of living trusts that are developed, written, reviewed, authorized, or used by respondents, their successors and assigns, their officers, and their agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device.

VI.

It is further ordered, That, in connection with the advertising, promoting, offering for sale, or sale of living trusts, respondents shall maintain, for a period of five (5) years from the date of issuance of this order, books, records, and accounts which, in reasonable detail, will demonstrate compliance with this order and accurately, fairly, and completely reflect the incomes, disbursements, transactions, and use of monies by respondents and, upon reasonable notice, make such

books, records, and accounts available to representatives of the Federal Trade Commission for inspection and copying.

VII.

It is further ordered, That the corporate respondent shall notify the Federal Trade Commission, through its Denver Regional Office unless otherwise directed, at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of new corporations, subsidiaries or affiliates of the respondent, the planned filing of a bankruptcy petition, or any other corporate change that may affect compliance obligations arising out of this order.

VIII.

It is further ordered, That respondent Michael P. McIntyre shall, for a period of five (5) years from the date of issuance of this order, notify the Federal Trade Commission, through its Denver Regional Office unless otherwise directed, within forty-five (45) days of the discontinuance of his present business or employment, including self-employment and of his affiliation with a new business or employment, including self-employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address and a statement describing the nature of the business or employment and his duties and responsibilities.

IX.

It is further ordered, That respondents shall:

A. Within thirty (30) days of service of this order upon them, provide a copy of this order to each of respondents' current principals, officers, directors and managers and to all personnel, agents and representatives who are or have been participating or engaging in any manner in respondents' living trust sales activities.

B. For a period of five (5) years from the date of issuance of this order, provide a copy of this order to each of respondents' principals, officers, directors and managers, and to all personnel, agents and

representatives who are participating or engaging in any manner in respondents' living trust sales activities, within three (3) days after the person assumes his or her position.

X.

It is further ordered, That this order will terminate on April 14, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XI.

It is further ordered, That respondents shall, within sixty (60) days of service of this order upon them, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

HULING BROS. CHEVROLET, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, THE TRUTH IN LENDING ACT AND REGULATION Z

Docket C-3732. Complaint, April 14, 1997--Decision, April 14, 1997

This consent order requires, among other things, the Seattle, Washington, automobile dealerships to correctly calculate the annual percentage rate ("APR") for financed purchases in accordance with Regulation Z, and to include in a clear and conspicuous manner all the disclosures required by law when a triggering term is used in an advertisement. The consent order prohibits the respondents from misrepresenting the terms of financed deals, the APR, the amount of any periodic payment, the availability of any advertised credit terms, the sale price, or the availability of any rebate.

Appearances

For the Commission: *Charles Harwood* and *George Zweibel.*
For the respondents: *James Aiken, Aiken & Fein,* Seattle, WA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Huling Bros. Chevrolet, Inc., a corporation; Huling Buick, Inc., a corporation; and Huling Bros. Chrysler/Plymouth, Inc., a corporation, have violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667e, as amended, and its implementing Regulation Z, 12 CFR Part 226, and the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 41-58, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint and alleges:

PARAGRAPH 1. Huling Bros. Chevrolet, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business located at 4755 Fauntleroy Way S.W., Seattle, Washington.

PAR. 2. Huling Buick, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business located at 4545 Fauntleroy Way S.W., Seattle, Washington.

PAR. 3. Huling Bros. Chrysler/Plymouth, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business located at 4550 Fauntleroy Way S.W., Seattle, Washington.

PAR. 4. In the ordinary course and conduct of their business, respondents have been engaged in the dissemination of advertisements that promote, directly or indirectly, credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "credit sale," "closed-end credit," and "consumer credit" are defined in the TILA and Regulation Z.

PAR. 5. The acts and practices of respondents alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in the FTC Act.

COUNT ONE

PAR. 6. Respondent Huling Bros. Chevrolet, Inc., in the course and conduct of its business, on numerous occasions has disseminated, or caused to be disseminated, advertisements that state annual percentage rates as well as monthly payment amounts and vehicle sales prices. In fact, in many instances, the advertisements understate the annual percentage rates by more than 1/4 of 1 percentage point, thereby failing to disclose accurately the annual percentage rate.

PAR. 7. Respondent's aforesaid practice violates Sections 107 and 144(c) and (d) of the TILA, 15 U.S.C. 1606 and 1664(c) and (d), and Sections 226.22(a) and 226.24(b) and (c) of Regulation Z, 12 CFR 226.22(a) and 226.24(b) and (c), and constitutes an unfair or deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT TWO

PAR. 8. Respondents Huling Bros. Chevrolet, Inc., Huling Buick, Inc., and Huling Bros. Chrysler/Plymouth, Inc., in the course and conduct of their business, on numerous occasions have disseminated, or caused to be disseminated, advertisements that state the amount or percentage of any downpayment, the number of payments or period of repayment, or the amount of any payment, but fail to state the annual percentage rate.

PAR. 9. Respondents' aforesaid practice violates Section 144(d) of the TILA, 15 U.S.C. 1664(d), and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT THREE

PAR. 10. Respondents Huling Bros. Chevrolet, Inc., and Huling Buick, Inc., in the course and conduct of their business, on numerous occasions have disseminated, or caused to be disseminated, advertisements that state conflicting monthly payment amounts for the same transaction, thereby failing to disclose accurately the terms of repayment.

PAR. 11. Respondents' aforesaid practice violates Section 144(d) of the TILA, 15 U.S.C. 1664(d), and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), and constitutes an unfair or deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT FOUR

PAR. 12. Respondents Huling Bros. Chevrolet, Inc., Huling Buick, Inc., and Huling Bros. Chrysler/Plymouth, Inc., in the course and conduct of their business, on numerous occasions have disseminated, or caused to be disseminated, advertisements that state terms of repayment (such as monthly payment amounts) or annual percentage rates that are not actually arranged or offered by respondents.

PAR. 13. Respondents' aforesaid practice violates Section 142 of the TILA, 15 U.S.C. 1662, and Section 226.24(a) of Regulation Z, 12 CFR 226.24(a), and constitutes an unfair or deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT FIVE

PAR. 14. Respondents Huling Bros. Chevrolet, Inc., Huling Buick, Inc., and Huling Bros. Chrysler/Plymouth, Inc., in the course and conduct of their business, in numerous instances including but not limited to Exhibits A and B, have disseminated, or caused to be disseminated, advertisements offering new motor vehicles that state monthly payment amounts, sale prices, and rebates. In many instances, the advertisements represent that "College Graduate" or "1st Time Buyer" rebates are available in conjunction with a payment plan in which monthly payments are at one amount for the first 12 months and are approximately double that amount thereafter ("Half Payment Program"). In fact, these rebates are not available to purchasers who choose the Half Payment Program.

PAR. 15. Respondents' aforesaid practice constitutes an unfair or deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT SIX

PAR. 16. Respondent Huling Buick, Inc., in the course and conduct of its business, has disseminated, or caused to be disseminated, advertisements that state a rate of a finance charge, but fail to state the rate as an "annual percentage rate," using that term or the abbreviation "APR."

PAR. 17. Respondent's aforesaid practice violates Section 144(c) of the TILA, 15 U.S.C. 1664(c), and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b).

EXHIBIT A

EXHIBIT B

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Seattle Regional Office proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge the respondents with violation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq*., and its implementing Regulation Z, 12 CFR 226, and the Federal Trade Commission Act, 15 U.S.C. 45 *et seq*.; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have violated the said Acts and Regulation, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Huling Bros. Chevrolet, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business located at 4755 Fauntleroy Way S.W., Seattle, Washington.

2. Respondent Huling Buick, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business located at 4545 Fauntleroy Way S.W., Seattle, Washington.

3. Respondent Huling Bros. Chrysler/Plymouth, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place

of business located at 4550 Fauntleroy Way S.W., Seattle, Washington.

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

ORDER

I.

It is ordered, That respondents Huling Bros. Chevrolet, Inc., a corporation, its successors and assigns, and its officers; Huling Buick, Inc., a corporation, its successors and assigns, and its officers; and Huling Bros. Chrysler/Plymouth, Inc., a corporation, its successors and assigns, and its officers; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit, as "advertisement" and "consumer credit" are defined in the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667e, as amended, and in Regulation Z, 12 CFR Part 226, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the terms of financing the purchase of a vehicle, including but not limited to the annual percentage rate, the amount of any periodic payment amount, or the availability of any advertised credit term; the sale price; or the availability of any advertised rebate.

B. Stating a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term, and failing to calculate the rate in accordance with Regulation Z. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(Sections 144 and 107 of the TILA, 15 U.S.C. 1664 and 1606, and Sections 226.24(b) and 226.22 of Regulation Z, 12 CFR 226.24(b) and 226.22)

C. Stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any

payment, or the amount of any finance charge, without stating accurately, clearly and conspicuously, all of the terms required by Regulation Z, as follows:

(1) The amount or percentage of the downpayment;

(2) The terms of repayment; and

(3) The "annual percentage rate," using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c))

D. Failing to state only those terms that actually are or will be arranged or offered by the creditor, in any advertisement for credit that states specific credit terms, as required by Regulation Z.

(Section 142 of the TILA, 15 U.S.C. 1662, and Section 226.24(a) of Regulation Z, 12 CFR 226.24(a))

E. Failing to comply in any other respect with the Truth in Lending Act, 15 U.S.C. 1601-1667e, as amended, or its implementing regulation, Regulation Z, 12 CFR Part 226, as amended.

II.

It is further ordered, That respondents, and their successors and assigns, shall distribute a copy of this order to all present or future officers, agents, representatives, and employees having responsibility with respect to the subject matter of this order, and that respondents, and their successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

III.

It is further ordered, That each respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate entity, 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 the order.

IV.

It is further ordered, That for five (5) years after the date of service of this order respondents, and their successors and assigns, shall maintain and upon request make available all records that will demonstrate compliance with the requirements of this order.

V.

It is further ordered, That respondents, and their successors and assigns, shall, within sixty (60) days of the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VI.

This order will terminate on April 14, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

1554 CORPORATION, ET AL.

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

Docket C-3733. Complaint, April 14, 1997--Decision, April 14, 1997

This consent order prohibits, among other things, the California company, doing business as The Mellinger Company, and its president from making any unsubstantiated success, profitability, performance, benefits, efficacy or success rate claims with regard to a business opportunity product or service. The consent order also prohibits the respondents from using testimonials or endorsements that make deceptive or unsubstantiated representations.

Appearances

For the Commission: *Justin Dingfelder*, *Lemuel Dowdy* and *Jonathan Cowen.*

For the respondents: *Shirley Johnson,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that 1554 Corporation, a corporation, and Brainerd L. Mellinger, III, individually as an officer of 1554 Corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent 1554 Corporation is a California corporation, with its office and principal place of business located at 6100 Variel Ave., Woodland Hills, CA. Respondent 1554 Corporation has traded and done business as The Mellinger Company.

Respondent Brainerd L. Mellinger, III, is president of the corporate respondent. Individually, or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have, individually or in concert with others, created and disseminated advertisements for the Mellinger World

Trade Mail Order Plan ("Mellinger Plan"), and have offered for sale and sold the Mellinger Plan to consumers who respond to their advertisements.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents' advertisements for the Mellinger World Trade Mail Order Plan include, but are not necessarily limited to, the attached Exhibits A-D. These advertisements contain the following statements:

A. A program-length television advertisement for the Mellinger Plan, identified as "Mellinger's Secret Treasures" (Exhibit A):

(1) Announcer: "How would you like to earn substantial income right from the comfort of your own home? . . . Living a luxurious lifestyle with long-term security for you and your family." (P. A1)

(2) Endorser: "Doesn't matter what age, what your background is, what your education is. The sooner you get started, the sooner you start making money." (P. A2)

(3) Host: "His name is Brainerd Mellinger III, and he makes it easier than ever for people to make riches they've only dreamed of." (P. A3)

(4) Endorser: "On my first customer my first day with the World Traders I made twelve thousand dollar profit." (P. A4)

(5) Host: "Brainerd, these folks are making a lot of money, and enjoying every minute of it." (P. A13)

(6) Brainerd Mellinger, III: "If you've ever dreamed of riches and living a luxurious lifestyle, give us a call right now." (P. A17)

(7) Endorser: "You will be successful. It's been proven time and time again." (P. A17)

(8) Endorser: "I started off with $250 that my husband gave me, and last year I earned over $35,000, and I did it all with the help of the Mellinger Company." (P. A21)

(9) Endorser: "Get involved with Mellinger, and if you stick with them they have the support team there for you, they can make something like this possible for you." (P. A23)

(10) Endorser: "Anybody today that really wants to work, and has the initiative to get out and try something new, this plan definitely makes it about as easy as pie." (P. A25)

(11) Announcer: "Kirk may not be a rocket scientist, but with the help of the Mellinger World Trade Plan he has launched a company with sky-rocketing profits. Today is a typical business day, and Kirk is shipping out more than 400 hats. The profits are all his." (P. A36)

(12) Endorser: "[A]nyone that gets involved with this is gonna really find [it] exciting, interesting, and create an income for themselves. It's fantastic." (P. A38)

(13) Host: "The Mellinger Plan makes it so easy to achieve financial independence. Why isn't everyone doing it?" (P. A42)
Brainerd Mellinger, III: "Good question. Well -- it's just that they don't know about the Mellinger Plan yet. They aren't aware that this fabulous opportunity for success and riches is waiting for them. And that's why I'm here today. I want to tell everyone that they can make money, like some of the folks you've seen on our show. The Mellinger company shows you how, step by step. And we make it simple and fun . . . ." (P. A43)

B. A magazine advertisement for the Mellinger Plan (Exhibit B):
2 valuable New Reports Can Make You Rich! I'll send both to you FREE! You've seen me on T.V.! Now I'm ready to help you get a fast start! Discover How to Be Independent -- Be Your Own Boss -- Make Big Money in your own IMPORT/EXPORT MAIL ORDER BUSINESS! . . . Enjoy earnings probably far greater than you ever dreamed any job could pay.

* * *

Join these successful Men and Women! . . .
"Mellinger has the answers! I'm looking at $25,000. year's income -- just 2 hours a day part-time." [endorser]
"Just one world trade transaction paid me $5,000 profit! Yes...follow the Mellinger Plan!" [endorser]

C. Mellinger Internet site (http://www.tradezone.com) (Exhibit C):
SUCCESSFUL INTERNATIONAL TRADERS MEMBERS[.] HOW PLAN BROUGHT SUCCESS TO THEM! . . .
Having trouble sleeping one night, [endorser] turned on his TV and became enthralled by a Mellinger infomercial. A phone call brought him full details about the Mellinger Plan. "I was so impressed with what I saw, I immediately began following the Mellinger Plan and became a Member of International Traders. I began putting the Plan into practice and started showing Import products. In less than two months, I had generated well over $2,000 in business." . . .
The Mellinger Plan provided exactly what [endorser] needed. . . . "I would tell you this works for you. It's very good for beginners like myself." She reported sales of $1200. right away and with her early momentum she says she is looking now at earnings of $6000. a month!

D. A pamphlet mailed to consumers who request information about the Mellinger Plan (Exhibit D):
START AT HOME...make money your very first day!

* * *

MEN & WOMEN--Welcome to your exciting, high-income, full-or part-time future in Import/Export/Mail Order. Follow the Mellinger Plan as it guides your every step. Nothing has been left to chance. Each easily followed step is based 100% upon many years of successful business experience!

* * *

SUCCESS STORIES in World Trade! Read these ACTUAL REPORTS of MONEY-MAKING . . . .
Concentrating on imported sports equipment, [endorser] took in $35,000.00 the first year, devoting only a few hours a day.

PAR. 5. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not limited to the advertisements attached as Exhibits A-D, respondents have represented, directly or by implication, that:

A. Consumers who use the Mellinger Plan typically succeed in readily starting and operating profitable businesses;

B. Consumers who use the Mellinger Plan typically earn substantial income; and

C. Endorsements appearing in Exhibits A-D reflect the typical or ordinary experience of members of the public who have used the Mellinger Plan.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

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EXHIBIT B

EXHIBIT C

Mellinger Company http://www.noboss.com/mellingr.html

PRIME-CATEGORY: Consumer Services
CATEGORY: Import/Export

SOURCE: The Mellinger Company
OFFER: become a member of International Traders, gain introduction and access to hundreds of carefully screened foreign suppliers carrying over 20,000 imports plus gain information regarding profit potential as export agent for domestic manufacturers.
COST: $198 or payments of $15 to start. $18.90 for 12 months.
THE PACKAGE: Receive 20 Section Mellinger World Trade/Mail Order Plan, Supplement and 11-piece Visualizer Kit. When paid in full, receive 3 Year International Traders Membership, Free sample Imports, Trade Agreements, Drop Ship Directory, Trade Opportunities Magazine for 3 years (published bimonthly) and sample portfolio of business forms. Free personal telephone consultation available to members. Visa/Mastercard payment accepted.
In addition, the Platinum Profession Training includes round-trip air fare transportation and hotel accommodations at a 4-star hotel while attending 3 days of factory training and Master Certificate as a Professional Glass Repair Technician. Bonus Book "How To Run Mail Order Advertising" for orders within 14 days of receipt of information.
MARKETING TECHNIQUE: sell imports by mail. Members-only Drop-Ship Plan enables you to start without product investment.
MISCELLANEOUS: Mellinger family active in world trade and mail order for over 90 years. You deal directly with overseas suppliers, cut out middlemen and keep all profits. International Traders Trade Show Convention in Las Vegas held annually for International Traders members.
TYPICAL EARNINGS: Examples of earnings of individual members (1) borrowed $500 to start, made $45,000 after 6 months, (2) first year brought $30,000: recently had sales of $41,920 in a single day, (3) first year sales of $55,000; now serve 250 customers are 'trying for a million'.
GEOGRAPHIC AVAILABILITY: USA
ADDITIONAL INFORMATION: For full details on this Business Opportunity simply.

REQUEST TO BE SENT DETAILED INFORMATION

or you can write :

The Mellinger Company 6100 Variel Avenue, Dept NOBOSS Woodland Hills, CA 91367
6100 Variel Avenue, Dept NOBOSS
Woodland Hills, CA 91367

NOTE: this "Listing" has NOT been reviewed-for-accuracy by the Source

110808 Complaint

TO TOP

EXHIBIT D

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act, 15 U.S.C. 45 *et seq.*; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent 1554 Corporation is a California corporation, with its office and principal place of business located at 6100 Variel Ave., Woodland Hills, CA. Respondent 1554 Corporation has traded and done business as The Mellinger Company. Respondent Brainerd L. Mellinger, III, is president of the corporate respondent. Individually, or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in the draft complaint. His principal office or place of business is the same as that of the corporate respondent.

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

ORDER

DEFINITIONS

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

1. *"Mellinger Plan"* shall mean the Mellinger World Trade Mail Order Plan.

2. *"Business opportunity"* shall mean an activity engaged in for the purpose of making a profit.

3. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondents 1554 Corporation, a corporation, its successors and assigns, and its officers, and Brainerd L. Mellinger, III, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Mellinger Plan, or any other product or service concerning business opportunities, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That consumers who use such product or service typically succeed in readily starting and operating profitable businesses;

B. That consumers who use such product or service typically earn substantial income; or

C. Otherwise concerning the performance, benefits, efficacy or success rate of any such product or service,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when

appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

It is further ordered, That respondents 1554 Corporation, a corporation, its successors and assigns, and its officers, and Brainerd L. Mellinger, III, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Using, publishing, or referring to any endorsement (as "endorsement" is defined in Section 255(b), Part 255, Title 16, Code of Federal Regulations) unless respondents have good reason to believe that at the time of such use, publication, or reference, the endorsement reflects the honest opinions, findings, beliefs, or experience of the endorser and contains no express or implied representations which would be deceptive or unsubstantiated if made directly by the respondents; or

B. Representing, directly or by implication, that any endorsement of the product or service represents the typical or ordinary experience of members of the public who use the product or service unless such representation is true and unless, at the time of making the representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation. Provided, however, respondents may use such endorsements if the statements or depictions that comprise the endorsements are true and accurate, and if respondents disclose clearly, prominently, and in close proximity to the endorsement:

1. What the generally expected performance would be in the depicted circumstances; or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve; *i.e.*, that consumers should not expect to experience similar results.

III.

It is further ordered, That, for five (5) years after the last date of dissemination of any representation covered by this order, respondents, their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

1. All advertisements and promotional materials setting forth any representation covered by this order;

2. All materials that were relied upon to substantiate any representation covered by this order; and

3. All test reports, studies, surveys, demonstrations or other evidence in their possession or control, or of which they have knowledge, that contradict, qualify, or call into question such representation or the basis upon which respondents relied for such representation, including complaints from consumers or governmental entities.

IV.

It is further ordered, That:

A. Respondent 1554 Corporation shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporation 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 which may affect compliance obligations arising under this order; and

B. Respondent Brainerd L. Mellinger, III, shall, for a period of three (3) years from the date of service of this order, promptly notify the Commission of the discontinuance of his present business or employment, or his affiliation with a new business or employment, with each such notice to include his new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties and responsibilities in connection with the business or employment.

V.

It is further ordered, That respondents, their successors and assigns, shall forthwith distribute a copy of this order to each of their operating divisions and to each of their officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order, and shall obtain from each such person or entity a signed statement acknowledging receipt of the order.

VI.

It is further ordered, That this order will terminate on April 14, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

VII.

It is further ordered, That respondents, their successors and assigns, shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the

manner and form in which they have complied or intend to comply with this order.

110808 Decision and Order

IN THE MATTER OF

HERB GORDON AUTO WORLD, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, THE TRUTH IN LENDING ACT, REGULATION Z, THE CONSUMER LEASING ACT AND REGULATION M

Docket C-3734. Complaint, April 15, 1997--Decision, April 15, 1997

This consent order prohibits, among other things, the Maryland company and its seven dealerships from obscuring important cost information in fine or unreadable print, from advertising financed purchase or leasing terms that are not available to consumers, and from misrepresenting the terms of financing or leasing any vehicle, the existence of the amount of any balloon payment, or the existence, number or amount of payments for financed purchases. The consent order requires the respondents to make all the disclosures required by the Truth in Lending Act, Regulation Z, Consumer Leasing Act, and Regulation M, and to ensure that the disclosures are noticeable, readable, and comprehensible to an ordinary customer.

Appearances

For the Commission: *Carole L. Reynolds.*

For the respondents: *Charles M. English, Jr., Ober, Kaler, Grimes & Shriver,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Herb Gordon Auto World, Inc. dba Herb Gordon Auto World, Herb Gordon Dodge, Herb Gordon Mercedes-Benz, Herb Gordon Nissan, Herb Gordon Oldsmobile, Herb Gordon Volvo, and Herb Gordon Used Cars, a corporation, ("respondent") has violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, as amended, the Consumer Leasing Act ("CLA"), 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint and alleges:

PARAGRAPH 1. Herb Gordon Auto World, Inc. dba Herb Gordon Auto World, Herb Gordon Dodge, Herb Gordon Mercedes-

Benz, Herb Gordon Nissan, Herb Gordon Oldsmobile, Herb Gordon Volvo, and Herb Gordon Used Cars, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3121-3161 Automobile Blvd., Silver Spring, Maryland.

PAR. 2. In the ordinary course and conduct of its business, and at least since January 1, 1994, respondent has been engaged in the dissemination of advertisements that promote, directly or indirectly, credit sales and other extensions of other than open end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit," are defined in the TILA and Regulation Z. In the ordinary course and conduct of its business, and at least since January 1, 1994, respondent has been engaged in the dissemination of advertisements that promote, directly or indirectly, consumer leases, as the terms "advertisement," and "consumer lease," are defined in the CLA and Regulation M.

PAR. 3. The acts and practices of respondent alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in the FTC Act.

COUNT ONE

PAR. 4. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibit A, has disseminated or caused to be disseminated print advertisements that state initial, low monthly payment amounts, such as "$163" per month, and promote the "luxury of low payments" ("Gold Key Plus advertisements"). In fine print, respondent's Gold Key Plus advertisements, *inter alia*, state an initial number of payments, a downpayment and another amount described as a "purchase option." Respondent's Gold Key Plus advertisements misrepresent that the additional amount is optional and fail to disclose that the financing to be signed at purchase requires the consumer to make a substantial balloon payment at the conclusion of the initial payments, which is a mandatory obligation.

PAR. 5. Respondent's aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT TWO

PAR. 6. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibit A, has disseminated or caused to be disseminated Gold Key Plus advertisements that state initial, low monthly payment amounts and promote the "luxury of low payments." In fine print, respondent's Gold Key Plus advertisements, *inter alia*, state an initial number of payments, a downpayment and another amount described as a "purchase option." Respondent's Gold Key Plus advertisements fail to accurately state the terms of repayment, by failing to disclose that the additional amount is a final payment and by inaccurately stating that the amount is optional when, in fact, it is mandatory, based on the financing to be signed at purchase.

PAR. 7. Respondent's aforesaid practice violates Section 144(d) of the TILA, 15 U.S.C. 1664(d), and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT THREE

PAR. 8. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibit A, has disseminated or caused to be disseminated Gold Key Plus advertisements, *inter alia*, that state initial, low monthly payment amounts and promote the "luxury of low payments." Respondent's Gold Key Plus advertisements fail to disclose the annual percentage rate for the financing, using that term or the abbreviation "APR."

PAR. 9. Respondent's aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a), and a violation of Section 144(d) of the TILA, 15 U.S.C. 1664(d) and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT FOUR

PAR. 10. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibit A, has disseminated or caused to be disseminated Gold Key Plus advertisements that state initial, low monthly payment amounts and boldly promote the "luxury of low payments." In fine print, respondent's Gold Key Plus advertisements, *inter alia*, state an initial number of payments, a downpayment and another amount described

as a "purchase option" (the "disclaimer"). The disclaimer in respondent's Gold Key Plus advertisements is virtually unreadable and incomprehensible to ordinary consumers because of the extremely small typesize and is not clear and conspicuous.

PAR. 11. Respondent's aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a) and a violation of Section 226.24 of Regulation Z, 12 CFR 226.24, as more fully set out in Section 226.24-1 of the Federal Reserve Board's Official Staff Commentary to Regulation Z ("Commentary"), 12 CFR 226.24-1, Supp. 1.

COUNT FIVE

PAR. 12. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibits B-1, B-2 and B-3, has disseminated or caused to be disseminated print advertisements that boldly state "$95 down with low monthly payments for the first 12 months" and radio and televised advertisements that boldly state "$95 down and payments as low as $155 a month for the first 12 months" ("Drive For 95 advertisements"). Respondent's Drive For 95 print, radio and televised advertisements also state various initial, low monthly payment amounts, such as "$155" a month. Thereafter, respondent's Drive For 95 print, radio and televised advertisements, *inter alia*, state "balance of 48 payments will be higher than 1st 12 months" and "cost per $1,000 borrowed $20.52." Respondent's Drive For 95 advertisements misrepresent and fail to accurately disclose the amount of the second series of installment payments required at the conclusion of the initial payments, based on the financing to be signed at purchase.

PAR. 13. Respondent's aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT SIX

PAR. 14. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibits B-1, B-2 and B-3, has disseminated or caused to be disseminated Drive For 95 print advertisements that state "$95 down with low monthly payments

for the first 12 months" and Drive For 95 radio and televised advertisements that state "$95 down and payments as low as $155 a month for the 1st 12 months." Respondent's Drive For 95 print, radio and televised advertisements also state various initial, low monthly payment amounts, such as "$155" a month. Thereafter, respondent's Drive For 95 print, radio and televised advertisements, *inter alia*, state "balance of 48 payments will be higher than 1st 12 months" and "cost per $1,000 borrowed $20.52." Respondent's Drive For 95 advertisements fail to accurately disclose the terms of repayment, by failing to accurately state the amount of the second series of installment payments required at the conclusion of the initial payments, based on the financing to be signed at purchase.

PAR. 15. Respondent's aforesaid practice violates Section 144(d) of the TILA, 15 U.S.C. 1664(d), and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT SEVEN

PAR. 16. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibits B-1, B-2 and B-3, has disseminated or caused to be disseminated Drive For 95 print advertisements that state "$95 down with low monthly payments for the first 12 months" and Drive For 95 radio and televised advertisements that state "$95 down and $155 a month for the 1st 12 months." Respondent's Drive For 95 print, radio and televised advertisements also state various initial, low monthly payment amounts. In fine print in the print advertisements, in fine print for a short duration in the televised advertisements, and orally for a short duration in the radio advertisements, respondent's Drive For 95 advertisements, *inter alia*, state "balance of 48 payments will be higher than 1st 12 months," "cost per $1,000 borrowed $20.52," and an annual percentage rate (the "disclaimer"). The disclaimer in respondent's Drive For 95 advertisements is virtually incomprehensible to ordinary consumers and is not clear and conspicuous because of the small typesize in the print and televised advertisements and because of the short duration in the radio and televised advertisements.

PAR. 17. Respondent's aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a), and a violation of Section 226.24 of Regulation Z, 12 CFR

226.24, as more fully set out in Section 226.24-1 of the Commentary, 12 CFR 226.24-1, Supp. 1.

COUNT EIGHT

PAR. 18. Respondent, in the course and conduct of its business, in numerous instances has disseminated or caused to be disseminated advertisements that state the amount or percentage of any downpayment, the number of payments or period of repayment, or the amount of any payment, but fail to state all of the terms required by Regulation Z, as follows: the amount or percentage of the downpayment, the terms of repayment, and the annual percentage rate, using that term or the abbreviation "APR."

PAR. 19. Respondent's aforesaid practice violates Section 144(d) of the TILA, 15 U.S.C. 1664(d), and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT NINE

PAR. 20. Respondent, in the course and conduct of its business, in numerous instances has disseminated or caused to be disseminated advertisements that state the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease, but fail to state all of the terms required by Regulation M, as applicable and as follows: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the number, amount, due dates or periods of scheduled payments, and the total of such payments under the lease; a statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price); and a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

PAR. 21. Respondent's aforesaid practice violates Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c).

EXHIBIT A

EXHIBIT B

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 complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge the respondent with violation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq*. and its implementing Regulation Z, 12 CFR 226, the Consumer Leasing Act, 15 U.S.C. 1667 *et seq*. and its implementing Regulation M, 12 CFR 213 and the Federal Trade Commission Act, 15 U.S.C. 45 *et seq*.; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts and Regulation, 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:

l. Respondent Herb Gordon Auto World, Inc. dba Herb Gordon Auto World, Herb Gordon Dodge, Herb Gordon Mercedes-Benz, Herb Gordon Nissan, Herb Gordon Oldsmobile, Herb Gordon Volvo, and Herb Gordon Used Cars, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3121-3161 Automobile Blvd., Silver Spring, Maryland.

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

ORDER

DEFINITIONS

"Clearly and conspicuously" as used herein shall mean:

(a) In a television or videotaped advertisement, the required disclosures made in the audio portion of the advertisement shall be delivered in a volume, cadence and location, and for a duration, as to be readily noticeable, hearable and comprehensible to an ordinary consumer. The required disclosures made in the video portion of the advertisement shall appear on the screen in a size, shade, contrast, prominence and location, and for a duration, as to be readily noticeable, readable and comprehensible to an ordinary consumer.

(b) In a radio advertisement, the required disclosures shall be delivered in a volume, cadence and location, and for a duration, as to be readily noticeable, hearable and comprehensible to an ordinary consumer.

(c) In a print advertisement (including but not limited to mail solicitations), the required disclosures shall appear in a size, shade, contrast, prominence and location as to be readily noticeable, readable and comprehensible to an ordinary consumer.

Nothing contrary to, inconsistent with or in mitigation of the required disclosures shall be used in any advertisement.

I.

It is ordered, That respondent Herb Gordon Auto World, Inc. dba Herb Gordon Auto World, Herb Gordon Dodge, Herb Gordon Mercedes-Benz, Herb Gordon Nissan, Herb Gordon Oldsmobile, Herb Gordon Volvo, and Herb Gordon Used Cars, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote directly or indirectly any extension of consumer credit, as "advertisement" and "consumer credit" are defined in the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, as amended, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the terms of financing the purchase of a vehicle, including but not limited to whether there may be a balloon payment or second series of installment payments, and the amount of any balloon payment or the number and amount of any second series of installment payments.

B. Stating any number or amount of payment(s) required to repay the debt, without stating accurately, clearly and conspicuously, all of the terms required by Regulation Z, as follows, and as amended:

(1) The amount or percentage of the downpayment;

(2) The terms of repayment, including the amount of any balloon payment, or the number and amount of any second series of installment payments; and

(3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction that fact must also be disclosed.

(Section 144(d) of the TILA, 15 U.S.C. 1664(d), as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board's Official Staff Commentary to Regulation Z (hereinafter referred to as "Commentary"), 12 CFR 226.24(c), Supp. 1, as amended).

C. Stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment or the amount of any finance charge, without stating, clearly and conspicuously, all of the terms required by Regulation Z, as follows, and as amended:

(1) The amount or percentage of the downpayment;

(2) The terms of repayment, and

(3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144(d) of the TILA, 15 U.S.C. 1664(d), as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c)), as amended,

as more fully set out in Section 226.24(c) of the Commentary, 12 CFR 226.24(c), Supp. 1, as amended).

D. Stating a rate of finance charge without stating the rate as an "annual percentage rate" using that term or the abbreviation "APR," as required by Regulation Z. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.
(Section 144(c) of the TILA, 15 U.S.C. 1664(c), as amended, and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b), as amended, as more fully set out in Section 226.24(b) of the Commentary, 12 CFR 226.24(b), Supp. 1, as amended).

E. Failing to state only those terms that actually are or will be arranged or offered by the creditor, in any advertisement for credit that states specific credit terms, as required by Regulation Z.
(Section 142 of the TILA, 15 U.S.C. 1662, as amended, and Section 226.24(a) of Regulation Z, 12 CFR 226.24(a), as amended).

F. Failing to comply in any other respect with Regulation Z and the TILA.
(Regulation Z, 12 CFR 226, as amended, and the TILA, 15 U.S.C. 1601-1667, as amended).

II.

It is ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote or assist directly or indirectly any consumer lease, as "advertisement" and "consumer lease" are defined in the Consumer Leasing Act ("CLA"), 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the costs or terms of leasing a vehicle.

B. Stating the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease, unless all of the following

items are disclosed, clearly and conspicuously, as applicable, as required by Regulation M, as amended:

(1) That the transaction advertised is a lease;

(2) The total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments are required;

(3) The number, amounts, due dates or periods of scheduled payments and the total of such payments under the lease;

(4) A statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price); and

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lessee has such liability.

For all lease advertisements, respondent may comply with the requirements of this subparagraph by utilizing Section 184(a) of the CLA, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 ("Omnibus Act"), Pub. L. No. 104-208, 110 Stat. 3009, 3009-473 (Sept. 30, 1996) (to be codified at 15 U.S.C. 1667c(a)) ("Section 184(a) of the revised CLA"), as amended, or by utilizing Section 213.7(d) of revised Regulation M, 61 Fed. Reg. 52246, 52261 (Oct. 7, 1996) (to be codified at 12 CFR 213.7(d)) ("revised Regulation M"), as amended. For radio lease advertisements, respondent may also comply with the requirements of this subparagraph by utilizing Section 184(b) of the CLA, 15 U.S.C. 1667c(b), as amended by Title II, Section 2605 of the Omnibus Act (to be codified at 15 U.S.C. 1667c(c)) ("Section 184(c) of the revised CLA"), as amended, or by utilizing Section 213.7(f) of revised Regulation M (to be codified at 12 CFR 213.7(f)), as amended. For television lease advertisements, respondent may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of revised Regulation M, as amended.

(Sections 184(a)-(b) of the CLA, 15 U.S.C. 1667c(a)-(b), as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended).

C. Stating that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases or will lease such property at those amounts or terms, as required by Regulation M.
(Section 213.5(a) of Regulation M, 12 CFR 213.5(a), as amended).

D. Failing to comply in any other respect with Regulation M and the CLA.

Respondent may comply with the requirements of this subparagraph by utilizing revised Regulation M, 61 Fed. Reg. 52246 (Oct. 7, 1996) (to be codified at 12 CFR 213), as amended.
(Regulation M, 12 CFR 213, as amended, and the CLA, 15 U.S.C. 1667-1667e, as amended).

III.

It is further ordered, That respondent, its successors and assigns shall distribute a copy of this order to any present or future officers, agents, representatives, and employees having responsibility with respect to the subject matter of this order and secure from each such person a signed statement acknowledging receipt of said order.

IV.

It is further ordered, That respondent, its successors and assigns shall promptly notify the Commission at least thirty (30) days prior to any proposed change in the corporate entity 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 which may affect compliance obligations arising out of the order.

V.

It is further ordered, That for five years after the date of service of this order respondent, its successors and assigns shall maintain and upon request make available all records that will demonstrate compliance with the requirements of this order.

VI.

It is further ordered, That respondent, its successors and assigns shall, within sixty (60) days of the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

It is further ordered, That this order will terminate on April 15, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

THE MONEY TREE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, THE TRUTH IN LENDING ACT AND THE FAIR CREDIT REPORTING ACT

Docket C-3735. Complaint, April 28, 1997--Decision, April 28, 1997

This consent order requires, among other things, the Georgia company and its officer to offer customers the chance to cancel the credit-life, credit-disability, or accidental death and dismemberment insurance they purchased, and to obtain cash refunds or credit which could amount to as much as $1.2 million. The consent order prohibits the respondents from requiring consumers to sign statements that such purchases are voluntary, if they are required to obtain the loan; from referring to credit-related insurance or auto club membership without telling consumers their loan applications have been approved and the amount of the approved loans; and requires the respondents to disclose to consumers that such coverage is optional and to have those consumers sign a form acknowledging that fact and the amount the extras will cost if they choose to purchase them. The consent order also prohibits violations of the Fair Credit Reporting Act provisions regarding disclosures to consumers when their credit reports influence the denial of credit.

Appearances

For the Commission: *Thomas Kane, Rolando Berrelez* and *William Haynes.*

For the respondents: *Sheldon Feldman, Weil, Gotshal & Manges,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Money Tree, Inc., a corporation, and Vance R. Martin, individually and as an officer of The Money Tree, Inc. ("respondents"), have violated the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681-1681t, as amended, and that The Money Tree, Inc. has violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR Part 226, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Respondent The Money Tree, Inc., which also does business as Money To Lend, Inc. and Money To Lend, is a Georgia corporation, with its office and principal place of business located at 114 South Broad Street, Bainbridge, Georgia, and operates offices throughout Georgia and Alabama.

2. Respondent Vance R. Martin is the sole owner and president of The Money Tree, Inc. Individually, or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal place of business is the same as that of the corporate respondent.

3. Respondent The Money Tree, Inc. has engaged in the business of offering "consumer credit" to the public and is a "creditor" as those terms are defined in the Truth in Lending Act and Regulation Z.

4. Respondent The Money Tree, Inc. makes short-term installment loans to primarily low-income consumers. The loans are often for amounts between $150 and $400.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I: TRUTH IN LENDING ACT

6. Respondent The Money Tree, Inc., in the course and conduct of its business, has, on numerous occasions, required consumers to purchase a combination of credit-life, credit accident and health, credit accident and sickness, or accidental death and dismemberment insurance and/or an auto club membership (collectively referred to as "the extras") in connection with an extension of credit. On average, The Money Tree, Inc.'s customers paid approximately $80.00 for the extras, plus interest.

7. Respondent The Money Tree, Inc. has not included the cost of the extras in the finance charge and the annual percentage rate disclosed to consumers, and has wrongfully included the cost of the extras in the amount financed disclosed to consumers.

8. Respondent The Money Tree, Inc.'s aforesaid acts and practices violate Sections 106, 107, and 128 of the TILA, 15 U.S.C. 1605, 1606, and 1638, as amended, respectively, and Sections 226.4, 226.4(d), 226.22 and 226.18(b), (d) and (e) of Regulation Z, 12 CFR 226.4, 226.4(d), 226.22 and 226.18(b), (d) and (e), respectively, and

constitute unfair and deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT II: SECTION 5 OF THE FTC ACT

9. Respondents The Money Tree, Inc. and Vance R. Martin, in the course and conduct of their business, have, on numerous occasions, in connection with extensions of credit, induced consumers to execute statements indicating that they have voluntarily chosen certain "extras" when, in fact, the purchase of some combination of such extras was required to obtain credit with The Money Tree, Inc. The "extras" consisted of credit-life insurance, credit accident and health insurance, credit accident and sickness insurance, accidental death and dismemberment insurance, and an auto club membership.

10. Respondents' aforesaid acts and practices have caused substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.

11. Therefore, the acts and practices of respondents alleged in paragraph ten were, and are, unfair or deceptive in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT III: FAIR CREDIT REPORTING ACT

12. For purposes of this count, the terms "consumer," "consumer report," and "consumer reporting agency" are defined as set forth in Sections 603(c), (d) and (f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), (d) and (f).

13. Respondents The Money Tree, Inc. and Vance R. Martin, in the course and conduct of their business, have, on numerous occasions when respondents have denied credit to a consumer either in whole or in part because of information contained in a consumer report from a consumer reporting agency, failed to:

a. Advise the consumer, at the time when the consumer was informed of such adverse action, that the adverse action was based in whole or in part on information contained in a consumer report; and

b. Supply the consumer with the name and address of the consumer reporting agency that furnished the consumer report.

14. Respondents' aforesaid acts and practices violate Section 615(a) of the FCRA, 15 U.S.C. 1681m(a). Pursuant to Section 621 of the FCRA, 15 U.S.C. 1681s, respondents' violations of the FCRA

constitute unfair or deceptive acts and practices, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of the complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act, the Truth in Lending Act and its implementing Regulation Z, and the Fair Credit Reporting Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 the respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts and Regulations, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The Money Tree, Inc., which also does business as Money To Lend, Inc. and Money To Lend, is a Georgia corporation, with its office and principal place of business located at 114 South Broad Street, Bainbridge, Georgia, and operates offices throughout Georgia and Alabama.

2. Respondent Vance R. Martin is the sole owner and president of The Money Tree, Inc. He formulates, directs, and controls the

policies, acts and practices of said corporation, and his principal office and place of business is the same as that of The Money Tree, Inc.

3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

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

ORDER

I.

It is ordered, That respondent The Money Tree, Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with any closed-end credit transaction originated by respondent, shall:

A. Make all disclosures, determined in accordance with Sections 106 and 107 of the Truth in Lending Act, 15 U.S.C. 1605 and 1606, and Sections 226.4 and 226.22 of Regulation Z, 12 CFR 226.4 and 226.22, in the manner, form and amount required by Sections 226.17, 226.18, 226.19 and 226.20 of Regulation Z, 12 CFR 226.17, 226.18, 226.19 and 226.20.

B. Include in the finance charge and the annual percentage rate disclosed to the consumer, as required by Sections 106, 107 and 128 of the Truth in Lending Act, 15 U.S.C. 1605, 1606 and 1638, and Sections 226.4(d), 226.22 and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4(d), 226.22, and 226.18(d) and (e), the premiums for credit-life, credit accident and health, credit accident and sickness, or accidental death and dismemberment insurance (hereinafter referred to collectively as "credit-related insurance") or auto club memberships that consumers are required to purchase in connection with an extension of credit.

C. Exclude from the amount financed disclosed to the consumer, as required by Section 128 of the Truth in Lending Act, 15 U.S.C. 1638, and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b), credit-related insurance premiums or auto club membership fees that

consumers are required to purchase in connection with an extension of credit.

II.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and its officers, and respondent Vance R. Martin, individually and as an officer of the corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with any closed-end credit transaction originated by respondents:

A. Shall not require consumers to sign or initial a statement that credit-related insurance, auto club membership, or any other ancillary product or service has been voluntarily chosen if the consumer's purchase of such insurance, auto club membership, or ancillary product was required;

B. Shall not misrepresent, orally or otherwise, directly or indirectly, that consumers who obtain a loan from respondents will receive credit-related insurance or an auto club membership at no additional cost to the consumer; and

C. Shall not misrepresent, orally or otherwise, directly or indirectly, that the consumer's failure to elect credit-related insurance or auto club membership will result in delay in processing the loan or distributing the proceeds.

III.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and its officers, and respondent Vance R. Martin, individually and as an officer of the corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with any closed-end credit transaction originated by respondents:

A. Shall not, when credit-related insurance premiums and/or auto club membership fees are not included in the finance charge, refer in any way to the availability of such coverage, either orally or in writing, without at the same time disclosing orally:

(1) That the consumer has already been approved for the loan and the amount of the loan;

(2) That credit-related insurance and/or auto club memberships are optional;

(3) That the consumer's decision about insurance or auto club membership does not affect the amount of the consumer's loan or whether the consumer receives a loan;

(4) The amount of the premium or fee for each credit-related insurance or auto club membership; and

(5) That respondents will add the premiums and fees for the credit-related insurance and auto club membership to the consumer's loan amount.

B. Shall, when credit-related insurance premiums and/or auto club membership fees are not included in the finance charge:

(1) Present to the consumer as the first document at the time of closing, a separate, voluntary insurance election form ("Voluntary Insurance Election Form") that sets forth clearly and prominently the following information:

(a) A statement that the consumer has already been approved for the loan;

(b) A statement that the consumer does not have to purchase credit-related insurance or auto club membership to obtain the loan;

(c) A statement that the consumer's decision about credit-related insurance or auto club membership will not affect the amount of the consumer's loan or whether the consumer receives a loan;

(d) Each option (*i.e.*, type of credit-related insurance or auto club membership) available to the consumer;

(e) The amount of the premium or fee for each credit-related insurance or auto club membership;

(f) A statement that, if the consumer decides to buy credit-related insurance or an auto club membership, the consumer will have to pay the amounts listed in (e) above;

(g) A statement that, if the consumer decides to buy credit-related insurance or an auto club membership, respondents will add the insurance premiums and membership fees to the consumer's loan amount;

(h) A signature and date line for each option set forth in (d) above for the consumer to indicate his/her election; and

(i) A statement that, if the consumer does not want to buy one of the products listed on the document described in this section, they should not place their signature on the line next to the product.

(2) Make the disclosures required by paragraph III(B)(1) on a separate document entitled "Voluntary Insurance Election Form" that contains no other printed or written material. The disclosures required by subparagraphs III(B)(1)(a) through (c) shall not be smaller than 12-point type. A form substantially in conformance with Appendix A herein will be considered to be in compliance with the provisions of this paragraph and paragraph III(B)(1). Respondents shall maintain the original form for two years following its execution and provide the consumer with an executed copy thereof.

(3) Provide, without marking or otherwise instructing a consumer where to sign or date the form, the separate Voluntary Insurance Election Form required by paragraph III(B)(1) in advance of the consumer's free and independent choice for such insurance.

IV.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and respondent Vance R. Martin shall, on an annual basis, submit a written report, stating, for each branch office of The Money Tree, Inc., the penetration rate for direct loans of each product or service sold to loan applicants and purchased in connection with any credit transaction, including: credit-life insurance, credit accident and health insurance, credit accident and sickness insurance, accidental death and dismemberment insurance, and auto club memberships.

Such reports shall be submitted each year to the Commission's Division of Enforcement, Bureau of Consumer Protection, on the anniversary of the date this order is entered, for a period of five (5) years following the effective date of this order and thereafter upon request. The reports shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Avenue, N.W., Washington, D.C.

For purposes of this section, the term "penetration rate" means the percentage of all loans or contracts eligible for credit-related insurance or auto club membership on which charges for such insurance or auto club membership are made. In reporting penetration rates the respondents must state separately the total number and dollar amount of loan contracts entered into which were eligible for credit-related insurance or auto club membership, stated separately for

credit-life, credit accident and health, credit accident and sickness, and accidental death and dismemberment insurance, and auto club membership.

V.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and respondent Vance R. Martin shall, for five (5) years from the date of issuance of this order, maintain and upon request immediately make available to the Federal Trade Commission for inspection and copying, all documents demonstrating compliance with this order.

VI.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and its officers, and respondent Vance R. Martin, individually and as an officer of the corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, shall comply with all provisions of the Consumer Redress Program as described in Appendices B, C, D, E, F, G and H.

VII.

It is further ordered, That during the sixty (60) day period described in Appendix B during which consumers are given the opportunity to cancel credit-related insurance, respondent The Money Tree, Inc., a corporation, respondent Vance R. Martin, or their employees or agents, and staff of the Federal Trade Commission shall not otherwise communicate directly with the consumers on the List, orally or in writing, concerning the redress program, except to refer such consumers to a taped 800-number message provided by the independent agent, which shall not deviate in substance from the document attached hereto as Appendix G, entitled "Script to Be Read Into 800-Number Voice Message."

VIII.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and its officers, and

respondent Vance R. Martin, individually and as an officer of the corporation, and respondents' agents, representatives, and employees, in connection with any closed-end credit transaction originated by respondents, shall, when respondents deny credit to a consumer or the charge for such credit is increased either in whole or in part because of information contained in a consumer report from a consumer reporting agency:

A. Advise the consumer, at the time when the consumer is informed of the adverse action, that such action is based in whole or in part on information contained in a consumer report; and

B. Supply the consumer with the name and address of the consumer reporting agency that furnished the consumer report.

IX.

It is further ordered, That respondent The Money Tree, Inc., its successors and assigns, and respondent Vance R. Martin shall, for a period of five (5) years following the date of service of this order, deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future agents, representatives, and employees having responsibility with respect to the subject matter of this order and shall secure from each such person a signed statement acknowledging receipt of the order. Respondents shall maintain and make available upon reasonable request by representatives of the Federal Trade Commission copies of said signed statements. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

It is further ordered, That respondent The Money Tree, Inc., its successors and assigns, and respondent Vance R. Martin shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this

order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Avenue, N.W., Washington, D.C.

XI.

It is further ordered, That respondent Vance R. Martin, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment relating to the extension of consumer credit. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th & Pennsylvania Avenue, Washington, D.C.

XII.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and its officers, and respondent Vance R. Martin shall, within one hundred and eighty (180) days of the date of service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIII.

This order will terminate on April 28, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order,

whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint has never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

APPENDIX A

VOLUNTARY INSURANCE ELECTION FORM

YOU HAVE ALREADY BEEN APPROVED FOR THIS LOAN.

YOU DO NOT HAVE TO PURCHASE CREDIT-LIFE, CREDIT-DISABILITY ("ACCIDENT AND HEALTH," "ACCIDENT AND SICKNESS," OR "UNEMPLOYMENT"), ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE, OR AN AUTO CLUB MEMBERSHIP TO OBTAIN THIS LOAN.

YOUR DECISION ABOUT INSURANCE OR AUTO CLUB MEMBERSHIP DOES NOT AFFECT THE AMOUNT OF YOUR LOAN OR WHETHER YOU WILL RECEIVE A LOAN.

Your choices are shown below. If you decide to buy insurance or an auto club membership, you will pay the amounts listed below. The Money Tree, Inc. will add the premiums and membership fee to your loan amount.

IF YOU DO NOT WANT TO BUY ONE OF THESE PRODUCTS, DO NOT PLACE YOUR SIGNATURE NEXT TO THAT PRODUCT ON THE LINES BELOW.

I/We have chosen the following option(s)

DATE: _____

Type	**Cost to You**	**Signature**
Credit-Life Insurance	$_____	I want credit-life insurance _____ Signature _____ Co-borrower

Credit-Disability Insurance	$_____	I want credit-disability insurance _____ Signature _____ Co-borrower
Accidental Death and Dismemberment ("AD&D") Insurance	$_____	I want AD&D insurance _____ Signature _____ Co-borrower
Auto Club Membership	$_____	I want auto club membership _____ Signature _____ Co-Borrower

APPENDIX B

Consumer Redress Program

1. Within 5 days after the date the order is issued, Money Tree shall deliver to the independent agent on magnetic tape or some other electronic medium the following loan data concerning all consumers who are obligated to make monthly payments to Money Tree as of the date the order is issued and whose loans were consummated during the two-year period ending on the date the order is issued ("open loan customers"):

a. Data pertaining to the first consumer named on the loan contract ("primary borrower"):
   Date of Loan Closing
   Account Number
   Contract Number
   Branch Number
   Branch State
   First Name and Middle Initial
   Last Name
   Address
   City
   State
   Zip
   Amount Financed
   Credit-Life Insurance Premium Amount
   Credit-Disability Insurance Premium Amount
   Accidental Death & Disability Insurance Premium Amount
   Date Loan Is Expected to Terminate
   Monthly Payment Amount
   Number of Monthly Payments
b. Data pertaining to all subsequent consumers named on the loan contract ("co-borrowers"):
   Account Number
   Contract Number

Branch Number
Branch State
First Name and Middle Initial
Last Name
Address
City
State
Zip

c. Data pertaining to co-signers:
Account Number
Contract Number
Branch Number
Branch State
First Name and Middle Initial
Last Name
Address
City
State
Zip

d. Data pertaining to consumers who have canceled or received a benefit from one or more insurance products:
Account Number
Contract Number
Branch Number
Branch State
Insurance Type (L/A/D) (representing "Life," "Accident & Health," and "Accidental Death & Dismemberment" insurance)
Benefit/Canceled (B/C)

Money Tree will also provide as soon as possible any additional information that the independent agent reasonably needs to carry out the redress program described in this Appendix. Money Tree shall deliver all data and information described in this paragraph to the independent agent in a clean format compatible with the independent agent's computers.

2. During the period when the order is published in the Federal Register for notice and comment, Money Tree shall cooperate fully with the independent agent to conduct a test run that permits the independent agent to mail the letters described later in this Appendix as soon as possible.

3. After receiving from Money Tree all the data and other information described in Paragraph 1, the independent agent shall create a list ("the List") of eligible consumers who meet the following criteria:

a. Purchased one or more of the three types of credit-related insurance (as "credit-related insurance" is defined in the order) through Money Tree, the charge for which was not included in the finance charge computed for that loan; and

b. Have not voluntarily canceled the coverage ("canceled") or had an insurance claim paid to them or paid on their behalf ("received a benefit") from each policy written through Money Tree. For purposes of this subsection, consumers who

obtained more than one credit-related insurance policy from Money Tree shall not be excluded from the List unless they canceled or received a benefit from each of those policies.

4. For each consumer excluded from the List because they either canceled or received a benefit from one or more of their credit-related insurance policies, Money Tree shall provide to the Associate Director for Credit Practices, within sixty (60) days of the date the order is issued, the consumer's name, the consumer's address, the Money Tree account number, the Money Tree contract number, and the claim number assigned by the independent agent. At the same time, Money Tree shall provide a copy of the front of the check from the insurance company made payable to the consumer (in the case of the accidental death & dismemberment insurance) or made payable to the consumer and Money Tree (in the case of credit life insurance and credit disability insurance), to be accompanied by an affidavit from Money Tree authenticating such copies.

5. For each consumer on the List, the independent agent shall apply the formula in the document attached to the order as Appendix C to determine the amount of the premiums and related finance charges that were charged to the consumer's account for each credit-related insurance purchased through Money Tree ("amounts paid by the consumer").

6. For each consumer on the List, the independent agent shall create the Money Tree Insurance Cancellation Form ("Cancellation Form"), a copy of which is attached as Appendix D. The Cancellation Form shall include (a) the consumer's name and address, (b) the consumer's Money Tree account number, (c) the consumer's Money Tree contract number, (d) the claim number assigned to the consumer by the independent agent, (e) the date the letter was mailed, (f) the "return deadline" date, and (g) the amounts paid by the consumer for any of the three insurance products.

7. If the independent agent has no difficulty translating the data described in paragraph 1 that it receives from Money Tree, the independent agent shall mail, as soon as possible and no later than thirty (30) calendar days after receiving all the data described in paragraph 1 above, to all or nearly all consumers on the List by first class mail through the U.S. Postal Service, a Cancellation Form and the letter explaining the Cancellation Form attached to this order as Appendix E ("Redress Letter"), unless this deadline cannot be met due to unforeseen occurrences (*e.g.*, fire in the independent agent's plant) ("the First Mailing"). The independent agent shall include with the Cancellation Form and the Redress Letter a return envelope addressed to the independent agent. If the independent agent is unable to mail Cancellation Forms and Redress Letters to a small percentage of consumers on the List by the 30-day deadline, the independent agent shall send the Cancellation Form and the Redress Letter to those consumers within five (5) additional days, *i.e.*, thirty-five (35) days after the independent agent receives all data described in paragraph 1 ("the Second Mailing").

8. The Cancellation Form must be signed by all borrowers before the credit-related insurance shall be canceled. On any transaction with two or more borrowers where the borrowers reside at different addresses, the independent agent shall mail the Cancellation Form and the Redress Letter to each borrower's address by first-class mail through the U.S. Postal Service.

9. For any transactions for which a co-signer was involved, the independent agent shall mail a copy of the corresponding Cancellation Form and the Redress Letter to the co-signer(s) with the word "COPY" stamped in red on the Cancellation Form and the Redress Letter.

10. If any Cancellation Form, other than a copy to a co-signer, is returned as undeliverable, the independent agent shall request that Money Tree provide the independent agent with any current information in Money Tree's possession that may be needed to send a follow-up Redress Letter to the consumer. The independent agent will send one additional Cancellation Form and Redress Letter to the consumer's place of business, relatives, or any other location at which the consumer may be contacted ("the Re-Mailing"). If Money Tree is unable to provide an additional address, the independent agent, or a sub-contractor of the independent agent, shall perform an address search to attempt to locate the consumer. The one additional Cancellation Form and Redress Letter that the independent agent sends in the Re-Mailing shall include the date of the Re-Mailing and the new return deadline date, which shall be thirty (30) days after the date of the Re-Mailing, or the original return deadline date, whichever is later.

11. All consumers who meet the following criteria shall be entitled to a credit toward their outstanding loan balance:

a. Return the Cancellation Form in an envelope with a postmark date before the return deadline date stated on their Cancellation Form, or if the postmark is illegible, the Cancellation Form is received by the independent agent no later than five (5) days after the return deadline date; and

b. Indicate by a signature or signatures that they did not wish to purchase one or more credit-related insurance coverage and would like their insurance canceled and their account credited.

12. If a co-borrower fails to sign the Cancellation Form before it is returned to the independent agent, the deadline date for that co-borrower shall be extended by thirty (30) days. The independent agent shall re-mail the Cancellation Form and the Redress Letter to the co-borrower as soon as possible ("Co-Borrower Re-Mailing") with a copy of the letter attached to this order as Appendix F ("Notice to Co-Borrowers"). If the co-borrowers do not reside at the same address, the independent agent shall send the Co-Borrower Re-Mailing to the address of each co-borrower.

13. The independent agent shall determine the amount of the credit that Money Tree shall pay to each consumer ("credit amount") by adding together the amounts for those items listed on the Cancellation Form that the consumer has indicated he or she did not wish to purchase.

14. The independent agent shall transmit to Money Tree a list ("Credit List") containing the names of all consumers eligible to receive a credit under this Consumer Redress Program and all data necessary for Money Tree to apply the credit amount to the consumers' outstanding loan balances. For each consumer, the data shall include the consumer's full name, address, Money Tree branch number, Money Tree account number and contract number, claim number assigned by the independent agent, insurance product(s) to be canceled, and total amount to be credited to the consumer's account. The independent agent shall deliver the Credit List to Money Tree in five (5) installments, each delivery separated by fourteen (14)

days. The independent agent shall deliver the first installment so that it is received by Money Tree fourteen (14) days after the independent agent sends the First Mailing. The second installment shall be received by Money Tree twenty-eight (28) days after the independent agent sends the First Mailing. The third installment shall be received forty-two (42) days after the First Mailing; the fourth installment shall be received fifty-six (56) days after the First Mailing; and the fifth installment shall be received seventy (70) days after the First Mailing. The first installment shall include the names of all eligible consumers whose Cancellation Forms were received by the independent agent between the date of the First Mailing and the date the first installment is due. Each successive installment shall include the names of all eligible consumers whose Cancellation Forms were received by the independent agent since the previous installment.

15. For any consumer who has neither paid off nor refinanced his or her loan between the date the order is issued and the date Money Tree receives the Credit List installment on which the consumer's name is listed, Money Tree shall reduce the consumer's last monthly payment by the credit amount or, if the credit amount exceeds the last monthly payment, all payments necessary to accommodate the credit. If the credit amount exceeds the outstanding loan balance, Money Tree shall, within fifteen (15) days of the date Money Tree receives the Credit List installment on which the consumer's name is listed, refund the excess in one lump sum payment by delivering a check to the consumer either in person or by first-class mail through the U.S. Postal Service. No payment checks shall have a void date earlier than ninety (90) days after the date the check was issued.

16. For any consumer who makes his or her last loan payment between the date the order is issued and the date Money Tree receives the Credit List installment on which the consumer's name is listed, Money Tree shall, within fifteen (15) days after receiving that Credit List installment, refund the credit amount, less any refund already made by virtue of the prepayment of the loan that was current on the date the order was issued, in one lump sum payment by delivering a check for the credit amount either in person or by first-class mail through the U.S. Postal Service. No payment checks shall have a void date earlier than ninety (90) days after the date the check was issued. Money Tree shall document any deductions from the credit amount for refunds already made.

17. For any consumer who refinances his or her loan between the date the order is issued and the date Money Tree receives the Credit List installment on which the consumer's name is listed, Money Tree shall reduce the consumer's last monthly payment on the new, refinanced loan by the credit amount, less any refund already made by virtue of the prepayment of the loan that was current on the date the order was issued, or, if the credit amount exceeds the last monthly payment, all payments necessary to accommodate the credit. If the credit amount exceeds the outstanding loan balance on the refinanced loan as of the date Money Tree receives the Credit List from the independent agent, Money Tree shall, within fifteen (15) days after receiving the Credit List, refund the excess in one lump sum payment by delivering a check to the consumer either in person or by first-class mail through the U.S. Postal Service. No payment checks shall have a void date earlier than ninety (90) days after the date the check was issued. Money Tree shall document any deductions from the credit amount for refunds already made by providing a copy of the loan contract for the refinanced loan.

18. Within fifteen (15) calendar days after receiving each Credit List installment from the independent agent, Money Tree shall send a notice with language identical to that in the document entitled "Notice to Customers" (attached to the order as Appendix H) to all consumers listed on the Credit List installment who refinanced between the date the order was issued and the date Money Tree received the Credit List installment that includes their name. All blank lines on the Notice to Consumers shall be filled in by Money Tree. Money Tree shall deliver the Notice to Consumers either in person or by first-class mail through the U.S. Postal Service.

19. For any consumer who refinances his or her loan once between the date the order is issued and the date Money Tree receives the Credit List installment on which the consumer's name is listed, and then a second time after Money Tree receives that Credit List installment, Money Tree shall give the consumer a check for the credit amount during the loan closing of the second refinancing.

20. For any consumer who refinances his or her loan twice between the date the order is issued and the date Money Tree receives the Credit List installment on which the consumer's name is listed, Money Tree shall, within fifteen (15) days after receiving that Credit List installment, refund the credit amount in one lump sum payment by delivering a check for the credit amount either in person or by first-class mail through the U.S. Postal Service. No payment checks shall have a void date earlier than ninety (90) days after the date the check was issued.

21. Within thirty (30) days after receiving each Credit List installment, Money Tree shall deliver to the independent agent a list of consumers on that Credit List installment to whom Money Tree delivered a check pursuant to paragraphs 15, 16, 17, 19 and 20 of this Appendix. The list of consumers shall include the consumer's name, the consumer's address, the Money Tree account number and contract number, the claim number assigned by the independent agent, the number of the check Money Tree issued, and the amount of the check.

22. Money Tree shall not cancel the insurance of any consumer until Money Tree has received the Credit List installment stating which insurance products the consumer wishes to cancel. If a consumer refinances the loan that is open at the time the order is issued, Money Tree shall cancel only the insurance paid for with the loan that is open at the time the order is issued. If the consumer pays for insurance in connection with the refinanced loan, that insurance shall remain in force.

23. Between 10 and 13 months after the date the order is issued, Money Tree shall provide the independent agent with a report that includes the following (all computerized lists described in this section shall include Money Tree account numbers, Money Tree contract numbers, and the claim numbers assigned by the independent agent):

a. A computerized list of all consumers who received credit toward their outstanding loan balance; the amount of credit each of these consumers received; the amount that each of these consumers received, if any, in the form of a check; and the check number of that check;

b. A computerized list of all consumers who received a check and the check number and amount that each of these consumers received, including check number, name and address;

c. Check registers that include name, address, check numbers, Money Tree account numbers, Money Tree contract numbers, and the amount of the check for each consumer to whom Money Tree delivered a check, either in person or by mail;

d. Checking account statements documenting all checks cashed by consumers; and

e. A computerized list of consumers who, despite returning their Cancellation Form to the independent agent and indicating that they did not wish to purchase one or more of the three types of insurance, received neither a credit nor a check from Money Tree. For each of these consumers, Money Tree shall state on the list why the consumer did not receive a credit or a check.

24. Money Tree shall bear all costs for the administration of the redress program described in this Appendix.

APPENDIX C

Formula for Calculating Redress

Terms Used

ToP = "Total of payments" stated on loan note or Truth in Lending disclosure statement (collectively referred to as "TILA disclosure")

AF = "Amount financed" stated on TILA disclosure

CL = Premium for credit-life insurance stated on TILA disclosure

CD = Premium for credit-disability insurance (referred to on TILA disclosure forms as "credit A&S" for Georgia loans and "credit A&H" for Alabama loans) stated on TILA disclosure

AD = Premium for accidental death & dismemberment ("AD&D") insurance (designated by the name "Thomas Jefferson" or the name of some other insurance company) stated on TILA disclosure

Performing the Calculations

The amount that the independent agent shall include in the Money Tree Insurance Cancellation Form for each of the three insurance products (credit-life, credit-disability, and accidental death & dismemberment insurance) shall be determined as follows:

1. Using the TILA disclosure, identify premiums and fees charged to the consumer for CL, CD, and AD ("insurance products");

2. Determine the "repayment factor" by dividing ToP by AF;

3. For each of the insurance products listed on the consumer's TILA disclosure, multiply the charge for the insurance product by the repayment factor to obtain the amount to include for that insurance product.

Thus, if a consumer's TILA disclosure indicates a charge for credit-life insurance, the amount that the independent agent should include in the Money Tree Insurance Cancellation Form for that product equals the following:

$$CL \times (ToP / AF)$$

EXAMPLE:

TILA disclosure included the following data:
ToP = $850.00
AF = $703.63
CL = $ 10.37
AD = $156.00
Repayment factor = 850.00 ÷ 703.63 = 1.208
Amount to include for credit-life = 10.37 x 1.208 = $12.53
Amount to include for AD&D = 156.00 x 1.208 = $188.45

Because the TILA disclosure included no charges for credit-disability insurance, the Money Tree Insurance Cancellation Form would not mention that product.

APPENDIX D

[Name and Address of
Independent Agent]

[Borrower's Name] Claim Number: _____
[Address]
[City, State and Zip Code] Mailing Date: _____

Account Number: _____
Contract Number: _____ Return Deadline: _____

Money Tree Insurance Cancellation Form

If you want to cancel any of the following insurance products because you did not want them when you got the loan from The Money Tree, sign this form above your printed name and make sure that your co-borrower, if any, also signs the form. This form must be returned with a postmark no later than _____ [the Return Deadline]. [Form will include only those insurance products for which the consumer was charged.]

Credit-Life Insurance

You paid $_____ for credit-life insurance.

I did not want credit-life insurance. Please cancel my credit-life insurance and credit my account for the amount listed above.

_____ _____
Joseph Smith Date

_____ _____
Mary Smith Date

Credit-Disability Insurance

You paid $_____ for credit-disability insurance (called "Credit A&H" or "Credit A&S" on your loan contract).

I did not want credit-disability insurance. Please cancel my credit-disability insurance and credit my account for the amount listed above.

_____ _____
Joseph Smith Date

_____ _____
Mary Smith Date

Accidental Death and Dismemberment Insurance

You paid $_____ for accidental death and dismemberment insurance.

I did not want accidental death and dismemberment insurance. Please cancel my accidental death and dismemberment insurance and credit my account for the amount listed above.

_____ _____
Joseph Smith Date

_____ _____
Mary Smith Date

APPENDIX E

[Money Tree Letterhead]

Dear Money Tree Customer:

When you got your loan from us, you bought one or more of the following insurance products:

1. Credit-life insurance
2. Credit-disability insurance (called "Credit A&H" or "Credit A&S" on your loan contract)
3. Accidental death and dismemberment insurance

The amount(s) you paid for the product(s) are shown on the enclosed Money Tree Insurance Cancellation Form ("Cancellation Form").

In settlement of an action brought by the Federal Trade Commission, The Money Tree, Inc. is offering you an opportunity to cancel one or all of the types of insurance if you did not want them when you got the loan from us.

If you cancel any of the insurance, your last monthly payment will be reduced by the amount listed shown on the attached Cancellation Form for any insurance you choose to cancel. If the amount you would receive as a credit is larger than your last monthly payment, you will not have to make the last monthly payment, and your second-to-last payment will be reduced. If you have already made your last payment

on this loan but did not want one or more of the insurance products listed above that you paid for, and if you do not have a new loan with us at the time, we will send you a refund check for that amount. If you have refinanced your loan and still owe Money Tree on the new, refinanced loan, the credit described above will be applied at the end of your refinanced loan.

What is credit-life insurance, and what happens if I cancel it?

It depends on whether you got your loan from one of our offices in Alabama or from one of our offices in Georgia or Louisiana. In Alabama, if you have credit-life insurance with your loan and you die before your loan is paid off, the insurance company will pay Money Tree the part of the loan amount that you have not yet paid. In Georgia and Louisiana, if you have credit-life insurance with your loan and you die before your loan is paid off, the insurance company will pay Money Tree the amount that you have not yet paid and give the remainder of the payoff amount, if there is any, to the person you named as your beneficiary when you got the loan. If you cancel your insurance now and die before your Money Tree loan is paid off, the insurance company will not finish paying off the loan.

What is credit-disability insurance, and what happens if I cancel it?

If you have credit-disability insurance with your loan and become disabled and unable to work before your loan is paid off, the insurance company will make your monthly loan payments to Money Tree, based on the number of days you are disabled. If you cancel your credit-disability insurance now, you will have to make the monthly payments.

What is accidental death and dismemberment insurance, and what happens if I cancel it?

If you paid for accidental death and dismemberment insurance when you got your loan with us, the insurance company will pay the person you named as a beneficiary on the insurance forms if you die accidentally. If, instead of dying, you lose a body part (such as an eye, arm or leg), the insurance company will pay you the amount of money stated in the insurance policy. If you cancel the insurance now, you will not be covered if you die accidentally or are dismembered accidentally.

If you want to keep all the insurance products that you bought, you do not have to do anything. Your insurance coverage will continue as before.

If you did not want one or more of the insurance products when we made the loan to you and you want to cancel one or more of the insurance products, please sign and date the enclosed Money Tree Insurance Cancellation Form next to any product you want to cancel. Then return it to [__Independent Agent__] in the return envelope provided. If you want to cancel one insurance product but keep another one, you should sign your name next to only the one(s) that you want to cancel. The Cancellation Form must be put in the mail and postmarked by the

Return Deadline shown on the Cancellation Form. THIS IS THE ONLY CHANCE YOU WILL HAVE TO RESPOND TO THIS OFFER.

If there is more than one borrower on your loan, make sure that each borrower signs the Cancellation Form. (This does not include people who co-signed -- or guaranteed -- the loan.) Unless all borrowers sign the form, the insurance will not be canceled and the cost of the insurance will not be credited toward your account.

If you have any questions concerning this letter, please contact [__Independent Agent__] at this toll-free number: 1- 800-xxx-xxxx. Please do not contact us.

You must keep paying your monthly installments on your loan from us, even if you cancel the insurance and request a credit toward your account. We value you as a customer and hope to serve your financial needs in the future.

Sincerely,

Vance R. Martin, President
The Money Tree, Inc.

APPENDIX F

[Money Tree Letterhead]

[Borrower's Name] Claim Number: _____
[Address]
[City, State and Zip Code] Mailing Date: _____

Account Number: _____
Contract Number: _____ Return Deadline: _____

Notice to Co-Borrower

Dear [Co-Borrower's Name]:

Our records show that you and [__Name of Other Co-Borrower___] are co-borrowers on a loan with The Money Tree. Your co-borrower requested that we cancel the credit-life [and/or credit-disability, accidental death and dismemberment] insurance listed on the enclosed Money Tree Insurance Cancellation Form and give you a credit toward your loan balance because you and the co-borrower did not want the insurance when you took out a loan with us.

Before we can cancel the insurance and credit your loan balance for the amount you paid, we need your signature on the Cancellation Form also. If you did not want the insurance products listed on the Cancellation Form and you wish to cancel the insurance and receive a credit toward your loan balance, please sign the Cancellation Form and return it to [__Independent Agent___] in the return envelope provided. The return envelope must be postmarked by [_Return Deadline date__] or the insurance will not be canceled and you will not receive a credit.

If you have any questions concerning this letter, please contact [__Independent Agent__] at this toll-free number: xxx-xxx-xxxx. Please do not contact us.

You must keep paying your monthly installments on your loan from us, even if you cancel the insurance and request a credit toward your account. We value you as a customer and hope to serve your financial needs in the future.

Sincerely,

Vance R. Martin, President
The Money Tree, Inc.

APPENDIX G

Script to Be Read Into 800-Number Voice Message

You have reached the toll-free, question-and-answer line for Money Tree and Money To Lend customers. If you have questions about the letter you recently received from Money Tree, please remain on the line and listen to the following taped series of questions and answers. Listening to the entire series will take approximately five minutes. You are free to hang up at any time, of course, if your

question, or questions, are answered before the end of the tape. There will not be an opportunity to speak to a live operator at the end of the tape.

1. Q. Why did I get this letter?
   A. It was sent to all recent customers of Money Tree who were charged for the insurance mentioned in the letter. Money Tree agreed to send the letter to settle an action brought by the Federal Trade Commission, a federal agency in Washington, D.C. Money Tree denies any wrongdoing.
2. Q. What was the action about?
   A. The FTC alleged that Money Tree violated the Truth in Lending Act by requiring its customers to purchase certain types of insurance but failing to include the cost of the insurance in the finance charge and the annual percentage rate as required by the Act. Money Tree's position is that all such charges were voluntary.
3. Q. What is credit-life insurance?
   A. If you got your loan in Alabama and you die before your loan is paid off, the insurance company will pay Money Tree the part of the loan amount that you have not yet paid. If you got your loan in Georgia or Louisiana and you die before your loan is paid off, the insurance company will pay Money Tree the amount you still owe and pay your beneficiary the difference between the coverage amount and the payoff amount of your loan.
4. Q. I don't understand.
   A. For example, if you died when the balance due on your loan was $500, the insurance company would pay Money Tree $500. Your estate would not owe Money Tree any more money.
5. Q. What if I already have a life insurance policy?
   A. Your life insurance benefits may be large enough to cover your loan with Money Tree. The credit-life insurance purchased through Money Tree is in addition to any other life insurance you may have.
6. Q. What is credit-disability insurance?
   A. It is insurance that provides financial protection in case you become sick or injured. If you become totally disabled and cannot work for some period (more than three days in a row in Georgia or more than two weeks in a row in Alabama and Louisiana), the insurance company will make your monthly payments to Money Tree for you, based on the number of days you are out of work due to illness. Of course, once you are able to return to work, the insurance company no longer makes these payments.
7. Q. What is accidental death and dismemberment insurance?
   A. If you have this insurance and you die accidentally, the insurance company will pay the face amount of the policy to the beneficiary. If you are injured and lose the use of some part of your body (such as an eye, arm, or leg), the insurance will pay you an amount specified in the policy.
8. Q. What does this letter mean? Why am I being given the chance to cancel my insurance?
   A. Money Tree states that it does not require borrowers to buy insurance. This opportunity to cancel is being offered to you in case you did not wish to buy insurance when you got the loan.

9. Q. What should I do if I want to cancel the insurance?
   A. Sign the Cancellation Form on the lines next to whichever type(s) of insurance you wish to cancel. Then place the Cancellation Form in the return envelope provided, place a stamp on the envelope, and put it in the mail by the Return Deadline printed on the Cancellation Form. If there was more than one borrower on the loan, each of you must sign the Form.
10. Q. What should I do if I want to keep the insurance?
   A. You do not have to do anything. Your insurance coverage will remain in force.
11. Q. What happens to my loan if I cancel the insurance?
   A. If you cancel, your last monthly payment will be reduced by the amount shown on the Cancellation Form for any insurance you choose to cancel. If you have already made your last payment and you do not have a loan with Money Tree right now, Money Tree will send you a refund check for the amount on the Cancellation Form. If you have refinanced your loan, you will receive a credit on your new, refinanced loan.
12. Q. If I cancel the credit-life insurance and then die before the loan is paid in full, what will happen?
   A. If you are the principal borrower, you will not have credit-life insurance through Money Tree to pay off your loan.
13. Q. If I cancel the credit-disability insurance and then get sick or become disabled before the loan is paid in full, what will happen?
   A. If you are the principal borrower and you cannot work because of sickness or disability for some specified period of time (more than three days in a row in Georgia or more than two weeks in a row in Alabama), you will not have insurance through Money Tree to make your monthly payments and you would still have to make the monthly payments.
14. Q. If I cancel the accidental death and dismemberment policy, what will happen?
   A. The insurance company will not pay the person named in the policy as your beneficiary if you die accidentally. Also, if you are injured and lose the use of a body part, you will not receive the payment specified in the policy.
15. Q. If I cancel the insurance, will Money Tree be willing to lend to me in the future?
   A. Canceling the insurance will not affect your ability to get credit from Money Tree in the future.

You have reached the end of the question-and-answer line for Money Tree and Money Tree customers. We hope you found it helpful. Thank you for calling.

APPENDIX H

[Money Tree Letterhead]

[Consumer's Name]
[Address]
[City, State and Zip Code] Account Number: _____
Claim Number: _____ Contract Number: _____

Notice to Customers

Dear Money Tree Customer:

In response to a letter from us, you recently sent a Money Tree Insurance Cancellation Form to [__Independent Agent__]. On that Cancellation Form you indicated that you did not want one or more of the following insurance products when you got your former loan from us, which has now been refinanced:

1. Credit-life insurance
2. Credit-disability insurance (called "Credit A&H" or "Credit A&S" on your loan contract)
3. Accidental death and dismemberment insurance

On the Cancellation Form, you requested that we cancel one or more of the insurance products and give you a credit toward your outstanding loan balance. Since that loan was paid off when you refinanced, we have applied the credit to your new, refinanced loan.
The amount for which we have credited your loan balance is the following:

$_____

Because of this credit, your final loan payment will be smaller. You will pay this amount:

$_____

If the credit amount is larger than the amount of your final loan payment, you will not have to make your final loan payment at all, and your next-to-last payment will also be smaller. You will pay this amount for your next-to-last payment:

$_____

If your credit amount is larger than your last two monthly payments combined, this is the number of monthly payments you may skip:

You do not have to pay the final ___ monthly payments.

Even though you have canceled one or more of your insurance coverages, you must keep making your monthly installments on your loan until the loan is fully paid. If this notice states that you owe nothing for one or more of your final payments, you do not have to make those payments, but you do have to make all earlier payments.

We hope this explanation has been helpful. We value you as a customer and hope to serve your financial needs in the future.

Sincerely,

Vance R. Martin, President
The Money Tree, Inc.

IN THE MATTER OF

NATIONWIDE SYNDICATIONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3736. Complaint, April 28, 1997--Decision, April 28, 1997

This consent order prohibits, among other things, the Illinois company and its president from representing that NightSafe Glasses or any substantially similar product makes driving safer or improves night vision, and requires them to have competent and reliable scientific evidence to substantiate claims about the efficacy, performance, benefits or safety of such products. The consent order also prohibits the use of the trade name "NightSafe" or any other trade name that implies the use of such product makes night driving safer. In addition, the respondents will pay $125,000 in consumer redress.

Appearances

For the Commission: *Karen Dodge.*
For the respondents: *David A. Clanton,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Nationwide Syndications, Inc., a corporation, and Thomas W. Karon, individually and as an officer of said corporations, ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Nationwide Syndications, Inc. is an Illinois corporation with its principal office or place of business at 223 Applebee St., Barrington, Illinois.

Respondent Thomas W. Karon is an officer of Nationwide Syndications, Inc. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Nationwide Syndications, Inc.

PAR. 2. Respondents have advertised, labeled, offered for sale, sold, and distributed night driving glasses, including NightSafe Glasses, and other products to consumers. This product is a "device"

within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements, including product labeling, for NightSafe Glasses, including but not necessarily limited to the attached Exhibits A through C. These advertisements and product labeling contain the following statements and depictions:

A. DRIVE SAFER AT NIGHT, IN RAIN, SNOW, SLEET, EVEN FOG. Order your NightSafe Glasses Today!

* * *

WITH...
NightSafe Glasses, your night vision actually improves! . . .
[Photograph of front end of vehicle in sharp focus.]
WITHOUT...
[Photograph of front end of vehicle out of focus.]

* * *

WHAT A DIFFERENCE! Experience an incredible improvement in your night vision with NightSafe Glasses--the glasses that make driving safer and more relaxing. Thousands of drivers find them welcome traveling companions. You will too--objects appear sharper and better defined . . . . No matter what the weather--rain, snow, sleet, fog or haze--you'll feel safer and more confident with NightSafe Glasses.
. . . ADVANCED OPTICAL TECHNOLOGY. NightSafe Glasses were perfected after years of optical experimentation and laboratory testing. The UV400 lenses block harmful ultraviolet rays and bring incredible clarity and sharpness to otherwise distorted images. (Exhibit A).

B. SEE THE DIFFERENCE FOR YOURSELF!
[Photograph of oncoming traffic in sharp focus.]
With NightSafe Glasses.
[Photograph of oncoming traffic out of focus.]
Without NightSafe Glasses.
NightSafe Glasses help improve night vision instantly. . . . You'll see better in rain, snow, sleet and fog, and drive more safely. With NightSafe Glasses everything appears sharper, clearer and brighter. Contrast is enhanced. Actually helps you see better at night--no matter what the weather!

* * *

NIGHTSAFE GLASSES DRIVE SAFER AT NIGHT--NO MATTER WHAT THE WEATHER!

* * *

A remarkable difference...NightSafe Glasses improve your vision instantly . . . . Everything appears sharper, clearer, brighter, with more definition. You'll see better than you ever thought possible.

. . . Laboratory tested and proven NightSafe Glasses really work. The innovative UV400 lenses block harmful ultraviolet rays and cut through dense haze. . . . NightSafe helps improve your night vision . . . .
You won't believe your eyes...NightSafe lets you drive at night as confidently as during the day. Just slip them on and you'll notice an immediate difference. Hazy objects appear crisp and clear. And bright, blinding lights will be a thing of the past. You will drive relaxed with renewed confidence. (Exhibit B).

C. Enhance your night vision with NightSafe Glasses.

* * *

[Photograph of oncoming traffic out of focus.]
Without NightSafe Glasses...
[Photograph of oncoming traffic in sharp focus.]
With NightSafe Glasses!

* * *

NightSafe Glasses give you clearer, sharper images...especially in rain, sleet or snow when driving is most hazardous. That's why professional drivers, pilots and other who rely on their vision, rely on NightSafe Glasses. And why you should, too. Protect yourself and your passengers with NightSafe. (Exhibit C).

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through C, respondents have represented, directly or by implication, that:

A. NightSafe Glasses improve night vision.
B. Laboratory tests prove that NightSafe Glasses improve night vision.

PAR. 6. In truth and in fact:

A. NightSafe Glasses do not improve night vision.
B. Laboratory tests do not prove that NightSafe Glasses improve night vision.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the trade name NightSafe Glasses and the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through C, respondents have represented, directly or by implication, that NightSafe Glasses make night driving safe or safer.

PAR. 8. In truth and in fact, NightSafe Glasses do not make night driving safer. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of the trade name and the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five and seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 10. In truth and in fact, at the time they made the representations set forth in paragraphs five and seven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT C

EXHIBIT C

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of the complaint that the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act, and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 the respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Nationwide Syndications, Inc. is an Illinois corporation with its principal office or place of business at 223 Applebee Street, Barrington, Illinois.

2. Respondent Thomas W. Karon is an officer of Nationwide Syndications, Inc. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Nationwide Syndications, Inc.

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

ORDER

DEFINITIONS

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

1. The term *"substantially similar product"* means any eyeglasses with tinted lenses.

2. The term *"competent and reliable scientific evidence"* means tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondents, Nationwide Syndications, Inc., a corporation, its successors and assigns, and its officers, and Thomas W. Karon, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of NightSafe Glasses or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product makes night driving safe or safer; or

B. Such product improves night vision.

II.

It is further ordered, That respondents, Nationwide Syndications, Inc., a corporation, its successors and assigns, and its officers, and Thomas W. Karon, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of NightSafe Glasses or any substantially similar product in or affecting commerce, as "commerce" is defined

in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the efficacy, performance, safety, or benefits of such product, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

III.

It is further ordered, That respondent, Nationwide Syndications, Inc., a corporation, its successors and assigns, and its officers, and Thomas W. Karon, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

IV.

It is further ordered, That respondent, Nationwide Syndications, Inc., a corporation, its successors and assigns, and its officers, and Thomas W. Karon, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of NightSafe Glasses or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the name "NightSafe," or any other name, in a manner that represents, directly or by implication, that such product makes night driving safe or safer.

V.

It is further ordered, That respondents, Nationwide Syndications, Inc., its successors and assigns, and Thomas W. Karon, shall pay to

the Federal Trade Commission, by cashier's check or certified check made payable to the Federal Trade Commission and delivered to the Director of the Chicago Regional Office, Federal Trade Commission, 55 East Monroe, Suite 1860, Chicago, Illinois, the sum of one hundred and twenty five thousand dollars ($125,000). This payment shall constitute full and complete satisfaction of all claims for redress by the Commission, under the Federal Trade Commission Act or any other applicable rule of law, for conduct covered by the order which occurred prior to the date of service of this order. Respondents shall make this payment no later than ten (10) days following the date of service of this order. In the event of any default on any obligation to make payment under this section, interest, computed pursuant to 28 U.S.C. 1961(a), shall accrue from the date of default to the date of payment. The funds paid by respondents shall, in the discretion of the Federal Trade Commission, be used by the Commission to provide direct redress to purchasers of NightSafe Glasses in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Federal Trade Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.

VI.

It is further ordered, That respondents shall provide the names and addresses of each individual who purchased NightSafe Glasses or any substantially similar product (hereafter "NightSafe Glasses") from Nationwide Syndications, Inc., or each individual who purchased NightSafe Glasses from any of the retailers, credit card companies, or any other person, partnership or corporation to whom Nationwide Syndications, Inc. sold NightSafe Glasses for resale, and whose names and addresses are in the possession of Nationwide Syndications, Inc. or Thomas W. Karon or can reasonably be obtained from the agents or representatives involved in fulfilling orders on behalf of Nationwide Syndications, Inc., to the Federal Trade Commission no later than ten (10) days after the date of service of

this order. The respondents shall provide these names and addresses to the Commission in a format consistent with the Commission's Standards for Production/Acceptance of Magnetically Recorded Information as set forth in Appendix A. The Commission may, in its sole discretion, provide notification to the purchasers of NightSafe Glasses to inform the purchasers of the safety information contained in Appendix B. The funds paid by respondents, pursuant to paragraph V of this order, may, in the discretion of the Commission, be used by the Commission to pay any of the costs associated with providing this notification to purchasers of NightSafe Glasses.

VII.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

VIII.

It is further ordered, That respondents Nationwide Syndications, Inc. shall:

A. Within thirty (30) days after the date of service of this order, deliver a copy of this order to each of the corporate respondent's officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

B. For a period of ten (10) years after the date of service of this order, deliver a copy of this order to each of the corporate respondent's future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements,

promotional materials, product labels or other such sales materials covered by this order, within three (3) days after the person assumes such position.

IX.

It is further ordered, That respondents Nationwide Syndications, Inc. shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as a 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 which may affect compliance obligations under this order.

X.

It is further ordered, That respondent Thomas W. Karon shall, for a period of ten (10) years after the date of issuance of this order, notify the Commission within thirty (30) days of discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.

XI.

This order will terminate on April 28, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XII.

It is further ordered, That each respondent shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

APPENDIX A

Federal Trade Commission Standards for Production/Acceptance of Magnetically Recorded Information

The Federal Trade Commission utilizes standards for information transfer adopted by the National Institute for Standards and Technology and in compliance with the International Standards Organization guidelines for information exchange.
The Commission encourages the use and exchange of magnetic media as a cost-effective, resource conscious alternative to printed materials.
The Commission will accept magnetic media in the following formats:

(A) Magnetic storage media:	(1) 9-track computer tapes recorded in ASCII or EBCDIC format at either 1600 or 6250 BPI. No internal labels should be written. (2) 5.25 inch IBM-compatible format diskettes. (3) 3.5 inch IBM-compatible format micro floppy diskettes. (4) Local Area Network backup cassettes or cartridges by pre-authorization only. (Contact (202)326-2280 for authorization.)

(B) File structures: (1) Sequential Access Method (SAM) files only. All indexed file structures must be dumped down into SAM format in primary-key order. Micro-computer (IBM-compatible) file structures should be in ASCII-comma-separated format.

(C) Record structures: Fixed length records only. Maximum block size for data is 32,000 bytes for data submitted on 9-track tapes. All data in the record is to be provided as it would appear in printed format: (*e.g.*) unpacked, printed decimal points, signed if relevant.

(D) Documentation: Brief documentation of each file on the tape or diskette must be provided. This information should include the following: (1) File name, (2) What tape/diskette file resides on, (3) Position of file on tape or diskette, (4) Number of records contained in the file, (5) The length of each record, (6) The record layout: (a) field name

(b) field size in bytes

(c) field data type (numeric/alpha-numeric/dollar/logical/date/etc.)

File layout documentation should be included in the same package as the tape/diskettes when sent.

(E) Shipping: Magnetic media must be shipped clearly marked: MAGNETIC MEDIA DO NOT X-RAY. Data received unmarked can not be accepted by our computer center. Media should be sent to the following address:

Federal Trade Commission
Computer Operations Center, Room-192
6th & Pa. Ave. N.W.
Washington, DC 20580
Attn: Litigation & Customer Support

(F) Technical Support: The Litigation & Customer Support Consulting staff is available at (202) 326-2200 to answer your technical questions regarding production of data for the Commission from 8:30 am to 6:00 pm EST.

APPENDIX B

Please note this important safety information:

> The NightSafe Glasses you purchased do not improve your vision while driving at night. In fact, these glasses may impair your vision while driving at night. This means that you should not wear NightSafe Glasses while driving at night.

Although NightSafe Glasses may impair your vision while driving at night, they may be used during the daytime as sunglasses.

IN THE MATTER OF

SPLITFIRE, INC.

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

Docket C-3737. Complaint, April 28, 1997--Decision, April 28, 1997

This consent order prohibits, among other things, the Illinois spark plugs manufacturer from making fuel economy, emissions, horsepower, or cost savings claims without competent and reliable scientific evidence to support them. The consent order also prohibits misrepresentations regarding the existence, contents, validity, results, conclusions or interpretations of any test or study. In addition, the consent order requires the respondent to possess competent and reliable scientific evidence to substantiate claims in endorsements or testimonials.

Appearances

For the Commission: *Laura Fremont* and *Matthew Gold.*

For the respondent: *Edward Geltman, Squire, Sanders & Dempsey*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that SplitFire, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Respondent SplitFire, Inc. is an Illinois corporation with its principal office or place of business at 4065 Commercial Avenue, Northbrook, Illinois.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed automotive products to the public, including the "SplitFire Spark Plug," an internal combustion engine spark plug with one split or forked electrode.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements for SplitFire Spark Plugs, including but not

necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. "Good [Depiction of a conventional spark plug]
Conventional Plugs
. . .
Better [Depiction of a platinum-tipped spark plug]
Platinum Plugs
. . .
BEST [Depiction of a SplitFire Spark Plug]
SplitFire Plugs
. . .
Experts say improved combustion of the fuel/air mixture results in:
MORE POWER · MORE MILEAGE · LOWER EMISSIONS
The SplitFire Advantage
'It Only Costs More Until You Use It!'™
Equipped with conventional spark plugs, up to 15% of the combustion cycles in a modern engine end up in 'partial misfires.' SplitFire's larger flame kernel helps reduce partial misfires, and experts say it helps improve:

PERFORMANCE	ECONOMY	EMISSIONS
* More horsepower	* More M.P.G.	* Lower emissions
. . .	. . .	. . .

Improved combustion efficiency means that a higher percentage of fuel is converted to power, not partially-burned exhaust. Higher efficiency means you get more out of every ounce of fuel, so you use less of it."
(Exhibit A, consumer brochure)

B. "CONSUMER RESEARCH RESULTS
SplitFire conducts continuous consumer surveys to constantly monitor 'real life' performance in all vehicle types, coast-to-coast.
. . .
Of all users (regardless of vehicle type, age, condition, and use) responding:
. . .
70% reported a gas mileage increase of from 1 to 6 more miles per gallon."
(Exhibit B, product catalog)

C. Consumer Endorser: "Yeah, I went from probably 300 miles on a full tank to almost 400."
. . .
Consumer Endorser: "I probably was getting, I would say about 20 miles more per tankful, and that's a lot for me!"
. . .
Consumer Endorser: "And when you're driving a four-wheel drive vehicle, you need all the extra gas mileage you can get."
(Exhibit C, television ad)

D. "SplitFire. At $5.99, America knows it only costs more 'til you use it!
. . .
Consumer Endorser: 'I can say I've saved at least $3 - $4 a week.'
. . .
Consumer Endorser: 'They'll pay for themselves, basically, in the first 6 months you own 'em.'"

(Exhibit D, television ad)

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. Use of SplitFire Spark Plugs will result in significantly better fuel economy than will use of either conventional spark plugs or platinum-tipped spark plugs.

B. Use of SplitFire Spark Plugs will result in significantly lower emissions than will use of either conventional spark plugs or platinum-tipped spark plugs.

C. Use of SplitFire Spark Plugs will result in significantly greater horsepower than will use of either conventional spark plugs or platinum-tipped spark plugs.

D. Use of SplitFire Spark Plugs will result in significant cost savings over use of either conventional spark plugs or platinum-tipped spark plugs.

E. The testimonials or endorsements from consumers appearing in advertisements and promotional materials for SplitFire Spark Plugs reflect the typical or ordinary experience of members of the public who use SplitFire Spark Plugs.

F. 70% of SplitFire Spark Plug users achieve a gas mileage increase of from 1 to 6 more miles per gallon.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that competent and reliable studies or surveys show that 70% of SplitFire users achieve a gas mileage increase of from 1 to 6 more miles per gallon.

9. In truth and in fact, competent and reliable studies or surveys do not show that 70% of SplitFire users achieve a gas mileage increase of from 1 to 6 more miles per gallon. Therefore, the

representation set forth in paragraph eight was, and is, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT C

Tape labeled:

Splitfire Spark Plugs
"Economy #1"
SFE-101193 (:30)

Yeah I went from probably 300 miles on a full tank to almost 400.
(on screen: Splitfire - the Patented Performance Spark Plug)
America is talking about Splitfire.
I probably was getting, I would say about 20 miles more per tankful, and that's a lot for me!
And when you're driving a four wheel drive vehicle, you need all the extra gas mileage you can get.
I have them on my motorcycle, my boat, and my car. I love 'em.
(Splitfire: The Patented Performance Spark Plug -
In [sic] only costs more until you use it)
Splitfire, at $5.99 it only costs more 'till you use it.

EXHIBIT D

Splitfire Spark Plugs/Wire Set
"Testimonial"
SFT-94-803WS (:50/:10)
My truck has 99,000 miles on it, and it's like a brand new engine.
(onscreen: America is taling [sic] about Splitfire. The patented performance spark plug)
America is talking about Splitfire. I feel like I have a new engine.
No hestitation. You hit your passing gear, you're gone! Right now!
("U.S. patent #4268774")
Splitfire won a United States patent. It doesn't look like any other sparkplug, it doesn't work like any other sparkplug.
(conventional spark plug - U.S. patented Splitfire)
I love 'em. I have them on my motorcycle, my boat, and my car. I love them. I love them.
(Splitfire - the patented performance spark plug)
Splitfire, at $5.00, America knows it only costs more, 'till you use it!
(It only costs more until you use it.)
I can say I've saved at least $3 - $4/week.
Probably getting, I would say about 20 miles more per tankful. And that's a lot for me! They'll pay for themselves, basically, in the first 6 months you own 'em!
(Splitfire - the patented performance spark plug - It only costs more until you use it.)
Splitfire -- it only costs more, 'till you use it!
Here's another Splitfire breakthrough! Twin coil wire sets -- with a dual firing path to every plug.

(Box shown. More power! More mileage! 30-day money back guarantee! Details in store.)

More power, and more mileage, or your money back!

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 the complaint that the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act, and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent SplitFire, Inc. is an Illinois corporation with its principal office or place of business at 4065 Commercial Avenue, Northbrook, 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

DEFINITIONS

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

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondent"* shall mean SplitFire, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees. For purposes of this order, "successors" shall include, but not be limited to:

(a) Any person who

(1) Markets the SplitFire spark plug, any split-electrode spark plug, or any spark plug with more than two electrodes; and

(2) Holds or has held an ownership interest in and/or serves or has served as an officer of respondent SplitFire, Inc.; and

(b) Any entity that

(1) Markets the SplitFire spark plug, any split-electrode spark plug, or any spark plug with more than two electrodes; and

(2) Is owned or controlled, wholly or in part, by any person who holds or has held an ownership interest in respondent SplitFire, Inc. and/or serves or has served as an officer of respondent SplitFire, Inc.

3. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the "SplitFire Spark Plug," or any other motor vehicle product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

A. The effect of such product on a vehicle's fuel economy;

B. The effect of such product on a vehicle's level of emissions;

C. The effect of such product on a vehicle's horsepower; or

D. The comparative or absolute cost savings that such product will contribute to or achieve,

unless, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any motor vehicle product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

III.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any motor vehicle product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondent discloses, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any motor vehicle product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, or efficacy of such product, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

V.

It is further ordered, That respondent SplitFire, Inc. and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

It is further ordered, That respondent SplitFire, Inc. and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having

responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

It is further ordered, That respondent SplitFire, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondent SplitFire, Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IX.

This order will terminate on April 28, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order,

whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

ZALE CORPORATION

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

Docket C-3738. Complaint, April 28, 1997--Decision, April 28, 1997

This consent order prohibits, among other things, the Texas-based chain of retail jewelry stores from misrepresenting the composition or origin of any imitation, cultured or natural pearl product. The consent order requires the respondent to include a word such as "artificial," "imitation," or "simulated" in close proximity to any representation that an imitation pearl product contains pearls; and to include a word such as "cultured" or "cultivated" in close proximity to any representation that a cultured pearl product contains pearls. In addition, the consent order requires the respondent, for three years, to make available to consumers in their stores an information sheet that describes the origin of imitation, cultured or natural pearls.

Appearances

For the Commission: *Matthew Gold.*
For the respondent: *Alan P. Shor,* in-house counsel, Irving, TX.

COMPLAINT

The Federal Trade Commission, having reason to believe that Zale Corporation, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Respondent Zale Corporation is a Delaware corporation with its principal office or place of business at 901 W. Walnut Hill Lane, Irving, Texas.

2. Respondent operates the country's largest chain of retail jewelry stores with more than 1,200 locations throughout the United States, Guam, and Puerto Rico.

3. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed the "Ocean Treasures" line of imitation pearl jewelry, and numerous other lines of cultured pearl jewelry, to the public. These lines of jewelry have included bracelets, earrings, pendants, rings and strands. None of respondent's jewelry products has included natural pearls.

4. Federal Trade Commission industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. The Federal Trade Commission's Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 CFR Part 23, 61 F.R. 27212 (May 30, 1996), state as follows:

A. Section 23.2 Misleading Illustrations. It is unfair or deceptive to use, as part of any advertisement, packaging material, label, or other sales promotion matter, any visual representation, picture, televised or computer image, illustration, diagram, or other depiction which, either alone or in conjunction with any accompanying words or phrases, misrepresents the type, kind, grade, quality, quantity, metallic content, size, weight, cut, color, character, treatment, substance, durability, serviceability, origin, preparation, production, manufacture, distribution, or any other material aspect of an industry product.

B. Section 23.20 Misuse of terms such as "cultured pearl," "seed pearl," "Oriental pearl," "natura," "kultured," "real," "gem," "synthetic," and regional designations. It is unfair or deceptive to use the term "cultured pearl," "cultivated pearl," or any other word, term, or phrase of like meaning to describe, identify, or refer to any imitation pearl.

C. Section 23.19 Misuse of the word "pearl." (c) It is unfair or deceptive to use the word "pearl" to describe, identify, or refer to an imitation pearl unless it is immediately preceded, with equal conspicuousness, by the word "artificial," "imitation," or "simulated," or by some other word or phrase of like meaning, so as to indicate definitely and clearly that the product is not a pearl.

5. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

6. Respondent has disseminated or has caused to be disseminated advertisements for its Ocean Treasures imitation pearl jewelry products, including but not necessarily limited to the attached Exhibits A through B. These advertisements contain the following statements and depictions:

1. "ZALES THE DIAMOND, SEMI-PRECIOUS AND PEARL STORE™
Ocean Treasures™ Fine Jewelry
Created by nature, enhanced by man."
[Depictions of necklace, earrings, rings, and pendants, all of which appear to contain pearls or cultured pearls](Exhibit A)

2. "Ocean Treasures™ Fine Jewelry
Created by nature, enhanced by man."
[Depictions of necklace, earrings, and pendant, all of which appear to contain pearls or cultured pearls] (Exhibit B)

7. Through the means described in paragraph six, respondent has represented, expressly or by implication, that the Ocean Treasures line of jewelry is composed of cultured pearls.

8. In truth and in fact, the Ocean Treasures line of jewelry is not composed of cultured pearls, but rather is composed exclusively of imitation pearls. A cultured pearl is a pearl formed by a mollusk as a result of an irritant placed in the mollusk's shell by humans. An imitation pearl is a manufactured product that is designed to simulate in appearance a pearl or cultured pearl. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

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 the complaint that the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act, and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Zale Corporation is a Delaware corporation with its principal office or place of business at 901 W. Walnut Hill Lane, Irving, Texas.

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

DEFINITIONS

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

1. *"Clearly and prominently"* shall mean as follows:

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In a print advertisement, or on any in-store sign or display, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

D. On a product label, the disclosure shall be in a type size, and in a location on the principal display panel, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

2. *"Natural Pearl"* shall mean a calcareous concretion consisting essentially of alternating concentric layers of carbonate of lime and organic material formed within the body of certain mollusks, the result of an abnormal secretory process caused by an irritation of the mantle of the mollusk following the intrusion of some foreign body inside the shell of the mollusk, or due to some abnormal physiological condition in the mollusk, neither of which has in any way been caused or induced by humans.

3. *"Cultured Pearl"* shall mean the composite product created when a nucleus (usually a sphere of calcareous mollusk shell) planted by humans inside the shell or in the mantle of a mollusk is coated with nacre by the mollusk.

4. *"Imitation Pearl"* shall mean a manufactured product composed of any material or materials that simulate in appearance a natural pearl or cultured pearl.

5. Unless otherwise specified, *"respondent"* shall mean Zale Corporation, a corporation, its successors and assigns, and its officers, agents, representatives and employees.

6. *"Commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of imitation pearl jewelry, in or affecting commerce, shall not represent that imitation pearls are cultured pearls.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of imitation pearl jewelry, in or affecting commerce, shall not represent that such product is or contains one or more pearls unless respondent discloses, clearly and prominently, and in close proximity to such representation, that the product is comprised of one or more imitation pearls, by describing such product as "artificial," "imitation," or "simulated," or with another word or phrase of like meaning.

III.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of cultured pearl jewelry, in or affecting commerce, shall not represent that such product is or contains one or more pearls unless respondent discloses, clearly and prominently, and in close proximity to such representation, that the product is comprised of one or more cultured pearls, by describing such product as "cultured" or "cultivated," or with another word or phrase of like meaning.

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any jewelry product composed partially or entirely of natural pearls, cultured pearls, or imitation pearls, shall not misrepresent the composition or origin of such product.

V.

It is further ordered, That, for a period of three (3) years from the date of service of this order, respondent, directly or through any corporation, subsidiary, division, or other device, shall make available, in a place and manner calculated to attract the attention of consumers, an information sheet in the form set forth in Appendix A to this order at each store that offers for sale any jewelry product composed partially or entirely of natural pearls, cultured pearls, or imitation pearls.

VI.

It is further ordered, That respondent, and its successors and assigns, shall, for five (5) years after the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, business records demonstrating its compliance with the terms and provisions of this order, including but not limited to:

A. All advertisements and promotional materials for jewelry containing one or more natural pearls, cultured pearls, or imitation pearls;

B. All brochures, hang tags or other in-store displays relating to jewelry containing one or more natural pearls, cultured pearls, or imitation pearls; and

C. All invoices and order forms relating to jewelry containing one or more natural pearls, cultured pearls, or imitation pearls.

VII.

It is further ordered, That respondent, and its successors and assigns, shall deliver a copy of this order, or a summary in the form set forth as Appendix B to this order, to all current and future principals and directors; to all current and future officers and managers with responsibilities or duties affecting compliance with the terms of this order; and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order, or a summary in the form set forth as Appendix B to this order, to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

It is further ordered, That respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

IX.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

X.

This order will terminate on April 28, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

APPENDIX A

APPENDIX B

[To be printed on Zale Corporation letterhead]

[date]

Dear Zale employee:

This letter is to inform you that Zale Corporation recently settled a civil dispute with the Federal Trade Commission ("FTC") regarding certain alleged claims for our "Ocean Treasures" line of imitation pearl jewelry. We deny the FTC's allegations, but in order to avoid protracted litigation we have entered into a settlement agreement. As part of that settlement, we are required to summarize the requirements of the settlement for our directors and officers, and for employees and others who sell our products to consumers.

The FTC alleged that Zale advertisements falsely claimed, expressly or by implication, that Ocean Treasures jewelry was composed of cultured pearls. Our settlement with the FTC contains the following requirements:

1. Zale may not represent that imitation pearls are cultured pearls. 2. Zale may not represent that imitation pearl jewelry contains pearls unless we specifically describe the jewelry as "artificial," "imitation," "simulated," or with another word or phrase of like meaning.

3. Zale may not represent that cultured pearl jewelry contains pearls unless we specifically describe the jewelry as "cultured" "cultivated," or with another word or phrase of like meaning.

4. Zale may not misrepresent the composition or origin of any jewelry product composed partially or entirely of natural pearls, cultured pearls, or imitation pearls.

5. Zale must make available to consumers for a period of three years, in each store that offers for sale natural pearl, cultured pearl, or imitation pearl jewelry, an information sheet that describes the difference among natural pearls, cultured pearls, and imitation pearls. This information sheet, which we are providing to each store, must be made available in a place and manner that is calculated to attract the attention of consumers.

Requirements 1-4, above, apply to all representations made in advertising, labeling, promotion, offering for sale, sale and distribution, including individual sales transactions.

Thank you for your assistance. If you have any questions about the requirements contained in this letter, please call _____.

Sincerely,

[Zale Official]
[Title]

IN THE MATTER OF

AMERICAN CYANAMID COMPANY

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

Docket C-3739. Complaint, May 12, 1997--Decision, May 12, 1997

This consent order prohibits, among other things, a New Jersey-based distributor of agricultural herbicides and insecticides from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for their products, and from agreeing with its dealers to control or maintain resale prices. The consent order requires the respondent, for three years, to post clearly and conspicuously a statement, on any price list, advertising or catalogue that contains a suggested resale price, that dealers remain free to determine on their own the prices at which they sell the company's products. In addition, the respondent must mail a letter containing this statement to all current dealers, distributors, officers, management employees and sales representatives.

Appearances

For the Commission: *Michael Antalics* and *Sarah O. Allen.*

For the respondent: *Daniel K. Mayers, Wilmer, Cutler & Pickering,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (15 U.S.C. 41 *et seq*.), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Cyanamid Company, a corporation (hereinafter "Am Cy" or "respondent"), has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent American Cyanamid Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business at One Campus Drive, Parsippany, New Jersey. Respondent is a wholly-owned subsidiary of American Home Products Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Five Giralda Farms, Madison, New Jersey.

PAR. 2. Respondent is now, and for some time has been, engaged in the offering for sale, sale, and distribution of crop protection chemicals, such as herbicides and insecticides used in commercial agriculture, to over 2500 retail dealers located throughout the United States. In 1995, Am Cy sold at retail more than $1 billion of its crop protection chemicals.

PAR. 3. In 1995, Am Cy was the market share leader in three domestic crop protection chemical markets: soybean broadleaf herbicides, soybean grass herbicides, and corn soil insecticides. In addition, Am Cy had the second-largest share of the domestic cotton grass herbicide market.

PAR. 4. Respondent's acts and practices, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. For approximately five years beginning in 1989, Am Cy operated two rebate programs for its retail dealers. From 1989-1992, the plan was called the "Cash Reward on Performance" ("C.R.O.P.") program, and was renamed the "Award for Performance Excellence" ("A.P.E.X.") program in late 1992 through August 1995. Pursuant to the written agreements respondent entered into with its dealers under these programs, Am Cy offered to pay the dealers substantial rebates on each sale if the dealers sold Am Cy's crop protection chemicals at or above specified minimum resale prices. The specified minimum resale prices were equal to the wholesale prices paid by the dealers for the crop protection chemical products. Under the terms of the agreements, a dealer was not entitled to, and did not receive, any rebate on sales made below the specified minimum price; therefore, sales below Am Cy's specified minimum resale prices were made at a loss to the dealer. The dealers overwhelmingly accepted Am Cy's offer by selling at or above the specified minimum prices.

PAR. 6. Am Cy also included certain nonprice performance criteria in its C.R.O.P. and A.P.E.X. programs that could increase the amount of the rebate, but compliance with those performance criteria was neither necessary nor, by itself, sufficient to obtain rebates. For example, if the dealer did not meet any of Am Cy's performance criteria, but sold the product at or above the specified minimum resale price, the dealer nonetheless received a rebate on that sale. On the other hand, if the dealer met all of the performance criteria, but sold the product below Am Cy's specified minimum resale price, the dealer received no rebate on that sale.

PAR. 7. The purpose, effects, tendency, or capacity of the acts and practices described in paragraphs five and six are and have been to restrain trade unreasonably and hinder competition in the provision of crop protection chemicals in the United States.

PAR. 8. The aforesaid acts and practices of the respondent were and are to the prejudice and injury of the public. These acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts and practices may recur in the absence of the relief requested.

Commissioner Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission ("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 the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, 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 Act, 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 described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Cyanamid Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business at One Campus Drive, Parsippany, New Jersey. Respondent is a wholly-owned subsidiary of American Home Products Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Five Giralda Farms, Madison, 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"* or *"Am Cy"* means American Cyanamid Company, its directors, officers, employees, agents and representatives, predecessors, successors (including American Home Products Corporation) and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by American Cyanamid Company, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

(B) *"Commission"* means the Federal Trade Commission.

(C) *"Product"* or *"Products"* means any crop protection chemicals, such as herbicides and insecticides used in commercial agriculture, that are manufactured, offered for sale, sold, or distributed by Am Cy to retail dealers or consumers located in the United States of America.

(D) *"Dealer"* means any person, corporation or entity not owned by Am Cy that in the course of its business purchases from Am Cy or a distributor and sells any Product in or into the United States of America.

(E) *"Resale price"* means any price, price floor, minimum price, maximum discount, price range, or any mark-up formula or margin of profit used by any dealer for pricing any Product. "Resale price"

includes, but is not limited to, any established or customary resale price.

II.

It is ordered, That Am Cy, directly or indirectly, or through any corporate or other device, in connection with the manufacturing, offering for sale, sale, or distribution of any Product in or into the United States of America in or affecting "commerce," as defined by the Federal Trade Commission Act, forthwith cease and desist from:

(A) Conditioning the payment of any rebate or other incentive to any dealer, in whole or in part, directly or indirectly, on the resale price at which the dealer offers for sale or sells any Product; and

(B) Otherwise agreeing with any dealer to control or maintain the resale price at which the dealer may offer for sale or sell any Product.

III.

It is further ordered, That, for a period of three (3) years from the date on which this order becomes final, Am Cy shall clearly and conspicuously state the following on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any Product to any dealer:

ALTHOUGH AMERICAN CYANAMID MAY SUGGEST RESALE PRICES FOR PRODUCTS, DEALERS ARE FREE TO DETERMINE ON THEIR OWN THE PRICES AT WHICH THEY WILL SELL AMERICAN CYANAMID PRODUCTS.

IV.

It is further ordered, That respondent shall:

(A) Within thirty (30) days after the date on which this order becomes final, mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to all of its officers, management employees, dealers, distributors, and agents or representatives having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America;

(B) For a period of three (3) years after the date on which this order becomes final, mail by first class mail the letter attached as

Exhibit A, together with a copy of this order, to each person who becomes an officer, management employee, or agent or representative having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America, within thirty (30) days of the commencement of such person's employment or affiliation with Am Cy; and

(C) For a period of three (3) years after the date on which this order becomes final, require each of its officers, management employees, and agents or representatives having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America, to sign and submit to Am Cy 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 American Cyanamid Company to penalties for violation of the order.

V.

It is further ordered, That respondent shall:

(A) Within sixty (60) days after the date on which this order becomes final, and annually thereafter for three (3) years on the anniversary of the date this order becomes final, and at such other times as the Commission shall request, file with the Commission a verified written report setting forth in detail the manner and form in which Am Cy has complied and is complying with this order;

(B) For a period of three (3) years after the order becomes final, maintain and make available to Commission staff for inspection and copying, upon reasonable notice, all records of communications with dealers, distributors, and agents or representatives having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America relating to any aspect of retail pricing in the United States of America, and records pertaining to any action taken in connection with any activity covered by paragraphs II, III, IV, and V of this order; and

(C) Notify the Commission at least thirty (30) days prior to any proposed changes in Am Cy 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.

VI.

It is further ordered, That this order shall terminate on May 12, 2017.

Commissioner Starek dissenting.

EXHIBIT A

[AMERICAN CYANAMID LETTERHEAD]

Dear Dealer:

The Federal Trade Commission has conducted an investigation into American Cyanamid's sales policies, and in particular, American Cyanamid's C.R.O.P. and A.P.E.X. rebate programs, which were in effect from mid-1989 through August 1995. To expeditiously resolve the investigation and to avoid disruption to the conduct of its business, American Cyanamid has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission prohibiting certain practices relating to resale prices. A copy of the order is enclosed. This letter and the accompanying order are being sent to all of our dealers, distributors, sales personnel and representatives.

The order spells out our obligations in greater detail, but we want you to know and understand that you can sell our products at any price you choose. While we may send materials to you which contain suggested retail prices, you remain free to sell those products at any price you choose.

We look forward to continuing to do business with you in the future.

Sincerely yours,

_____

President

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONERS JANET D. STEIGER AND CHRISTINE A. VARNEY

The Commission today enters a consent order with American Cyanamid prohibiting it from engaging in conduct designed to prevent its dealers from making discounted sales below the minimum price that American Cyanamid specified. American Cyanamid entered into written agreements with its dealers that provided dealers with "rebates" each time they sold their product at or above a certain resale price (the floor transfer price). For dealers who sold at the specified price, this rebate constituted their entire profit margin. The Commission believes that this conduct amounted to an illegal resale price maintenance agreement.

Commissioner Starek, in his dissent, criticizes this enforcement action for a number of reasons. As explained below, we disagree with Commissioner Starek's reasoning.

First, the dissenting statement appears to conclude that a situation where a manufacturer and a dealer enter into an express agreement that the manufacturer will pay the dealer to adhere to the manufacturer's specified resale price, is not an "agreement on resale prices" but rather some form of voluntary behavior. Judge Posner responded to similar arguments in *Khan v. State Oil.*[1]

In Khan, the court declared a maximum resale price arrangement *per se* illegal where the manufacturer permitted dealers to charge above a maximum price, but required them in such case to provide any resulting profit above the maximum price to the manufacturer. The "voluntary" nature of the arrangement did not detract from the finding that there was an agreement. Judge Posner noted that the arrangement was indistinguishable from an agreement not to exceed the maximum price, because the dealer was sanctioned for violating the agreement by having to remit any resulting profit to the manufacturer. In responding to State Oil's argument that there was no price fixing agreement, Judge Posner observed: "The purely formal character of the distinction that it urges can be seen by imagining that the contract had forbidden Khan to exceed the suggested resale price

[1] 93 F.3d 1358 (7th Cir.), *cert. granted*, ___S. Ct. ___ (1996).

and had provided that if he violated the prohibition the sanction would be for him to remit any resulting profit to State Oil."[2]

We agree with Judge Posner. In this case, the sanction was loss of the rebate for sales made below the floor transfer price. If an agreement to forego one's entire profit margin if one departs from the specified price does not constitute a price maintenance agreement, then nothing remains of the *per se* rule.

Second, the dissent seems to suggest that this case is one where agreement is being inferred from unilateral conduct. We cannot concur. American Cyanamid entered into written agreements which offered financial incentives for adherence to a minimum price schedule. Courts, both before and after Sharp,[3] have held such arrangements unlawful where adherence to a suggested price was the *quid pro quo* for the financial inducements. Judge Posner's decision in Khan is consistent with this approach.[4]

Third, the dissenting statement, relying in large part on recent economic literature, argues that American Cyanamid's program should not be condemned without proof of a supplier cartel, dealer cartel, or market power.[5] That view is inconsistent with the Supreme Court's view that resale price maintenance continues to be illegal *per se* and we reject the idea that the Supreme Court can be overruled by scholarly contributions to economic journals.

Finally, we cannot agree with the suggestion that this enforcement action somehow creates uncertainty about the Commission's treatment of pass through rebates or cooperative advertising programs. As the analysis to aid public comment explains, pass through programs have always been permitted, as long as the dealer is free to discount to an even greater extent than the pass through amount. Similarly, both the courts and the Commission have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer's right: (1) to discount below the

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[2] *Id.,* at 1361. *See also Isaksen v. Vermont Castings, Inc.,* 825 F.2d 1158, 1164 (7th Cir. 1987) (in finding a violation based on economic coercion, Judge Posner noted, "It is as if Vermont Castings had told Isaksen that it would reduce its wholesale price to him if he raised his retail price, and Isaksen had accepted the offer by raising his price.").

[3] *Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717 (1988).

[4] 93 F.3d at 1362.

[5] Although we do not fully detail our disagreement with the description of the facts in the dissent, we believe that a full trial would have shown that an overwhelming portion of sales were made at or above the minimum resale price. Moreover, a dealer's advisory council voted to advise American Cyanamid to retain the program in order to protect its margins.

advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement. Unlike those programs, American Cyanamid's rebate program controlled the actual prices charged and was structured to prevent dealers from pricing below the floor transfer price.

Attachment to Statement of Chairman Pitofsky, Commissioner Steiger, and Commissioner Varney

ANALYSIS TO AID PUBLIC COMMENT ON THE PROPOSED CONSENT ORDER

The Federal Trade Commission ("the Commission") has accepted an agreement to a proposed consent order from American Home Products Corporation ("AHP"), through its wholly-owned subsidiary, American Cyanamid Company ("American Cyanamid"), located in Parsippany, New Jersey. The agreement would settle charges by the Commission that American Cyanamid violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted competition in the domestic markets for crop protection chemicals, which are herbicides and insecticides widely used in commercial agriculture.

The proposed consent order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (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 purpose of this analysis is to invite public comment concerning the consent order and any other aspect of American Cyanamid's alleged anticompetitive conduct relating to its C.R.O.P. and A.P.E.X. rebate programs. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

The Complaint

The complaint prepared for issuance by the Commission along with the proposed order alleges that American Cyanamid has engaged in acts and practices that have unreasonably restrained competition in

the sale and distribution of crop protection chemicals in the United States. In 1995, the Commission's proposed complaint alleges, American Cyanamid sold at retail more than $1 billion of its crop protection chemicals and was the market share leader in three domestic crop protection chemical markets: soybean broadleaf herbicides, soybean grass herbicides, and corn soil insecticides, as well as being the second-largest domestic producer of cotton grass herbicides.

According to the complaint, American Cyanamid operated two cash rebate programs for its retail dealers for approximately five years. From 1989-1992, the plan was called the "Cash Reward on Performance" ("C.R.O.P.") program, and was renamed the "Award for Performance Excellence" ("A.P.E.X.") program in late 1992 through August 1995. The complaint states that American Cyanamid entered into written agreements with its dealers under these programs, pursuant to which American Cyanamid offered to pay its dealers substantial rebates on each sale of its crop protection chemicals that was made at or above specified minimum resale prices. According to the complaint, the dealers overwhelmingly accepted American Cyanamid's rebate offer by selling at or above the specified minimum resale prices.

The complaint further alleges that the wholesale prices in the agreements were set at a level equal to the specified minimum resale prices, and because a dealer received no rebate on sales below the specified prices, those sales were made at a loss to the dealer.

The complaint further states that although American Cyanamid included certain non-price performance criteria in its rebate programs that could increase the amount of the rebate, a dealer's compliance with these performance criteria was neither necessary nor, by itself, sufficient to obtain rebates. As examples, the complaint alleges that if a dealer met all of American Cyanamid's performance criteria, but sold the product for less than American Cyanamid's specified minimum resale price, that dealer received no rebate on the sale. On the other hand, if the dealer met none of the performance criteria, but sold the product at or above American Cyanamid's specified minimum resale price, the dealer nonetheless received a rebate on that sale.

American Cyanamid's conditioning of financial payments on dealers' charging a specified minimum price amounted to the *quid pro quo* of an agreement on resale prices. In cases where this issue has

arisen, both before and after the Supreme Court examined the *per se* rule against resale price maintenance in Monsanto and Sharp,[1] courts have treated such agreements as *per se* illegal. *See Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 39, 40 (5th Cir.), *cert denied*, 409 U.S. 1077 (1972) (stating that ". . .adherence to a suggested price schedule was the *quid pro quo* for Lehrman's receiving Gulf's TCAs [temporary competitive allowances]" and "there is no comparable justification for conditioning wholesale price support upon adherence to a schedule of minimum retail prices." (emphasis in original)); *Butera v. Sun Oil Co., Inc.*, 496 F.2d 434, 437 (1st Cir. 1974). By offering financial inducements in return for selling at specified minimum prices, a manufacturer seeks the "acquiescence or agreement" of its dealers in a resale price-fixing scheme. *Monsanto*, 465 U.S. at 764 n. 9. The dealer, in turn, accepts the manufacturer's offer by selling at or above the specified minimum prices. *See Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (Posner, J.) (an "obvious" resale price-fixing agreement is found" . . . if [the manufacturer] had told [the dealer] that it would reduce its wholesale price to him if he raised his retail price, and [the dealer] had accepted the offer by raising his price."). *See also Khan v. State Oil Co.*, 93 F.3d 1358, 1360-61 (7th Cir. 1996) (Posner, J.), *petition for cert. pending* (No. 96-871) (agreement on price found where dealership agreement on its face allowed dealer to charge any resale price it wished, but distributor tied financial consequences to dealers' not charging the resale prices it suggested). As a result, incentives to reduce price below the specified level were substantially affected by American Cyanamid's rebate scheme.

The rebate programs challenged in this case are unlike situations where manufacturers are permitted to condition a discount or other incentive on that discount being "passed through" to consumers, which prevents a dealer from simply "pocketing" the discount. In these types of cases, the dealer is free to sell at even lower prices than the amount of the direct "pass through" of the discount or other incentive. Discounts cannot be conditioned, therefore, on the dealers' adherence to specified minimum prices. *See AAA Liquors, Inc. v. Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203, 1206 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983) (Seagram's requirement of passing through its discount "[did] not prohibit the wholesaler from

[1] *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

making greater reductions in price than the discount provides."). *See also Acquaire v. Canada Dry Bottling Co.*, 24 F.3d 401, 409-10 (2d Cir. 1994); *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 845-47 (8th Cir. 1983) (because dealers could discount more than Mack's sales assistance, the court found that "the purpose of Mack's discount program [was] not to force adherence to any particular price scheme of Mack's.").

The Proposed Consent Order

Part I of the proposed order covers definitions. These definitions make clear that the consent order applies to the directors, officers, employees, agents and representatives of American Cyanamid. The order also defines the terms product, dealer and resale price.

Part II of the order contains two major operative provisions: Part II(A) deals with the specific conduct at issue in this case. It prohibits American Cyanamid from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for its products. Part II(B) prevents American Cyanamid from otherwise agreeing with its dealers generally to control or maintain resale prices.

Neither of these provisions should be construed to prohibit lawful cooperative advertising programs or "pass through" discount programs that are not otherwise part of an unlawful resale price maintenance scheme. The Commission has previously determined that order provisions prohibiting agreements on resale prices do not restrict a company's ability to implement otherwise lawful cooperative advertising and "pass through" rebate plans because such programs do not, in themselves, constitute agreements on resale prices. *See, e.g., In Re Magnavox Co.*, 113 FTC 255, 263, 269-70 (1990).

Part III of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall include a statement, posted clearly and conspicuously, on any price list, advertising, catalogue or other promotional material where it has suggested a resale price for any product to any dealer. The required statement explains that while American Cyanamid may suggest resale prices for its products, dealers remain free to determine on their own the prices at which they will sell American Cyanamid's products.

Part IV of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall mail the letter attached to the order as Exhibit A and a copy of this order to all of its current dealers, distributors, officers, management employees, and agents or representatives with sales or policy responsibilities for American Cyanamid's products. American Cyanamid also must mail the letter and order to any new dealer, distributor or employee in the above positions within thirty (30) days after the commencement of that person's affiliation or employment with American Cyanamid. All of the above dealers, distributors and

employees must sign and return a statement to American Cyanamid within thirty (30) days of receipt that acknowledges they have read the order and that they understand that non-compliance with the order may subject American Cyanamid to penalties for violation of the order.

Part V of the order requires that American Cyanamid file with the Commission an annual verified written report giving the details of the manner and form in which American Cyanamid is complying and has complied with the order. In addition, Part V of the order also requires American Cyanamid to maintain and make available to the Commission upon reasonable notice all records of communications with dealers, distributors, and agents or representatives relating to resale prices in the United States, as well as records of any action taken in connection with activities covered by the rest of the order. Finally, American Cyanamid must inform the Commission at least thirty (30) days before any proposed changes in the corporation, such as dissolution or sale.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to issue the consent order, but decline to join the separate statement of Chairman Pitofsky and Commissioners Steiger and Varney. The consent agreement, which includes the consent order and the complaint on which it is based, constitutes the decisional document of the Commission. My substantive views on this matter are contained entirely within the four corners of the decisional document. If the majority wants to revise or expand its decision, the proper course is to revise the decisional document. *See* Dissenting Statement of Commissioner Mary L. Azcuenaga in Dell Computer Corp. at 21-23 (Docket No. 3658, May 20, 1996).

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue a consent order against American Cyanamid Company ("AmCy"), a producer of agricultural chemicals. The complaint claims that certain aspects of AmCy's compensation arrangement with its dealers constitute *per se* illegal resale price maintenance ("RPM"), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. I do not agree that AmCy's dealer rebate policies constitute the functional and legal equivalent of RPM agreements.

Consequently, I conclude that the decision to challenge AmCy's distribution policies would expand substantially the range of activities condemned by the Commission as illegal *per se*. This policy is ill-advised and runs contrary to twenty years of case law in which the scope of vertical arrangements subject to *per se* condemnation has been steadily narrowed. This case is an especially poor vehicle for expanding the scope of the *per se* rule, for it would be difficult to find conduct that better exemplifies the economic deficiencies of that standard.

Condemning certain conduct as illegal *per se* normally is rationalized by the belief that the conduct in question is so frequently pernicious that one cannot justify the cost of attempting to identify the few instances in which it is not. Whether RPM warrants characterization as *per se* illegal conduct has increasingly been called into question by antitrust scholars,[1] indeed, it would be difficult to find an antitrust economist who would defend this enforcement standard.[2] RPM remains illegal *per se*, however, and, consistent with this standard, I have voted to support enforcement actions against RPM agreements when I have been convinced that (1) the conduct in question plainly constituted an illegal agreement on price (as construed by contemporary case law), and (2) the relief was appropriately tailored to deter future illegal conduct.

Notwithstanding the continued *per se* treatment of RPM -- and my willingness to support RPM cases in the limited circumstances identified above -- I cannot ignore the persistent accumulation of

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[1] There is a substantial body of economic literature demonstrating that RPM frequently can be socially beneficial. *See, e.g.* Michael L. Katz, "Vertical Contractual Relations," in Richard Schmalensee and Robert D. Willig, 1 Handbook of Industrial Organization 655 (1989). The existing empirical literature fails to find evidence supporting an anticompetitive characterization of RPM. *See, e.g.*, Pauline M. Ippolito & Thomas R. Overstreet, Jr., "Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Coming Glass Works," 39 J.L. & Econ 285 (1996) (evidence convincingly rejects anticompetitive theories and suggests instead that RPM increased sales of Corning's products); Pauline M. Ippolito, "Resale Price Maintenance: Empirical Evidence from Litigation," 34 J.L. & Econ. 263 (1991) (empirical evidence cannot support a collusive explanation for the use of RPM).

[2] I also emphasize that in none of the RPM actions brought by the Commission during my tenure could one have plausibly characterized the condemned conduct as having an anticompetitive effect (indeed, in several instances, procompetitive rationales for the restrictions were plainly evident). In only one instance, *Nintendo of America Inc.*, 114 FTC 702 (1991), could one have plausibly ascribed market power to the manufacturer that was party to the agreement. Without manufacturer market power, RPM agreements between a single manufacturer and its dealers cannot harm consumers. Of course, it cannot be overemphasized that market power is only a necessary, but not a sufficient, condition for vertical restraints to reduce consumer welfare; by itself, market power does not establish that the conduct is anticompetitive. Even when a manufacturer possesses substantial market power, all of the procompetitive rationales for vertical restraints remain potentially valid.

economic evidence demonstrating the potentially procompetitive (or, at worst, economically neutral) nature of RPM agreements, At minimum, this evidence counsels against expanding the boundaries of *per se* illegal conduct to envelop activities that (at best) only weakly satisfy the legal criteria for finding the existence of an "agreement" and, more important, appear to be procompetitive in both purpose and effect. Under these evaluative criteria, the present matter is a poor candidate for an enforcement action.

The Supreme Court set forth the legal standard for finding an illegal RPM "agreement" in *Monsanto Co. v. Spray-Rite Service Corporation:*[3]

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Monsanto, 465 U.S. at 768. The court stated further that the "concept of 'a meeting of the minds' or 'a common scheme' . . . includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id.* at 764 n. 9 (emphasis added).

While it is true that AmCy entered into contracts with its distributors providing for compensation for sales at or above the wholesale purchase price, it is clear that there was no "meeting of the minds" or "common scheme," and thus no illegal agreement, to maintain resale prices. At no time did AmCy tell its distributors that they must sell agricultural chemicals at specific prices or risk losing supplies; AmCy did not attempt to coerce or intimidate its distributors into selling at specific price levels; distributors did not communicate an agreement to sell at specific prices; no distributors were ever terminated for selling at prices below the wholesale price; and distributors remained free (as explicitly provided by contract) to resell products at any price of their choosing. That distributors sometimes sold at prices below the wholesale level without loss of supply or termination is testament to the unilateral nature of the distributors' pricing decisions and to the absence of any agreement to maintain

[3] 465 U.S. 752 (1984).

resale prices.[4] In this instance, all of the hallmarks of a *per se* illegal RPM agreement are lacking.

Evidence that dealers did in fact resell AmCy products at or above the wholesale purchase price does not relieve the Commission of its obligation to demonstrate the existence of an illegal agreement. As made clear by Colgate,[5] a unilateral, self-motivated decision by a distributor to accept a manufacturer's pricing policies, and thus sell products at a suggested retail price, does not constitute an illegal RPM agreement. In Monsanto, the Supreme Court stated: "Under Colgate, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." 465 U.S. at 761. As Monsanto and Colgate make clear, something more than mere acquiescence by a distributor in a manufacturer's pricing policies is necessary to convert a unilateral decision by a distributor into an agreement to maintain resale prices.

I am therefore puzzled why the majority is so quick to infer the existence of a *per se* illegal RPM agreement from evidence that many distributors found it in their self-interest unilaterally to sell at or above the wholesale price and thereby receive rebates from AmCy. To infer the existence of a *per se* illegal RPM agreement in this context, when AmCy never announced minimum resale prices nor sought a commitment from distributors to sell at or above certain price levels, violates the fundamental principle of RPM law announced in Colgate. How can the majority find a *per se* illegal agreement here -- under arguably weaker factual circumstances than existed in Colgate -- and believe that it still seeks to enforce the rule announced in Colgate, and reiterated in Monsanto, that mere

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[4] Evidence suggests that distributors in fact sold specific products covered by the AmCy program at retail prices both above and below the wholesale transfer price. Wide variation in distributor resale prices runs contrary to usual evidence of a minimum resale price fixing agreement. As Chairman Pitofsky has stated: "The one point that emerges clearly in any debate concerning the *per se* rule is that minimum vertical price agreements lead to higher, and usually uniform, resale prices." Robert Pitofsky, "In Defense of Discounters: The No-Frills Case for a *Per Se* Rule Against Vertical Price Fixing," 71 Geo. L.J. 1487, 1488 (1983). The Commission's complaint does not allege, nor does it provide supporting evidence, that the rebate program resulted in higher retail prices for AmCy's products. Moreover, the wide dispersion in resale prices demonstrates the absence of the type of uniformity believed to be an indicator of a minimum resale price agreement. This dispersion in retail prices suggests that distributors were engaging in loss-leader programs out of a desire to increase future sales of AmCy products. In addition to encouraging distributors to provide valuable pre-sale services, AmCy's rebate program may have encouraged distributors to engage in loss-leader programs as a means of persuading customers to switch to AmCy products.

[5] *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

acquiescence by a distributor in the pricing policies of a manufacturer is insufficient as a matter of law to warrant inference of the existence of a *per se* illegal RPM agreement?[6]

The majority's finding that AmCy entered into illegal RPM agreements with its distributors is nothing less than a retreat from the principles of vertical restraints analysis laid down by the Supreme Court in Colgate, Monsanto, Sylvania,[7] and Sharp.[8] In cases involving allegations of concerted price fixing, "the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an interference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded." *Monsanto*, 465 U.S. at 763. I concluded that the standard set forth by Supreme Court for the finding of a price-fixing agreement has not been met. That the majority is willing to infer the existence of an agreement in this instance on the basis of such ambiguous evidence, and to rely primarily on pre-Sharp case law and post-Sharp dicta and one case not on point[9] to justify its conclusion,

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[6] Although the majority's reply emphasizes "written agreements" pursuant to which dealers were offered compensation for sales at prices above the wholesale transfer price (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of American Cyanamid, at 2), the complaint in this case indicates that the Commission is willing -- despite the clear warnings of Colgate and Monsanto to the contrary -- to infer the existence of *per se* illegal RPM "agreements" solely from the dealers' unilateral response to AmCy's "offer." Complaint, at ¶ 6 ("The dealers overwhelmingly accepted AmCy's offer by selling at or above the specified minimum prices.").

[7] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

[8] *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

[9] The majority relies heavily on Judge Posner's opinion in *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 941 (1997). Besides the obvious difference that Khan deals with maximum rather than minimum RPM, the facts of Khan are fundamentally different. The contract between State Oil (the supplier) and Khan (the dealer) provided that State Oil would announce a suggested retail price for gasoline and sell it to Khan for 3.25 cents per gallon less. The contract further required Khan to rebate to State Oil any profit received for sales above the suggested retail price. As Judge Posner noted, the contract eliminated any incentive for Khan to charge above the suggested retail price. Since absolute compliance was thus guaranteed under the facts of Khan, it is not surprising that a dealer challenged the program. AmCy, on the other hand, never announced suggested retail prices to its dealers, never established an explicit mark-up, and never required dealers to seek permission before lowering their price. The fact that AmCy's dealers frequently lowered retail prices below the wholesale purchase price indicates that AmCy did not implement its rebate program in order to eliminate dealers' incentives to reduce prices (*e.g.*, to develop new customers, to increase business with existing customers, or to encourage switching by customers from other manufacturers' agricultural products to AmCy's products). The majority's reliance on Khan is therefore of doubtful relevance to this case, particularly in light of the Supreme Court's recent decision to review Khan and the Commission's decision to join with the Antitrust Division of the Justice Department in the filing of an amicus brief in that Court that seeks to overrule the precedent on which Khan relies, *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and bring an end to the *per se* rule against maximum RPM. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Reversal, *State Oil v. Khan*, No.

represents an effort to circumvent the law of RPM (and of vertical restraints in general) laid down by the Supreme Court over the last twenty years.[10]

The majority's decision to issue a consent order here also cannot be supported on economic grounds. The *per se* treatment of RPM usually is justified by the assertion that such agreements almost invariably are used to support collusion, either among manufacturers or among distributors.[11] RPM could support manufacturer collusion for two reasons.[12] First, RPM may make it easier to detect cheating on a cartel agreement, because resale prices (presumably) are easier to observe than wholesale prices, and successful monitoring of prices is necessary for any successful collusive price agreement to work.[13] Second, RPM may reduce the incentive to cheat on a cartel because a manufacturer cutting its wholesale price will not increase sales by very much if the corresponding resale price cannot fall.[14] If RPM is being used to facilitate manufacturer collusion, we would expect to see other manufacturers adopting similar price restrictions; collectively, these manufacturers would have to account for sufficient total output to give them power over price.[15]

As far as I can tell, the "manufacturer cartel" theory is not relevant to the present case. The Commission's complaint does not allege, let alone provide supporting evidence, that AmCy attempted to collude

96-871 (April 1997).

[10] Today's action by the Commission has by no means established a clearer and more certain legal rule for RPM cases than exists under the rule of Colgate and other Supreme Court decisions. Whereas a supplier before today's order might know with certainty that mere voluntary adherence by a distributor to a unilaterally announced resale price policy does not constitute illegal RPM, this same supplier must now worry that the Commission may henceforth use such voluntary adherence as evidence of a *per se* illegal agreement to maintain resale prices. Moreover, as a result of today's decision, the business community may be left wondering how the Commission can -- and whether it will -- maintain the functional distinction it currently draws between, on the one hand, rebate-pass-through provisions and cooperative advertising programs -- programs that the Commission generally does not consider to be *per se* illegal -- and, on the other hand, other types of rebate programs that similarly impose restrictive conditions on the buyer.

[11] Of course, much of the empirical literature on the actual uses of RPM (*see* note 1, *supra*) casts serious doubt upon the validity of this proposition.

[12] *See* Lester G. Telser, "Why Should Manufacturers Want Fair Trade?," 3 J.L. & Econ. 86 (1960).

[13] *See* George J. Stigler, "A Theory of Oligopoly," in The Organization of Industry 39, 43 (1968) ("In general the policing of a price agreement involves an audit of the transactions prices.").

[14] This argument is subject to the obvious limitation that a manufacturer wishing to cheat on the collusive arrangement would have little incentive to enforce the RPM agreement.

[15] Of course, all of the standard factors used to analyze market power and the ability to implement and maintain collusive pricing (*e.g.*, ease of entry, heterogeneity of the products, and so forth) would also be relevant to judging the likelihood of successful supplier collusion.

with other agricultural chemical makers, such as DuPont, Monsanto, Ciba-Geigy, or BASF. There is also no evidence that these other firms used RPM, as is required for the theory to work. But even putting aside the absence of such evidence, it is difficult to imagine an arrangement less suited to cartel stability than that which existed between AmCy and its distributors. Specifically, under the terms of AmCy's C.R.O.P.™ and A.P.E.X.™ programs, a dealer's compensation was tied explicitly to the share of chemical sales accounted for by AmCy's products. Given that a crucial element of cartel enforcement is the discovery of some means by which each member can commit credibly to maintaining -- but not increasing -- its market share,[16] how could a program that explicitly rewards market share expansion plausibly be characterized as a cartel enforcement tool?

Furthermore, the available evidence suggests that the C.R.O.P.™ and A.P.E.X.™ programs were extraordinarily successful in expanding AmCy's sales and market share, which grew substantially while the program was in use. Certainly, other factors (*e.g.*, the successful introduction of several new product lines) may have accounted for a portion of this increase,[17] nevertheless, it is difficult (if not impossible) to reconcile the behavior of AmCy's output -- or of total market output -- during this period with any coherent theory of competitive harm involving collusion with other chemical makers.

In the alternative, *per se* treatment sometimes is predicated on the characterization of RPM as an aid to dealer collusion. Under such a scenario, a group of dealers pressures the supplier to adopt RPM to achieve and maintain a collusive resale price arrangement among the dealers. When RPM is used for this purpose, we would expect to see coordinated pressure on the manufacturer to adopt RPM from a group of dealers with sufficient market power to credibly threaten the manufacturer. Moreover, to be effective, the dealer cartel must enter into similar arrangements with enough manufacturers to be able to affect market price; otherwise, the collusive retail price of price-maintained products would be undermined by competition from products not subject to RPM agreements. Under such conditions, we

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[16] As Stigler (*supra* note 13, at 42) noted, "[f]ixing market shares is probably the most efficient of all methods of combating secret price reductions."

[17] The likelihood of successfully maintaining collusion in the face of product innovation (as was occurring in this instance) is, of course, quite small. Collusion is more likely to be successful, the greater the degree of similarity (*e.g.*, in terms of cost, demand, and product characteristics) among the parties to the agreement.

would expect the manufacturer to be a reluctant participant in the scheme, though it would enforce the RPM agreement if the dealer threats were credible. Finally, it is unlikely that the colluding dealers would carry competing products not subject to RPM agreements, as that would be equivalent to cheating on the collusively-determined resale margin.

This second anticompetitive theory fits the facts of this case no better than the first. The Commission's complaint does not allege that AmCy is the victim of a dealer cartel. As I already have noted, it does not appear that other manufacturers had similar arrangements with the members of any putative "dealer cartel," or that this "cartel" eschewed the products of rival manufacturers.[18] Had AmCy been the victim of a cartel, its attitude toward the Commission and numerous state investigations should have been one of grateful acquiescence, because the enforcement agencies would be rescuing it from the clutches of its rapacious dealers. In fact, of course, AmCy unilaterally terminated the challenged provisions of the C.R.O.P.™ and A.P.E.X.™ programs several years ago. So much for "dealer coercion,"[19]

Given that neither of the two traditional anticompetitive theories can be reconciled with the terms of the AmCy program, could the Commission's action be justified on some other basis? The Commission might attempt to seek refuge in some unilateral theory of market power, under which a manufacturer with substantial pre-existing market power is hypothesized to use vertical restraints because, for some reason, it cannot extract the full value of its market power simply by raising its wholesale price. The economics literature certainly acknowledges such possibilities, but these theories provide

[18] This is unsurprising, because over 2500 dealers participated in the C.R.O.P.™ and A.P.E.X.™ programs. It is fanciful to believe that a cartel could have been formed from among such a large number of dealers. If such a cartel exists, one might reasonably ask why the dealers that belong to it are not also named in the Commission's complaint.

[19] In its reply, the majority appears to suggest that the existence of a dealer cartel can be inferred from the allegation that "a dealer's advisory council voted to advise American Cyanamid to retain the program in order to protect its margins." Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of American Cyanamid, at note 5. Even if an advisory council furnished this advice to AmCy, communications of this nature between dealers and manufacturers do not establish that the dealers acted collusively. Moreover, the fact that dealers may have communicated this advice says nothing about the competitive effects of AmCy's rebate program. One would expect dealers to provide this same "advice" if AmCy's program were designed to prevent discounters from free-riding on the pre-sale services provided by other dealers.

a fragile basis for antitrust enforcement.[20] As such models show, vertical restraints often can improve consumer welfare even when adapted by firms with substantial market power,[21] the models fail, however, to provide empirical criteria by which enforcers can distinguish anticompetitive from procompetitive effects.[22] Thus, the practical utility of these theories is questionable even for conduct judged under the rule of reason; their inability to justify a policy of *per se* illegality appears self-evident.

On several grounds, therefore, issuance of the complaint and consent order in this matter represents a poor policy choice by the Commission. From a legal perspective, AmCy's conduct does not constitute an illegal agreement to maintain resale prices; from an economic perspective, the evidence points to the conclusion that AmCy's conduct was procompetitive; and from a policy perspective, the Commission's decision hardly delineates a clearer distinction (and in fact seriously blurs the line) between conduct likely to be subject to *per se* condemnation and conduct that is not. Instead of reaching for ways to expand the application of the *per se* rule to conduct that is plainly procompetitive, enforcers should reserve their heavy hand for conduct that falls within standards for *per se* illegality clearly enunciated by the Supreme Court.

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[20] *See, e.g.*, Remarks of Commissioner Roscoe B. Starek, III, "Reinventing Antitrust Enforcement? Antitrut at the FTC in 1995 and Beyond," before a conference on "A New Age of Antitrust Enforcement: Antitrust in 1995" (Marina del Rey, California, Feb. 24, 1995).

[21] As I noted earlier (*supra* note 2), market power is a necessary, but not a sufficient, condition for vertical restraints to reduce consumer welfare.

[22] As Katz (*supra* note 1, at 713-14) notes, "[much of the literature on vertical restraints has been conducted with the express aim of deriving policy conclusions. But in many, if not most, instances there is no widespread agreement on whether a particular vertical practice is socially beneficial or harmful. This unhappy state of affairs is due, in part, to the fact that all of the practices can be beneficial in some instances and harmful in others, and it may be extremely difficult to distinguish between the two cases."

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3740. Complaint, May 16, 1997--Decision, May 16, 1997

This consent order requires, among other things, American Home Products Corporation ("AHP"), a New Jersey-based manufacturer of animal vaccines, to divest Solvay's U.S. and Canada rights to three types of vaccines to the Schering-Plough Corporation; to assist Schering-Plough in obtaining U.S. Department of Agriculture ("USDA") certifications; and to manufacture and supply the three vaccines to Schering-Plough for 24 to 36 months or until Schering-Plough obtains USDA approvals. The consent order also prohibits AHP from suing Schering-Plough for patent infringements relating to the vaccines.

Appearances

For the Commission: *Casey Triggs, Ann Malester* and *William Baer*.

For the respondent: *Michael Sohn, Arnold & Porter*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, American Home Products Corporation ("AHP"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the animal health business of Solvay S.A. ("Solvay"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. *"Canine Lyme Vaccines"* means all vaccines used to create and maintain antitoxin levels in dogs to prevent lyme disease.

2. *"Canine Corona Virus Vaccines"* means all combination vaccines used to create and maintain antitoxin levels in dogs to

prevent corona virus, including the single antigens contained therein, individually, or in any combination.

3. *"Feline Leukemia Vaccines"* means all combination vaccines used to create and maintain antitoxin levels in cats to prevent feline leukemia, including the single antigens contained therein, individually, or in any combination.

4. *"Respondent"* means AHP.

II. RESPONDENT

5. Respondent AHP is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at Five Giralda Farms, Madison, New Jersey.

6. Respondent is engaged in, among other things, the research, development, manufacture and sale of Canine Lyme Vaccines, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines.

7. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

8. Solvay is a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its principal place of business located at Rue du Prince Albert, 33, 1050 Brussels, Belgium.

9. Solvay is engaged in, among other things, the research, development, manufacture and sale of Canine Lyme Vaccines, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines.

10. Solvay is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

11. On October 31, 1996, AHP entered into a Purchase Agreement with Solvay to purchase Solvay's entire animal health business for approximately $463 million ("Acquisition").

V. THE RELEVANT MARKETS

12. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

A. The research, development, manufacture and sale of Canine Lyme Vaccines;

B. The research, development, manufacture and sale of Canine Corona Virus Vaccines; and

C. The research, development, manufacture and sale of Feline Leukemia Vaccines.

13. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

VI. STRUCTURE OF THE MARKETS

14. The market for the research, development, manufacture and sale of Canine Lyme Vaccines is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The post merger HHI is 8,042 points, which is an increase of 1,976 points over the premerger HHI level. AHP and Solvay are two of only three suppliers of Canine Lyme Vaccines in the United States.

15. AHP and Solvay are actual competitors in the relevant market for the research, development, manufacture and sale of Canine Lyme Vaccines in the United States.

16. The market for the research, development, manufacture and sale of Canine Corona Virus Vaccines is highly concentrated as measured by the HHI. The post merger HHI is 5,496 points, which is an increase of 809 points over the premerger HHI level. AHP and Solvay are two of only a small number of suppliers of Canine Corona Virus Vaccines in the United States. With the exception of Solvay, other suppliers of Canine Corona Virus Vaccines license from AHP the right to manufacture and sell their vaccines.

17. AHP and Solvay are actual competitors in the relevant market for the research, development, manufacture and sale of Canine Corona Virus Vaccines in the United States.

18. The market for the research, development, manufacture and sale of Feline Leukemia Vaccines is highly concentrated as measured by the HHI. The post merger HHI is 6,980 points, which is an increase of 3,353 over the premerger HHI level. AHP and Solvay are two of only three suppliers of Feline Leukemia Vaccines in the United States.

19. AHP and Solvay are actual competitors in the relevant market for the research, development, manufacture and sale of Feline Leukemia Vaccines in the United States.

VII. BARRIERS TO ENTRY

20. Entry into the research, development, manufacture and sale of Canine Lyme Vaccines and Canine Corona Virus Vaccines is difficult and time consuming, requiring the expenditure of significant resources over a period of many years with no assurance that a viable commercial product will result. The existence of broad patents governing the manufacture of such products compounds the difficulty of new entry.

21. Entry into the research, development, manufacture and sale of Feline Leukemia Vaccines is difficult and time consuming, requiring the expenditure of significant resources over many years with no assurance that a viable commercial product will result.

22. The need to obtain approvals by the United States Department of Agriculture to manufacture and sell animal vaccines in the United States further lengthens the time required to enter the relevant markets.

VIII. EFFECTS OF THE ACQUISITION

23. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

A. By eliminating actual, direct, and substantial competition between AHP and Solvay in the relevant markets;

B. By increasing the likelihood that AHP will unilaterally exercise market power in the relevant markets; and

C. By increasing the likelihood of collusion or coordinated action among the remaining firms in the relevant markets.

IX. VIOLATIONS CHARGED

24. The Acquisition agreement described in paragraph eleven constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

25. The Acquisition described in paragraph eleven, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of Solvay S.A., ("Solvay") and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented 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

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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The 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 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 described in Section 2.34 of its Rules, the Commission

hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Home Products Corporation ("AHP") is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at Five Giralda Farms, Madison, 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.

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

A. *"AHP"* or *"respondent"* means American Home Products Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by AHP, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. *"Solvay"* means Solvay S.A., a corporation organized, existing and doing business under the laws of Belgium with its principal place of business located at Rue du Prince Albert, 33, 1050 Brussels, Belgium.

C. *"Acquisition"* means the acquisition by AHP of the animal health business of Solvay pursuant to a letter of intent dated September 12, 1996.

D. *"Interim Trustee"* means the trustee set forth in paragraph III of this order.

E. *"Divestiture Trustee"* means the trustee set forth in paragraph IV of this order.

F. *"Acquirer"* means Schering-Plough, Ltd., ("Schering-Plough") or the entity to whom AHP shall divest the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and Feline Leukemia Vaccine Assets pursuant to paragraph II of this order.

G. *"New Acquirer"* means the entity to whom the Divestiture Trustee shall divest the Solvay Companion Animal Vaccine Assets pursuant to paragraph IV of this order.

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

I. *"Canine Lyme Vaccine"* means all Solvay vaccines used to create and maintain antitoxin levels in dogs to prevent lyme disease.

J. *"Canine Lyme Vaccine Assets"* means Solvay's assets and rights, as of the date AHP signs this agreement containing consent order, relating to the research, development, manufacture and sale of Canine Lyme Vaccine that are not part of Solvay's physical facilities; provided, however, that for the single antigen lyme, "Canine Lyme Vaccine Assets" does not include, and AHP may retain, a non-exclusive right for AHP to research, develop, manufacture and sell products for use in species other than canines. "Canine Lyme Vaccine Assets" does not include, and AHP may retain, co-exclusive rights to all regulatory approvals relating to sales outside the United States and Canada and a non-exclusive right for AHP to research, develop, and manufacture Canine Lyme Vaccine for sale outside the United States and Canada.

K. *"Canine Corona Virus Vaccines"* means all Solvay combination vaccines used to create and maintain antitoxin levels in dogs to prevent corona virus, including the single antigens contained therein, individually, or in any combination.

L. *"Canine Corona Virus Vaccine Assets"* means Solvay's assets and rights, as of the date AHP signs this agreement containing consent order, relating to the research, development, manufacture and sale of Canine Corona Virus Vaccines that are not part of Solvay's physical facilities. "Canine Corona Virus Vaccine Assets" includes, but is not limited to, any single antigen included in any Solvay canine corona virus combination vaccine and those Solvay projects relating to improving any of the antigens currently in any canine corona virus combination vaccine or the research and development of any antigens for possible inclusion in any canine corona virus combination vaccine in the future; provided, however, that for the single antigen corona, "Canine Corona Virus Vaccine Assets" does not include, and AHP may retain, a non-exclusive right for AHP to research, develop, manufacture and sell products for use in species other than canines. "Canine Corona Virus Vaccine Assets" does not include, and AHP may retain, co-exclusive rights to all regulatory approvals relating to sales outside the United States and Canada and a non-exclusive right

for AHP to research, develop, and manufacture Canine Corona Virus Vaccines for sale outside the United States and Canada.

M. *"Feline Leukemia Vaccines"* means all Solvay combination vaccines used to create and maintain antitoxin levels in cats to prevent feline leukemia, including the single antigens contained therein, individually, or in any combination.

N. *"Feline Leukemia Vaccine Assets"* means Solvay's assets and rights, as of the date AHP signs this agreement containing consent order, relating to the research, development, manufacture and sale of Feline Leukemia Vaccines that are not part of Solvay's physical facilities. "Feline Leukemia Vaccine Assets" includes, but is not limited to, any single antigen in any Solvay feline leukemia combination vaccine and Solvay projects relating to improving any of the antigens currently in any feline leukemia combination vaccine or the research and development of any antigens for possible inclusion in any feline leukemia combination vaccine in the future. "Feline Leukemia Vaccine Assets" does not include, and AHP may retain, co-exclusive rights to all regulatory approvals relating to sales outside the United States and Canada and a non-exclusive right for AHP to research, develop, manufacture, and sell Solvay's feline leukemia combination vaccines with rabies for a period of four years from the date this order becomes final. "Feline Leukemia Vaccine Assets" does not include, and AHP may retain, co-exclusive rights to all regulatory approvals relating to sales outside the United States and Canada and a non-exclusive right to research, develop, manufacture and sell the rabies single antigen. AHP shall have the exclusive rights to any combination of the rabies antigen with other AHP antigens. "Feline Leukemia Vaccine Assets" does not include, and AHP may retain, co-exclusive rights to all regulatory approvals relating to sales outside the United States and Canada and a non-exclusive right for AHP to research, develop, manufacture and sell Feline Leukemia Vaccines outside the United States and Canada. "Feline Leukemia Vaccine Assets" does not include, and AHP may retain, an exclusive right for AHP to research, develop, manufacture and sell products incorporating the feline immunodeficiency virus and feline infectious peritonitis antigens.

O. *"Equine Vaccines"* means all Solvay equine vaccines in combination or single antigen.

P. *"Equine Vaccine Assets"* means Solvay's assets and rights as of the date AHP signs this agreement containing consent order, relating

to the research, development, manufacture and sale of Equine Vaccines manufactured at the Charles City Facility that are not part of Solvay's physical facilities. "Equine Vaccine Assets" includes, but is not limited to, any single antigens included in any Solvay equine combination vaccine and those Solvay projects relating to improving any of the antigens currently in any equine combination vaccine or the research and development of any antigens for possible inclusion in any equine combination vaccine.

Q. *"Solvay Companion Animal Vaccine Assets"* means Solvay's assets and rights, including, but not limited to, all inventory designated for sale in the United States and Canada and 50% of the inventory designated for sale outside the United States and Canada, as of the date the Divestiture Trustee divests to the New Acquirer, relating to the research, development, manufacture and sale of Canine Lyme Vaccine Assets, Canine Corona Virus Vaccines Assets, Feline Leukemia Vaccines Assets and Equine Vaccines Assets, including the single antigens contained therein, individually, or in any combination. "Solvay Companion Animal Vaccine Assets" includes, but is not limited to, the Charles City Facility and at AHP's discretion a supply contract, for a term not to exceed (3) three years, from the date of the divestiture between AHP and the New Acquirer, to supply AHP (i) any swine or poultry vaccines for sale worldwide, (ii) any Canine Lyme Vaccine, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines for sale by AHP outside the United States and Canada and (iii) single antigen rabies vaccine and feline leukemia combination vaccine containing rabies for sale worldwide being produced at the Charles City Facility at the time of divestiture to the New Acquirer and priced at each vaccine's Average Total Cost.

R. *"Divestiture Agreement"* means the agreement for the sale of Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and Feline Leukemia Vaccine Assets between AHP and an Acquirer or New Acquirer.

S. *"Charles City Facility"* means the facility located in Charles City, Iowa, in which Solvay manufactures companion animal biologicals.

T. *"Contract Manufacture Agreement"* means an agreement to manufacture Canine Lyme Vaccine, Canine Corona Virus Vaccines, Feline Leukemia Vaccines or rabies vaccine by AHP for sale to the Acquirer or New Acquirer.

U. *"Contract Manufacture"* means the manufacture of Canine Lyme Vaccine, Canine Corona Virus Vaccines, Feline Leukemia Vaccines or rabies vaccine by AHP for sale to the Acquirer or New Acquirer.

V. *"Cost"* means Solvay's average direct per unit cost for each of the single antigens and the combination vaccines referred to in Definitions "J," "L" and "N".

W. *"USDA"* means the United States Department of Agriculture.

X. *"Average Total Cost"* means average direct per unit cost including all allocated overhead for each of the swine and poultry vaccines, Canine Lyme Vaccine, Canine Corona Virus Vaccines, Feline Leukemia Vaccines, single antigen rabies vaccine and feline leukemia combination vaccine with rabies referred to in Definition "Q".

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, the Solvay Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and the Feline Leukemia Vaccine Assets to (1) Schering-Plough, in accordance with the agreement dated January 30, 1997, no later than ten (10) days after the date on which this order becomes final; or, (2) at no minimum price, within ninety (90) days of the date on which this order becomes final, to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and Feline Leukemia Vaccine Assets is to ensure the continued use of the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and Feline Leukemia Vaccine Assets in the same business in which the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and Feline Leukemia Vaccine Assets are engaged at the time of the proposed Acquisition and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

B. Respondent shall enter into a Divestiture Agreement with Schering-Plough or an Acquirer that shall include the following and AHP shall commit to satisfy the following:

1. AHP shall Contract Manufacture and deliver to the Acquirer (or the New Acquirer, as applicable) in a timely manner and under reasonable terms and conditions, a supply of Solvay's Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines specified in the Divestiture Agreement at Cost for a period not to exceed twenty-four (24) months from the date the Divestiture Agreement (or the New Acquirer's Divestiture Agreement) is approved, or three (3) months after the date the Acquirer or the New Acquirer obtains all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines in the United States, whichever is earlier; provided, however, that the twenty-four (24) month period may be extended by the Commission for one additional period of up to twelve (12) months if the Interim Trustee submits to the Commission the certification provided for in subparagraph II.B.8 of this order.

2. After AHP commences delivery of the Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines to the Acquirer or the New Acquirer pursuant to subparagraph II.B of this order, all United States and Canadian inventory of the Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines acquired by AHP through the Acquisition may be sold by AHP only to the Acquirer (or the New Acquirer, as applicable).

3. AHP shall make representations and warranties to the Acquirer or the New Acquirer that the Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines supplied pursuant to the Contract Manufacturing Agreement by AHP to the Acquirer or the New Acquirer meet the USDA approved specifications. AHP shall agree to indemnify, defend and hold the Acquirer or the New Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines supplied to the Acquirer or New Acquirer pursuant to the Contract Manufacturing Agreement by AHP to meet USDA specifications. This obligation shall be contingent upon the Acquirer or the New Acquirer giving AHP prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting AHP to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require AHP to be liable for any

negligent act or omission of the Acquirer or the New Acquirer or for any representations and warranties, express or implied, made by the Acquirer or the New Acquirer that exceed the representations and warranties made by AHP to the Acquirer or the New Acquirer.

4. During the term of the Contract Manufacturing Agreement between AHP and the Acquirer or the New Acquirer, upon reasonable request by the Acquirer, New Acquirer or the Interim Trustee, AHP shall make available to the Interim Trustee all records kept in the normal course of business that relate to the Cost of manufacturing Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines.

5. Upon reasonable notice and request from the Acquirer or the New Acquirer to AHP, AHP shall provide: (a) such assistance and advice as is reasonably necessary to enable the Acquirer or the New Acquirer to obtain all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States; (b) such assistance to the Acquirer or New Acquirer as is reasonably necessary to enable the Acquirer or New Acquirer to manufacture Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in substantially the same manner and quality employed or achieved by Solvay at the time the agreement containing consent order is signed; and (c) consultation with knowledgeable employees of AHP and training at either the Charles City Facility or the Acquirer's or New Acquirer's facility, at the Acquirer's or New Acquirer's option for a period of time until the Acquirer or New Acquirer receives certification from the USDA or abandons its efforts for certification from the USDA, sufficient to satisfy reasonably the management of the Acquirer or New Acquirer that its personnel are adequately trained in the manufacture and sale of Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States. Such assistance shall include an on-site inspection of the Charles City Facility, at the Acquirer's or New Acquirer's request, that is the specified source of supply of the Contract Manufacturing. AHP may require reimbursement from the Acquirer or New Acquirer for all its direct out-of-pocket expenses incurred in providing the services required by this subparagraph II.B.5.

6. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission, at the same time that the respondent submits its application for approval of divestiture, a

certification attesting to the good faith intention of the Acquirer or the New Acquirer, including an actual plan by the Acquirer or the New Acquirer, to obtain in an expeditious manner all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States.

7. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Interim Trustee, periodic verified written reports setting forth in detail the efforts of the Acquirer or the New Acquirer to sell in the United States, Canine Lyme Vaccine, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines obtained pursuant to the Contract Manufacturing Agreement and to obtain all USDA approvals necessary to manufacture and sell its own Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States. The Divestiture Agreement shall require the first such report to be submitted 60 days from the date the Divestiture Agreement is approved by the Commission and every 90 days thereafter until all necessary USDA approvals are obtained by the Acquirer or the New Acquirer to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States. The Divestiture Agreement shall also require the Acquirer or the New Acquirer to report to the Commission and the Interim Trustee within ten (10) days of its ceasing the sale in the United States of Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines obtained pursuant to the Contract Manufacture Agreement for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary USDA approvals to manufacture and sell its own Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines in the United States.

8. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or the New Acquirer: (a) voluntarily ceases for sixty (60) days or more the sale of Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines (except for feline leukemia combinations including the rabies antigen) in the United States prior to obtaining all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines in the United States; (b) abandons its efforts to obtain all necessary USDA approvals to manufacture and sell Canine Lyme

Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines (except for feline leukemia combinations including the rabies antigen)in the United States; or (c) fails to obtain all necessary USDA approvals of its own to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines (except for feline leukemia combinations including the rabies antigen) in the United States within twenty-four (24) months from the date the Commission approves the Divestiture Agreement between AHP and the Acquirer or the New Acquirer; provided, however, that the twenty-four (24) month period may be extended by the Commission for one additional period of up to twelve (12) months if the Interim Trustee certifies to the Commission that the Acquirer or the New Acquirer made good faith efforts to obtain all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States and that such USDA approvals appear likely to be obtained within such extended time period.

9. The Divestiture Agreement shall provide that if it is terminated, the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets, and the Feline Leukemia Vaccine Assets shall revert back to AHP and the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets, and the Feline Leukemia Vaccine Assets shall be divested by the Divestiture Trustee to a New Acquirer pursuant to the provisions of paragraph IV of this order.

C. While the obligations imposed by paragraphs II, III or IV of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines, Feline Leukemia Vaccines, including the single antigen rabies, and Equine Vaccines in the United States; (2) to maintain the viability and marketability of the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets, Feline Leukemia Vaccine Assets, including single antigen rabies, and Equine Vaccine Assets, as well as all tangible assets, including the Charles City Facility, used to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets, Feline Leukemia Vaccine Assets and Equine Vaccine Assets,

including the Charles City Facility, used to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines, Feline Leukemia Vaccines or Equine Vaccines except for ordinary wear and tear. Nothing herein shall prohibit AHP from transferring products, including the single antigen rabies, other than the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets, Feline Leukemia Vaccine Assets, or Equine Vaccine Assets from the Charles City Facility to any other AHP facility.

D. Respondent agrees not to sue the Acquirer or the New Acquirer for patent infringement with regard to the Acquirer's or the New Acquirer's manufacture or sale of Canine Corona Virus Vaccines or Feline Leukemia Vaccines. Respondent agrees not to acquire the right to sue the Acquirer or the New Acquirer for patent infringement with regard to the Acquirer's or the New Acquirer's manufacture or sale of the Canine Lyme Vaccine.

III.

It is further ordered, That:

A. At any time after the order becomes final, the Commission may appoint an Interim Trustee to monitor that AHP and the Acquirer or New Acquirer, expeditiously perform their respective responsibilities as required by this order and the Divestiture Agreement approved by the Commission. AHP shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this paragraph:

1. The Commission shall select the Interim Trustee, subject to the consent of AHP, which consent shall not be unreasonably withheld. If AHP 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 AHP of the identity of any proposed trustee, AHP shall be deemed to have consented to the selection of the proposed trustee.

2. The Interim Trustee shall have the power and authority to monitor AHP's compliance with the terms of this order and with the terms of the Divestiture Agreement with the Acquirer or New Acquirer.

3. Within ten (10) days after appointment of the Interim Trustee, AHP shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor AHP's compliance with the terms of this order and with the Divestiture Agreement with the Acquirer or New Acquirer, and to monitor the compliance of the Acquirer or New Acquirer under the Divestiture Agreement.

4. The Interim Trustee shall serve until such time as the Acquirer or New Acquirer has received all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines (except for feline leukemia combinations including rabies) in the United States.

5. The Interim Trustee shall have full and complete access to AHP's personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of Canine Lyme Vaccine, Canine Corona Virus Vaccines, or Feline Leukemia Vaccines, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacturing of Canine Lyme Vaccine, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines. AHP shall cooperate with any reasonable request of the Interim Trustee. AHP shall take no action to interfere with or impede the Interim Trustee's ability to monitor AHP's compliance with paragraphs II, III and IV of this order and the Divestiture Agreement between AHP and the Acquirer or New Acquirer.

6. The Interim Trustee shall serve, without bond or other security, at the cost and expense of AHP, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the cost and expense of AHP, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

7. AHP shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim 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 Interim Trustee.

8. If the Interim Trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in subparagraph III.A.1 of this order.

9. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this order and the Divestiture Agreement with the Acquirer or New Acquirer.

10. The Interim Trustee shall evaluate reports submitted to it by the Acquirer or the New Acquirer with respect to the efforts of the Acquirer or the New Acquirer to obtain all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines. The Interim Trustee shall report in writing to the Commission every two months concerning compliance by AHP and the Acquirer or New Acquirer, with the provisions of paragraphs II, III and IV of this order and the efforts of the Acquirer or New Acquirer to obtain all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines in the United States.

B. If the Commission terminates the Divestiture Agreement pursuant to subparagraph II.B.8 of this order, the Commission may direct the Interim Trustee to seek a New Acquirer, as provided for in subparagraph II.B.9 of this order.

IV.

It is further ordered, That:

A. If AHP fails to divest absolutely and in good faith, and with the Commission's prior approval: the Canine Lyme Vaccine Assets, the Canine Corona Virus Vaccine Assets, and the Feline Leukemia Vaccine Assets and comply with the requirements of paragraph II of this order, or if Schering-Plough or the Acquirer abandons its efforts

or fails to obtain all necessary regulatory approvals in the manner set out in paragraph II.B.8(b) and (c), then any executed Divestiture Agreement between AHP and Schering-Plough or an Acquirer, as applicable, shall be terminated and the Commission may appoint a Divestiture Trustee to divest the Solvay Companion Animal Vaccine Assets and execute a new Divestiture Agreement that satisfies the requirements of paragraph II of this order. The Divestiture Trustee may be the same person as the Interim Trustee and will have the authority and responsibility to divest the Solvay Companion Animal Vaccine Assets absolutely and in good faith, and with the Commission's prior approval. The proceeds of any divestiture by the Divestiture Trustee shall be for the account of AHP.

B. If the Commission terminates a Divestiture Agreement and if a Divestiture Trustee is appointed or directed by the Commission or a court pursuant to subparagraph A of this paragraph to divest the Solvay Companion Animal Vaccine Assets to a New Acquirer, AHP shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Divestiture Trustee shall have the same authority and responsibilities with respect to the New Acquirer as those described in paragraph III of this order, as well as the authority and responsibility necessary to effect the required divestiture pursuant to this paragraph.

2. Neither the decision of the Commission to direct the Divestiture Trustee, nor the decision of the Commission not to direct the Divestiture Trustee, to divest any of the assets under subparagraph A of this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

3. The Commission shall select the Divestiture Trustee, subject to the consent of AHP, which consent shall not be unreasonably withheld. If AHP has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to AHP of the identity of any proposed Divestiture Trustee, AHP shall be deemed to have consented to the selection of the proposed Divestiture

Trustee. The Divestiture Trustee may be the same person as the Interim Trustee.

4. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Solvay Companion Animal Vaccine Assets to a New Acquirer pursuant to the terms of this order and to enter into a Divestiture Agreement with the New Acquirer pursuant to the terms of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission.

5. Within ten (10) days after appointment of the Divestiture Trustee, AHP shall execute a (or amend the existing) trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Solvay Companion Animal Vaccine Assets to a New Acquirer and to enter into a Divestiture Agreement with the New Acquirer.

6. The Divestiture Trustee shall have six (6) months from the date the Commission approves the trust agreement described in subparagraph IV.B.3 of this order to divest the Solvay Companion Animal Vaccine Assets and to enter into a Divestiture Agreement with the New Acquirer that satisfies the requirements of paragraph II of this order. If, however, at the end of the applicable six (6)month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such 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 such divestiture period only two (2) times.

7. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of AHP related to the manufacture, distribution, or sale of the Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines or to any other relevant information, as the Divestiture Trustee may request. AHP shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. AHP shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities.

8. The Divestiture Trustee shall use reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to AHP's absolute and unconditional obligation to divest at no minimum price and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of the order; to assure that AHP enters into a Divestiture Agreement that complies with the provisions of paragraph IV.A; to assure that AHP complies with the remaining provisions of paragraphs IV of this order; and to assure that the New Acquirer obtains all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines in the United States. The divestiture shall be made to, and the Divestiture Agreement executed with, the New Acquirer in the manner set forth in paragraph II of this order; provided, however, if the Divestiture Trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by AHP from among those approved by the Commission.

9. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of AHP, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of AHP, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture 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 AHP. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating a New Acquirer and assuring compliance with this order.

10. AHP shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture 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 Divestiture Trustee.

11. If the Divestiture 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.

12. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this order.

13. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Solvay Companion Animal Vaccine Assets.

14. The Divestiture Trustee shall report in writing to AHP and the Commission every two months concerning his or her efforts to divest the relevant assets, AHP's compliance with the terms of this order, and the New Acquirer's efforts to obtain all necessary USDA approvals to manufacture and sell the Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines.

V.

It is further ordered, That:

A. Within sixty (60) days of the date this order becomes final and every ninety (90) days thereafter until AHP has fully complied with the provisions of paragraphs II, III and IV of this order, AHP shall submit to the Commission a verified written report setting forth in detail the manner and form of which it intends to comply, is complying, and has complied with these paragraphs of this order. AHP shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with these paragraphs of this order, including a description of all substantive contacts or negotiations for accomplishing the divestiture and entering into the Divestiture Agreement required by this order, including the identity of all parties contacted. AHP shall include in its compliance reports copies of all written communications to and from such parties, all internal

memoranda, and all reports and recommendations concerning the Divestiture Agreement required by paragraph II.

B. One (1) year from the date this order becomes final and annually until AHP has complied with all terms of this order or until the Acquirer or New Acquirer has obtained all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States, and at such other times as the Commission may require, AHP shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent, respondent shall permit any duly authorized representatives 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 consent order; and

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

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

IN THE MATTER OF

SCHERING-PLOUGH HEALTHCARE PRODUCTS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3741. Complaint, May 16, 1997--Decision, May 16, 1997

This consent order prohibits, among other things, the Tennessee-based manufacturer of health care products from making certain claims about the effectiveness or length of protection provided by any children's sun protection product unless they possess scientific evidence to substantiate the claims, and from misrepresenting the existence, contents, validity, results or conclusions of any test or study concerning sun protection products. The consent order requires the respondent to produce and distribute 150,000 consumer education brochures regarding sunscreen protection for children.

Appearances

For the Commission: *Mamie Kresses* and *Toby Levin.*

For the respondent: *Nancy Buc, Buc & Beardsley,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Schering-Plough Healthcare Products, Inc., a corporation, ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Schering-Plough Healthcare Products, Inc. is a Delaware corporation, with its principal office or place of business at 3030 Jackson Avenue, Memphis, Tennessee.

PAR. 2. Respondent has manufactured, advertised, labeled, promoted, offered for sale, sold, and distributed over-the-counter health care products, including "Coppertone Kids" sunblock lotion, to consumers. Coppertone Kids is a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for

Coppertone Kids, including but not necessarily limited to the attached Exhibits A through H. These advertisements and promotional materials contain the following statements and depictions:

A. (Depiction: child performing cannonball dive off of diving board) Coppertone Kids sunblock lasts through 32 back flips, 64 cannonballs and 52 belly flops. Introducing new Coppertone Kids 6-Hour Waterproof Sunblock. It goes on. And goes on protecting. In and out of the water, all day long. Because it's the sunblock that keeps kids protected from the sun, and waterproof for a full six hours. As proven by kids themselves in test after test. Coppertone Kids 6-Hour Waterproof Sunblock. It goes on. And stays on. Read and follow label directions (Exhibit A)(magazine ad)

B. (Depiction: child performing cannonball dive off of diving board) Coppertone KIDS sunblock lasts through 32 back flips, 64 cannonballs and 52 belly flops. Coppertone KIDS 6-Hour Waterproof Sunblock goes on and stays on. In and out of the water. All day long. Because it's the waterproof sunblock that keeps kids protected from the sun for a full six hours. As proven by kids themselves in test after test. Coppertone KIDS 6-Hour Waterproof Sunblock. It goes on and stays on. Read and follow label directions (Exhibit B)(magazine ad)

C. (Sound effects: kids playing in pool) ... Kids can last in the water for hours...But all sunblocks can't. That's why there's Coppertone Kids Waterproof Sunblock. It lasts 6 full hours, in and out of the water, so you don't have to reapply it as often. Which means your kids get great protection, and you get peace of mind...Coppertone Kids 6-Hour Waterproof Sunblock. It goes on and stays on. Use as directed. (Exhibit C) (radio ad)

D. (Sound effects: kids playing in pool; mother repeating herself) Billy, time for more sunblock. ...time for more sunblock. ...time for more sunblock... Coppertone Kids waterproof sunblock is made to last a full 6 hours, in and out of the water, so you won't have to reapply it as often. That means your kids get great protection, and you can stop repeating yourself... Coppertone Kids 6 hour waterproof sunblock. It goes on. And stays on. (Exhibit D) (radio ad)

E. (Depiction: Three mothers fishing at the ocean. One mother reels in her son from the water, applies sunscreen on the child, and then cuts the fishing line holding him) ...Mom's gotta keep a line on her kids... 'cause she's gotta keep re-applying that sunblock every time they come out of the water. But now there's new Coppertone Kids 6 Hour Waterproof Sunblock. (super: USE ONLY AS DIRECTED) It keeps a kid protected from the sun, and waterproof for a full six hours. So Mom puts it on...and cuts them loose... New Coppertone Kids 6 Hour Waterproof Sunblock. It goes on and stays on. (Super: It goes on. And stays on.) (Exhibit E) (tv ad)

F. Coppertone Kids sunblock is uniquely formulated to provide long-lasting waterproof protection. This waterproof formula lasts for a full 6 HOURS in and out of the water, and keeps kids protected from the sun's burning UVA and UVB rays. 6-HOUR WATERPROOF - Ideal for water active kids. LONG LASTING - Kid tested to go on and stay on... (Exhibits F & G) (label and promotion sample)

G. Dear Doctor: ...Coppertone, the most trusted name in suncare, now provides a complete line of sunblocks specially formulated for children...Coppertone KIDS offers 6-hour waterproof protection. ...

Coppertone KIDS
* Waterproof for a full 6 hours
* Long-lasting protection...
* Available in SPF 15 and 30
... All Coppertone Children's Sunblocks are clinically tested on children, so you can be confident your patients are getting safe, effective sun protection. (Exhibit H) (promotional letter to doctors)

PAR. 5. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through H, respondent has represented, directly or by implication, that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water.

PAR. 6. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through H, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 7. In truth and in fact, at the time it made the representation set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A, B, F, G and H, respondent has represented, directly or by implication, that it has conducted tests demonstrating that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water.

PAR. 9. In truth and in fact, respondent has not conducted tests demonstrating that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water. Among other reasons, none

of the tests relied upon by respondent evaluated a single application of the product under the advertised conditions of use, *i.e.*, sustained vigorous activity in and out of the water. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

EXHIBIT G

EXHIBIT H

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 complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the 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 Act, 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. Respondent Schering-Plough Healthcare Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office or place of business at 3030 Jackson Avenue, Memphis, Tennessee.

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 the purpose of this order, the following definitions shall apply:

A. *"Sun protection product"* shall mean any product intended for, or promoted as, providing users with protection against the harmful effects of sun exposure or ultraviolet radiation, including but not limited to products containing a sunscreen ingredient.

B. *"Children's sun protection product"* shall mean any sun protection product that uses the word "babies," "children," "kids," or words of similar import in the name or promotion of the product, or that is advertised or promoted for use primarily by children under the age of twelve (12).

C. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondent, Schering-Plough Healthcare Products, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Coppertone Kids or any other children's sun protection product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication:

A. The length of time that a single application of the product will provide protection from the sun for individuals engaged in sustained vigorous activity in and out of the water; or

B. The efficacy of such product in providing protection against any harmful effect of sun exposure or ultraviolet radiation,

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, Schering-Plough Healthcare Products, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any sun protection product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test or study.

III.

Nothing in this order shall prohibit respondent from making any representation for any sun protection product that is specifically permitted in labeling for any such product under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IV.

It is further ordered, That respondent shall design, produce and print a color brochure concerning the importance of sunscreen usage by children, which contains all of the following messages or themes:

A. The importance of sunscreens in preventing skin damage, including skin cancer, sunburn and premature skin aging;

B. Regular use of a high SPF sunscreen during childhood can significantly reduce the risk of certain types of skin cancers later in life;

C. A single bad sunburn during childhood can significantly increase a child's risk of developing skin cancer later in life;

D. The importance of proper application of sunscreens;

E. The need to reapply sunscreens after toweling or sustained vigorous activity; and

F. The need to use sunscreens during outdoor activities -- not only in connection with water activities.

Respondent shall submit a draft of the brochure, and a draft plan for its dissemination, no later than sixty (60) days after the date of service of this order, to the Associate Director of the Commission's Division of Advertising Practices for review and approval. No later than sixty (60) days after the Associate Director's approval of the brochure and the dissemination plan, respondent shall disseminate 150,000 copies of the brochure to parents or organizations with access to parents or others who work with or care for children under the age of 12.

V.

It is further ordered, That, for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating any such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers or governmental organizations.

VI.

It is further ordered, That the provisions of this order shall not apply to any label or labeling printed prior to the date of service of this order and shipped by respondent to purchasers for resale prior to one hundred (100) days after service of this order.

VII.

It is further ordered, That respondent, its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, provide a copy of this order to each of respondent's current principals, officers, and directors, and to all personnel, managers, agents, and

representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of five (5) years from the date of service of this order, provide a copy of this order to each of respondent's principals, officers, and directors, and to all personnel, managers, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order within three (3) days after the person assumes his or her position.

VIII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure, 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 which may affect compliance obligations arising under this order.

IX.

This order will terminate on May 16, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline

for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

X.

It is further ordered, That respondent shall, within sixty (60) days after service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA CONCURRING IN PART AND DISSENTING IN PART

Today, the Commission issues a final decision and order resolving allegations about certain claims in the advertising of Coppertone Kids 6-Hour Waterproof Sunblock. I concur except with respect to Part IV of the order, which requires the respondent to develop and disseminate a consumer education brochure addressing the dangers of unprotected exposure to the sun. Consumer education brochures are an integral part of the Commission's consumer protection program, but they are not necessarily defensible adjuncts to Commission orders.

A fencing-in provision will be sustained by the coursts as long as it is "reasonably related" to the violation found.[1] Fencing-in relief properly may include requirements beyond simply prohibiting the challenged conduct that are designed to "close all roads to the prohibited goal, so that [the Commission's] order may not be by-passed with impunity."[2] The allegedly deceptive claim is that the respondent's sunblock for children would remain effective for six hours even if the children engaged in "sustained vigorous activities in and out of the water," such as playing in sand, taking off and putting on clothes and toweling off after swimming. Complaint ¶ 5. The order expressly enjoins the respondents from making the challenged claim, either directly or indirectly, for the product at issue as well as for "any other children's sun protection product." Order ¶ I.

In addition, the order requires the respondent to develop and distribute 150,000 copies of a color brochure concerning the

[1] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957).

[2] *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

importance of sunscreen usage by children. The order requires that the brochure contain six messages or themes only one of which addresses the issue in this case, the need to reapply so-called water-proof or water-resistant sunblock after vigorous activity or after toweling off. Order ¶ IV-E.

The brochure requirement, even the message that relates most closely to the challenged claim, is not focused on preventing the respondent from making the challenged claim or otherwise from avoiding compliance with the order. The brochure would help educate consumers regarding an important health issue, and, presumably, make them less likely to be misled by the kind of implied claims challenged in this action.[3] There is no reason to think that it would enhance the deterrent effect of the order on Schering.

Presumably, the brochure requirement will not be unduly burdensome or costly for Schering because it will promote the use of its product, and the brochure is undoubtedly commendable as a public health initiative. Nevertheless, under the circumstances, it is an overly broad requirement as measured against the current standard for ordering relief.[4] There is a value to the Commission in maintaining the integrity of the standard for imposing a fencing-in remedy.

I respectfully dissent from Part IV of the order.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III CONCURRING IN PART AND DISSENTING IN PART

I have voted to approve final issuance of the complaint and consent order against Schering-Plough Healthcare Products, Inc. ("Schering"), because I have reason to believe that the challenged advertisements are deceptive and I find that the order, for the most part, provides appropriate relief. I continue, however, to oppose the requirement that Schering produce and distribute a consumer education brochure that includes numerous specified "messages or themes." This remedy is overbroad and is unlikely to assist in the prevention of the violations alleged in the complaint. Although I am an advocate of a strong Commission consumer education program, and we can be proud of the valuable work done by the Bureau of

[3] The product label already contains the statement, "Reapply after toweling."

[4] It would be even more difficult to justify Part IV of the order as corrective advertising, because it is unlikely that the implied claim challenged in the complaint would linger in the minds of consumers long after it ceased being made. *See Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

Consumer Protection's Office of Consumer and Business Education, the consumer education remedy contained in this order is a well-meaning but not legally justifiable effort to fund a general consumer education campaign.

The Commission enjoys extensive authority to fashion fencing-in relief for deceptive practices so long as the remedy has a reasonable relation to the violations alleged in the complaint. *See, e.g., FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.,* 352 U.S. 419, 428-29 (1957). With such authority, however, comes the responsibility to exercise it judiciously. In my view, the consumer education remedy mandated by this order bears no reasonable relationship to the violations alleged in the complaint.

The complaint alleges that Schering lacked a reasonable basis for the claim that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water.[1] The order addresses this allegation by requiring scientific substantiation for claims about the efficacy of any children's sun protection product in providing protection against any harmful effect of sun exposure or ultraviolet radiation, or about the length of time that any such product will provide sun protection for individuals engaged in sustained vigorous activity in and out of the water.

In addition, however, the order requires Schering to design, produce and print a brochure -- subject to the approval of the Associate Director of the Division of Advertising Practices ("DAP") in the Commission's Bureau of Consumer Protection -- about the importance of sunscreen usage by children. The order mandates that the brochure include all of the following "messages or themes":

(A) The importance of sunscreens in preventing skin damage, including skin cancer, sunburn, and premature skin aging;

(B) Regular use of a high SPF sunscreen during childhood can significantly reduce the risk of certain types of skin cancers later in life;

[1] The complaint challenges as false the claim that Schering has conducted tests demonstrating that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water. The order broadly prohibits false establishment claims for any sun protection product.

(C) A single bad sunburn during childhood can significantly increase a child's risk of developing skin cancer later in life;

(D) The importance of proper application of sunscreens;

(E) The need to reapply sunscreens after toweling or sustained vigorous activity; and

(F) The need to use sunscreens during outdoor activities -- not only in connection with water activities.

Order ¶ IV. Schering must disseminate 150,000 copies of this brochure to parents or to organizations with access to parents or others who work with or care for children under age twelve.[2]

Of the six required messages, only statement (E) seems likely to assist in the prevention of future deception like or related to that alleged in the complaint. Yet by including this key reapplication information in an extensive list of other facts about sunscreen, the order makes it less likely that consumers will see the reapplication information. In my view, it is highly unlikely that a parent who receives and reviews whatever brochure is approved will recall the one piece of information related to the complaint allegation when the parent makes a sunscreen purchase. Because the scope of the information to be included in the brochure is so broad, the consumer education remedy is not reasonably related to the violations alleged in the complaint.[3]

It is also troubling that the Commission essentially is ordering the respondent to advertise that persons should buy and use more of the respondent's products. Schering already has every incentive to communicate the required messages to consumers. In fact, the consumer education remedy is advertising ("use more sunscreen") that the company might wish to do in any event since the conduct

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[2] Like the brochure, the dissemination plan is subject to the approval of the Associate Director in charge of DAP.

[3] The consumer education remedy here stands in contrast to a fencing-in provision contained in a consent order issued by the Commission last year. *See* Blenheim Expositions, Inc., Docket No. C-3633 (Jan. 18, 1996) (requiring a franchise show promoter to undertake a limited distribution of an FTC consumer education brochure to customers attending its franchise shows). The respondent in Blenheim allegedly made unsubstantiated claims regarding the earnings and success of franchise owners and false claims regarding a poll of franchise owners. The brochure specifically identified FTC requirements with which franchisors must comply, including consumers' right to receive an earnings claims document, and it provided instructions on how to evaluate earnings claims. It thus contained information likely to assist the respondent's customers to detect and protect themselves from possible future misrepresentations of earnings like those alleged in the complaint. Although the brochure also addressed other issues related to the purchase of a franchise, all of the advice in the brochure at least arguably would help prospective franchisees avoid becoming victims of future violations by the respondent.

provisions of the order may prevent it from continuing to distinguish its children's sun protection product from others by claiming that it requires fewer applications. The deterrence value of this remedy is minimal at best.

Finally, if this relief were sought in litigation, rather than obtained through a consent agreement, it would not withstand scrutiny under the First Amendment. For purposes of First Amendment analysis, there is no difference between compelled speech and restrictions on speech. *Riley v. National Fed'n of the Blind,* 487 U.S. 781, 796-97 (1988). A valid restriction on commercial speech must be no more extensive than necessary to serve the substantial governmental interest directly advanced by the restriction. *Rubin v. Coors Brewing Co.,* 115 S. Ct. 1585, 1591 (1995) (discussing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 566 (1980)). Thus, disclosures compelled by the FTC can be no broader than necessary to prevent future deception or to correct the effects of past deception. *See, e.g., National Comm'n on Egg Nutrition v. FTC,* 570 F.2d 157, 164 (7th Cir. 1977), *cert. denied,* 439 U.S. 821 (1978). Additionally, the government bears the burden of showing that a speech restriction will advance its interest "to a material degree." *44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495, 1509 (1996) (plurality opinion of Justice Stevens) (citing *Edenfield v. Fane,* 507 U.S. 761, 771 (1993)). A commercial speech restriction that "provides only ineffective or remote support for the government's purpose" does not pass this test. *44 Liquormart,* 116 S. Ct. at 1509 (citing *Central Hudson,* 447 U.S. at 564).

The dubious efficacy of this consumer education remedy makes it unlikely that it will directly advance the asserted governmental interest in preventing future deception by the respondent. In addition, I doubt that a credible argument can be made that the information that the order specifically requires be included in the brochure is no more extensive than necessary to prevent future violations by Schering. Certainly Schering has waived any First Amendment objections to this relief by entering into the consent agreement. Nonetheless, when a remedy implicates First Amendment rights, the Commission should be particularly reluctant to obtain through negotiation relief that it lacks at least a colorable chance to obtain in litigation.

In my view, it would be better to have no consumer education remedy in the consent order if the only alternative is an overbroad remedy of doubtful efficacy that raises First Amendment concerns.

IN THE MATTER OF

GENERAL MILLS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3742. Complaint, May 16, 1997--Decision, May 16, 1997

This consent order requires General Mills, among other things, to permit New Ralcorp to transfer to any successor party, without authorization or approval from General Mills, the right to manufacture and sell cereals identical to the Chex brand products. The consent order also prohibits General Mills from delaying production of the private label Chex rivals.

Appearances

For the Commission: *Phillip Broyles* and *Anthony Joseph.*

For the respondent: *James Rill, Collier, Shannon, Rill & Scott,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent General Mills, Inc., subject to the jurisdiction of the Commission, has agreed to acquire the branded ready-to-eat cereal and snack mix businesses from Ralcorp Holdings, Inc., in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that the acquisition, if consummated, would violate 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 it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT GENERAL MILLS, INC.

1. Respondent General Mills, Inc. ("General Mills"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. General Mills' headquarters, office and principal place of business is located at Number One General Mills Boulevard, Minneapolis, Minnesota. In

fiscal year 1996, General Mills had sales of approximately $5.4 billion.

2. Respondent General Mills is, and at all times relevant herein has been, engaged in the sale of branded ready-to-eat ("RTE") cereals to retail grocery stores, grocery wholesalers, and others throughout the United States. General Mills's primary RTE cereals include Cheerios, Total, and Wheaties. General Mills is the nation's second largest producer of RTE cereals, measured based on pound sales or dollar revenues. General Mills's revenue from the sale of RTE cereals worldwide was $2.75 billion in fiscal year 1996.

II. RALCORP HOLDINGS, INC.

3. Ralcorp Holdings, Inc.("Ralcorp"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri. Ralcorp's headquarters, office and principal place of business is located at 800 Market Street, Suite 2900, St. Louis, Missouri. In fiscal year 1995, Ralcorp had sales of approximately $1 billion.

4. In 1994, the Ralston Purina Company created Ralcorp, as a wholly-owned subsidiary, and then distributed Ralcorp's shares to Ralston Purina's shareholders. As part of the creation of an independent Ralcorp, Ralston Purina entered into a technology license authorizing Ralcorp to use certain identified technology in the production of branded and private label RTE cereals.

5. Ralcorp is, and at all times relevant herein has been, engaged in the sale of branded and private label RTE cereals to retail grocery stores, grocery wholesalers, and others throughout the United States. Ralcorp's primary RTE cereals include Corn CHEX, Rice CHEX, and Wheat CHEX. Ralcorp is the nation's fifth largest producer of branded RTE cereals and the largest producer of private label RTE cereals. Ralcorp's revenue from the sale of RTE cereals was $585.5 million in fiscal year 1995. Its revenue from branded RTE cereals was more than $311 million for the same year.

III. JURISDICTION

6. General Mills is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in

Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

7. On or about August 13, 1996, General Mills and Ralcorp entered into an agreement for General Mills to acquire Ralcorp's branded RTE cereal and snack mix businesses. In exchange for these businesses, General Mills agreed to give Ralcorp's shareholders General Mills' common stock and to assume certain Ralcorp debt. The total value of this consideration is approximately $570 million.

8. General Mills will not acquire Ralcorp's private label RTE cereal business or other non-cereal or snack mix businesses. Ralcorp will form a new entity, New Ralcorp Holdings, Inc., ("New Ralcorp") to hold the businesses that General Mills will not acquire. As a result of the acquisition agreement, New Ralcorp acquired the right to manufacture and sell private label CHEX products, but was restricted from transferring this right to a third party without permission from General Mills and Ralston Purina Company. The agreement also restricts New Ralcorp from producing private label CHEX products for a period ending eighteen months after consummation of General Mills' acquisition of Ralcorp's branded RTE cereal and snack mix businesses.

V. TRADE AND COMMERCE

9. The relevant line of commerce (*i.e.*, the product market) in which to analyze the effects of the proposed transaction is the sale of branded and private label RTE cereals.

10. The relevant section of the country (*i.e.*, the geographic market) in which to analyze the effects of the acquisition is the United States.

VI. MARKET STRUCTURE

11. The sale of RTE cereals in the United States is highly concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly called the "HHI") or by four-firm concentration ratios.

12. The post acquisition HHI for the sale of RTE cereals in the United States measured based on dollar revenues would increase by approximately 223 points, from 2,317 to 2,540. Measured in pounds, the post acquisition HHI for the sale of RTE cereals in the United

States would increase by 158, from 2,103 to 2,261. Post acquisition General Mills' market share in dollars would be almost 31 percent. Its share in pounds would be almost 27 percent.

VII. ENTRY CONDITIONS

13. Entry of new RTE cereal producers into the relevant markets is difficult, and would not be timely, likely or sufficient to prevent anticompetitive effects.

VIII. EFFECTS OF THE ACQUISITION

14. The effects of the acquisition, if consummated, may be substantially to lessen competition in the RTE cereal market in the United States in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by increasing the likelihood of the unilateral exercise of market power and simultaneously restricting the entry of new private label cereal products into competition with General Mills.

IX. VIOLATIONS CHARGED

15. The acquisition agreement, entered into between General Mills and Ralcorp for General Mills to acquire Ralcorp's branded RTE cereal and snack mix businesses, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate 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.

Commissioner Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition by General Mills, Inc. ("GMI"), of the branded cereals and snack mix businesses of Ralcorp Holdings, Inc. ("Ralcorp"), and it now appearing that GMI, hereinafter sometimes referred to as "respondent," having been furnished with a copy of a draft of complaint that the Bureau of Competition presented 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

Respondent, its attorney, 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The 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 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 described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent GMI is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Number One General Mills Boulevard, Minneapolis, MN.

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 *"GMI"* means General Mills, Inc., its subsidiaries, divisions, and groups and affiliates controlled by General Mills, Inc., their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. *"Ralcorp"* means Ralcorp Holdings, Inc., its subsidiaries, divisions, and groups and affiliates controlled by Ralcorp Holdings, Inc., their successors and assigns, and their directors, officers, employees, agents, and representatives.

C. *"New Ralcorp"* means New Ralcorp Holdings, Inc., an entity created by the Reorganization Agreement to acquire the Private Label cereal business and other businesses from Ralcorp.

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

E. *"Ralston Purina Company"* means Ralston Purina Company, a Missouri corporation, having its principal office in St. Louis, Missouri, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Ralston Purina Company, their successors and assigns, and their directors, officers, employees, agents, and representatives.

F. *"Private Label"* means a cereal product bearing the trade names or trademarks owned by a grocery retailer, a wholesaler, or broker, which entity is not a cereal producer or primarily in the cereal business, which trade names or trademarks are used by such entities to identify grocery products sold by such entities and in which New Ralcorp has no rights, except for the right to produce products utilizing such trade names or trademarks for such entities or their licensees, but which shall not, in any event, include trade names or trademarks described in sections 2(d)(i) and 2(d)(ii)(A) of the Trademark Agreement.

G. *"Successor Party"* means any entity which acquires (by way of asset transfer, stock transfer, merger, or otherwise), following the date of the acquisition of Ralcorp by GMI, all or substantially all of New Ralcorp's assets, title, properties, interests, rights, and privileges, tangible and intangible, to manufacture and sell cereals that are identical to or substantially similar in form or overall appearance to cereal products bearing the CHEX trademark, including any entity that is a subsidiary or affiliate of New Ralcorp, and any entity that is a subsequent transferee of such assets, title, properties, interests, rights, and privileges.

H. The *"relevant geographic market"* means the United States.

I. *"CHEX trademark"* has the same meaning as any "CHEX trademark" identified in the Trademark Agreement.

J. *"Agreement and Plan of Merger"* means the Agreement and Plan of Merger by and among Ralcorp, GMI, and General Mills Missouri, Inc., dated August 13, 1996.

K. *"Reorganization Agreement"* means the Reorganization Agreement attached as Exhibit A to the Agreement and Plan of Merger.

L. *"Technology Agreement"* means the Technology Agreement attached as Exhibit 6.2(c) to the Reorganization Agreement.

M. *"Trademark Agreement"* means the Trademark Agreement attached as Exhibit 6.2(b) to the Reorganization Agreement.

N. *"Supply Agreement"* means the Transition Services -- Supply Agreement attached as Exhibit 6.2(d) to the Reorganization Agreement.

II.

It is further ordered, That:

A. Respondent shall, before consummating the Agreement and Plan of Merger, include in its agreements with Ralcorp and New Ralcorp provisions that will permit the transfer to any Successor Party of the right to manufacture and sell in the relevant geographic market Private Label cereals that are identical to or substantially similar in form or overall appearance to cereal products bearing the CHEX trademark. These provisions shall permit the Successor Party to manufacture and sell these Private Label cereals without further authorization or approval from GMI or Ralston Purina Company.

B. Respondent shall not enter into, enforce or attempt to enforce any agreement that prohibits or delays New Ralcorp, as long as it retains the rights referred to in II.A, *supra*, or a Successor Party thereafter, from manufacturing and selling in the relevant geographic market any Private Label cereals that are identical to or substantially similar in form or overall appearance to cereal products bearing the CHEX trademark upon consummation of the Agreement and Plan of Merger.

C. Respondent shall not enforce any provision in the Technology Agreement, the Reorganization Agreement, the Trademark Agreement, the Agreement and Plan of Merger, or any other agreement with Ralcorp that would prevent the transfer to any Successor Party, of the right to manufacture and sell in the relevant geographic market Private Label cereals substantially similar in form or overall appearance to cereal products bearing the CHEX trademark, provided, however, that nothing in this paragraph shall be

construed to interfere with General Mills' rights to enforce the provisions of the Supply Agreement.

III.

It is further ordered, That:

A. Within sixty (60) days after consummating the Agreement and Plan of Merger, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraph II. A of this order.

B. One year (1) from the date this order becomes final, annually for the next three (3) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II. B, and C, and III of this order.

IV.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate 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 the order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondent shall permit any duly authorized representative 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 days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

VI.

It is further ordered, That this order shall terminate on May 16, 2017.

Commissioner Starek dissenting.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between General Mills, Inc., a corporation organized and existing under the laws of the State of Delaware ("General Mills") and the Federal Trade Commission, an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (the "Commission").

Whereas, General Mills has proposed to acquire Ralcorp Holdings, Inc.'s ("Ralcorp") branded ready-to-eat ("RTE") cereal and snack businesses pursuant to an Agreement and Plan of Merger dated August 13, 1996 ("the proposed Acquisition"); and

Whereas, the Commission is now investigating the proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and,

Whereas, the Commission is concerned that if an understanding is not reached during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm, and relief resulting from a proceeding challenging the legality of the proposed Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the entering into this Interim Agreement by General Mills shall in no way be construed as an admission by General Mills that the proposed Acquisition constitutes a violation of any statute; and

Whereas, General Mills understands that no act or transaction contemplated by this Interim Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Interim Agreement.

Now, therefore, General Mills agrees, upon the understanding that the Commission has not yet determined whether the proposed

Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public record comment, it will grant early termination of the Hart-Scott-Rodino-waiting period, as follows:

1. General Mills agrees to execute the Consent Agreement and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date General Mills signs the Consent Agreement.

2. General Mills agrees to submit, within twenty (20) days of the date the Consent Agreement is signed by General Mills, and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraph II.A of the Consent Agreement, written reports, pursuant to Section 2.33 of the Commission's Rules, signed by General Mills setting forth in detail the manner in which General Mills will comply or has complied with paragraph II.A of the Consent Agreement.

3. General Mills agrees that, from the date it signs the Consent Agreement until the first of the dates listed in subparagraphs 3.a and 3.b, it will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date the order is final.

4. General Mills waives all rights to contest the validity of this Interim Agreement.

5. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege, and upon written request, and on reasonable notice, General Mills shall permit any duly authorized representative or representatives of the Commission:

a. Access, during the office hours of General Mills 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 General Mills relating to compliance with this Interim Agreement; and

b. Upon five (5) days' notice to General Mills and without restraint or interference from it, to interview officers, directors, or

employees of General Mills, who may have counsel present, regarding any such matters.

6. Should the Federal Trade Commission seek in any proceeding to compel General Mills to divest itself of Ralcorp, or any other assets that it may hold as a result of the proposed Acquisition, or to seek any other injunctive or equitable relief, General Mills shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the proposed Acquisition.

7. This Interim Agreement shall not be binding until accepted by the Commission.

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA CONCURRING IN PART AND DISSENTING IN PART

The Commission today issues a consent order based on a complaint alleging that the acquisition by General Mills, Inc., of the branded ready-to-eat cereal business of Ralcorp Holdings, Inc., violates Section 7 of the Clayton Act. The order is narrow, but I would narrow it even further. In particular, I would delete paragraph II(B) of the proposed order, which requires elimination of a noncompete clause that would have prevented Ralcorp for a period of eighteen months from introducing a new privaate label cereal identical or similar to the CHEX-brand cereals being sold to General Mills.

Paragraph fourteen of the complaint alleges that the noncompete clause described in paragraph eight would have the anticompetitive effect of "restricting the entry of new private label cereal products into competition with General Mills." That effect, however, is precisely the purpose of this (and every other) noncompete clause.[1] Although the complaint might be read as alleging that noncompete clauses are *per se* anticompetitive, that interpretation would be inconsistent with the Commission's recent decision in another case to issue an order that imposed an affirmative prohibition on competition for six years between the merged firm and the acquirer of certain assets to be divested under the order. *See* Ciba Geigy Limited,

[1] The noncompete clause described in paragraph eight of the complaint prohibits Ralcorp from entering the market with a private label, CHEX-type cereal product for eighteen months. As indicated in the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (April 2, 1992), a merger is unlikely to create or enhance market power if entry is "timely, likely and sufficient," and entry is deemed "timely" if it can be achieved within two years. Under this standard, the noncompete clause is unlikely to create or enhance market power.

(Docket No. C-3725, March 24, 1997). The Ciba Geigy decision recognizes the efficiency potential of noncompete clauses, which, among other benefits, can facilitate an orderly transfer to ownership and provide a brief transition period for new owners to establish themselves in the business.

Although the appropriate duration of a noncompete clause may vary depending on the circumstances of the industry and the acquisition, using a noncompete clause for a short period to smooth a transition may be procompetitive. I do not find reason to believe that this short-term noncompete clause is anticompetitive, and I dissent from the order requirement to eliminate it.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the decision of the majority to issue a consent order against General Mills, Inc. relating to the acquisition of the branded ready-to-eat ("RTE") cereal and snack food businesses of Ralcorp Holdings, Inc. ("Ralcorp"). My dissent rests on two grounds.

As noted in the Commission's complaint, General Mills will not acquire the private label RTE cereal or snack food businesses of Ralcorp. Ralcorp instead will form a new entity, New Ralcorp Holdings, Inc. ("New Ralcorp"), to hold the private label cereal and snack food businesses that General Mills will not acquire. Under the acquisition agreement, New Ralcorp has the right to manufacture and sell a private label version of the Chex RTE cereal products, but is restricted from transferring this right to a third party without permission from General Mills. The acquisition agreement further provides that New Ralcorp may not produce private label Chex products for a period of eighteen months following consummation of the acquisition.

My first reason for voting against issuing the consent order is that the Commission lacks sufficient evidence to support the unilateral effects theory alleged in the complaint. Second, it is completely unnecessary -- and in fact creates inefficiency -- to bar enforcement of the parties' non-compete agreement. Whatever minimal competitive risks this transaction may raise are adequately addressed by eliminating the restrictions on Ralcorp's ability to transfer manufacturing and sales rights for private label Chex to a third party.

General Mills' share of the RTE cereal market will increase by approximately three percent as a result of the acquisition. The number of competitors in the RTE cereal industry will remain the same, and

General Mills will remain the second largest RTE cereal producer in the United States.[1] New Ralcorp will immediately assume Ralcorp's position as the largest private label cereal producer in the United States. Moreover, General Mills' post-merger share of the RTE cereal market will be between 25 and 31 percent (depending on whether share is measured in pounds or sales dollars), well below levels suggested by the Horizontal Merger Guidelines as the minimum threshold at which the Commission might reasonably presume market power.[2] It is hard to understand under these simple facts how the majority determined that the acquisition will enable General Mills unilaterally to exercise market power.

Unable to presume market power, the Commission instead relies upon a "close substitutes" theory of unilateral harm, notwithstanding a paucity of empirical evidence demonstrating that Ralcorp's branded Chex products are the closest substitutes to the branded cereals of General Mills. Although Chex products clearly compete with the branded General Mills RTE cereal products, consumers have a preference for variety when they choose RTE cereals and frequently choose among the many branded and private label cereals produced by RTE cereal manufacturers in the United States. Not surprisingly, Judge Wood reached this conclusion in her opinion explaining why she refused to block the acquisition of the Nabisco RTE cereal assets by Kraft General Foods in early 1993.[3] In Kraft General Foods, an empirical analysis of cereal purchasing patterns suggested -- as it does in the present matter -- that consumers have many attractive alternatives from which to choose in the event that one RTE cereal producer tries to raise prices above competitive levels. Overall, the empirical evidence does not support the Commission's claim, under either a "close substitutes" or a dominant firm theory, that General Mills would be able unilaterally to raise the prices of its branded RTE cereals after the acquisition.

Even if I agreed with the majority that this consent order rests upon an empirically sound theory of competitive harm, the order

[1] General Mills' share of branded cereals will of course increase as a result of the transaction, but the complaint does not allege a relevant market consisting of "branded RTE cereal." Indeed, the provisions of the order (which affect the disposition of assets used in the production of nonbranded cereals; make sense only in the context of an "all RTE cereal" product market.

[2] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines Section 2.211, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,573-79.

[3] *State of New York v. Kraft General Foods, Inc.*, 1995-1 Trade Cas. (CCH) ¶ 70,911, at 74,039, 74,066 (S.D.N.Y. 1995).

would bar General Mills from enforcing an arguably procompetitive non-compete agreement that is properly limited in scope and duration. Covenants not to compete are often included in contracts for the sale of a business, and generally are enforceable when ancillary to an enforceable agreement and reasonable in geographic coverage, scope of activity, and duration. *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981) ("The recognized benefits of reasonably enforced non-competition covenants are now beyond question."), *cert denied*, 455 U.S. 921 (1982); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-82 (6th Cir. 1898), *aff'd* as modified, 175 U.S. 211 (1899).[4] Judicial inquiry into non-compete provisions generally focuses on whether the restriction is reasonably necessary to protect the legitimate business interests of the party seeking to enforce the provision. *United States v. Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Sound Ship Bldg. Corp. v. Bethlehem Steel Corp.*, 387 F. Supp. 252, 255 (D.N.J. 1975), *aff'd*, 533 F.2d 96 (3d Cir.), *cert. denied*, 429 U.S. 680. (1976).

The Commission has often recognized that competitive benefits can flow from a non-compete clause in the context of the sale of a business. The Commission's recent issuance of a consent order in Ciba-Geigy, Ltd., et al., Docket No. C-3725 (April 8, 1997), is illustrative. In Ciba-Geigy, the Commission imposed an affirmative obligation on the newly merged entity, Novartis AG, not to compete in the United States and Canada for six years in the sale of animal flea control products.[5] As the Ciba-Geigy order indicates, the Commission clearly recognizes that non-compete clauses -- even when long in duration and broad in scope -- can serve legitimate procompetitive purposes in some circumstances by allowing an acquiring entity a brief period to re-deploy the acquired assets in a manner that increases competition in the marketplace. I am therefore puzzled why the Commission so hastily condemns a non-compete provision here that is only eighteen months in duration, limited to the manufacture and sale of private label Chex products, and arguably necessary to protect the legitimate interests of the contracting parties.[6] Because I find that the facts do not support the Commission's theory of unilateral competitive harm in this instance, and because in any event

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[4] *See also Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 729 n.3 ("The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market.)

[5] *See* paragraph VI of the order in Ciba-Geigy.

[6] Barring enforcement of the non-compete agreement might undermine adherence by the parties to the supply agreement, an element of the acquisition agreement found acceptable by the majority.

I disagree with the Commission's decision to bar enforcement of the non-compete provision contained in the parties' acquisition agreement, I have voted against issuance of the consent order.

IN THE MATTER OF

TENET HEALTHCARE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3743. Complaint, May 20, 1997--Decision, May 20, 1997

This consent order, among other things, requires Tenet Healthcare Corporation ("Tenet"), a California acute care hospital chain, to divest OrNda's French Hospital Medical Center and related assets and facilities by August 1, 1997. The consent order also requires Tenet to maintain the marketability and viability of French Hospital, pending the divestiture of French, and to notify the Commission before combining its acute care hospitals in San Luis Obispo County with any other acute care hospital in the area and before acquiring any Monarch stock.

Appearances

For the Commission: *Robert Leibenluft, Oscar Voss* and *William Baer.*

For the respondent: *Clifford Aronson, Skadden, Arps, Slate, Meagher & Flom,* New York, N.Y.

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 the respondent, Tenet Healthcare Corporation ("Tenet"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement whereby Tenet will acquire the stock of OrNda HealthCorp ("OrNda"); that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that the proposed acquisition, if consummated, would violate 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 it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint the following definitions shall apply:

(a) *"Acute care hospital"* means a health facility, licensed as a hospital, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized professional staff, that provides 24-hour inpatient care, and may also provide outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

(b) *"Acute care inpatient hospital services"* means 24-hour inpatient health care, and related medical or surgical diagnostic and treatment services, for physically injured or sick persons with short-term or episodic health problems or infirmities.

THE PARTIES

PAR. 2. Tenet is a corporation organized, existing, and doing business under and by virtue of the laws of Nevada, with its principal place of business at 3820 State Street, Santa Barbara, California. Tenet owns and operates, among other things, over seventy-five acute care hospitals throughout the United States. Included among those hospitals are Sierra Vista Regional Medical Center ("Sierra Vista"), a 195-bed acute care hospital in the city of San Luis Obispo, California, and Twin Cities Community Hospital, an 84-bed acute care hospital in Templeton, California, about twenty-two miles north of the city of San Luis Obispo. In fiscal year 1996, Tenet had total sales of approximately $5.6 billion, and its two hospitals in San Luis Obispo County, California had total sales of about $83 million.

PAR. 3. OrNda is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 3401 West End Avenue, Nashville, Tennessee. OrNda owns and operates over fifty acute care hospitals throughout the United States. Included among those hospitals is French Hospital Medical Center ("French Hospital"), a 147-bed acute care hospital in the city of San Luis Obispo, California. In fiscal year

1996, OrNda had total sales of about $1.8 billion, and French Hospital had total sales of about $47 million.

JURISDICTION

PAR. 4. Tenet and OrNda, at all times relevant herein, have been and are now engaged in or affecting commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of Tenet and OrNda, at all times relevant herein, have been and are now in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE PROPOSED ACQUISITION

PAR. 5. On or about October 16, 1996, Tenet and OrNda entered into an agreement whereby Tenet will acquire 100 percent of the voting stock of OrNda, and OrNda stockholders will receive Tenet voting stock in exchange. Tenet will also assume OrNda debt. The total value of the transaction is about $3.1 billion.

NATURE OF TRADE AND COMMERCE

PAR. 6. The relevant line of commerce in which to analyze the proposed acquisition is the production and sale of acute care inpatient hospital services and/or any narrower group of services contained therein.

PAR. 7. The relevant section of the country in which to analyze the proposed acquisition is San Luis Obispo County, California ("San Luis Obispo County"), and/or any narrower area contained therein.

MARKET STRUCTURE

PAR. 8. Tenet currently owns two of the five acute care hospitals in San Luis Obispo County, including Sierra Vista, the largest acute care hospital in the county. Tenet's acquisition of OrNda would add the largest of its competitors, French Hospital, to its holdings in San Luis Obispo County. Sierra Vista and French each provide a broader range of acute care inpatient hospital services than any of the other three acute care hospitals in San Luis Obispo County, and are each other's principal and most direct competitor. The other providers of acute care inpatient hospital services in San Luis Obispo County are

Arroyo Grande Community Hospital, a 79-bed hospital in Arroyo Grande, about thirteen miles south of the city of San Luis Obispo, and San Luis Obispo General Hospital, a 64-bed hospital located in the city of San Luis Obispo and operated by the San Luis Obispo County government. The long-term competitive prospects of San Luis Obispo General Hospital are clouded by its need for expensive capital improvements to, among other things, meet stringent new state earthquake safety requirements.

PAR. 9. The relevant market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by market share. The proposed acquisition would significantly increase concentration in this market. It would increase Tenet's market share by at least 17%, to at least 71%. The HHI would increase at least 2000 points, to a post-acquisition level over 5000.

ENTRY CONDITIONS

PAR. 10. It is unlikely that entry into the relevant market would prevent, or remedy in a timely manner, any anticompetitive effects from the proposed acquisition. Entry is difficult, and likely to take more than two years, due to among other things the time required to obtain necessary government permits, including state architectural review, and to complete construction of an acute care hospital.

COMPETITION

PAR. 11. Tenet and OrNda are actual and potential competitors in the relevant market.

EFFECTS

PAR. 12. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between Tenet and OrNda;

(b) It would significantly increase the already high level of concentration;

(c) It would eliminate OrNda as a substantial, independent and competitive provider;

(d) It may permit Tenet to unilaterally raise prices;

(e) It may result in less favorable prices and other terms for health plans that contract with providers of acute care hospital services;

(f) It may increase the possibility of collusion or interdependent coordination by the remaining providers of acute care inpatient hospital services;

(g) It may deny patients, physicians, third-party payers, and other consumers of acute care inpatient hospital services the benefits of free and open competition based on price, quality, and service; and

(h) It may deny the San Luis Obispo County government the ability to purchase on competitive terms the acute care inpatient hospital services it must provide to certain indigent County residents, as a potentially less costly alternative to providing such services to those residents at its own hospital.

VIOLATIONS CHARGED

PAR. 13. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 14. The acquisition described in paragraph five, if consummated, would violate 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.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of OrNda Healthcorp by Tenet Healthcare Corporation ("Tenet" or "respondent"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition and the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, 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:

A. Respondent Tenet is a corporation organized, existing, and doing business under and by virtue of the laws of Nevada, with its principal place of business at 3820 State Street, Santa Barbara, California.

B. 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. *"Tenet"* or *"respondent"* means Tenet Healthcare Corporation; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Tenet Healthcare Corporation; and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

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

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

D. The *"Acquisition"* means the transaction contemplated by the October 16, 1996 Agreement and Plan of Merger between Tenet and OrNda, pursuant to which OrNda will become a wholly-owned subsidiary of Tenet.

E. *"Acute care hospital"* means a health care facility, licensed as a hospital, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized professional staff, that provides 24-hour inpatient care, that may also provide outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short term or episodic health problems or infirmities.

F. *"Affiliate"* means any entity whose management and policies are controlled in any way, directly or indirectly, by the person with which it is affiliated.

G. *"Person"* means any natural person, partnership, corporation, company, association, trust, joint venture, or other business or legal entity, including any governmental agency.

H. *"Relevant area"* means the county of San Luis Obispo in California.

I. The *"Schedule A assets"* mean the assets identified in the attached Schedule A.

J. The *"Schedule B assets"* mean the assets identified in the attached Schedule B.

K. *"Monarch Health Systems"* or *"Monarch"* means Monarch Medical Alliance, Inc., doing business as Monarch Health Systems (a corporation with its headquarters in Santa Barbara, California), its subsidiaries, and their successors and assigns.

L. *"Assets and Businesses"* include, but are not limited to, all assets, properties, businesses, rights, privileges, contractual interests, licenses, and goodwill of whatever nature, tangible and intangible, including, without limitation, the following:

1. All real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee), together with all buildings, improvements, and fixtures located thereon, all construction in progress thereat, all appurtenances thereto, and all licenses and permits related thereto (collectively, the "real property");

2. All contracts and agreements with physicians, other health care providers, unions, third party payers, health maintenance organizations and other health plans, customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners, and consignees (collectively, the "contracts");

3. All machinery, equipment, fixtures, vehicles, furniture, inventories, and supplies (other than such inventories and supplies as are used in the ordinary course of business during the time that Tenet owns the assets) (collectively, the "personal property");

4. All research materials, technical information, management information systems, software, software licenses, inventions, trade secrets, technology, know- how, specifications, designs, drawings, processes, and quality control data (collectively, the "intangible personal property");

5. All books, records, and files, excluding, however, the corporate minute books and tax records of Tenet, OrNda, and their affiliates; and

6. All prepaid expenses.

M. To *"operate"* an acute care hospital means to own, lease, manage, or otherwise control or direct the operations of an acute care hospital, directly or indirectly.

N. To *"acquire"* an acute care hospital means, directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. To acquire the whole or any part of the assets used or previously used within the last two years (and still suitable for use) for operating an acute care hospital from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital;

2. To acquire the whole or any part of the stock, share capital, equity, or other interest in any person engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital;

3. To acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of an acute care hospital; or

4. To enter into any other arrangement to obtain direct or indirect ownership, management, or control of an acute care hospital or any

part thereof, including, but not limited to, a lease of or management contract for an acute care hospital.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, on or before August 1, 1997, the Schedule A assets.

B. Respondent shall also divest, absolutely and in good faith, on or before August 1, 1997, such additional ancillary assets and businesses, and effect such arrangements, as are necessary to assure the marketability, independence, viability, and competitiveness of French Hospital Medical Center.

C. Respondent shall also divest, absolutely and in good faith, on or before August 1, 1997, all of its stock in Monarch Health Systems. The Monarch Health Systems stock may be, but need not be, divested to the same person to whom the Schedule A assets are divested.

D. The purpose of the foregoing divestitures is to ensure the continuation of French Hospital Medical Center as an ongoing, independent, and viable acute care hospital, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

E. Respondent shall divest the Schedule A assets, the Monarch Health Systems stock, and any additional assets that must be divested pursuant to paragraph II.B above, only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; provided, however, that respondent may divest the Monarch Health Systems stock, or that stock together with the loan agreement identified in Schedule A, without the prior approval of the Commission, to a person other than respondent in connection with that person's acquisition of all, or substantially all, Monarch Health Systems stock.

F. Respondent shall comply with all terms of the Agreement to Hold Separate concerning the Schedule A assets, the Schedule B assets, and the Monarch Health Systems stock, attached hereto and made a part hereof as Appendix I. Said Hold Separate shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this paragraph II or until such other time as said Hold Separate provides.

G. Pending the divestitures required by this paragraph II, respondent shall take such actions as are necessary to maintain the present marketability, viability, and competitiveness of the Schedule A and Schedule B assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Schedule A and Schedule B assets, except for ordinary wear and tear.

H. A condition of approval by the Commission of the divestiture of the Schedule A assets shall be a written agreement by the acquirer(s) of those assets that it will not sell for a period of ten (10) years from the date of divestiture, directly or indirectly, through subsidiaries, partnerships, or otherwise, without prior notification to the Commission in the manner prescribed by paragraph IV of this order, any Schedule A asset to any person who operates, or will operate immediately following the sale, any other acute care hospital in the relevant area.

III.

It is further ordered, That:

A. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Schedule A assets, in accordance with this order, on or before August 1, 1997, the Commission may appoint a trustee to effect the divestiture of the Schedule A assets. The trustee may on his or her initiative, or at the direction of the Commission, also divest some or all of the Schedule B assets, to the extent such additional divestitures are necessary to completely fulfill the purpose, identified in paragraph II.D above, of the divestiture of the Schedule A assets.

B. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, its stock in Monarch Health Systems, in accordance with this order, on or before August 1, 1997, the Commission may appoint a trustee to effect the divestiture of the Monarch Health Systems stock.

C. In the event that the Commission or the Attorney General brings an action for any failure to comply with this order or in any way relating to the Acquisition, pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, the respondent 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 paragraph III.A or paragraph III.B shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to them for any failure by the respondent to comply with this order.

D. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A or paragraph III.B of this order, the respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of the respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent 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 respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission (except with respect to any divestiture of Monarch Health Systems stock which paragraph II.E permits to be made without Commission approval), the trustee shall serve as an agent of the Commission and shall have the exclusive power and authority to divest (a) the Schedule A assets and, as necessary, some or all of the Schedule B assets, if the trustee is appointed pursuant to paragraph III.A, and (b) respondent's Monarch Health Systems stock, if the trustee is appointed pursuant to paragraph III.B.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.D.3 to accomplish the divestitures, which shall be subject to the prior approval of the Commission (with the exception set forth in paragraph III.D.2). If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture 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, that the Commission may extend this period only two (2) times, for up to twelve (12) months each time.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the assets he or she is to divest, as well as to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request, and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph III in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the trustee's fiduciary duty to the Commission and to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to an acquirer as set forth in paragraph II; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity for the Schedule A assets (along with, if necessary, some or all of the Schedule B assets), or for the Monarch Health Systems stock, and if the Commission determines to approve more than one such acquiring entity (or, for the Monarch Health Systems stock, more than one entity is either approved to acquire the stock, or does not require Commission approval under paragraph II.E), the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of the 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 sale 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 shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule A assets (if the trustee is appointed pursuant to paragraph III.A) and the Monarch Health Systems stock (if the trustee is appointed pursuant to paragraph III.B).

8. 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.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A or paragraph III.B of this order.

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

11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of French Hospital Medical Center.

12. The trustee shall have no obligation or authority to operate or maintain the Schedule A assets, or the Schedule B assets, or to take any actions (other than in furtherance of divestiture) relating to the Monarch Health Systems stock.

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

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without providing

advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any person, other than respondent, operating an acute care hospital in the relevant area;

B. Acquire any assets of an acute care hospital in the relevant area, or any assets used within the two years preceding such acquisition (and still suitable for use) for operating an acute care hospital in the relevant area;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any acute care hospital, or any part thereof, in the relevant area, including but not limited to, a lease of or management contract for any such facility;

D. Acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any acute care hospital in the relevant area;

E. Permit any acute care hospital it operates in the relevant area to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in the relevant area; or

F. Acquire any stock, share capital, equity, or other interest in Monarch Health Systems.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, 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 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondent shall not consummate the transaction until twenty days after submitting such additional information and documentary material. Early termination of the waiting periods in this

paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification pursuant to this paragraph IV, or pursuant to paragraph II.H of this order, shall not be required for:

(1) The establishment by respondent of an acute care hospital in the relevant area: (a) that is a replacement for an existing acute care hospital, if that facility is operated by respondent and is not required to be divested pursuant to paragraph II of this order; or (b) that is not a replacement for any acute care hospital in the relevant area;

(2) Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the acute care hospital or part thereof to be acquired does not exceed one million dollars ($1,000,000); or

(3) Any 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.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not permit all, or any substantial part of, any acute care hospital it operates in the relevant area to be acquired by any other person (except pursuant to the divestitures required by paragraph II, or to divestitures by a trustee pursuant to paragraph III), unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions of this order, which agreement respondent shall require as a condition precedent to the acquisition.

VI.

It is further ordered, That within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondent has fully complied with paragraph II of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraph II of this order. Respondent shall include in its compliance reports, among

other things that are required from time to time, a full description of the efforts being made to comply with paragraph II of the order, including a description of all substantive contacts or negotiations for the divestitures, and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestitures.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate 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 the order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, the respondent shall permit any duly authorized representative 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 the respondent relating to any matters contained in this order; and

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

SCHEDULE A

The "Schedule A assets" to be divested pursuant to paragraph II shall include all Assets and Businesses (including all improvements, additions and enhancements made to such assets prior to divestiture) of French Hospital Medical Center, 1911 Johnson Avenue, San Luis Obispo, California, including without limitation OrNda's ownership, partnership, or leasehold interests in the following properties and businesses in San Luis Obispo County, California:

1. Pacific Medical Plaza, 1941 Johnson Avenue, San Luis Obispo, California;

2. Pulse Health Services, 1911 Johnson Avenue, San Luis Obispo, California;

3. Med Stop Urgent Care Centers, at 283 Madonna Road, San Luis Obispo, California, and 877 Oak Park Boulevard, Pismo Beach, California;

4. Central Coast Surgery Center, 1941 Johnson Avenue, Suite 103, San Luis Obispo, California;

5. San Luis Recovery Partners, 1575 Bishop, San Luis Obispo, California; and

6. La Posada Medical Center, 225 Posada Lane, Templeton, California.

The "Schedule A assets" shall include, in addition, the January 1997 loan agreement between OrNda Investments, Inc. and Monarch

Health Systems, including all of OrNda Investments' rights and obligations thereunder, and all promissory notes issued thereunder.

SCHEDULE B

The "Schedule B assets" shall consist of all Assets and Businesses (including all improvements, additions and enhancements made to such assets prior to divestiture) of Valley Community Hospital, 505 East Plaza Drive, Santa Maria, California, including without limitation OrNda's ownership, partnership, or leasehold interests in the following properties and businesses in Santa Barbara County, California:

1. Valley Medical Plaza, 525 East Plaza Drive, Santa Maria, California;
2. Valley Medical Courtyard, 505 and 506 East Plaza Drive, Santa Maria, California; and
3. Knollwood Business Plaza, 5075 South Bradley Road, Santa Maria, California.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between Tenet Healthcare Corporation ("Tenet" or "respondent"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its principal place of business at 3820 State Street, Santa Barbara, California; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

PREMISES

Whereas, on October 16, 1996, Tenet and OrNda Healthcorp ("OrNda") entered into an Agreement and Plan of Merger pursuant to which OrNda will become a wholly-owned subsidiary of Tenet (the "Acquisition"); and

Whereas, Tenet with its principal place of business at 3820 State Street, Santa Barbara, California, owns and operates, among other things, acute care hospitals in San Luis Obispo County, California, and elsewhere; and

Whereas, Tenet through the Acquisition will acquire French Hospital Medical Center and related OrNda assets and businesses in San Luis Obispo County, California; Valley Community Hospital and related OrNda assets and businesses in northern Santa Barbara County, California; about one-third of the outstanding stock of Monarch Medical Alliance, Inc., doing business as Monarch Health Systems ("Monarch"), an integrated health care delivery system which is a major customer of French Hospital Medical Center; and a short-term loan agreement for OrNda to lend funds to Monarch; and

Whereas, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order in this matter, which would require the divestiture of French Hospital Medical Center and certain related assets identified in Schedule A of the Consent Order (the "Schedule A assets") and respondent's Monarch stock, and may require the divestiture of certain other assets identified in Schedule B of the Consent Order (the "Schedule B assets") pursuant to paragraph II of the Consent Order, the Commission must place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Schedule A assets and the Schedule B assets, and preserving the independence of Monarch from Tenet, during the period prior to the final acceptance and issuance of the Consent Order by the Commission (after the "60-day public comment period"), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, if the Commission accepts the Consent Order, and Tenet has not divested with the Commission's prior approval French Hospital Medical Center, related assets, and its Monarch stock, in accordance with the Consent Order, on or before August 1, 1997, the Commission may appoint a trustee to divest those assets; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of French Hospital Medical Center, related assets, and Monarch stock, and the Commission's right to have

French Hospital Medical Center continue as a viable acute care hospital independent of Tenet; and

Whereas, the purposes of this Agreement and the Consent Order are to:

(1) Preserve French Hospital Medical Center as a viable, competitive, and ongoing acute care hospital, independent of Tenet, pending the divestiture required under the terms of the Consent Order;

(2) Prevent interim harm to competition from the operation of French Hospital Medical Center pending the divestiture required under the terms of the Consent Order; and

(3) Remedy any anticompetitive effects of the Acquisition;

Whereas, respondent's entering into this Agreement shall in noway be construed as an admission by respondent that the Acquisition is illegal; and

Whereas, respondent understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the Consent Order, it will not seek further relief from respondent with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and in the event the divestitures required by the Consent Order are not accomplished on or before August 1, 1997, to appoint a trustee to seek divestiture of French Hospital Medical Center, related assets, and Monarch stock pursuant to the Consent Order, to seek civil penalties, to seek a court appointed trustee, and/or to seek other equitable relief, as follows:

1. Respondent agrees to execute the Agreement Containing Consent Order and be bound by the attached Consent Order.

2. Respondent agrees that:

a. From the date this Agreement to Hold Separate is accepted until the earliest of the dates listed in subparagraphs 2.a.(i) or 2.a.(ii), it will comply with the provisions of paragraph 3 of this Agreement:

(i) Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

(ii) The day after the divestitures required by paragraphs II.A and II.B of the Consent Order are completed.

b. From the date this Agreement to Hold Separate is accepted until the earliest of the dates listed in subparagraphs 2.b(i) or 2.b(ii), it will comply with the provisions of paragraph 4 of this Agreement:

(i) Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

(ii) The day after the divestiture required by paragraph II.C of the Consent Order is completed, or, if later, the day after all loan agreements between respondent and Monarch expire, are terminated, or are divested in accordance with paragraph II.A of the Consent Order.

3. To ensure the complete independence and viability of the Schedule A assets and the Schedule B assets, and to ensure that no competitive information is exchanged between respondent and the managers of the Schedule A assets and the Schedule B assets, respondent shall hold the Schedule A assets and the Schedule B assets, as they are presently constituted, separate and apart on the following terms and conditions:

a. The Schedule A assets and the Schedule B assets, as they are presently constituted, shall be held separate and apart and shall be managed and operated independently of respondent (meaning here and hereinafter, Tenet excluding the Schedule A assets and the Schedule B assets), except to the extent that respondent must exercise direction and control over such assets to assure compliance with this Agreement or the Consent Order, and except as otherwise provided in this Agreement.

b. Prior to, or simultaneously with the Acquisition, respondent shall adopt, for the corporations that now own and operate,

respectively, French Hospital Medical Center (the "French Company"), and Valley Community Hospital (the "Valley Company"), constituent documents that are not inconsistent with other provisions of this Agreement or the Consent Order. Respondent shall transfer to the French Company all ownership and control of any Schedule A assets it does not already own and control. Respondent shall transfer to the Valley Company all ownership and control of any Schedule B assets it does not already own and control. The French Company and the Valley Company shall hereafter be described collectively as the "Hold Separate Companies."

c. The boards of directors of each of the Hold Separate Companies ("Hold Separate Companies Boards") shall have the same three members for each of the Hold Separate Companies. Respondent shall elect the members of the Hold Separate Companies Boards. The Hold Separate Companies Boards shall consist of the following three persons: (i) Michael D. Bakst; (ii) Thomas Sawicki, and (iii) Michael H. Focht Sr., provided they agree, or comparable, knowledgeable persons. The Chairman of the Hold Separate Companies Boards shall be Michael D. Bakst, provided he agrees, or a comparable, knowledgeable person, who shall remain indepenent of respondent and competent to assure the continued viability and competitiveness of the Schedule A assets and the Schedule B assets. The Hold Separate Companies Boards shall include no more than one member who is a director, officer, employee, or agent of respondent, who shall be Michael H. Focht Sr., provided he agrees, or a comparable, knowledgeable person ("the respondent's Hold Separate Companies Boards member"). The Hold Separate Companies Boards shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the Hold Separate Companies Boards during the term of this Agreement shall be audiographically transcribed and the tapes retained for two (2) years after the termination of this Agreement.

d. The operations of the Hold Separate Companies shall, to the extent deemed desirable by the Hold Separate Companies Boards, coordinate their operations with each other as if they were a single company.

e. Respondent shall not exercise direction or control over, or influence directly or indirectly, the Schedule A assets, the Schedule B assets, the independent Chairman of the Boards of the Hold Separate Companies, or any of their operations or businesses;

provided, however, that respondent may exercise only such direction and control over the Hold Separate Companies as is necessary to assure compliance with this Agreement or the Consent Order, or with all applicable laws.

f. Respondent shall maintain the viability, competitiveness, and marketability of the Schedule A assets and the Schedule B assets; shall not sell, transfer, or encumber the Schedule A assets or the Schedule B assets (other than in the normal course of business); and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of the Schedule A assets or the Schedule B assets.

g. Except for the respondent's Hold Separate Companies Boards member, respondent shall not permit any director, officer, employee, or agent of respondent to also be a director, officer, or employee of the Hold Separate Companies.

h. The Hold Separate Companies shall be staffed with sufficient employees to maintain the viability and competitiveness of the Schedule A assets and the Schedule B assets, which employees shall be selected from the existing employee base of each facility or entity and may also be hired from sources other than these facilities and entities.

i. Respondent shall not employ, or make offers of employment to, any person employed by the Schedule A assets or the Schedule B assets in any capacity relating to the management or marketing activities of those assets. Respondent shall encourage and facilitate continued employment by the Schedule A assets and the Schedule B assets of such employees; shall not offer any incentive to such employees to cease employment with the Schedule A assets or the Schedule B assets, or to accept other employment with respondent; and shall take all actions necessary to remove any impediments that may deter such employees from continuing their employment with the Schedule A assets or the Schedule B assets, including but not limited to, the payment, or transfer for the account of the employee, of all accrued bonuses, pensions and other accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of respondent.

j. With the exception of the respondent's Hold Separate Companies Boards Member, respondent shall not change the composition of the Hold Separate Companies Boards unless the independent Chairman consents. The independent Chairman shall

have power to remove members of the Hold Separate Companies Boards for cause and to require respondent to appoint replacement members to the Hold Separate Companies Boards as provided in paragraph 3.c. Respondent shall not change the composition of the management of the Hold Separate Companies, except that the Hold Separate Companies Boards shall have the power to remove management employees for cause.

k. If the independent Chairman ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraph 3.c of this Agreement.

l. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating agreements to divest assets, or complying with this Agreement or the Consent Order, respondent shall not receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about the Hold Separate Companies, the activities of the hospitals operated by the Hold Separate Companies Boards, the activities of Monarch, the Schedule A assets, or the Schedule B assets. Nor shall the Hold Separate Companies or the Hold Separate Companies Boards receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about respondent and relating to respondent's acute care hospitals. Respondent may receive, on a regular basis, aggregate financial information relating to the Hold Separate Companies necessary and essential to allow respondent to prepare United States consolidated financial reports, tax returns, Medicare or Medicaid cost reports, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material Confidential Information," as used herein, means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, customer lists, price lists, health plan contracts, marketing methods, patents, technologies, processes, or other trade secrets.)

m. Except as permitted by this Agreement, the respondent's Hold Separate Companies Boards member shall not, in his or her capacity as a Hold Separate Companies Boards member, receive Material Confidential Information, and shall not disclose any such information

received under this Agreement to respondent, or use it to obtain any advantage for respondent. The respondent's Hold Separate Companies Boards member shall enter a confidentiality agreement prohibiting disclosure of Material Confidential Information. The respondent's Hold Separate Companies Boards member shall participate in matters that come before the Hold Separate Companies Boards only for the limited purposes of considering a capital investment or other transaction exceeding $250,000, approving any proposed budget and operating plans, and carrying out respondent's responsibilities under this Agreement and the Consent Order. Except as permitted by this Agreement, the respondent's Hold Separate Companies Boards member shall not participate in any matter, or attempt to influence the votes of the other members of the Hold Separate Companies Boards with respect to matters, that would involve a conflict of interest if respondent and the Hold Separate Companies were separate and independent entities.

n. Any material transaction of the Hold Separate Companies that is out of the ordinary course of business must be approved by a majority vote of the Hold Separate Companies Boards; provided that the Hold Separate Companies shall engage in no transaction, material or otherwise, that is precluded by this Agreement.

o. If necessary, respondent shall provide the Hold Separate Companies with sufficient working capital to operate the Schedule A assets and the Schedule B assets at their current rate of operation, to fulfill respondent's obligations under the loan agreement identified in Schedule A of the Consent Order, and to carry out any capital improvement plans for the Schedule A assets and the Schedule B assets that have already been approved.

p. Respondent shall continue to provide the same support services to the Schedule A assets and the Schedule B assets as are being provided to them by OrNda as of the date this Agreement is signed. Respondent may charge the Hold Separate Companies the same fees, if any, charged by OrNda as of December 1, 1996 for such support services. Respondent's personnel providing such support services must retain and maintain all Material Confidential Information of the Schedule A assets and the Schedule B assets on a confidential basis, and, except as is permitted by this Agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of respondent's businesses. Such

personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Schedule A assets and the Schedule B assets.

q. During the period commencing on the date this Agreement is effective and terminating on the earlier of (i) August 1, 1997, or (ii) the date contemplated by subparagraph 2.a(ii) (the "Initial Divestiture Period"), respondent shall make available for use by the Hold Separate Companies funds sufficient to perform all necessary routine maintenance to, and replacements of, the Schedule A assets and the Schedule B assets ("normal repair and replacement"). Provided, however, that in any event, respondent shall provide the Hold Separate Companies with such funds as are necessary to maintain the viability, competitiveness, and marketability of the Schedule A assets and the Schedule B assets.

r. Respondent shall circulate, to its management employees responsible for the operation of acute care hospitals in San Luis Obispo County, California, a notice of this Hold Separate and Consent Order in the form attached as Attachment A.

s. The Hold Separate Companies Boards shall serve at the cost and expense of respondent. Respondent shall indemnify the Hold Separate Companies Boards against any losses or claims of any kind that might arise out of its involvement under this Hold Separate Agreement, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Hold Separate Companies Boards directors.

t. The Hold Separate Companies Boards shall have access to and be informed about all companies who inquire about, seek, or propose to acquire the Schedule A assets or the Schedule B assets.

u. Within thirty (30) days after the date this Agreement is accepted by the Commission and every thirty (30) days thereafter until this Agreement terminates, the Hold Separate Companies Boards shall together report in writing to the Commission concerning those Boards' efforts to accomplish the purposes of this Hold Separate.

4. To ensure the complete independence of Monarch from respondent (meaning here and hereinafter, Tenet excluding the Schedule A assets and the Schedule B assets), and to ensure that no competitive Monarch information is disclosed to respondent,

respondent shall establish a trust for Tenet's Monarch stock, on the following terms and conditions:

a. Prior to, or simultaneously with the Acquisition, respondent shall establish a voting trust for Tenet's Monarch stock, for which the Trustee shall be the independent Chairman of the Hold Separate Companies Boards. The Trustee shall exercise any and all voting rights of Tenet's Monarch stock, on all matters (including without limitation the election or removal of directors), voted on by Monarch shareholders, whether at a regular or special meeting, or pursuant to a unanimous written consent. The Trustee shall vote all shares of Tenet's Monarch stock in the same proportion as all other shares of Monarch's stock are voted with respect to such matters. The Trustee shall also be present, in person or by proxy, at all annual or special meetings of Monarch shareholders, so that Tenet's Monarch stock may be counted for purposes of determining the presence of a quorum at such meetings.

b. Tenet shall not use its holdings of Monarch stock, or any loan agreements with Monarch:

(i) To control or influence the conduct of Monarch's business, or Monarch's business relationships with French Hospital Medical Center; or

(ii) To obtain Material Confidential Information of Monarch, except Monarch financial information necessary and essential to allow respondent to prepare United States consolidated financial reports and tax returns, to allow respondent to prepare Medicare or Medicaid cost reports, or for use by the Hold Separate Companies in order to carry out the loan agreement identified in Schedule A of the Consent Order (which Monarch information shall be used only for the purposes set forth in this subparagraph).

c. Tenet shall not permit any director, officer, employee, agent, or representative of Tenet to serve on Monarch's board of directors.

5. Should the Commission seek in any proceeding to compel respondent to divest the Schedule A assets and/or the Schedule B assets, as provided in the Consent Order, or to seek any other injunctive or equitable relief for any failure to comply with the Consent Order or this Agreement, or in any way relating to the

Acquisition, as defined in the Consent Order, respondent shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondent also waives all rights to contest the validity of this Agreement.

6. To the extent that this Agreement requires respondent to take, or prohibits respondent from taking, certain actions that otherwise may be required or prohibited by contract, respondent shall abide by the terms of this Agreement or the Consent Order and shall not assert as a defense such contract requirements in a civil penalty action brought by the Commission to enforce the terms of this Agreement or the Consent Order.

7. For the purposes of determining or securing compliance with this Agreement, and subject to any legally recognized privilege, and upon written request with reasonable notice to respondent made to its principal office, respondent shall permit any duly authorized representatives of the Commission:

a. Access, during office hours of respondent and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the respondent relating to compliance with this Agreement;

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

8. This Agreement shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Tenet Healthcare Corporation has entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission relating to the divestiture of certain assets, in or near San Luis Obispo County, California, that Tenet is to acquire through its acquisition of OrNda Healthcorp.

Until after the divestitures required under the Consent Agreement are completed, OrNda's hospitals and other businesses in San Luis Obispo County, California, as well as those in Santa Barbara County, California (collectively the "Hold Separate Assets"), must be managed and maintained as a separate, ongoing business, independent of all other Tenet businesses. All competitive information relating to the Hold Separate Assets must be retained and maintained by the persons involved in the operation of those Assets on a confidential basis, and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Tenet business. Similarly, all such persons involved in Tenet shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of the Hold Separate Assets. (These confidentiality requirements are subject to limited exceptions, set forth in the Hold Separate Agreement.)

Monarch Health Systems is also to remain independent of Tenet's businesses, other than the Hold Separate Assets, pending Tenet's divestiture of its Monarch stock.

Any violation of the Consent Agreement or the Agreement to Hold Separate (which is incorporated by reference as part of the Consent Order to which Tenet has agreed), may subject Tenet to civil penalties and other relief as provided by law.

IN THE MATTER OF

GERBER PRODUCTS COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3744. Complaint, May 27, 1997--Decision, May 27, 1997

This consent order prohibits Gerber, among other things, from making any claims, without competent and reliable scientific substantiation, about the extent to which doctors or other health, nutrition, child care or medical professionals recommend, approve of, or endorse baby or toddler food; and from misrepresenting the results or existence of any survey, test or research.

Appearances

For the Commission: *Jill E. Samuels* and *Rosemary Rosso.*

For the respondent: *John J. James* and *Jane Gennaro,* in-house counsel, Fremont, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that Gerber Products Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Gerber Products Company ("Gerber") is a Michigan corporation with its principal office or place of business at 445 State Street, Fremont, Michigan.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including Gerber baby and toddler foods. Gerber baby and toddler foods are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements for Gerber baby and toddler foods, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. [Depiction: Smiling baby]
VOICEOVER: "There's only one baby like yours."
[Depiction: Jar of Gerber baby food]
VOICEOVER: "And only one baby food like ours. Gerber."
[Depiction: Fresh apples]
VOICEOVER: "No one knows more about purity, . . ." [Depiction: Fresh carrots]
VOICEOVER: ". . . safety and nutrition . . ." [Depiction: Toddler being fed]
VOICEOVER: " . . . *(and* how to make sure baby likes it!) . . ."
[Depiction: Jars of Gerber baby and toddler food]
VOICEOVER: " . . . than Gerber. To learn more why four out of five pediatricians who recommend baby food recommend Gerber, . . ."
[Depiction: Baby being fed] "1-800-4-GERBER"
VOICEOVER: " . . . call us, anytime, day or night. You know you can trust Gerber . . ." [Depiction: Woman eating an apple]
"For learning to eat smart, right from the start."
VOICEOVER: " . . . for learning to eat smart, right from the start."
[Exhibit A, television advertisement]

B. [Ad translated from Spanish] [SFX: Baby crying]
WOMAN: "Oh! Mom could you hand me the baby food from the kitchen. The baby is hungry!"
MOM: "Hey, but not all of them are Gerber."
WOMAN: "But those are less expensive. Aren't they all the same?"
MOM: "Of course not. Gerber is the most recommended by pediatricians."
VOICEOVER: "She knows that there is nothing more nutritious and reliable for babies. As a matter of fact, four out of every five pediatricians that recommend baby food recommend Gerber."
WOMAN: "Now that I know I will always buy Gerber. My baby's health is priceless." [SFX: Baby laughing]
VOICEOVER: "For a better start in life, give him only Gerber."
[Exhibit B, radio advertisement]

C. [Gerber ran a promotion in which consumers who purchased a jar of Beech-Nut baby food were given a checkout coupon for Gerber baby food that offered five minutes of free long-distance telephone time upon calling an 800-number and listening to the following recording]
"Congratulations on your free five minutes of long distance, compliments of Gerber. Gerber feels there are a few things you should know. For one, *nobody* makes a safer baby food than Gerber. Plus, four out of five pediatricians who recommend baby food recommend Gerber. And nobody else knows more about purity, safety, nutrition, and of course, taste. And Gerber offers more variety than any other brand -- more than 180 kinds! In a few of those foods we add a controlled amount of sugar, or tapioca. Because research has proven it enhances the taste, without compromising the nutritional composition. No other baby food in the world does all that. Give Gerber a try and find out why it's the baby food more pediatricians recommend. To begin your call, use your key pad to enter your personal identification number found on your store receipt."
[Exhibit C, script of recorded message]

D. "4 OUT OF 5 PEDIATRICIANS* RECOMMEND GERBER

*A 1994 CONTEMPORARY PEDIATRICS RECOMMENDATION STUDY FOUND THAT 88% OF PEDIATRICIANS WHO RECOMMEND BABY FOOD RECOMMEND GERBER."
[Exhibit D, display case sticker]

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that competent and reliable studies or surveys show that four out of five pediatricians who recommend baby food recommend Gerber.

6. In truth and in fact, competent and reliable studies or surveys do not show that four out of five pediatricians who recommend baby food recommend Gerber. In the survey relied upon by respondent, 562 of the surveyed doctors responded to the questions concerning baby food. Of these 562 pediatricians, 408 responded that they recommend baby food to their patients at least once per week. Of the 408 pediatricians who recommend baby food to their patients at least once per week, 332, or approximately 82%, responded that they did not recommend any specific brands of baby food. Of the 76 pediatricians who did recommend specific brands, 67 recommended Gerber. Thus, only 67 of the 408 pediatricians who recommend baby food, or approximately 16%, recommend Gerber to their patients. Therefore, the representation set forth in paragraph five was, and is, false or misleading.

7. Through the means described in paragraph four, respondent has represented, expressly or by implication, that approximately four out of five pediatricians recommend Gerber.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraphs five and seven, at the time the representations were made.

9. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraphs five and seven, at the time the representations were made. In the survey relied upon by respondent, 67, or approximately 12%, of the 562 pediatricians surveyed recommended Gerber. Therefore, the representations set forth in paragraphs five and eight were, and are, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT B

136565 Complaint

EXHIBIT C

EXHIBIT D

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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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. Respondent Gerber Products Company is a Michigan corporation with its principal office or place of business at 445 State Street, Fremont, Michigan.

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

ORDER

DEFINITIONS

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

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondent"* shall mean Gerber Products Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees.

3. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. *"Baby or toddler food"* shall mean any food or juice manufactured, labeled, advertised, promoted, offered for sale, sold, or distributed by respondent for consumption by infants and children up to 4 years of age.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of baby or toddler food shall not make any representation, in any manner, expressly or by implication, about:

A. The extent to which doctors or other health, nutrition, child care, or medical professionals recommend such product; or

B. The recommendation, approval, or endorsement of such product by any health, nutrition, child care, or medical professional, profession, group, or other such entity,

unless, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any baby or toddler food, in or affecting

commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any survey, test, study, or research.

III.

Nothing in this order shall prohibit respondent from making any representation that is specifically permitted in labeling for any baby or toddler food by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990, or by nutrition labeling regulations promulgated by the Department of Agriculture pursuant to the Federal Meat Inspection Act or the Poultry Products Inspection Act.

IV.

It is further ordered, That respondent, and its successors and assigns, shall for three (3) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including written consumer complaints or any communications with governmental or consumer protection organizations.

V.

It is further ordered, That respondent, and its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, deliver a copy of this order to all current principals, officers, directors, and sales, advertising, and marketing managers, and to all

current employees, agents, and representatives having responsibilities with respect to the subject matter of this order; and

B. For a period of five (5) years after the date of service of this order, deliver a copy of this order to all future principals, officers, directors, and sales, advertising, and marketing managers, and to all employees, agents, and representatives having responsibilities with respect to the subject matter of this order, within thirty (30) days after the person assumes such position or responsibilities.

VI.

It is further ordered, That respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VII.

It is further ordered, That respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VIII.

This order will terminate on May 27, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying

consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

ABBOTT LABORATORIES

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3745. Complaint, May 30, 1997--Decision, May 30, 1997

This consent order prohibits, among other things, the Illinois corporation that manufactures and advertises Ensure, a meal supplement, from making scientifically unsubstantiated claims about the extent to which doctors or other professionals recommend any food dietary or nutritional supplement for healthy adults; and about the recommendation, approval or endorsement of any such product by any person, profession or other entity. The consent order also prohibits the respondent from misrepresenting that one serving of any product sold as a meal replacement or supplement, including Ensure, for healthy adults provides vitamins in an amount comparable to typical vitamin supplements; and from misrepresenting the amount of any vitamin or any other nutrient or ingredient in such products.

Appearances

For the Commission: *Michelle Rusk, Michael Ostheimer* and *C. Lee Peeler.*

For the respondent: *Nancy Buc, Buc & Bearsdley,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Abbott Laboratories, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Abbott Laboratories ("Abbott") is an Illinois corporation with its principal office or place of business at One Abbott Park Road, Abbott Park, Illinois.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed nutritional products to the public, including Ensure products. Ensure products are marketed through Abbott's Ross Products Division and include Ensure, Ensure High Protein, Ensure Plus, Ensure With Fiber, Ensure Pudding, and Ensure Light. These products are "foods" and/or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements for Ensure, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. VIDEO	AUDIO
Close-up of a graduation photograph of man and woman.	Man: For 15 years, we've taken good care of each other.
Man and woman who appear to be in their middle thirties.	Woman: We sure have.
	Man: And to take better care of our health, we started drinking Ensure.
Can of Ensure being poured into glass.	Woman: More than a vitamin supplement, Ensure is a delicious drink with all the nutrients adults need to help stay healthy, active, be energetic.
Man and woman jogging in a park.	
Cans of Ensure. Super:	Man: Drink Ensure as a meal.
	Woman: Or in between meals.
RECOMMENDED #1 BY DOCTORS.	Man: Ensure is even recommended number one by doctors as a source of complete balanced nutrition.
	Woman: Ensure, to your health honey.
	Man: Uh, uh, to our health.

(Exhibit A, television advertisement entitled "Younger Husband/Wife").

B. VIDEO	AUDIO
Close-up of black and white photograph of little girl and young father fishing.	Woman: When I was young, you and mom made sure I ate right.
Father and adult daughter fishing on dock.	Man: Well you were my little girl.
	Woman: Well today we're listening to our doctors and taking better care of our health with Ensure.
Three cans of Ensure. Super: RECOMMENDED #1 BY DOCTORS.	Man: Ensure is recommended number one by doctors as a source of complete balanced nutrition.
Can of Ensure being poured into glass.	Woman: More than a vitamin supplement, Ensure has all the nutrients adults need to help stay healthy, active, be energetic.
Father and daughter in boat with father casting.	Man: Drink Ensure as a meal.
Three cans of Ensure. Super: RECOMMENDED #1 BY DOCTORS.	Woman: Or in between meals. Ensure, to your health dad.

Mother: Uh, uh, to our health.
Announcer: Ensure, doctors recommend it number one.

(Exhibit B, television advertisement entitled "Father/Daughter").

C. Wife: Oh boy, that water felt great!
Husband: Sure did. I always feel so good after a swim.
Wife: For 15 years, we've shared a pretty active life.
Husband: I've loved every minute.
Wife: And to help make sure we stay active, one thing we've done lately is to drink Ensure.
Husband: Hm Hmm. See, our doctor told us that a key to being energetic and in good health is good nutrition.
Wife: Right. And one way to help guarantee that you're getting the nutrition you need, is by drinking Ensure.
Husband: More than a vitamin supplement, Ensure is a delicious drink that provides complete balanced nutrition.
Wife: It's got the protein, carbohydrates, minerals and vitamins your body needs everyday to help you stay healthy, active, be energetic.
Husband: Drink Ensure anytime.
Wife: I like it as a delicious meal.
Husband: I like it in between meals. Ensure is even recommended number one by doctors and nutritionists for complete balanced nutrition.
Wife: So make sure the ones you love get the nutrition they need. Ensure. To your health, dear.
Husband: Uh, uh, to our health.
(Exhibit C, radio advertisement entitled "Younger Husband/Wife").

D. Depiction: Snapshots of a young man and a young woman. "Back then we promised to make the most out of life...today we're enjoying every moment." DRINK TO YOUR HEALTH WITH ENSURE.® Depiction: Man and woman who appear to be in their thirties holding glasses of Ensure.

The #1 Doctor Recommended Source of Nutrition.

Most doctors will tell you that a key to good health is good nutrition. But even if you've improved your diet by eating more lean meats, fruits and vegetables, you still may not be getting the balanced nutrition you need.

So how can you help guarantee that you and the ones you love get the right nutrition?

With Ensure and ***New*** Ensure High Protein.

Ensure is more than a vitamin supplement. It's complete balanced nutrition in a delicious ready-to-serve drink that provides an excellent balance of protein, carbohydrate, vitamins, and minerals. In addition, ***New*** Ensure High Protein is low in cholesterol and low in saturated fat while being high in the nutrients you need everyday to help stay healthy, be energetic and more active. Drink your favorite Ensure anytime. Enjoy it as a healthy meal by itself or as a healthy between-meal snack. Ensure is even recommended #1 by doctors as a complete source of nutrition.

So make sure the ones you love get the right nutrition. Drink Ensure and drink to your health.
(Exhibit D, print advertisement).

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that many doctors recommend Ensure as a meal supplement and as a meal replacement for healthy adults, including those in their thirties and forties.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made. Among other reasons, a survey of doctors relied upon by respondent was not designed to elicit whether many doctors actually recommend Ensure as a meal supplement or meal replacement for healthy adults, as opposed to for adults who are ill or elderly and may have nutritional deficiencies. The survey merely asked doctors to assume that they would recommend a supplement for adults who were not ill, and then to select the brand they would most recommend. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that one serving of Ensure provides vitamins in an amount comparable to typical multivitamin supplements.

9. In truth and in fact, one serving of Ensure does not provide vitamins in an amount comparable to typical multivitamin supplements. While the typical multivitamin supplement provides at least 100% of the recommended daily intake (RDI) of vitamins for which RDIs have been established, at the time the advertisements were first disseminated, one serving of Ensure provided 62% of the RDI of Vitamin C and between 12% and 26% of the RDIs of the other vitamins for which RDIs have been established. Ensure has been reformulated and currently one serving provides 50% of the RDI of Vitamin C and 25% of the RDIs of the other vitamins for which RDIs have been established. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT C

EXHIBIT C

EXHIBIT D

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 complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Act, 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, and having duly considered the comments received, 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. Respondent Abbott Laboratories is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal office or place of business at One Abbott Park Road, Abbott Park, 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

DEFINITIONS

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

1. Unless otherwise specified, *"respondent"* shall mean Abbott Laboratories, a corporation, its successors and assigns, and its officers, agents, representatives and employees.

2. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Ensure products, any other food, or any other dietary or nutritional supplement in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

A. The extent to which doctors or other professionals recommend such product for healthy adults; or

B. The recommendation, approval, or endorsement of such product by any person, profession, group, or other entity,

unless, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Ensure products, or any other product advertised, marketed or sold as a meal replacement or meal supplement for healthy adults, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

A. That one serving of such product provides vitamins in an amount comparable to typical vitamin supplements; or

B. The absolute or comparative amount of any vitamin or any other nutrient or ingredient contained in or provided by such product.

If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

III.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

IV.

It is further ordered, That respondent, and its successors and assigns, shall for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

V.

It is further ordered, That respondent, and its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, deliver a copy of this order to all current principals, officers, directors, and managers, and to all current employees, agents, and representatives having responsibilities with respect to the subject matter of this order; and

B. For a period of five (5) years after the date of service of this order, deliver a copy of this order to all future principals, officers, directors, and managers, and to all employees, agents, and representatives having responsibilities with respect to the subject matter of this order, within thirty (30) days after the person assumes such position or responsibilities.

VI.

It is further ordered, That respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VII.

It is further ordered, That respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VIII.

This order will terminate on May 30, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

BST ENTERPRISES, INC., ET AL.

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

Docket 9276. Complaint, Sept. 27, 1995--Final Order, May 30, 1997

This final order adopts the initial decision and order issued by the Administrative Law Judge which prohibits, among other things, the maker of ABS BrakeSafe Equipment and its president from using the term ABS in connection with their retrofitted brakes and from representing that their brakes: are an antilock braking system; will qualify a vehicle for an automobile insurance discount; comply with performance standards set by the Society of Automotive Engineers or the National Highway Traffic Safety Administration; or provide antilock benefits equivalent to those provided by genuine ABS systems. In addition, the order prohibits safety claims, unless the respondents possess competent and reliable scientific substantiation.

Appearances

For the Commission: *Theodore Hoppock.*
For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that BST Enterprises, Inc., a corporation, and Michael Woodruff, individually and as an officer and director of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent BST Enterprises, Inc., is a Nevada corporation, with its offices and principal place of business located at 3139 National Circle, Garland, Texas.

Respondent Michael Woodruff is or was at relevant times herein an officer and director of BST Enterprises, Inc. Individually or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His office and principal place of business is at 3139 National Circle, Garland, Texas.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold, and distributed certain after-market automotive products including ABS BrakeSafe, a device that is installed on a vehicle to improve its braking performance.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or caused to be disseminated advertisements and promotional materials for ABS BrakeSafe, including but not necessarily limited to the advertisements and promotional materials attached hereto as Exhibits A through D. Those advertisements and promotional materials contain the following statements and depictions:

(a) NOW YOU CAN BRAKESAFE™, NO MATTER WHAT YOU DRIVE

In just 30 minutes or less, your car, truck, motorhome, or motorcycle can be RETROFITTED with the anti-lock benefit braking of BrakeSafe!!

For over forty years, the aerospace and aviation industries have equipped military fighter jets and state-of-the-art airliners with the unmatched, non-skid action of hydraulic anti-locking braking systems. In the late 1980's, electronic variations were offered on expensive European luxury cars and later on select domestic models.

But now you don't have to own a new high-priced car or truck to have the safety of BrakeSafe™.

And, since some insurance companies support this type of safety product, your BrakeSafe™ installation certificate may entitle you to discounts on your yearly premium, it varies, but reductions as high as 10% are not unusual.

Don't just brake - BrakeSafe.

Unlike electronic ABS systems which react only in emergency or panic situations, BrakeSafe™ is pro-active - it's in continuous operation.

* * * *

While results can vary substantially by road conditions, vehicle weight and other factors, BrakeSafe™ has been found to reduce stopping distances up to 30% when aggressively decelerating from 60 to 0 mph.

[Depiction of two sets of tire tracks, one long and wavy, extending from 0 to 80 on a graph, and the other short and straight, extending from 0 to 60 on the graph.]

* * * *

Shorter stopping distances are also realized, not just during panic stops or on wet roads.

* * * *

Here's How BrakeSafe™ Works

With conventional brakes, vehicles go into a skid when excess brake pressure is applied - usually the driver's response to an unexpected situation.

As brake pressure increases, one tire can begin to slow at a disproportionate rate to the others. The result, wheel lock-up and an immediate reduction in road adhesion. A skid or spin-out.

In contrast, BrakeSafe™ coordinates braking by modulating brake line pressure to all four wheels, controlling the rotational wheel lock-up before it occurs. . . .
* * * * [Exhibit A]

(b) ABS BRAKESAFE™

Mechanical Safety Braking System With Anti-lock Benefits

PROTECT YOUR FAMILY, YOURSELF & OTHERS WITH MORE EFFICIENT STOPPING.

NOW YOU CAN BRAKESAFE™, NO MATTER WHAT YOU DRIVE.

* * * *

What BrakeSafe™ offers:

* * * *

* With this system you will notice a Softer Pedal which minimizes premature lock-up and increases vehicle stability in emergency situations.

* Controlled stopping and positive steering control during panic stops and dangerous driving conditions make this BrakeSafe™ system especially attractive for motor homes, trailer pullers and commercial vehicles.

* * * *

* In summary, Safer Operation, Greater Control, and Reduced Break Wear more than justify the small investment.

Affordable Aerospace Technology

For years, the aerospace and aviation industries have equipped military fighter jets and state-of-the-art airliners with hydraulic anti-skid, anti-locking braking systems. In the late 1980's, electronic variations were offered on expensive European luxury cars, and later on selected domestic models.

Insurance Discounts

Since insurance companies support this type of safety product, your BrakeSafe™ installation certificate may entitle you to a discount on your yearly premium.

* * * *

While results can vary substantially by road conditions, vehicle weight and other factors, BrakeSafe™ has been found to reduce stopping distances up to 20% when aggressively decelerating from 60 to 0 mph.

[Depiction of two sets of tire tracks, one long and wavy, extending from 0 to 85 on a graph, and the other short and straight, extending from 0 to 55 on the graph.]

* * * *

Does it work?

"We have tested and used it (BrakeSafe) in competition and it greatly enhances our stopping ability. Your product has allowed us to go much deeper into turns while avoiding wheel lockup."

Croydon Kemp CROCYCO RACING

". . . I had no choice but to apply maximum brakes at approximately 115 MPH. There was no lock up and no skip and the car stopped immediately. Had it not been for this system (BrakeSafe™), there would have been a mojor [sic] accident. . ."

Bob Beaucond NORTH COUNTY MUSTANG RACING TEAM

WARRANTY

. . . . BrakeSafe™ is in compliance with the Wheel Slip Brake Control System Road Test Code SAE J46, and National Highway Traffic Safety Administration. (DOT) 49 Code of the Federal Regulations CH. V (10-1-87) Edition 571.105-SA Anti-lock System. [Exhibit B]

(c) PROTECT YOUR FAMILY

ABS BRAKESAFE™ (As used in the airline industry)

* Mechanical Safety Braking System with Anti-lock Benefits
* Safer, Skid Resistant Stopping
* Controls Premature Lock-up
* Shorter, Smoother Braking
* Efficiency in Emergencies
* * * *
NOW YOU CAN BRAKESAFE™, NO MATTER WHAT YOU DRIVE. [Exhibit C]

(d) THE ABS OF BRAKES

BrakeSafe is an enhanced braking system with ABS benefits. . . . Some of the many enhancements to conventional braking is that you normally stop straighter and shorter. . . . In independent testing, the BrakeSafe devices have proven [sic] to stop at least 20 percent shorter when traveling at 60 mph. . . In some cases, your customers may also be offered decreased insurance premiums. [Exhibit D]

PAR. 5. Through the use of the trade name ABS BrakeSafe and the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through D, respondents have represented, directly or by implication, that ABS BrakeSafe is an antilock braking system.

PAR. 6. In truth and if fact, ABS BrakeSafe is not an antilock braking system. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through D, respondents have represented, directly or by implication, that:

(a) ABS BrakeSafe prevents or substantially reduces wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(b) Installation of ABS BrakeSafe will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(c) ABS BrakeSafe complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

(d) ABS BrakeSafe complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

(e) Tests prove that ABS BrakeSafe reduces stopping distances by at least 20% when the vehicle's brakes are applied at a speed of 60 mph;

(f) ABS BrakeSafe provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and

(g) Testimonials from consumers appearing in the advertisements and promotional materials for ABS BrakeSafe reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 8. In truth and in fact:

(a) ABS BrakeSafe does not prevent or substantially reduce wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(b) Installation of ABS BrakeSafe will not qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(c) ABS BrakeSafe does not comply with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46 ("SAE J46"). SAE J46 sets forth a test procedure for evaluating the performance of antilock brake systems, but contains no performance standard. Moreover, ABS BrakeSafe has not been subjected to the testing set forth in SAE J46;

(d) ABS BrakeSafe does not comply with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration. The provision referred to establishes only a definition pertaining to antilock braking systems, and ABS BrakeSafe does not meet that definition;

(e) Tests do not prove that ABS BrakeSafe reduces stopping distances by at least 20% when the vehicle's brakes are applied at a speed of 60 mph;

(f) ABS BrakeSafe does not provide antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and

(g) Testimonials from consumers appearing in the advertisements and promotional materials for ABS BrakeSafe do not reflect the

typical or ordinary experience of members of the public who have used the product.

Therefore, the representations set forth in paragraph seven were, and are, false and misleading.

PAR. 9. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through D, respondents have represented, directly or by implication, that:

(a) In emergency stopping situations, a vehicle equipped with ABS BrakeSafe will stop in a shorter distance than a vehicle that is not equipped with the device; and

(b) Installation of ABS BrakeSafe will make operation of a vehicle safer than a vehicle that is not equipped with the device.

PAR. 10. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five, seven, and nine, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time they made the representations set forth in paragraph five, seven, and nine, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT C

EXHIBIT D

DEFAULT JUDGMENT AGAINST RESPONDENTS BST ENTERPRISES, INC., AND MICHAEL WOODRUFF

I. INTRODUCTION

Complaint counsel have moved, pursuant to Sections 3.12(c) and 3.38(b)(5) of the Rules of Practice, for the entry of a default judgment against respondents in Docket 9276, BST Enterprises, Inc. ("BST") and Michael Woodruff.

The motion is based on the failure of respondents BST and Woodruff to answer the complaint in this matter or to respond to various discovery requests served upon them, and the failure of Woodruff to appear at a deposition in response to a subpoena.

II. BACKGROUND

A. Respondents Were Properly Served With The Complaint and Notice Order

Beginning on approximately October 6, 1995, the U.S. Postal Service made repeated, unsuccessful efforts to get respondents to claim the registered mail package containing the Commission's complaint and notice order in this matter. Thereafter, on November 21, 1995, an investigative assistant in the Commission's Dallas Regional Office hand-delivered to BST's corporate offices, at 3139 National Circle, Garland, Texas, an additional copy of the complaint and notice order, as well as complaint counsel's first set of interrogatories and first *subpoena duces tecum* to respondents, motion to consolidate, and other pleadings and orders issued prior to that date.[1]

Respondents were located at this address at the time the complaint was issued, and they received the pleadings. The address, 3139 National Circle, was then currently used on BST's stationery and other BST documents. The FTC investigator who delivered the pleadings to this address noted that the building entrance bore the trade name of the BST braking product, BrakeSafe. Moreover,

[1] *See* Spears Declaration and Griggs Declaration, dated November 22, 1995, and filed with the Secretary's Office on November 28, 1995 (Attachments 1 and 2 to complaint counsel's motion); Complaint Counsel's Response to Respondent BST's Motion for Thirty Day Extension to Submit Documents, at footnote 1, filed December 15, 1995 (Attachment 3 to complaint counsel's motion). Accompanying the complaint was the standard Secretary's letter informing respondents of the need to file an answer within the time set by the Commission's Rules. (Attachment 1, ¶2 to complaint counsel's motion).

employees present at BST's offices on November 21 confirmed that BST operated out of the location and led FTC personnel to respondent Woodruff's private office. *See* Spears Declaration; Griggs Declaration. Most importantly, respondents' opposition to the motion to consolidate, and their partial responses to complaint counsel's first subpoena and first set of interrogatories, although incomplete, are irrefutable evidence of the fact that respondents received the complaint and notice order.[2]

B. Respondents Failed to Comply With Duly Issued Subpoenas

In addition to their failure to answer the complaint, respondents BST and Woodruff have disobeyed my order that they respond to complaint counsel's November 17, 1995 *subpoena duces tecum* by January 5, 1996. On December 18, 1995, I issued an order requiring respondents to produce all documents responsive to complaint counsel's November 11, 1995 *subpoena duces tecum* by January 5, 1996. Respondents have yet to turn over such documents.[3] Moreover, it is apparent that respondents' failure to comply with my December 18 order is due to their unwillingness to defend this action and not to an inability to do so. Respondents have neither attempted to discuss the subpoena return with complaint counsel nor filed a motion to quash it.

BST and Woodruff also failed to respond to complaint counsel's February 6, 1996 requests for admissions, or to respond to complaint counsel's motion for partial summary judgment as to the advertising claims made by them. On May 22, 1996, I entered a partial summary decision against respondents BST and Woodruff ruling that respondents made each of the claims alleged in the complaint. My findings of fact were based in part upon the failure of respondents to answer the February 6 request for admissions. *See* Rule 3.32(b)

[2] *See* BST's Answer to Motion to Consolidate (stamped Dec. 15, 1995) (Attachment 4 to complaint counsel's motion); November 17, 1995 *Subpoena duces tecum* to BST and BST's December 22, 1995 Partial Response thereto (Attachment 5 to complaint counsel's motion); November 17, 1995 Interrogatories to BST and BST's December 26, 1995 Partial Responses thereto (Attachment 6 to complaint counsel's motion). *See also*, BST's request for a thirty day extension on the subpoena return (stamped Dec. 15, 1995) (Attachment 7 to complaint counsel's motion). These are all of the pleadings respondents have submitted in this proceeding. None of these pleadings dispute respondents' receipt of the complaint or other documents.

[3] *See* Order Granting Extension of Time to BST, D. 9276 (Dec. 18, 1995) (Attachment 8 to complaint counsel's motion); Hoppock Declaration (Attachment 9 to complaint counsel's motion) (complaint counsel never received the documents ordered to be turned over by January 5, 1996).

(matters deemed admitted unless replied to within ten days of service).

Finally, Woodruff failed to appear for deposition pursuant to a subpoena issued by me on June 4, 1996. In light of respondents' failure to respond to the outstanding discovery requests, complaint counsel had intended to depose respondent Woodruff, individually and as an officer of BST Enterprises, as to all issues to be adjudicated in this case. Complaint counsel have substantial proof that, despite Woodruff's ongoing efforts to evade service in this proceeding, the subpoena was successfully served upon him.[4] Woodruff not only failed to appear at his deposition; he also neglected to contact complaint counsel either before or after the date of deposition to attempt to comply with the subpoena.

III. DEFAULT JUDGMENT IS APPROPRIATE UNDER RULES 3.12(c) AND 3.38(b)(5) OF THE COMMISSION'S RULES OF PRACTICE

Default judgment against respondents BST and Woodruff is appropriate under both Rules 3.12(c) and 3.38(b)(5) of the Commission's Rules of Practice.

Rule 3.12(c) provides that the failure of a respondent to file an answer to a complaint:

> authorize[s] the Administrative Law Judge, without further notice to the respondent, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

---

[4] Since the complaint was issued, respondents BST and Woodruff have changed addresses several times without notifying complaint counsel, me, or the Secretary's Office. Despite this fact, complaint counsel have attempted to serve all pleadings to respondents' most current known address.

In May 1996, complaint counsel learned from the U.S. Postal Service that respondents had changed their address to a post office box in Dallas, Texas at zip code 75355. Hoping to effect personal service of a *subpoena ad testificandum* upon Woodruff, complaint counsel obtained the street address given by him in registering for the post office box. When it was determined that Woodruff did not reside at this address, an employee of the Commission's Dallas Regional Office hand-delivered a *subpoena ad testificandum* to the station manager for zip code 75355 for placement in respondent Woodruff's post office box. (*See* Elliott Declaration) (Attachment 10 to complaint counsel's motion). The station manager's sworn declaration states that the subpoena was picked up from the post office box the following day. (*See* Brown Declaration) (Attachment 11 to complaint counsel's motion). Accordingly, Woodruff was properly served with the *subpoena ad testificandum.*

Moreover, Woodruff and BST Enterprises continue to accept mail at this address. (*See* Teague Declaration) (Attachment 12 to complaint counsel's motion). On June 7, 1996, the same date that the subpoena was picked up, respondents renewed the post office box. At that time Woodruff changed his street address to 3131 National Circle, Garland, Texas -- evidently just doors down from BST's former corporate address of 3139 National Circle. (*See* Teague Declaration).

Respondents BST and Woodruff failed to answer the complaint in this action, despite the fact they clearly were served with the complaint and notice order almost one year ago. A default order is, therefore, appropriate. *See Griffin Systems, Inc.*, 1993 FTC LEXIS 167 (Order Granting Default Judgment Against Robert W. Boughton), *affirmed*, *Boughton v. FTC*, unreported (11th Cir. 1996);[5] *American Tractor Trailer Training, Inc.*, 86 FTC 654, 663-64 (1975); *Joseph Richard Horvath t/a Sew Rite*, 85 FTC 1081, 1085 (1975); *Robertson Investment Co.*, 83 FTC 1717, 1721-22 (1974).

Commission Rule 3.38(b)(5) provides that if a party fails to comply with a subpoena, or with an order for the production of documents or the answering of interrogatories, the Administrative Law Judge may rule that a "decision of the proceeding be rendered against the party." Respondents BST and Woodruff failed to comply with my order requiring the production of documents and failed to appear for testimony pursuant to subpoena.

In a recent Commission action against RustEvader Corp., the ALJ struck RustEvader's answer, pursuant to Rule 3.38(b)(5), on the grounds that the corporate respondent had failed to comply with the ALJ's order directing it to answer discovery requests. The ALJ then held that the entry of default judgment was appropriate under both Rule 3.12(c) and 3.38(b) where the corporate respondent generally had failed to respond to discovery as to all aspects of the litigation. *See* RustEvader Corp., Docket No. 9274 (Initial Decision) (May 24, 1996) (Timony, ALJ). A default judgment is also appropriate here since respondents BST and Woodruff have failed to answer the complaint, failed to appear for testimony pursuant to subpoena, and failed to comply with a subpoena or my order for the production of certain documents relevant to the central issues for adjudication in this case.

Commission Rules 3.12(c) and 3.38(b)(5) are modeled closely after Rules 37 and 55(b) of the Federal Rules of Civil Procedure. Under Rule 55(b) default judgment is available "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend [the lawsuit]. . . ." Under Rule 37, a court

[5] The circuit court's unpublished opinion is included as Attachment 14 to complaint counsel's motion. Both the ALJ and the circuit court found that the entry of a default judgment against the respondent for failure to answer the complaint was appropriate under Rule 3.12(c) where the complaint was properly served upon a post office box, respondent's only known address. In this instance, service was made at respondents' place of business, which unquestionably is appropriate under Rule 3.12(c).

may issue "an order rendering a judgment by default" if a party disobeys a discovery order, fails to attend its own deposition, fails to serve answers to interrogatories, or fails to respond to a request for inspection. The federal rules provide for default judgment in order to allow the courts to manage their dockets efficiently and effectively. *Merrill Lynch Mort. Corp. v. Narayan*, 908 F.2d 246, 252 (7th Cir. 1990). As the Supreme Court has stated:

> The most severe in the spectrum of sanctions must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. Met. Hockey Club, Inc., 427 U.S. 639, 643 (1976).

The federal courts frequently enter default judgments, pursuant to Rule 55(b), as a result of a party's failure to answer the complaint. For instance, in *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282 (D.C. Minn. 1985), the court held that Fed. R. Civ. P. 55(b) does not require a hearing before the entry of default where a defendant has failed to answer the complaint:

> If the court determines that a defendant is in default, the factual allegations of the complaint will be taken as true. This rule applies to cases seeking equitable as well as legal relief.

FTC v. Kitco of Nevada, Inc., 612 F. Supp. at 1297 (citations omitted).

The federal courts also frequently enter default judgments pursuant to Rule 37 where, as here, the defendant has failed to comply with duly served subpoenas or other discovery requests. In *FTC v. Packers Brand Meats, Inc.*, 562 F.2d 9, 10 (8th Cir. 1977), the defendant, after nearly six months, had failed to respond to the lower court's order to show cause why it should not be required to testify or produce documents pursuant to a subpoena issued by the FTC ALJ. The appellate court held that the district court was "fully justified" in entering a default where the defendant's failure to comply did not constitute either good faith mistake or excusable neglect.

Similarly, the appellate court in *U.S. v. DiMucci*, 879 F.2d 1488 (7th Cir. 1989), held that the district court did not abuse its discretion in entering default where:

Defendants' repeated failure to comply with discovery, to obey court orders regarding the same, and to appear for their depositions clearly constitute contumacious conduct which seriously hampered [plaintiff's] trial preparation.

U.S. v. DiMucci, 879 F.2d at 1494.

A default judgment is appropriate and necessary to ensure the functioning of the judicial process when a defendant's actions or inactions amount to willful misconduct. "A defendant cannot be permitted to avoid or delay a plaintiff's right to judicial resolution of a dispute by ignoring the proceeding." *Frank Keevan & Son v. Collier Steel Pipe & Tube*, 107 F.R.D. 665, 670 (1985). *See also Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 133 (4th Cir.), *cert. denied* 113 S. Ct. 70 (1992) (The district court was justified in entering default where defendant: failed to cooperate in discovery matters; refused to submit to depositions; and failed to participate in the prosecution and defense of the matter); *Crocker National Bank v. M.F. Securities (Bahamas)*, 104 F.R.D. 123, 127 (1985) ("As a result of defendants' willful failure to comply with the court's order to appear for deposition, this court is authorized in issuing an order rendering judgment by default against defendants."); *Minnesota Min. & Mfg. Co. v. ECO Chem., Inc.*, 757 F.2d 1256, 1261 (Fed. Cir. 1985) (district court did not abuse its discretion in entering default where the defendant repeatedly had engaged in dilatory tactics).

For the reasons given above,

It is ordered, That respondents BST Enterprises, Inc., and Michael Woodruff be, and they hereby are, found in default of this proceeding; and

It is further ordered, That because of respondents' default, and pursuant to Sections 3.12(c) and 3.38(b)(5) of the Rules of Practice, the following initial decision be, and it hereby is, entered.

INITIAL DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

OCTOBER 16, 1996

I. FINDINGS OF FACT

1. Respondent BST Enterprises, Inc., is a Nevada corporation, with its offices and principal place of business located at 3131 National Circle, Garland, Texas.

2. Respondent Michael Woodruff is an officer and director of BST Enterprises, Inc. His office and principal place of business is at 3131 National Circle, Garland, Texas, and he also receives mail at Post Office Box 551355, Dallas, Texas.

3. Respondent Michael Woodruff, individually or in concert with others, formulates, directs, and controls the acts and practices of the corporate respondent.

4. Respondents have manufactured, advertised, offered for sale, sold, and distributed certain after-market automotive products including ABS BrakeSafe, a device that is installed on a vehicle to improve its braking performance.

5. The acts and practices of respondents have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

6. Respondents have disseminated or caused to be disseminated advertisements and promotional materials for ABS BrakeSafe, including but not necessarily limited to Exhibits A through D attached to the complaint. These advertisements and promotional materials contain the following statements and depictions:

(a) NOW YOU CAN BRAKESAFE™, NO MATTER WHAT YOU DRIVE.

In just 30 minutes or less, your car, truck, motorhome or motorcycle can be RETROFITTED with the anti-lock benefit braking of BrakeSafe!!

For over forty years, the aerospace and aviation industries have equipped military fighter jets and state-of-the-art airliners with the unmatched, non-skid action of hydraulic anti-locking braking systems. In the late 1980's, electronic variations were offered on expensive European luxury cars and later on select domestic models.

But now you don't have to own a new high-priced car or truck to have the safety of BrakeSafe™.

And, since some insurance companies support this type of safety product, your BrakeSafe™ installation certificate may entitle you to discounts on your yearly premium; it varies, but reductions as high as 10% are not unusual.

Don't just brake - BrakeSafe.

Unlike electronic ABS systems which react only in emergency or panic situations, BrakeSafe™ is pro-active - it's in continuous operation.

* * * *

While results can vary substantially by road conditions, vehicle weight and other factors, BrakeSafe™ has been found to reduce stopping distances up to 30% when aggressively decelerating from 60 to 0 mph.

[Depiction of two sets of tire tracks, one long and wavy, extending from 0 to 80 on a graph, and the other short and straight, extending from 0 to 60 on the graph.]

* * * *

Shorter stopping distances are also realized, not just during panic stops or on wet roads.

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Here's How BrakeSafe™ Works

With conventional brakes, vehicles go into a skid when excess brake pressure is applied - usually the driver's response to an unexpected situation.

As brake pressure increases, one tire can begin to slow at a disproportionate rate to the others. The result: wheel lock-up and an immediate reduction in road adhesion. A skid or spin-out.

In contrast, BrakeSafe™ coordinates braking by modulating brake line pressure to all four wheels, controlling the rotational wheel lock-up before it occurs. . . .

* * * * [Complaint Exhibit A]

(b) ABS BRAKESAFE™

Mechanical Safety Braking System With Anti-lock Benefits

PROTECT YOUR FAMILY, YOURSELF & OTHERS WITH MORE EFFICIENT STOPPING.

NOW YOU CAN BRAKESAFE™, NO MATTER WHAT YOU DRIVE.

* * * *

What BrakeSafe™ offers:

* * * *

* With this system you will notice a Softer Pedal which minimizes premature lock-up and increases vehicle stability in emergency situations.

* Controlled stopping and positive steering control during panic stops and dangerous driving conditions make this BrakeSafe™ system especially attractive for motor homes, trailer pullers and commercial vehicles.

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* In summary, Safer Operation, Greater Control, and Reduced Break Wear more than justify the small investment.

Affordable Aerospace Technology

For years, the aerospace and aviation industries have equipped military fighter jets and state-of-the-art airliners with hydraulic anti-skid, anti-locking braking systems. In the late 1980's, electronic variations were offered on expensive European luxury cars, and later on selected domestic models.

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Does it work?

"We have tested and used it (BrakeSafe)in competition and it greatly enhances our stopping ability. Your product has allowed us to go much deeper into turns while avoiding wheel lockup."
Croydon Kemp CROCYCO RACING

". . . I had no choice but to apply maximum brakes at approximately 115 MPH. There was no lock up and no skip and the car stopped immediately. Had it not been for this system (BrakeSafe™), there would have been a mojor [sic] accident. . ."
Bob Beaucond NORTH COUNTY MUSTANG RACING TEAM

WARRANTY

. . . . BrakeSafe™ is in compliance with the Wheel Slip Brake Control System Road Test Code SAE J46, and National Highway Traffic Safety Administration. (DOT) 49 Code of the Federal Regulations CH. V (10·1·87) Edition 571.105-SA Anti-lock System. [Complaint Exhibit B]

(c) PROTECT YOUR FAMILY

ABS BRAKESAFE™ (As used in the airline industry)
* Mechanical Safety Braking System with Anti-lock Benefits
* Safer, Skid Resistant Stopping
* Controls Premature Lock-up
* Shorter, Smoother Braking
* Efficiency in Emergencies
* * * *

NOW YOU CAN BRAKESAFE™, NO MATTER WHAT YOU DRIVE.

[Complaint Exhibit C]

(d) THE ABS OF BRAKES

BrakeSafe is an enhanced braking system with ABS benefits. . . . Some of the many enhancements to conventional braking is that you normally stop straighter and shorter. . . . In independent testing, the BrakeSafe devices have proven [sic] to stop at least 20 percent shorter when travelling at 60 mph. . . In some cases, your customers may also be offered decreased insurance premiums.

[Complaint Exhibit D]

7. On May 22, 1996, a Partial Summary Decision was issued in which, *inter alia*, respondents' advertising claims were discussed and analyzed at length. Thus, it has previously been found that respondents' ads, logos and promotional material make and have made the claim that the ABS BrakeSafe braking device is an antilock braking system. (Partial Summary Decision, at p. 27) (May 22, 1996).

8. In truth and in fact, ABS BrakeSafe is not an antilock braking system. Therefore, respondents' representation set forth in finding 7 was, and is, false and misleading.

9. As was detailed in the Partial Summary Decision, respondents' ads, logos and promotional material make and have made the claims that:

(a) ABS BrakeSafe prevents or substantially reduces wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(b) Installation of ABS BrakeSafe will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(c) ABS BrakeSafe complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

(d) ABS BrakeSafe complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration[6];

(e) ABS BrakeSafe provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and

(f) Consumer testimonials appearing in their ads and promotional materials reflect the typical or ordinary experience of members of the public who have used the ABS BrakeSafe device.

(g) Tests prove that ABS BrakeSafe will reduce stopping distance when compared with vehicles not furnished with the braking device.

(Partial Summary Decision, at pp. 27-28) (May 22, 1996).

10. In truth and in fact:

(a) ABS BrakeSafe does not prevent or substantially reduce wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(b) Installation of ABS BrakeSafe will not qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(c) ABS BrakeSafe does not comply with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46 ("SAE J46"). SAE J46 sets forth a test procedure for evaluating the performance of antilock brake systems, but contains no performance standard. Moreover, ABS BrakeSafe has not been subjected to the testing set forth in SAE J46;

(d) ABS BrakeSafe does not comply with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration. The provision referred to establishes only a

[6] This finding was articulated in my May 28,1996 order clarifying the May 22, 1996 Partial Summary Decision.

definition pertaining to antilock braking systems, and ABS BrakeSafe does not meet that definition;

(e) ABS BrakeSafe does not provide antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems;

(f) Testimonials from consumers appearing in the advertisements and promotional materials for ABS BrakeSafe do not reflect the typical or ordinary experience of members of the public who have used the product; and

(g) Tests do not prove that ABS BrakeSafe will reduce stopping distance when compared with vehicles not furnished with the braking device.

Therefore, respondents' representations as set forth in finding 9 were, and are, false and misleading.

11. As was detailed in the Partial Summary Decision, respondents' ads, logos and promotional material make and have made the claims that:

(a) In emergency stopping situations, a vehicle equipped with ABS BrakeSafe will stop in a shorter distance than a vehicle that is not equipped with the device; and

(b) Installation of ABS BrakeSafe will make operation of a vehicle safer than a vehicle that is not equipped with the device.

(Partial Summary Decision, at p. 28) (May 22, 1996).

12. As was detailed in the Partial Summary Decision, respondents' ads, logos and promotional material make and have made the claim that at the time respondents made the representations set forth in findings 7, 9, and 11, they possessed and relied upon a reasonable basis that substantiated such representations.

13. In truth and in fact, at the time respondents made the representations set forth in findings 7, 9, and 11, they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representations set forth in finding 12 were, and are, false and misleading.

II. CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. The acts and practices of respondents as described in findings 1 through 13 above constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

3. The following order is necessary and appropriate under applicable legal precedent and the facts of this case.

III. ORDER

DEFINITIONS

For the purposes of this order:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results; and

2. *"Purchasers for resale"* shall mean all purchasers of ABS BrakeSafe for resale to the public, including but not limited to franchisees, wholesalers, distributors, retailers, installers, and jobbers.

I.

It is ordered, That respondents, BST Enterprises, Inc., a corporation, its successors and assigns, and its officers, and Michael Woodruff, individually and as an officer and director of said corporation, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of ABS BrakeSafe or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from employing the initials or term ABS in conjunction with or as part of the name for such product or the product logo.

II.

It is further ordered, That respondents, BST Enterprises, Inc., a corporation, its successors and assigns, and its officers, and Michael Woodruff, individually and as an officer and director of said corporation, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of ABS BrakeSafe or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product:

A. Is an antilock braking system;

B. Prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;

C. Will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

D. Complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

E. Complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

F. Has been proven in tests to reduce stopping distances by at least 20% when the vehicle's brakes are applied at a speed of 60 mph; or

G. Provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems.

III.

It is further ordered, That respondents BST Enterprises, Inc., a corporation, its successors and assigns, and its officers, and Michael Woodruff, individually and as an officer and director of said corporation, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any braking system, accessory, or device, in or affecting commerce, as

"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. In emergency stopping situations, a vehicle equipped with the system, accessory, or device will stop in a shorter distance than a vehicle that is not equipped with the system, accessory, or device; or

B. Installation of the system, accessory, or device will make operation of a vehicle safer than a vehicle that is not equipped with the system, accessory, or device;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondents BST Enterprises, Inc., a corporation, its successors and assigns, and its officers, and Michael Woodruff, individually and as an officer and director of said corporation, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication:

A. The contents, validity, results, conclusions, or interpretations of any test or study;

B. The compliance of any such product with any standard, definition, regulation, or any other provision of any governmental entity or unit, or of any other organization;

C. The availability of insurance benefits or discounts arising from the use of such product; or

D. That any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product represents the typical or ordinary experience of members of the public who use the product, unless:

(1) Such representation is true, or

(2) Respondents disclose clearly, prominently, and in close proximity to the endorsement or testimonial either:

(a) What the generally expected results would be for users of such product, or

(b) The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

V.

It is further ordered, That respondents BST Enterprises, Inc., a corporation, its successors and assigns, and its officers, and Michael Woodruff, individually and as an officer and director of said corporation, and respondents' agents, representatives, and employees,

directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the absolute or comparative attributes, efficacy, performance, safety, or benefits of such system, accessory, or device, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

VI.

It is further ordered, That respondents BST Enterprises, Inc., a corporation, its successors and assigns, and Michael Woodruff shall:

A. Within forty-five (45) days after the date of service of this order, compile a current mailing list containing the names and last known addresses of all purchasers of ABS BrakeSafe since January 1, 1990. Respondents shall compile the list by:

1. Searching their own files for the names and addresses of such purchasers; and

2. Using their best efforts to identify any other such purchasers, including but not limited to sending by first class certified mail, return receipt requested, within five (5) days after the date of service of this order, to all of the purchasers for resale with which respondents have done business since January 1, 1990, an exact copy of the notice attached hereto as Appendix A. The mailing shall not include any other documents. In the event that any such purchaser for resale fails to provide any names or addresses of purchasers in its possession, respondents shall provide the names and addresses of all such purchasers for resale to the Federal Trade Commission within forty-five (45) days after the date of service of this order.

3. In addition, respondents shall retain a National Change of Address System ("NCOA") licensee to update this list by processing the list through the NCOA database.

B. Within sixty (60) days after the date of service of this order, send by first class mail, postage prepaid, to the last address known to respondents of each purchaser of ABS BrakeSafe identified on the mailing list compiled pursuant to subparagraph A of this Part, an exact copy of the notice attached hereto as Appendix B. The mailing shall not include any other documents. The envelope enclosing the notice shall have printed thereon in a prominent fashion the phrases "FORWARDING AND RETURN POSTAGE GUARANTEED" and "IMPORTANT NOTICE--U.S. GOVERNMENT ORDER ABOUT ABS BRAKESAFE BRAKING DEVICE."

C. Send the mailing described in subparagraph B of this Part to any person or organization not on the mailing list prescribed in subparagraph A of this Part about whom respondents later receive information indicating that the person or organization is likely to have been a purchaser of ABS BrakeSafe, and to any purchaser whose notification letter is returned by the U.S. Postal Service as undeliverable and for whom respondents thereafter obtain a corrected address. The mailing required by this subpart shall be made within ten (10) days of respondents' receipt of a corrected address or information identifying each such purchaser.

D. In the event respondents receive any information that, subsequent to its receipt of Appendix A, any purchaser for resale is using or disseminating any advertisement or promotional material that contains any representation prohibited by this order, immediately notify the purchaser for resale that respondents will terminate the use of said purchaser for resale if it continues to use such advertisement or promotional material.

E. Terminate within ten (10) days the use of any purchaser for resale about whom respondents receive any information that such purchaser for resale has continued to use any advertisement or promotional material that contains any representation prohibited by this order after receipt of the notice required by subparagraph A of this Part.

VII.

It is further ordered, That respondents BST Enterprises, Inc., a corporation, its successors and assigns, and Michael Woodruff shall for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. The list compiled pursuant to subparagraph A of Part VI of this order;

B. Copies of all notification letters sent to purchasers pursuant to subparagraphs B and C of Part VI of this order;

C. Copies of notification letters sent to purchasers for resale pursuant to subparagraphs A and D of Part VI of this order, and all other communications with purchasers for resale relating to the notices required by Part VI of this order.

VIII.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors or assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers, and complaints or inquiries from governmental organizations.

IX.

It is further ordered, That respondent BST Enterprises, Inc., its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, provide a copy of this order to each of respondent's current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of ten (10) years from the date of service of this order, provide a copy of this order to each of respondent's future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order, within three (3) days after the person assumes his or her position.

X.

It is further ordered, That respondent BST Enterprises, Inc., its successors and assigns, shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a 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 which may affect compliance obligations under this order.

XI.

It is further ordered, That respondent Michael Woodruff shall, for a period of ten (10) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XII.

It is further ordered, That this order will terminate twenty years from the date of its issuance, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XIII.

It is further ordered, That respondents shall, within sixty (60) days after service of this order upon them, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

APPENDIX A

[BST Enterprises, Inc. letterhead]

Dear ABS BrakeSafe Reseller:

Our records indicate that you are or have been a distributor or retailer of the ABS BrakeSafe, a brake product. This letter is to advise you that the Federal Trade Commission recently obtained an order against BST Enterprises, Inc. regarding certain claims made for the ABS BrakeSafe device. Under that order, we are required to notify our distributors, wholesalers and others who have sold ABS BrakeSafe to stop using or distributing advertisements or promotional materials containing these claims. We are also asking for your assistance in compiling a list of ABS BrakeSafe purchasers, so that we may contact them directly. Please read this letter in its entirety and comply with all parts.

The FTC's Decision and Order

The Federal Trade Commission has determined that the following claims made for the ABS BrakeSafe device in BST Enterprises' advertisements, logos and promotional material are FALSE and MISLEADING:

(a) ABS BrakeSafe is an antilock braking system.

(b) ABS BrakeSafe prevents or substantially reduces wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(c) Installation of ABS BrakeSafe will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(d) ABS BrakeSafe complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

(e) ABS BrakeSafe complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

(f) ABS BrakeSafe provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and

(g) Tests prove that ABS BrakeSafe will reduce stopping distances by at least 20% when the vehicle's brakes are applied at 60 mph.

The FTC Order requires BST Enterprises, Inc. to cease and desist from making these false claims for the ABS BrakeSafe device.

In addition, the FTC Order requires BST Enterprises, Inc. to cease and desist from making claims that ABS BrakeSafe will shorten stopping distances in emergency stopping situations or make a vehicle safer, unless at the time of making such representation it possesses competent and reliable scientific evidence substantiating the representation.

We need your assistance in complying with this order.

Please immediately send us the names and last known addresses of all persons or businesses, including other resellers, to whom you have sold an ABS BrakeSafe since January 1, 1990. We need this list in order to provide the notification required by the FTC Order. If you do not provide this information, we are required to provide your name and address to the FTC.

Please stop using the ABS BrakeSafe promotional materials currently in your possession. These materials may contain claims that the FTC has determined to be false or unsubstantiated. You also should avoid making any of the representations as described in this letter. Under the FTC Order, we must stop doing business with you if you continue to use the prohibited materials or make the prohibited representations.

If you have any questions, you may call Sydney Knight of the Federal Trade Commission at (202) 326-2162. Thank you for your cooperation.

Very truly yours,

Michael Woodruff
President
BST Enterprises, Inc.

APPENDIX B

[BST Enterprises, Inc. letterhead]

Dear ABS BrakeSafe Customer:

Our records indicate that you previously purchased an ABS BrakeSafe for your vehicle. This letter is to advise you that the Federal Trade Commission ("FTC") recently obtained an order against BST Enterprises, Inc. regarding certain claims made for ABS BrakeSafe. Please read this letter in its entirety.

The FTC's Decision and Order

The Federal Trade Commission has determined that the following claims made for the ABS BrakeSafe device in BST Enterprises, Inc.'s advertisements, logos and promotional material are FALSE and MISLEADING:

(a) ABS BrakeSafe is an antilock braking system.

(b) ABS BrakeSafe prevents or substantially reduces wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(c) Installation of ABS BrakeSafe will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(d) ABS BrakeSafe complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

(e) ABS BrakeSafe complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

(f) ABS BrakeSafe provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and

(g) Tests prove that ABS BrakeSafe will reduce stopping distances by at least 20% when the vehicle's brakes are applied at the speed of 60 mph.

The FTC Order requires BST Enterprises, Inc. to cease and desist from making these false claims for the ABS BrakeSafe device.

In addition, the FTC Order requires BST Enterprises, Inc. to cease and desist from making claims that ABS BrakeSafe will shorten stopping distances in emergency situations or make a vehicle safer, unless at the time of making such representation it possesses competent and reliable scientific evidence substantiating the representation.

If you have any questions, you may call Sydney Knight of the Federal Trade Commission at (202) 326-2162. Thank you for your cooperation.

Very truly yours,

Michael Woodruff
President
BST Enterprises, Inc.

FINAL ORDER

The Administrative Law Judge filed his Initial Decision in this matter on October 16, 1996, and entered a Default Judgment against the respondents. An appropriate order against the respondents to remedy the violations was appended to the Initial Decision and Default Judgment. Service of the Initial Decision and Default

Judgment was completed on March 27, 1997. Neither the respondents nor complaint counsel filed an appeal.

The Commission having determined that this matter should not be placed on its docket for review and that the Initial Decision and the order therein shall become effective as provided in Section 3.51(a) of the Commission's Rules of Practice, 16 CFR 3.51(a).

It is ordered, That the Initial Decision and the Order therein shall become the Final Order and Opinion of the Commission on the date of issuance of this order.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC.

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

Docket 9189. Complaint, Dec. 20, 1984--Decision, June 3, 1997*

This consent order prohibits each dealer, among other things, from agreeing with any other Detroit area dealer or dealer association to establish, maintain or adhere to any hours of operation, or requesting or encouraging any dealer or dealer association to maintain any hours of operation; prohibits each from exchanging information with any dealer or dealer association concerning hours of operation except in certain circumstances; and limits a minimum weekly hours-of-operation requirement to the time during which the dealers were already in compliance.

Appearances

For the Commission: *Ernest Nagata, Willard Tom* and *William Baer*.

For the respondents: *Lawrence Raniszeski, Colombo & Colombo,* Bloomfield Hills, MI. *John Youngblood, Abbott, Nicholson, Quilter, Esshaki & Youngblood,* Detroit, MI. and *Kenneth Wilson, Stringari, Fritz, Kreger, Ahearn, Goodnow, Bennett & Hunsinger,* Detroit, MI.

DECISION AND ORDER

The Federal Trade Commission having issued its two count complaint charging the respondents named in the complaint issued in this matter on December 20, 1984, with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondents identified in Attachment A to this order, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order for Count I of the complaint, an admission by the identified respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only, and waivers and other provisions as required by the Commission's Rules; and

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[1]* Complaint previously published at 108 FTC 193.

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

The Commission having thereafter considered the matter and 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 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent dealers identified in Attachment A are all corporations with their principal places of business located at the addresses shown in Attachment A.

2. Individual respondents identified in Attachment A are officers of various dealers, as shown in Attachment A, and as such they formulate, direct and control the acts and practices of the dealers for which they are officers.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as it relates to Count I of the complaint and of the identified respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That for the purposes of this order, the following definitions shall apply:

1. *"Person"* means any natural person, corporation, partnership, association, joint venture, trust, or other organization or entity, but not governmental entities.

2. *"Dealer"* means any person who receives on consignment or purchases motor vehicles for sale or lease to the public, and any director, officer, employee, representative or agent of any such person.

3. *"Dealer association"* means any trade, civic, service, or social association whose membership is composed primarily of dealers.

4. *"Detroit area"* means the Detroit, Michigan metropolitan area, comprising Macomb County, Wayne County and Oakland County in the State of Michigan.

5. *"Hours of operation"* means the times during which a dealer is open for business to sell or lease motor vehicles.

6. *"Weekday hours"* means the hours of 9:00 a.m. to 6:00 p.m. Monday through Friday.

7. *"Non-weekday hours"* means hours other than 9:00 a.m. to 6:00 p.m. Monday through Friday.

8. *"Respondent"* means any dealership, individual, or association respondent.

9. *"Commission"* means Federal Trade Commission.

I.

It is further ordered, That the order issued in this matter by the Commission on February 22, 1989, as modified by the order issued by the Commission on June 20, 1995, shall be and hereby is incorporated as part of this order except as provided below:

A. Respondents' compliance to date with Part III of said orders shall constitute full compliance with Part III.

B. The period for which compliance reports are required under Part X of the order of February 22, 1989, shall run for five (5) years from the effective date of the order of June 20, 1995. Any reports filed pursuant to said orders to date shall be construed to have been filed in compliance with said orders as modified herein.

C. All other obligations under said orders shall be construed to have commenced on the effective date of the order of June 20, 1995, and shall run for the periods specified in said orders.

ATTACHMENT A

Dealer Respondents	**Individual Respondents**
Crestwood Dodge, Inc. 32850 Ford Road Garder City, MI 48135	Robert C. Borst c/o Bob Borst Lincoln-Mercury, Inc., 1950 W. Maple Road Troy, MI 48084
Bob Borst Lincoln-Mercury, Inc. a/k/a Bob Borst Lincoln-Mercury Sales Inc. 1950 W. Maple Road Troy, MI 48084	Robert Dusseau, a/k/a/ Robert F. Dusseau c/o Bob Dusseau Lincoln-Mercury 31625 Grant River Avenue Farmington, MI 48024
Bob Dusseau, Inc. a/k/a Bob Dusseau Lincoln-Mercury 31625 Grant River Avenue	Robert Maxey c/o Bob Maxey Lincoln-Mercury Sales Inc. 16901 Mack Avenue

Farmington, MI 48024

Detroit, MI 48224

Bob Maxey Lincoln-Mercury Sales, Inc.
16901 Mack Avenue
Detroit, MI 48224

Crest Lincoln-Mercury Sales, Inc.
36200 Van Dyke Avenue
Sterling Heights, MI 48077

Stewart Chevrolet, Inc.
23755 Allen Road
Woodhaven, MI 48183

Woody Pontiac Sales, Inc.
12140 Joseph Campau
Hamtramck, MI 48212

Jack Demmer Ford, Inc.
a/k/a/ Jack Demmer Ford
37300 Michigan Avenue
Wayne, MI 48184

Al Long Ford, Inc.
13711 E. Eight Mile Road
Warren, MI 48089

Ed Schmid Ford, Inc.
21600 Woodward Avenue
Ferndale, MI 48220

Ray Whitfield Ford
a/k/a/ Ray Whitfield Ford, Inc.
10725 S. Telegraph Road
Taylor, MI 48180

William Ritchie, a/k/a/ William R. Ritchie
c/o Crest Lincoln-Mercury Sales, Inc.
36200 Van Dyke Avenue
Sterling Heights, MI 48077

Gordon L. Stewart, a/k/a/ Gordon Stewart
c/o Stewart Chevrolet, Inc.
23755 Allen Road
Woodhaven, MI 48183

Woodrow W. Woody
c/o Woody Pontiac Sales, Inc.
12140 Joseph Campau
Hamtramck, MI 48212

John E. Demmer, a/k/a/ Jack E. Demmer
c/o Jack Demmer Ford, Inc.
37300 Michigan Avenue
Wayne, MI 48184

Edward F. Schmid, a/k/a/ Edward Schmid
c/o Ed Schmid Ford, Inc.
21600 Woodward Avenue
Ferndale, MI 48220

Raymond J. Whitfield
a/k/a/ Raymond Whitfield
c/o Ray Whitefield Ford
10725 S. Telegraph Road
Taylor, MI 48180

IN THE MATTER OF

MAHLE GMBH, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3746. Complaint, June 4, 1997--Decision, June 4, 1997

This consent order requires Mahle, among other things, to divest, within 10 days, Metal Leve's U.S. piston business, which includes plants in Orangeburg and Sumter, South Carolina, and a research and development center in Ann Arbor, Michigan, as well as technology outside the United States which supports the business of manufacturing and selling pistons in the United States.

Appearances

For the Commission: *Howard Morse, Morris Bloom* and *William Baer*.

For the respondents: *Michael Sohn, Arnold & Porter,* Washington, D.C. and *Jay Herbst, Driggers, Schultz, Herbst & Patterson,* Troy, MI.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mahle GmbH, the parent company of Mahle, Inc., has acquired more than 50 percent of the voting securities of Metal Leve, S.A., the parent company of Metal Leve, Inc., in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. THE RESPONDENTS

Mahle GmbH and Mahle, Inc.

1. Respondent Mahle GmbH is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with

its office and principal place of business located at Pragstrasse 26-46, D-70376 Stuttgart, Germany. Mahle GmbH has had annual worldwide sales of approximately $1.7 billion.

2. Respondent Mahle, Inc., a majority-owned subsidiary of Mahle GmbH, is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1 Mahle Drive, Morristown, Tennessee. Mahle, Inc. has had annual U.S. sales of approximately $135 million.

3. Mahle GmbH, which operates in the United States through Mahle, Inc., manufactures and sells pistons for internal combustion engines and is a leading producer of articulated pistons and large bore two-piece pistons. Mahle, Inc. produces pistons in the United States at plants located in Tennessee.

4. At all times relevant herein, Mahle GmbH and Mahle, Inc. (collectively, "Mahle") have been, and are now, corporations as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, Mahle GmbH and Mahle, Inc. have been, and are now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

Metal Leve, S.A. and Metal Leve, Inc.

5. Respondent Metal Leve, S.A. is a corporation organized, existing and doing business under and by virtue of the laws of Brazil, with its office and principal place of business located at Rua Brasilio Luz 535, Sao Paolo SP 04746-901, Brazil. Metal Leve, S.A. has had annual worldwide sales of approximately $315 million.

6. Respondent Metal Leve, Inc., a wholly-owned subsidiary of Metal Leve, S.A., is a corporation organized, existing and doing business under and by virtue of the laws of Michigan, with its office and principal place of business located at 560 Avis Drive, Ann Arbor, Michigan. Metal Leve, Inc. has had annual U.S. sales of more than $60 million.

7. Metal Leve, S.A., which operates in the United States through Metal Leve, Inc., manufactures and sells pistons, pins, bearings, bushings, and thrust washers for internal combustion engines and is a leading producer of articulated pistons and large bore two-piece pistons. Metal Leve, Inc. produces pistons in the United States at two

plants in South Carolina, and conducts research and development at a facility in Michigan.

8. At all times relevant herein, Metal Leve, S.A. and Metal Leve, Inc. (collectively, "Metal Leve") have been, and are now, corporations as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, Mahle GmbH and Mahle, Inc. have been, and are now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

II. THE ACQUISITION

9. On or about June 26, 1996, Mahle GmbH acquired more than 50 percent of the voting securities of Metal Leve, S.A. (the "Acquisition"), for approximately $40 million.

III. THE RELEVANT MARKETS

10. Research, development, design, production and sale of articulated pistons constitute one relevant line of commerce within which to analyze the effect of the Acquisition on competition. A piston is an engine component that fits snugly into the hollow of an engine cylinder and moves back and forth under pressure generated by combustion within the cylinder. In a reciprocating engine, pistons are connected to piston rods which turn the crankshaft to generate the power that makes the engine turn. Each engine cylinder contains a separate piston. Articulated pistons are two-piece pistons with a crown made of steel and a skirt made of aluminum, in which the crown and skirt are able to articulate; that is, to move independently of each other. The crown and skirt are joined together by means of a piston pin. Articulated pistons of up to 150 millimeter in diameter are used in engine applications, such as Class 8 diesel truck engines, which require pistons that can withstand high temperatures and pressures to maintain engine performance while meeting increasingly stringent government emissions requirements. There are no economic substitutes for these articulated pistons.

11. Research, development, design, production and sale of large bore two-piece pistons constitute another relevant line of commerce within which to analyze the effect of the Acquisition on competition. Large bore two-piece pistons are pistons with a crown made of steel

and a skirt made of aluminum in bore sizes ranging from 150 to 300 millimeters and higher. The crown and skirt of a large bore two-piece piston may be separate pieces joined together by the piston pin, as in an articulated piston, or may be permanently joined together, as in a composite piston. Large bore two-piece pistons are used in high output diesel and natural gas engines, such as new generation locomotive engines and stationary power generators as well as engines for various marine and industrial applications. There are no economic substitutes for large bore two-piece pistons.

12. The United States is one relevant geographic area within which to analyze the likely effect of the Acquisition on competition in articulated pistons. Several factors limit the competitive significance of foreign-made articulated pistons in the United States. Articulated pistons are designed specifically for the U.S. market to meet technical requirements largely attributable to pollution control regulations. In addition, relatively high manufacturing costs in Europe make articulated pistons manufactured overseas uncompetitive in the United States. Moreover, engine manufacturers' use of just-in-time inventory management practices creates a preference for articulated piston suppliers located in the United States. As a result, articulated pistons consumed in the United States are manufactured in the United States, with the exception of a small quantity of specialized articulated pistons manufactured by Mahle outside the United States.

13. The relevant geographic area within which to analyze the likely effect of the Acquisition on competition in the large bore two-piece pistons may be worldwide. There are significant imports of large bore two-piece pistons into the United States from Europe. Factors that limit the competitive significance of imported articulated pistons in the United States do not have a significant impact on large bore two-piece pistons imports, in part because large bore two-piece pistons are used in engines that are produced in smaller quantities.

IV. CONCENTRATION

14. Prior to the acquisition, Mahle had more than a 50 percent share and Metal Leve had nearly a 45 percent share of United States sales of articulated pistons, producing a combined market share of more than 95 percent. The United States articulated piston market is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The Acquisition increased the HHI by more than 4,500

points to nearly 9,500 points. The only other firm currently selling articulated pistons in the market is a weak competitor that has been losing business to Mahle and Metal Leve.

15. The market for two-piece large bore pistons is also highly concentrated. There are currently only four producers of two-piece large bore pistons in the world. Mahle and one other firm dominate the worldwide large bore two-piece piston market, while Metal Leve has made sales and is aggressively bidding in the market.

V. ENTRY CONDITIONS

16. Entry into the articulated piston or large bore two-piece piston markets would not be timely, likely, or sufficient to deter or offset the adverse effects of the Acquisition on competition, because an entrant would have to develop manufacturing expertise, satisfy time-consuming customer qualification procedures, and acquire manufacturing equipment at a significant sunk cost. Engine manufacturers tend to be risk averse in choosing piston suppliers, because the cost of a piston tends to be small relative to the costs associated with poor piston performance or piston failure.

VI. EFFECT OF THE PROPOSED MERGER ON COMPETITION

17. The Acquisition will substantially lessen competition or tend to create a monopoly in the United States articulated piston market, because, among other things:

a. It increases concentration substantially in a highly concentrated market;

b. It eliminates actual, direct, substantial, and potentially increased competition between Mahle and Metal Leve;

c. It creates a monopoly or near monopoly;

d. It eliminates competition between the two closest substitutes among differentiated products in the articulated piston market;

e. It facilitates the unilateral exercise of market power by the merged firm;

f. It will likely result in increased prices for articulated pistons; and

g. It will likely result in reduced innovation as a result of delayed or reduced product development.

18. The Acquisition will substantially lessen competition or tend to create a monopoly in the United States large bore two-piece piston market, because, among other things:

a. It increases concentration substantially in a highly concentrated market;

b. It eliminates actual, direct, substantial, and potentially increased competition between Mahle and Metal Leve;

c. It eliminates a maverick competitor which has introduced increased competition in the market;

d. It facilitates coordinated interaction among sellers of large bore two-piece pistons in the United States;

e. It will likely result in increased prices for large bore two-piece pistons and

f. It may allow the merged firm to reduce innovation by delaying or reducing product development.

VII. VIOLATIONS CHARGED

19. The Acquisition by Mahle GmbH of more than 50 percent of the voting securities of Metal Leve, S.A., described in paragraph nine, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Mahle GmbH, the parent corporation of Mahle, Inc., of more than 50 percent of the voting securities of Metal Leve, S.A., the parent corporation of Metal Leve, Inc., and 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 respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have 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, and having duly considered a comment filed thereafter, and having modified paragraph II.A in one respect, 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. Respondent Mahle GmbH is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Pragstrasse 26-46, D-70376 Stuttgart, Germany.

2. Respondent Mahle, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1 Mahle Drive, Morristown, Tennessee.

3. Respondent Metal Leve, S.A. is a corporation organized, existing and doing business under and by virtue of the laws of Brazil, with its office and principal place of business located at Rua Brasilio Luz 535, Sao Paulo, SP 04746-901, Brazil.

4. Respondent Metal Leve, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Michigan, with its office and principal place of business located at 560 Avis Drive, Ann Arbor, Michigan.

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

ORDER

I.

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

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

B. *"Respondents"* means Mahle GmbH, Mahle, Inc., Metal Leve, S.A., and Metal Leve, Inc., their directors, officers, employees, agents and representatives, predecessors, successors and assigns; their subsidiaries, divisions, and groups and affiliates controlled by Mahle GmbH, Mahle, Inc., Metal Leve, S.A., and Metal Leve, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. *"Mahle GmbH"* means Mahle GmbH, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Mahle GmbH, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

D. *"Mahle, Inc."* means Mahle, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Mahle, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

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

F. *"Metal Leve, Inc."* means Metal Leve, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Metal Leve, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

G. *"Articulated piston"* means any two-piece piston consisting of a separate crown and skirt, as well as each individual piece of an articulated piston, including, but not limited to, forgings, castings, and finished pistons.

H. *"Other diesel piston"* means any type of diesel piston, other than an articulated piston, including, but not limited to, forgings, castings and finished pistons.

I. *"Other piston"* means any other diesel piston or other type of piston, other than an articulated piston, including, but not limited to, castings and finished pistons.

J. *"Metal Leve, Inc. Business"* means:

1. All assets, properties, business and goodwill, tangible and intangible, of Metal Leve, Inc., including, but not limited to:

a. The manufacturing facilities located at Orangeburg and Sumter, South Carolina,

b. The research and development facility and corporate offices located at Ann Arbor, Michigan; and

2. All assets, properties, business and goodwill, tangible and intangible, of Metal Leve, S.A. worldwide relating to: (i) the research, development, manufacture, or sale of articulated pistons or other pistons manufactured in the United States, (ii) the research, development, manufacture, or sale of articulated pistons anywhere in the world, and (iii) the research, development, manufacture or sale of other diesel pistons sold in the United States; including, without limitation, the following:

a. All machinery, fixtures, equipment, tools and other tangible personal property, but excluding machinery, fixtures, and equipment located outside the United States related to the manufacture of other diesel pistons sold in the United States;

b. All rights, titles and interests in and to owned or leased real property together with appurtenances, licenses and permits, but excluding real property located outside the United States related to the manufacture of other diesel pistons sold in the United States or to the manufacture of articulated pistons sold in Brazil;

c. All inventory;

d. All customer lists, distribution agreements, vendor lists, catalogs, sales promotion literature, and advertising materials;

e. All research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to, manufacturing know-how),

specifications, designs, drawings, processes, quality control data, and formulas, as well as licenses thereto, relating to the manufacture or sale of articulated pistons;

f. All Metal Leve, S.A. research and development projects for Metal Leve, Inc., including, but not limited to, all research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to, manufacturing know-how), specifications, designs, drawings, processes, quality control data, and formulas, as well as licenses thereto, relating to all such research and development projects, including, but not limited to, the following: (i) lightweight articulated ppt, (ii) oxidation resistant steels, (iii) iron aluminide, (iv) steel material evolution, (v) thermal barrier steel crown coatings, open versus closed articulated gallery, (vi) analytical software development, (vii) rapid solidification aluminum alloy, and (viii) bowl rim life prediction.

g. Rights that are equal to the rights held by Metal Leve, S.A. to all research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to manufacturing know-how), specifications, designs, drawings, processes, quality control data, and formulas, as well as licenses thereto, relating to the manufacture or sale of other diesel pistons sold in the United States or other pistons manufactured in the United States;

h. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

i. All rights under warranties and guarantees, express or implied;

j. All books, records, and files; and

k. All items of prepaid expense.

Provided, that this definition of the Metal Leve, Inc. Business does not include research and development conducted after the divestiture required by this order.

K. *"Metal Leve, S.A. Piston Business"* means all assets, properties, business and goodwill, tangible and intangible, relating to

the manufacture or sale of articulated pistons and other pistons by Metal Leve, S.A. or Metal Leve, Inc. anywhere in the world, including, without limitation, the following:

1. The Metal Leve, Inc. Business, plus all Metal Leve S.A. assets anywhere in the world relating to research, development, manufacture or sale of articulated pistons or other pistons, including, but not limited to:

a. The manufacturing facilities located at Santo Amaro and Limeira in Brazil,

b. The research and development facility located at Santo Amaro in Brazil;

2. All trademarks;

3. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

4. Inventory and storage capacity;

5. All customer lists, distribution agreements, vendor lists, catalogs, sales promotion literature, and advertising materials;

6. Exclusive rights to all research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to manufacturing know-how), specifications, designs, drawings, processes, quality control data, and formulas relating to the manufacture of articulated pistons or other pistons by Metal Leve;

7. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

9. All rights under warranties and guarantees, express or implied;

10. All books, records, and files; and

11. All items of prepaid expense.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, no later than ten (10) days after the date on which this order becomes final, the Metal Leve, Inc. Business as a fully viable and competitive ongoing business. Provided, however, that Metal Leve S.A. may retain a non-exclusive licence from the acquirer of the Metal Leve, Inc. Business to intellectual property for the sole purpose of producing for Volvo Brazil and Volvo Sweden service part number P-2067 in Brazil, and may retain the right to supply Volvo Brazil and Volvo Sweden service part number P-2067.

B. Respondents shall divest the Metal Leve, Inc. Business only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Metal Leve, Inc. Business is to ensure the continuation of the Metal Leve, Inc. Business as an ongoing, viable, and competitive operation engaged in the same business of researching, developing, manufacturing, and selling articulated pistons and other pistons, in which the Metal Leve, Inc. Business is engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. A condition of approval by the Commission of the divestiture shall be the submission by the acquirer to the Commission of an acceptable five-year business plan for the Metal Leve, Inc. Business demonstrating that the acquirer will establish the Metal Leve, Inc. Business as a viable and competitive business free of all continuing relationships with respondents in the research, development, manufacture or sale of articulated pistons and other pistons, except as set forth in paragraph II.D, below.

D. On reasonable notice to Metal Leve, S.A. from an approved acquirer, Metal Leve, S.A. shall provide technical assistance and know-how to the acquirer with respect to the Metal Leve, Inc. Business. Such technical assistance shall include, without limitation, consultation with knowledgeable employees of Metal Leve, S.A. and training at the manufacturing facilities of Metal Leve, S.A. Metal Leve, S.A. may charge the reasonable costs incurred in providing such technical assistance, including reimbursement (commensurate with the salary and benefits of Metal Leve, S.A. personnel involved)

for the time plus expenses of Metal Leve, S.A. personnel providing the technical assistance. Metal Leve, S.A. shall continue to provide such technical assistance until the acquirer of the Metal Leve, Inc. Business is satisfied that it is capable of producing, and of developing for production, commercially saleable articulated pistons and other pistons utilizing the assets of the Metal Leve, Inc. Business; provided, however, Metal Leve, S.A. shall not be required to continue providing such technical assistance and training for more than two (2) years after the date on which the divestiture required by this order is made.

E. Pending divestiture of the Metal Leve, Inc. Business, respondents shall take such actions as are reasonably necessary to maintain the viability, competitiveness, and marketability of the Metal Leve, Inc. Business and the Metal Leve, S.A. Piston Business and to prevent the destruction, removal, wasting, deterioration, or impairment of the Metal Leve, Inc. Business and the Metal Leve, S.A. Piston Business.

F. Respondents shall comply with all terms of the Agreement to Hold Separate signed by the respondents and accepted by the Commission on August 30, 1996, which is attached to this order and made a part hereof, and which shall continue in effect until such time as respondents have accomplished the divestiture required by this order.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Metal Leve, Inc. Business within ten (10) days of the date this order becomes final, then the Commission may appoint a trustee to divest the Metal Leve, Inc. Business. The trustee shall have all rights and powers necessary to permit the trustee to effect the divestiture of the Metal Leve, Inc. Business and to add to the Metal Leve, Inc. Business all or any part of the Metal Leve, S.A. Piston Business in order to assure the viability, competitiveness, and marketability of the Metal Leve, Inc. Business so as to expeditiously accomplish the remedial purposes of this order. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the

Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute, for any failure by any of the respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent 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 respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Metal Leve, Inc. Business and shall have the power to add to the Metal Leve, Inc. Business all or any part of the Metal Leve, S.A. Piston Business in order to accomplish the divestiture required by this order.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission (and, in the case of a court-appointed trustee, of the court), transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture of the Metal Leve, Inc. Business, to add to the Metal Leve, Inc. Business all or any part of the Metal Leve, S.A. Piston Business, and to divest such additional ancillary assets of Metal Leve S.A. and effect such additional arrangements, in order to assure the viability, competitiveness, and marketability of the Metal Leve, Inc. Business so as to expeditiously accomplish the remedial purposes of this order.

4. The trustee shall have twelve (12) months to accomplish the divestiture required by this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture 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 this period for no more than two (2) additional terms of six (6) months each.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Metal Leve, Inc. Business or the Metal Leve, S.A. Piston Business, or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by the respondent shall extend the time for divestiture under this paragraph III in an amount equal to the delay, as determined by the Commission (or, in the case of a court-appointed trustee, by the court).

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner, and to the acquirer or acquirers, as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission approves more than one such acquiring entity, then the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondents, 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 respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement (based on sales price) contingent on the trustee's accomplishing the divestiture required by this order.

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

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Metal Leve, Inc. Business or the Metal Leve, S.A. Piston Business.

12. The trustee shall report in writing to respondents and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without prior notification to the Commission, directly or indirectly:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in the sale of articulated pistons or other pistons in the United States within the year preceding

such acquisition; provided, however, an acquisition of securities will be exempt from the requirements of this paragraph if, after such acquisition of securities, respondents will hold cumulatively no more than two (2) percent of the outstanding shares of any class of securities of such person; or

B. Enter into any agreement or other arrangement to transfer direct or indirect ownership, management, or control of any assets used for or previously used for (and still suitable for use for) the manufacture or sale of articulated pistons or other pistons in the United States; provided, however, prior notice shall not be necessary for: the acquisition of assets in the ordinary course of business or the acquisition of assets valued at less than $100,000 from the same person within any twelve (12) month period; or for transfers to or from manufacturers of diesel engines.

The prior notifications required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that: no filing fee will be required for any such notification; notification shall be filed with the Secretary of the Commission and a copy shall be delivered to the Bureau of Competition; notification need not be made to the United States Department of Justice; and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to the consummation of any such transaction (hereinafter referred to as the "initial phase of the waiting period"). If, within the initial phase of the waiting period, the Commission or its staff makes a written request for additional information and documentary material, respondents shall not consummate the transaction until at least twenty (20) days after complying with such request for additional information and documentary material. Early termination of the waiting periods in this paragraph may, where appropriate, be 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, and prior notification shall not be

required by this paragraph for acquisitions by respondents Mahle GmbH or Mahle, Inc. of Metal Leve, S.A. stock or assets.

V.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondents intend to comply, are complying, and have complied with paragraphs II and III of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties that have contacted respondents or that have been contacted by respondents. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

VI.

It is further ordered, That one (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraph IV of this order.

VII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in Mahle GmbH,

Mahle, Inc., Metal Leve, S.A., or Metal Leve, Inc. that may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and respondents shall permit any duly authorized representatives 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 respondents relating to any matters contained in this order; and

B. Upon five (5) days' notice to respondents, and without restraint or interference, to interview officers, employees, or agents of respondents.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among Mahle GmbH, a German corporation and an entity included within its "ultimate parent entity" as that term is defined in 16 CFR 801.1(a)(3), MABEG, e.V., with its principal office and place of business at Pragstrasse 26-46, D-70376 Stuttgart, Germany; Mahle Inc., a corporation organized and existing under the laws of Delaware and a wholly-owned subsidiary of Mahle GmbH, with its principal office and place of business at 1 Mahle Drive, Morristown, Tennessee, (collectively referred to as "Mahle"); Metal Leve, S.A., a Brazilian corporation with its principal office and place of business at Rua Brasilo Luz 535, Sao Paolo, SP 04746-901, Brazil; Metal Leve, Inc., a corporation and an indirect wholly-owned subsidiary of Metal Leve S.A. organized and existing under the laws of Michigan, with its principal office and place of business at 560 Avis Drive, Ann Arbor, Michigan (collectively referred to as "Metal Leve"); and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

Whereas, on June 11, 1996, Mahle entered into a Purchase Agreement to acquire 50.1% of the voting shares of Metal Leve S.A. (hereinafter the "Acquisition"); and

Whereas, this Acquisition was subject to the prior notification requirements of the Hart Scott Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a ("HSR Act"); and

Whereas, on or before June 26, 1996, Mahle consummated the Acquisition without MABEG, e.V. or Mahle filing notification with the Commission or the Department of Justice pursuant to the HSR Act, and without observing the waiting periods required by that Act; and

Whereas, on July 22, 1996, Mahle, on behalf of MABEG, e.V. and Metal Leve submitted filings pursuant to the HSR Act; and

Whereas, Mahle and Metal Leve produce pistons for sale in the United States; and

Whereas, the Commission is now investigating the Acquisition to determine if it violates Section 7 of the Clayton Act, 15 U.S.C. 18;

Section 5 of the FTC Act, 15 U.S.C. 45; or any other statute enforced by the Commission; and

Whereas, the Commission is concerned that if an understanding is not reached, further changes in the operation and organization of Metal Leve by Mahle or its nominees during the period prior to the final resolution of the Commission's investigation of the Acquisition, may preclude an effective remedy; and

Whereas, the Commission is concerned that it is necessary to preserve the Commission's ability to seek an effective remedy and the Commission's right to seek to restore Metal Leve as a viable competitor; and

Whereas, the purpose of this Agreement is to:

(i) Preserve Mahle's and Metal Leve's piston businesses and other businesses as viable independent businesses pending the Commission's investigation, and

(ii) Prevent any anticompetitive effects resulting from the Acquisition; and

Whereas, Mahle and Metal Leve entering into this Agreement shall in no way be construed as an admission by Mahle or Metal Leve that the Acquisition is in violation of Section 7 of the Clayton Act or Section 5 of the FTC Act; and

Whereas, Mahle and Metal Leve understand that this Agreement shall in no way limit civil penalties of up to $10,000 per day under Section 7A(g)(1) of the Clayton Act for failing to file notifications and for continuing to hold stock in violation of the HSR Act; and

Whereas, Mahle and Metal Leve understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement; and

Whereas, the Commission has not yet determined whether the Acquisition will be challenged under any statute it enforces.

Now, therefore, Mahle and Metal Leve agree, in consideration of the Commission's agreement that the Commission will not seek further relief from Mahle or Metal Leve under Section 7A(g)(2) of the Clayton Act, 15 U.S.C. 18(A)(g)(2), except that the Commission may exercise any and all rights to enforce this Agreement, and, in the

event that the Parties do not comply with the terms of this Agreement, to seek further relief, as follows:

1. Mahle and Metal Leve agree to execute and be bound by this Agreement.

2. Mahle and Metal Leve agree that from the date they sign this Agreement until the earliest of the dates listed in subparagraphs 2.a - 2.b, they will comply with the provisions of paragraph 3 of this Agreement:

a. The expiration of all waiting periods under the HSR Act with respect to the Acquisition;

b. Such time as specified in any Consent Agreement accepted by the Commission in resolution of antitrust concerns raised by the Acquisition.

3. Mahle will hold Metal Leve separate and apart on the following terms and conditions:

a. Metal Leve shall be held separate and apart and shall be operated independently of Mahle (meaning here and hereinafter, Mahle excluding Metal Leve) except to the extent that Mahle must exercise direction and control over Metal Leve to assure compliance with this Agreement;

b. Mahle shall place its Metal Leve shares in trust pending the outcome of the Commissions investigation, and shall not vote those shares or in any other manner exercise control over Metal Leve;

c. Mahle shall not exercise direction or control over, or influence directly or indirectly, Metal Leve or any of its operations or businesses, and Metal Leve shall not receive direction from Mahle;

d. Mahle and Metal Leve shall maintain the viability and marketability of Metal Leve as a separate entity and shall not reorganize its operations in any way that would reduce the value or competitiveness of Metal Leve or Metal Leve Inc.'s business;

e. Mahle shall not permit any director, officer, employee, consultant or agent of Mahle, or any person affiliated with or associated with Mahle, to also be a director, officer, or employee of Metal Leve;

f. No Mahle employees, consultants, or agents shall consult with, advise on, or participate in any manner in the planning or conduct of Metal Leve operations;

g. Except as required by law, and except to the extent necessary information is exchanged among outside counsel in defending investigations or litigation, Metal Leve shall not give and Mahle shall not receive or have access to, or use of, any of Metal Leve's confidential information and Mahle shall not give and Metal Leve shall not receive or have access to, or use of, any of Mahle's confidential information, except as such information would be available to Mahle or Metal Leve in the normal course of business if the Acquisition had not taken place ("confidential information," as used herein, means competitively sensitive or proprietary information and includes but is not limited to financial information, customer lists, price lists, prices, engineering, manufacturing, and marketing methods, patents, technologies, processes, research and development or other trade secrets);

h. Mahle shall not change the composition of the Board of Directors or any officers of Metal Leve; and

i. Metal Leve shall not pay to Mahle, nor shall Mahle accept from Metal Leve any dividends.

4. Should the Commission or the United States institute any action under this Agreement, the FTC Act, or the Clayton Act, arising from this Acquisition, Mahle and Metal Leve waive any objection based on lack of personal jurisdiction. Mahle and Metal Leve appoint the attorneys identified below to accept service of process in any such action.

5. Should the Commission seek in a proceeding to compel Mahle to divest itself of Metal Leve or to compel Mahle to divest any assets or businesses of Metal Leve, or seek any other injunctive or equitable relief, neither Mahle nor Metal Leve shall raise any objection based upon this Agreement; and should the United States seek civil penalties under the HSR Act, neither Mahle nor Metal Leve shall raise any objection based on this Agreement. Mahle and Metal Leve also waive the right to contest the validity of this Agreement.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Mahle and Metal Leve made

to their principal offices, Mahle and Metal Leve shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Mahle or Metal Leve 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 Mahle or Metal Leve relating to compliance with this Agreement;

b. Upon five (5) days' notice to Mahle and Metal Leve, and without restraint or interference from them, to interview their officers or employees, who may have counsel present, regarding any such matters.

7. For the purpose of determining or securing compliance with this Agreement:

a. Metal Leve shall provide the Commission with reports every 30 days following the signing of this Agreement by Metal Leve which describe each change in organization, production, investment, sales, or research and development conducted by Metal Leve or its U.S. subsidiary;

i. Since June 11, 1996 and

ii. Since the date of the last report filed under this subparagraph; and

b. Mahle shall provide the Commission with reports every 30 days following the signing of this Agreement which describe its compliance with this Agreement.

8. The Parties agree to publicize this Agreement by taking the following actions:

a. The Commission making public this Agreement after acceptance by the Commission;

b. Mahle and Metal Leve promptly providing copies of this Agreement to all of Mahle and Metal Leve's officers and directors; and

c. Mahle and Metal Leve promptly providing notice of this Agreement to all Mahle and Metal Leve employees in the United States and to all U.S. pistons customers.

9. This Agreement shall be effective and binding immediately upon signing by Mahle and Metal Leve, but is subject to acceptance of the Commission.

IN THE MATTER OF

AMERIFIT, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3747. Complaint, June 16, 1997--Decision, June 16, 1997

This consent order requires, among other things, the Connecticut-based marketer of diet supplements to pay $100,000 for disgorgement, and prohibits the use of the name "Fat Burners" unless it is part of the trade name, "Fat Burners Diet, Exercise and Supplement System," and that the material containing the name includes the specified disclosure statements clearly and prominently. The consent order also requires the respondent to possess scientific substantiation for any claim that a food, drug or dietary supplement will cause weight loss or reduce body fat.

Appearances

For the Commission: *Jeffrey Feinstein.*

For the respondent: *Nancy Buc* and *Phillip Katz, Buc & Bearsdley*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that AmeriFIT, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent AmeriFIT, Inc., is a Delaware corporation with its principal office or place of business at 166 Highland Park Drive, Bloomfield, Connecticut.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold and distributed products to the public, including "Fat Burners," "Fast Burners," "Improved Formula Fat Burners," and "Extra Strength Fat Burners" (collectively, "the Fat Burners products"). These products are "foods" and/or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for the products referred to in paragraph two, including but not necessarily limited to the attached Exhibits A and B. These advertisements and promotional materials contain the following statements:

A. "WHEN IT COMES TO WEIGHT LOSS THERE'S NOTHING LIKE IT! FAT BURNERS™ is a 100% natural lipotropic formula designed to help people from every walk of life achieve the physique they desire. Fat that once created personal unhappiness and posed a hazard to one's health can now be utilized to one's advantage. FAT BURNERS™ may help active individuals lose weight and increase vascularity by increasing the body's ability to burn fat for energy. . . . 100% NATURAL WEIGHT LOSS SYSTEM." (Exhibit A).

B. "LOSE WEIGHT NOW! . . . introducing FAT BURNERS, America's choice for nutritional weight loss support. If your goal is a thinner, more attractive body, then let FAT BURNERS lead the way." (Exhibit B).

5. Through the means described in paragraph four, and through the use of the trade names "Fat Burners" and "Fast Burners," respondent has represented, expressly or by implication, that the Fat Burners products cause weight loss or reduce body fat.

6. Through the means described in paragraph four, and through the use of the trade names "Fat Burners" and "Fast Burners," respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five at the time the representations were made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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 the 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and determined that it had reason to believe that respondent has violated the said Act, 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 described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent AmeriFIT, Inc., is a Delaware corporation with its principal office or place of business at 166 Highland Park Drive, Bloomfield, Connecticut.

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

ORDER

DEFINITIONS

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

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondent"* shall mean AmeriFIT, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees.

3. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. *"The Fat Burners products"* shall mean products using the terms "fat burners" and "fast burners" in their trade names, including but not limited to, Fat Burners, Fast Burners, Improved Formula Fat Burners, and Extra Strength Fat Burners.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Fat Burners products or any other food, drug, or dietary supplement, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That such product can or will cause weight loss; or

B. That such product can or will reduce body fat,

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, directly or though any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of Fat Burners or any

substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from employing the name "Fat Burners" or any other name that communicates the same or similar meaning for such product; provided, however, that nothing in this order shall prevent the use of the name "Fat Burners Diet, Exercise, and Supplement System" if the material containing the name clearly and prominently contains the following disclosure:

"THE DIETARY SUPPLEMENT IN THIS SYSTEM IS FOR NUTRITIONAL USE ONLY AND DOES NOT CONTRIBUTE TO WEIGHT LOSS OR LOSS OF BODY FAT."

For purposes of this order, "clearly and prominently" shall mean as follows:

A. In a television or video advertisement less than fifteen (15) minutes in length, the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement, accompanying the first presentation of the name. When the first presentation of the name appears in the audio portion of the advertisement, the disclosure shall immediately follow the name. When the first presentation of the name appears in the visual portion of the advertisement, the disclosure shall appear immediately adjacent to the name. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of such a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it;

B. In a video advertisement fifteen (15) minutes in length or longer, the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement, accompanying the first presentation of the name and immediately before each presentation of ordering instructions for the product. When the name that triggers the disclosure appears in the visual portion of the advertisement, the disclosure shall appear immediately adjacent to the name. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to

read and comprehend it. Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number or address for viewers to contact to place an order for the product in conjunction with the name shall be deemed a presentation of ordering instructions so as to require the presentation of the disclosure provided herein;

C. In a radio advertisement, the disclosure shall immediately follow the first presentation of the name and shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it;

D. In a print advertisement, the disclosure shall be in close proximity to the largest presentation of the name, in a prominent type thickness and in a type size no smaller than twelve (12) point type. The disclosure shall be of a color or shade that readily contrasts with the background of the advertisement; and

E. On a product label, the disclosure shall be on the front panel of the label in immediate proximity to the largest presentation of the name, in a prominent type thickness and in a type size no smaller than twelve (12) point type. The disclosure shall be of a color or shade that readily contrasts with the background of the label.

Nothing contrary to, inconsistent with, or in mitigation of the above-required language shall be used in any advertising or labeling.

III.

It is further ordered, That respondent shall pay to the Federal Trade Commission, by cashier's check or certified check made payable to the Federal Trade Commission and delivered to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C., the sum of one hundred thousand dollars ($100,000). Respondent shall make this payment on or before the thirtieth day following the date of issuance of this order. In the event of any default of any obligation to make payment under this section, interest, computed pursuant to 28 U.S.C. 1961(a), shall accrue from the date of default to the date of payment.

IV.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutritional Labeling and Education Act of 1990.

VI.

It is further ordered, That respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements, labeling, and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VII.

It is further ordered, That, for a period of five years commencing with the date of issuance of this order, respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of this order. Respondent

shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

IX.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

X.

This order will terminate on June 16, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

2943174 CANADA INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3748. Complaint, June 16, 1997--Decision, June 16, 1997

This consent order requires, among other things, the Canadian company and its officer to have scientific substantiation for claims that any product or program controls appetite, increases human metabolism, reduces body fat, causes weight loss, causes long-term or permanent weight loss, reduces cholesterol, or provides any weight-related benefit. The consent order also requires scientific substantiation for claims about the benefits or efficacy of any drug or device. Finally, the consent order prohibits misrepresentations about the existence or results of any test or study.

Appearances

For the Commission: *Ronald Waldman* and *Donald G. D'Amato.*

For the respondents: *Jeffrey S. Edelstein, Hall, Dickler, Kent, Friedman & Wood,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that 2943174 Canada Inc., a corporation, and Patrice Runner, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent 2943174 Canada Inc. is a Canadian corporation with its principal office or place of business at 1414 Place Bonaventure, Montreal, Quebec, H5A 1H3.

2. Respondent Patrice Runner is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, participates in, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of 2943174 Canada Inc.

3. Respondents have advertised, offered for sale, sold, and distributed products to the public, including "Svelt-PATCH," a skin patch that purports to melt away body fat. The Svelt-PATCH is a

"drug" or "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Advertisements for Svelt-PATCH have appeared in numerous publications, including but not limited to: TV Guide, Woman's Day, Cosmopolitan, Red Book Magazine, Woman's World, American Woman, McCalls, Complete Woman, Family Magazine, Ladies Home Journal, Women's Own, The National Enquirer, The Star, USAir, World Traveler, Luxury Lifestyle, Farm Magazine, Hemisphere, Soap Opera Digest, Dell Puzzle, Sterling Woman's Group, Low Fat Meals, Black Group, Grit, Destination, Hairdo Ideas, Harris Hairdo, Lose Weight Stay Fit, All Around Kentucky, Mother Earth News, True Story Plus, The Globe, The Examiner, The Sun, San Antonio, The Denver Post, The New York Daily News, The Weekly World News, The LA Daily News, The Chicago Sun Times, The Boston Globe, Newsday, The Topeka News, The New York Post, and have been distributed as free standing inserts through Valassis FSI.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have disseminated or have caused to be disseminated advertisements for Svelt-PATCH, including but not necessarily limited to the attached Exhibit A (a newspaper advertisement). These advertisements contain the following statements:

"LOSING WEIGHT:
'Amazing Skin Patch Melts Away Body Fat'
Results of a study conducted for the United Research Center by G. Fleming
* Clinically tested in the United States

. . . .

Weight-loss patches have been scientifically tested in the USA and are used in European hospitals and clinics.

In the United States, Dr. Marvin Kaplan recently tested the weight-loss patch on 100 individuals.

. . . [H]ere are the results:

* The measured effectiveness of the weight-loss patch was 100%: absolutely all participants lost weight.

* Fifty-six percent of the participants lost at least 20 pounds in 2 months (between 20 and 71 pounds in only 2 months).

* Average weight losses [sic] in women was 4.9 pounds the first week, 12.8 pounds the first month, and 21.9 pounds in 2 months.

* Average weight loss in men was 4.7 pounds the first week, 15.7 pounds the first month, and 25.1 pounds in 2 months.

. . . .
Svelt PATCHES contain concentrated fucus. In contrast with most weight-loss products--which only work for a few hours following their consumption--SveltPATCH fucus is absorbed by your body, through the skin, *the entire* day and while you sleep--up to 24 hours per day.
. . . .
How fucus helps your body
⊠ Controls your appetite.
⊠ Stimulates your metabolism . . . .
⊠ Maintains weight loss . . .
⊠ Reduces cholesterol . . . .
(Exhibit A)

6. Through the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. Svelt-PATCH controls appetite.
B. Svelt-PATCH significantly increases human metabolism.
C. Svelt-PATCH significantly reduces body fat.
D. Svelt-PATCH causes significant weight loss.
E. Svelt-PATCH causes long-term or permanent weight loss.
F. Svelt-PATCH lowers serum cholesterol levels.

7. Through the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph six at the time the representations were made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph six at the time the representations were made. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. Through the means described in paragraph five, respondents have represented, expressly or by implication, that clinical evidence prove that Svelt-PATCH causes significant weight loss.

10. In truth and in fact, clinical evidence does not prove that Svelt-PATCH causes significant weight loss. Therefore, the representation set forth in paragraph nine was, and is, false or misleading.

11. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the

making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

1465 Complaint

EXHIBIT A

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1.a. Respondent 2943174 Canada Inc. is a Canadian corporation with its principal office or place of business at 1414 Place Bonaventure, Montreal, Quebec, H5A 1H3.

1.b. Respondent Patrice Runner is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of 2943174 Canada Inc.

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

ORDER

DEFINITIONS

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

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondents"* shall mean 2943174 Canada Inc., a corporation, also doing business as UNITED RESEARCH CENTER, INC., its successors and assigns and its officers; Patrice Runner, individually and as an officer of the corporation; and each of the above's agents, representatives and employees.

3. *"Commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not make any representation, in any manner, expressly or by implication that such product:

A. Controls appetite;
B. Increases human metabolism;
C. Reduces body fat;
D. Causes weight loss;
E. Causes long-term or permanent weight loss;
F. Reduces cholesterol levels; or
G. Provides any weight loss, fat loss, weight regulation, weight control, or weight maintenance benefit,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Svelt-PATCH, or any other "drug" or "device" as "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the health benefits, performance, or efficacy of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any dietary supplement, food, drug, or device, as "food," "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, weight loss or weight maintenance product or program, or any product or program designed or used to lower serum cholesterol, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

IV.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

It is further ordered, That respondents shall pay to the Commission as consumer redress the sum of three hundred and seventy-five thousand dollars ($375,000) no later than January 15, 1997. Such payment shall be deposited into an escrow account, to be established by the Commission for the purpose of receiving payment due under this order.

The funds paid by respondents shall, in the direction of the Commission, be used by the Commission to provide direct redress to purchasers of Svelt-PATCH in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in it sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission.

At any time after this order becomes final, the Commission may direct the escrow agent to transfer the funds from the escrow account to the Commission to be distributed as herein provided. The Commission, or its representative, shall, in its sole discretion, select the escrow agent.

Respondents relinquish all dominion, control and title to the funds paid into the escrow account, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondents shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondents, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

Respondents shall assist the Commission, and its agents, in locating and producing all records necessary to conduct any redress made under this paragraph, including, but not limited to, records identifying the names, addresses, and telephone numbers of consumers who paid for goods since January 1, 1994, and the amount the consumer paid including shipping and handling.

VI.

It is further ordered, That respondent 2943174 Canada Inc., and its successors and assigns, and respondent Patrice Runner shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation;

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

D. All records needed to effectuate any redress made pursuant to paragraph V herein.

VII.

It is further ordered, That respondent 2943174 Canada Inc., and its successors and assigns, and respondent Patrice Runner, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

It is further ordered, That respondent 2943174 Canada Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that

would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

IX.

It is further ordered, That respondent Patrice Runner, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment relating to the sale of any dietary supplement, drug, or device, as "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, weight loss or weight maintenance product or program, or any product or program designed or used to lower serum cholesterol, for which any health, weight loss, weight maintenance, or cholesterol reduction claim is made. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

It is further ordered, That respondent 2943174 Canada Inc., and its successors and assigns, and respondent Patrice Runner shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XI.

This order will terminate on June 16, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

WILLIAM E. SHELL, M.D.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3749. Complaint, June 16, 1997--Decision, June 16, 1997

This consent order prohibits, among other things, the former officer of Interactive Medical Technologies, which market cellulose-bile products, from assisting entities that he knows or should know are making false, misleading or unsubstantiated claims for any weight loss, fat reduction or cholesterol reduction product or program, requires the monitoring of the business practices of certain parties to whom assistance is provided, and requires Shell to pay $20,000 in redress over a period of one year; to post a $1 million performance bond before he markets Lipitrol or any similar product, or holds any ownership interest or official position in any business that markets Lipitrol or any similar product; and a $250,000 bond before he markets any weight loss, fat reduction or cholesterol reduction product or program or holds an ownership interest or official position in a business that markets any weight loss or fat or cholesterol reduction product or program.

Appearances

For the Commission: *Nadine Samter* and *Patricia Hensley*.
For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Interactive Medical Technologies, Ltd., and Effective Health, Inc., corporations, and William Pelzer, Jr., individually and as a former officer of Interactive Medical Technologies, Ltd., and Effective Health, Inc., and William E. Shell, M.D., individually and as a former officer of Interactive Medical Technologies, Ltd. ("respondents"), have violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Interactive Medical Technologies, Ltd. ("IMT"), is a Delaware corporation with its principal office or place of business at 2139 Pontius Avenue, Los Angeles, California.

2. Respondent Effective Health, Inc. ("EHI"), is a California corporation with its principal office or place of business at 2139

Pontius Avenue, Los Angeles, California. EHI is a wholly-owned subsidiary of IMT.

3. Respondent William Pelzer, Jr. ("Pelzer"), was chief executive officer and president of IMT and EHI from February 1993 to April 1995. Individually or in concert with others, he formulated, directed, controlled or participated in the acts and practices of IMT and EHI, including the acts and practices alleged in this complaint. His principal office or place of business is P.O. Box 269006, San Diego, California.

4. Respondent William E. Shell, M.D. ("Shell") was chairman of the board of IMT from January 1990 through February 1996, and served as that company's chief financial officer from May 1993 through June 1994. Individually or in concert with others, he formulated, directed, controlled or participated in the acts and practices of IMT and EHI, including the acts and practices alleged in this complaint. His principal office or place of business is 2934 ½ Beverly Glen Circle, Suite 209, Los Angeles, California.

5. Respondents IMT, EHI and Shell have advertised, labeled, offered for sale, sold and distributed products to the public, including Lipitrol, an over-the-counter fat reduction and weight-loss tablet. Lipitrol is a "food" and/or "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Respondents have advertised, distributed and sold Lipitrol, a combination of fiber and ox bile extract, to the public through direct mail.

6. Respondents also have assisted others who have advertised, labeled, offered for sale, sold and distributed products to the public, including SeQuester, an over-the-counter fat reduction and weight-loss tablet. SeQuester is a "food" and/or "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

7. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

Lipitrol Fat Reduction and Weight-Loss Tablets

8. Respondents IMT, EHI and Shell have disseminated or have caused to be disseminated advertisements for Lipitrol, including but not necessarily limited to the attached Exhibits A through E. These advertisements contain the following statements:

A. INTRODUCING LIPITROL a patented dietary supplement that aids in your FIGHT against FAT by assisting in weight and cholesterol reduction.

NO ANCIENT FORMULA NO MAGIC NO MECHANICAL GADGETS NO SHOTS NO DRUGS NO WILD PROMISES NO PATCHES NO SPECIAL FOOD TO PURCHASE NO SECRET INGREDIENTS NO WRAPS NO SPECIAL TESTING MATERIALS O POWDERS O SURGERY NO VERY LOW CALORIE DIETS NO GIMMICKS NO CURE-ALLS NO MOOD ELEVATORS NO SUPER-SPEEDY WEIGHT LOSS NO HYPE DOESN'T EVEN DISSOLVE CELLULITE BUT IT DOES WORK WHICH MAY SEEM LIKE A MIRACLE TO SOME PEOPLE

Effective Health knows of no other diet or weight loss program that is backed by scientific data and a recognized patent for "Dietary Fat Reduction."

Lipitrol contains natural ingredients consisting of Activated Fiber Complex (AFC). AFC forms an indigestible cellulose mesh containing molecules of bile. Bile is the part of the digestive system which enables the body to use and/or store fat. Fat droplets in stomach and intestines are naturally attracted to the AFC and when they adhere to the enmeshed bile molecules, they can then be carried through the intestinal tract and excreted rather than being absorbed for use or storage (sic). If stools are lighter in color, or yellowish, and if they frequently tend to float instead of sink in water, then the bile-bonded fat is now being excreted rather than absorbed. The only adverse effect from using LIPITROL is occasional diarrhea related to the excessive fat in the stools.

A major benefit of LIPITROL is that it imparts a feeling of satiety of fullness to the user (sic). A second, highly significant benefit is the fact that LIPITROL has been proven to lower blood cholesterol levels. Cholesterol is lowered as a result of the weight loss.

. . . .

Effective Health believes LIPITROL meets an urgent need in society, and does so in a healthy and genuine manner. LIPITROL is not an overnight solution to excess weight, but it offers sincere and dedicated users an option whereby they can lose weight and maintain the loss without doing violence to their lifestyles or drugging their systems.

You have nothing to LOSE but FAT itself!

(Exhibit A -- direct mail solicitation)

B. NOW THERE'S AN EFFECTIVE WAY TO HELP REDUCE FAT -- NOW THERE'S LIPITROL! -- DIETARY SUPPLEMENT

LIPITROL IS AN EFFECTIVE WEIGHT CONTROL PRODUCT

LIPITROL can help you control your weight by reducing FAT intake. No kidding! LIPITROL actually helps decrease the amount of FAT absorbed by your body. . . .

IT HELPS FAT PASS THROUGH THE BODY

LIPITROL'S fiber formula forms an indigestible cellulose mesh containing molecules of bile. Bile is part of the digestive system which enables the body to use and/or store FAT. FAT droplets in the stomach and intestines are naturally attracted to the "Fiber Complex." When the FAT adheres to the enmeshed bile molecules, the FAT can then be passed through the intestinal tract and is excreted rather than absorbed - Naturally and Comfortably. NO DRUGS, NO CAFFEINE, NO DIURETICS - EVER!

. . . .

CONTROL FAT WITH LIPITROL:

Keeping FAT under control is important to good health.

FAT makes you FAT. There are 9 calories in 1 gram of FAT - plus your body stores FAT directly. Get FAT out of your diet. FAT laden diets may contribute to a variety of health problems including high blood pressure, diabetes, breast cancer, and heart disease.

Our clinical studies have shown LIPITROL to absorb approximately 5.9 grams of FAT per tablet from the foods you eat. Take hold of the FAT before the FAT takes hold of you. Use LIPITROL - Dietary Supplement DAILY!

. . . .

A NATURAL FOOD PRODUCT

. . . .

Remember, LIPITROL is not an overnight solution to excess weight, but offers you, the sincere and dedicated individual the option to reduce FAT absorption, lose weight, and maintain that loss, without doing harm to your body.

MORE ABOUT LIPITROL:

LIPITROL has been studied for over 7 years. One of the recent 4 week studies has indicated that diet and exercise will result in an average weight loss of about 2.1 lbs per month. With sensible eating, exercise and LIPITROL the average weight loss was 6.2 lbs per month -- with little or no FAT retention.

THE REAL ENEMY

Remember while excess "weight" is certainly a big concern, your real enemy is FAT. LIPITROL Fights FAT, and losing FAT takes time. Use LIPITROL for 60 days or more to see measurable results. LIPITROL helps remove a large portion of the FAT from the food you eat before it ends up on your body, or clogging your arteries.

You Have Nothing to LOSE, But Fat Itself!

(Exhibit B -- direct mail solicitation)

C. Effective Health Inc. is pleased to announce the development of LIPITROL through fat sequestrant technology. Our specially formulated product, marketed as a dietary food supplement, assists in weight and cholesterol reduction.

. . . .

When taken as directed, our tablet attracts fat from the food you eat and helps eliminate it from your body. Cholesterol reduction occurs subsequent to weight loss. Overdoses result in nothing more serious than self/limiting diarrhea (sic).

. . . .

LIPITROL has undergone independent open label trials. A technical brochure that substantiates the efficacy of LIPITROL is available upon request.

(Exhibit C -- direct mail solicitation)

D. . . . .

Q: Should I Increase My Dosage?

A: After two or three days, increase your dosage to 2 tablets prior to your largest and Fattiest meal of the day. If no diarrhea results from 2 tablets at your largest meal, you may choose to use 2 tablets prior to every meal. Some people will even use 3 LIPITROL or more prior to their Fattiest meal. If diarrhea occurs, this is a form of controllable diarrhea and not the same as diarrhea caused by food poisoning. It does not require medication or any treatment. It just means that there is too much FAT in your stool to allow a normal bowel movement. This actually is a condition we regard as Desirable as it means the FAT is leaving your body. Whether the normal dosage or the Maxi FAT strategy described below is appropriate for you depends upon how your body responds to lesser dosages, and upon the advice of your physician.

Q: How Can I Get Maximum FAT Removal?

A: Each LIPITROL tablet has the capability to remove approximately 6 grams of FAT (the actual figure is 5.9 grams) from the food you eat. By determining as accurately as possible, the number of grams of FAT you are consuming in your next meal, you can use that figure, divided by 6, and take the appropriate number of tablets to absorb that FAT -- this is what we call the Maxi-FAT strategy.

. . .

Q: When Should I Begin To See Weight Loss and/or Size Loss?

A: One of our four week studies indicates that diet and exercise alone will result in an average weight loss of about 2.1 pounds per month. With diet and exercise plus LIPITROL the average weight loss in our study was 6.2 pounds per month.

. . . .

Q: NOTE: Please do not view your LIPITROL as an antidote for poor nutritional habits. Don't think that it is now o.k. to over indulge yourself and eat all the FAT-soaked food you want. NOT SO. You must realize that while some foods may be 40% or 50% FAT, the remaining 50% or 60% is not and still contains calories that won't be dealt with by taking LIPITROL.

. . . .

(Exhibit D -- product package insert)

E. . . . .

Each LIPITROL tablet has been shown to absorb approximately 5.9 grams of FAT, from the foods you eat.

. . . .

(Exhibit E -- product package label)

9. Through the means described in paragraph eight, respondents IMT, EHI and Shell have represented, expressly or by implication, that:

A. Lipitrol prevents or significantly reduces the body's absorption of fat from consumed food.

B. Lipitrol absorbs approximately 5.9 grams of fat per tablet from consumed food.

C. Scientific research demonstrates that Lipitrol prevents or significantly reduces the body's absorption of fat from consumed food.

D. Scientific research demonstrates that Lipitrol absorbs approximately 5.9 grams of fat per tablet from consumed food.

E. Scientific research demonstrates that Lipitrol causes significant weight loss.

F. Scientific research demonstrates that Lipitrol lowers blood cholesterol levels.

10. In truth and in fact:

A. Lipitrol does not prevent or significantly reduce the body's absorption of fat from consumed food.

B. Lipitrol does not absorb approximately 5.9 grams of dietary fat per tablet from consumed food.

C. Scientific research does not demonstrate that Lipitrol prevents or significantly reduces the body's absorption of fat from consumed food.

D. Scientific research does not demonstrate that Lipitrol absorbs approximately 5.9 grams of fat per tablet from consumed food.

E. Scientific research does not demonstrate that Lipitrol causes significant weight loss.

F. Scientific research does not demonstrate that Lipitrol lowers blood cholesterol levels.

Therefore, the representations set forth in paragraph nine were, and are, false or misleading.

11. Through the means described in paragraph eight, respondents IMT, EHI and Shell have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph nine(A) and (B), at the time the representations were made.

12. In truth and in fact, respondents IMT, EHI and Shell did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph nine(A) and (B), at the time the

representations were made. Therefore, the representation set forth in paragraph eleven was, and is, false or misleading.

13. Through the means described in paragraph eight, respondents IMT, EHI and Shell have represented, expressly or by implication, that Lipitrol:

A. Causes significant weight loss.

B. Lowers blood cholesterol levels.

C. Reduces, or reduces the risks associated with, high cholesterol, including clogged arteries, high blood pressure, diabetes, breast cancer and heart disease.

D. Causes significantly greater weight loss than diet and exercise alone.

E. Is beneficial and safe when taken in amounts sufficient to cause diarrhea.

14. Through the means described in paragraph eight, respondents IMT, EHI and Shell have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made.

15. In truth and in fact, respondents IMT, EHI and Shell did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made. Therefore, the representation set forth in paragraph fourteen was, and is, false or misleading.

SeQuester Fat Reduction and Weight-Loss Tablets

16. Since at least May 1994, KCD, Incorporated, its holding corporation, KCD Holdings, Inc., their former principal, Clark M. Holcomb, and current principal, Bonnie L. Richards (collectively, "KCD"), have advertised, distributed and sold an over-the-counter fat reduction and weight-loss product to the public through, among other means, newspaper and radio advertisements disseminated nationally. KCD has wholesaled this product to retail drug stores and other retailers for resale to the general public. The product, sold under the name "SeQuester," is a combination of fiber and ox bile extract, and is the same or substantially the same as Lipitrol.

17. IMT, through its subsidiary EHI, Pelzer and Shell (hereinafter "IMT respondents") have provided KCD with, among other things,

exclusive rights to sell SeQuester, technical assistance and "know how," clinical studies purporting to show that SeQuester is an effective fat reduction and weight-loss product, and certain promotional materials and information. Under the licensing agreement between the IMT respondents and KCD, KCD was required to make royalty payments to the IMT respondents based on sales of SeQuester.

18. KCD has disseminated or has caused to be disseminated advertisements for SeQuester, including but not necessarily limited to the attached Exhibits F through J. These advertisements contain the following statements and depictions:

F. **THIS**
IS WHAT
SEQUESTER
DOES TO
THE FAT
IN FOOD
YOU
EAT

Introducing SeQuester - the revolutionary tablet that "shrinks" the amount of dietary fat your body absorbs.

SeQuester is a lab-tested formula that neutralizes fat in the food you eat - safely and naturally - before it's absorbed, so it won't wind up on your body.

SeQuester's unique, patented ingredients bind fat molecules to vegetable fiber passing them gently and harmlessly through your digestive tract. It's like you never ate them at all. Shrink fat with SeQuester. Take advantage of introductory savings, and discover the safe, natural approach to fat reduction. It's in the diet section, today. (Exhibit F - newspaper advertisement)

G. THE FAT STOPS HERE

Dietary fat is a prime cause of overweight, heart disease, high cholesterol, and other major health problems. So imagine a tablet that can "shrink" the amount of fat your body absorbs.

Imagine SeQuester. A revolutionary discovery that lets you "remove" fat from the food you eat before it's absorbed, so it won't wind up on your body. Or in your arteries.

SeQuester is a safe, natural, lab-tested formula, shown to be effective in lowering fat absorption. It's easy. Just take one or more SeQuester tablets 30 minutes before meals. Its unique, patented formula binds fat molecules to natural vegetable fiber (as illustrated), passing it gently and harmlessly through your digestive tract.

SeQuester is intended for use as part of a program of sensible nutrition and exercise. Unlike fad diets that are ineffective at best, unhealthy at worst, SeQuester

contributes to a safe, gradual loss of body fat and weight significantly better than what you're likely to accomplish through dieting and exercise alone.

So get control of fat, before fat controls you. Take advantage of our introductory savings on SeQuester, and experience for yourself this patently superior approach to fat reduction. Look for SeQuester in the diet section, today.
(Exhibit G - newspaper advertisement)

H. For the holidays, don't cut it all out. Just take SeQuester.

SEQUESTER REDUCES FAT FROM THE FOOD YOU EAT.

Don't look now, weight watchers, but the holidays are gaining on us. So many parties, so much good food, so hard to say, "no." So consider your choices:

Either you can cut out all those rich, delicious foods that make life worthwhile.

Or you can cut out this coupon and introduce yourself to SeQuester - a revolutionary discovery that helps your body minimize fat retention from the food you eat.

With SeQuester, you can plan on enjoying reasonable portions of all those great holiday foods, confident that their entire fat content won't be showing up on your scale - or in your arteries - come January 1st.

SeQuester is a safe, natural dietary supplement. Its unique, patented formula helps bind fat molecules to natural vegetable fiber, so they pass gently and effortlessly through the digestive tract. Just take one or more tablets 30 minutes before meals.

This season, make SeQuester the centerpiece of all your holiday meals. You'll find it in better drugstores and supermarkets, everywhere.

NOTE: SeQuester is intended for use as part of a complete program of sensible nutrition and moderate exercise. By following this program, studies suggest that SeQuester contributes to a safe, gradual loss of body fat and weight significantly more successful than dieting and exercise alone.
(Exhibit H - newspaper advertisement)

I. . . . .

Q. SHOULD I INCREASE MY DOSAGE?

A: After two or three days, increase your dosage to 2 tablets prior to your largest and fattiest meal of the day. If no diarrhea results from 2 tablets at your largest meal, you may choose to use 2 tablets before every meal. Some people will even use 3 or more SeQuester tablets prior to their fattiest meal. If diarrhea occurs, it is controllable. It does not require medication or any treatment. It just means that there is too much fat in your stool to allow a normal bowel movement. This actually is a condition we regard as desirable as it means the fat is leaving your body. Whatever is appropriate for you depends upon how your body responds to lesser dosages, and upon the advice of your physician.

. . . .
(Exhibit I - product package insert)

J. **SeQuester**

Natural Nutritional Fat Sequestrant*

*SeQuester is a specially formulated patented product which, when used as directed, reduces fat and sugar from the foods you eat.

Tests have shown SeQuester effects metabolizable energy, thus increasing fecal energy (calorie) excretion and reduces hunger feelings without increasing total calorie intake.
(Exhibit J - product package)

19. Through the means described in paragraph eighteen, KCD has represented, expressly or by implication, that:

A. SeQuester prevents or significantly reduces the body's absorption of fat from consumed food.

B. SeQuester significantly reduces the body's absorption of sugar from consumed food.

C. Scientific research demonstrates that SeQuester prevents or significantly reduces the body's absorption of fat from consumed food.

D. Scientific research demonstrates that SeQuester causes significant weight loss.

20. In truth and in fact:

A. SeQuester does not prevent or significantly reduce the body's absorption of fat from consumed food.

B. SeQuester does not significantly reduce the body's absorption of sugar from consumed food.

C. Scientific research does not demonstrate that SeQuester prevents or significantly reduces the body's absorption of fat from consumed food.

D. Scientific research does not demonstrate that SeQuester causes significant weight loss.

Therefore, the representations set forth in paragraph nineteen were and are, false or misleading.

21. Through the means described in paragraph eighteen, KCD has represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph nineteen(A) and (B), at the time the representations were made.

22. In truth and in fact, KCD did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph nineteen(A) and (B), at the time the representations were

made. Therefore, the representation set forth in paragraph twenty-one was, and is, false or misleading.

23. Through the means described in paragraph eighteen, KCD has represented, expressly or by implication, that:

A. SeQuester causes significant weight loss.

B. Use of SeQuester allows consumers to eat high-fat foods without gaining weight.

C. SeQuester causes significantly greater loss of weight and body fat than diet and exercise alone.

D. Use of SeQuester allows consumers to eat high-fat foods without increasing their risk of high cholesterol, clogged arteries, heart disease and other health problems associated with a high-fat diet.

E. SeQuester reduces the risk of high cholesterol, clogged arteries, heart disease, and other health problems associated with a high-fat diet.

F. Use of SeQuester in amounts sufficient to cause diarrhea is beneficial and safe.

24. Through the means described in paragraph eighteen, KCD has represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph twenty-three, at the time the representations were made.

25. In truth and fact, KCD did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph twenty-three, at the time the representations were made. Therefore, the representation set forth in paragraph twenty-four was, and is, false or misleading.

26. The IMT respondents knew or should have known that the advertisements referred to in paragraph eighteen, including but not limited to the advertisements attached as Exhibits F through J, contained the false and misleading representations set forth in paragraphs nineteen through twenty-five above; but the IMT respondents nevertheless have provided services and promotional materials to assist KCD's marketing and sale of SeQuester, including but not limited to:

A. Studies purporting to show that SeQuester effectively reduces the body's absorption of fat from consumed food and causes significant weight loss;

B. The licensing rights to market and sell SeQuester to consumers;

C. Technical information regarding SeQuester; and

D. Various promotional materials and information.

27. Through the means described in paragraph twenty-six, the IMT respondents have provided means and instrumentalities and/or have provided substantial assistance to KCD in furtherance of the unfair or deceptive acts or practices alleged in paragraphs nineteen through twenty-five, which the IMT respondents knew or should have known were unfair or deceptive.

28. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT C

1477 Complaint

EXHIBIT D

EXHIBIT D

1477 Complaint

EXHIBIT D

EXHIBIT D

1477 Complaint

EXHIBIT D

EXHIBIT D

1477 Complaint

EXHIBIT E

EXHIBIT E

1477 Complaint

EXHIBIT F

EXHIBIT G

1477 Complaint

EXHIBIT H

EXHIBIT I

EXHIBIT I

EXHIBIT I

1477 Complaint

EXHIBIT J

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and respondent William E. Shell, M.D., having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent William E. Shell, M.D. was an officer of Interactive Medical Technologies, Ltd., and Effective Health, Inc. He formulated, directed and controlled the policies, acts and practices of said corporations. His home address is at 3048 Nicada Drive, in the City of Los Angeles, State of California.

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

It is ordered, That for purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondent"* shall mean William E. Shell, M.D., individually and as a former officer of IMT.

3. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of Lipitrol or any product or program marketed or sold under any name, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that such product prevents or reduces the body's absorption of fat from consumed food or absorbs any amount of fat from consumed food unless the representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of Lipitrol or any product or program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that any such product:

A. Provides any weight loss benefit;

B. Lowers blood cholesterol levels;

C. Reduces, or reduces the risks associated with, high cholesterol, including clogged arteries, high blood pressure, diabetes, breast cancer and heart disease; or

D. Can be used, beneficially and safely, in amounts or with frequency sufficient to cause diarrhea,

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of Lipitrol or any product or program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study or research.

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of Lipitrol or any product or program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, efficacy or safety of any such product or program, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

V.

It is further ordered, That respondent shall not provide means and instrumentalities or substantial assistance or support to any person or entity who respondent knows or should know is making any false or misleading benefits, performance, efficacy or safety claim, or any benefits, performance, efficacy or safety claim that is not substantiated by competent and reliable scientific evidence, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of any weight loss, fat reduction or cholesterol reduction product or program. "Assistance" includes, but is not limited to, providing:

A. Any tests, analyses, studies or research to determine the benefits, performance, efficacy or safety of any such product or program;

B. The licensing or other contractual rights to market any such product or program;

C. Any technical assistance; or

D. Any advertising, labeling or promotional materials.

VI.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division or other device, when providing assistance, as "assistance" is defined in Part V of this order, to any person or entity that is engaged in the labeling, advertising, promotion, offering for sale, sale or distribution of any weight loss, fat reduction or cholesterol reduction product or program, shall:

A. Take reasonable steps sufficient to determine, commencing with the beginning of any business relationship, or with entry of this order if a relationship already exists, and continuing on a regular basis throughout the relationship, whether any labeling, advertising, promotion, offering for sale, sale or distribution of any such product or program by any person to whom respondent is or will be providing assistance involves any false or misleading benefits, performance, efficacy or safety claim or any benefits, performance, efficacy or safety claim that is not substantiated by competent and reliable scientific evidence. Such steps shall include evaluating, on a basis independent of such person, the truthfulness of and substantiation for, representations made to consumers. For purposes of this order, evaluating includes, but is not limited to, reviewing all advertisements and promotional materials and all tests, reports, studies, surveys, demonstrations or other evidence that any such person relies upon in making any benefits, performance, efficacy or safety claims to consumers.

B. Immediately terminate any business relationship with any person who respondent knows or should know is making any false or misleading benefits, performance, efficacy or safety claim or any benefits, performance, efficacy or safety claim that is not substantiated by competent and reliable scientific evidence.

VII.

It is further ordered, That:

A. Respondent, directly or through any corporation, subsidiary, division or other device, shall not:

1. Advertise, promote, offer for sale, sell or distribute Lipitrol or any weight loss, fat reduction or cholesterol reduction product composed of any combination of fiber and bile extract, unless he first obtains a performance bond in the principal amount of one million dollars ($1,000,000);

2. Hold any ownership interest, share or stock in, other than a passive investment, or serve as an officer, director or trustee of, any business entity engaged, in whole or in part, in the advertising, promotion, offering for sale, sale or distribution of Lipitrol or any weight loss, fat reduction or cholesterol reduction product composed of any combination of fiber and bile extract, unless he first obtains a performance bond for each such business entity or activity in the principal sum of one million dollars ($1,000,000);

3. Advertise, promote, offer for sale, sell or distribute any weight loss, fat reduction or cholesterol reduction product or program, not including the treatment of patients in connection with his private medical practice, unless he first obtains a performance bond in the principal amount of two hundred and fifty thousand dollars ($250,000); or

4. Hold any ownership interest, share or stock in, other than a passive investment, or serve as an officer, director or trustee of, any business entity engaged, in whole or in part, in the advertising, promotion, offering for sale, sale or distribution of any weight loss, fat reduction or cholesterol reduction product or program, not including the treatment of patients in connection with his private medical practice, unless he first obtains a performance bond for each such business entity or activity in the principal sum of two hundred and fifty thousand dollars ($250,000).

B. Each such bond shall be deemed continuous and remain in full force and effect as long as respondent engages in or holds any ownership interest, share or stock in, or serves as an officer, director or trustee of, any business entity engaged, in whole or in part, in the

advertising, promotion, offering for sale, sale or distribution of any product or program that is related to weight loss, fat reduction or cholesterol reduction and for at least three (3) years after respondent has ceased to engage in any such activity.

C. Each such bond shall cite this order as the subject matter of the bond, and shall provide surety thereunder against financial loss due, in whole or in part, to any violation of Sections 5 and 12 of the FTC Act, to any violation of the provisions of this order, or to any other cause attributable to respondent's engaging or participating in the advertising, promotion, offering for sale, sale or distribution of any product or program that is related to weight loss, fat reduction or cholesterol reduction.

D. Each such bond shall be an insurance agreement providing surety for financial loss issued by a surety company that holds a Federal Certificate of Authority As Acceptable Surety On Federal Bond and Reinsuring and that is admitted to conduct surety business in each state where the entity to be insured does business. Each such bond shall be in favor of both: (1) the Commission for the benefit of consumers injured due, in whole or in part, to any violation of Sections 5 and 12 of the Federal Trade Commission Act, to any violation of the provisions of this order, or to any other cause attributable to respondent's engaging or participating in the advertising, promotion, offering for sale, sale or distribution of any product or program that is related to weight loss, fat reduction or cholesterol reduction; and (2) any consumer so injured. Each such bond shall be executed in favor of the Commission or in favor of any injured consumer if the Commission or the consumer demonstrates, by a preponderance of the evidence, that respondent has violated any condition of the bond.

E. Respondent shall provide a copy of each such bond required by this Part to the Regional Director, Federal Trade Commission, 915 Second Avenue, Suite 2896, Seattle, Washington, at least ten (10) days before commencing any activity or business for which the bond is required.

F. Respondent may not disclose the existence of the performance bond to any consumer, or other purchaser or prospective purchaser, to whom a covered weight loss, fat reduction or cholesterol reduction product or program is advertised, promoted, offered for sale, sold, or distributed, without also disclosing at the same time and in a like

manner that the performance bond is required by order of the Commission in settlement of charges that respondent engaged in false and misleading representations.

G. The bond required by this Part shall be in addition to, and not in lieu of, any other bond required by law.

H. Proceedings instituted under this Part are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings the Commission may initiate to enforce this order.

VIII.

It is further ordered, That respondent, his successors and assigns, shall deposit into an escrow account, to be established by the Commission for the purpose of receiving payment due under this order ("escrow account"), the sum of twenty thousand dollars ($20,000). This payment shall be made in the following manner:

A. By certified or cashier's check made payable to the Federal Trade Commission, in four installments, the first payment of five thousand dollars ($5,000) to be made within 60 days after the date that this order becomes final; the second payment of five thousand dollars ($5,000) to be made no later than the first day of the fourth month thereafter; the third payment of five thousand dollars ($5,000) to be made no later than the first day of the eighth month thereafter; and the final payment of five thousand dollars ($5,000) to be made within one year from the date that this order becomes final. The checks shall be deliverable to Regional Director, Federal Trade Commission, 915 Second Avenue, Suite 2896, Seattle, Washington.

B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the entire amount due, together with interest, as computed pursuant to 28 U.S.C. 1961 from the date of default to the date of payment, shall immediately become due and payable.

C. In order to secure payment of respondent's indebtedness to the Commission, within seven (7) days of the date that this order becomes final, respondent shall cause to be transferred to the Commission a security interest in the property described in Appendix A, which property has been determined by an independent appraisal to have a value of twenty thousand dollars ($20,000) or more in excess of all other perfected security interests, as security for the

payments required to be made by respondent in Part VIII(A) of this order. The respondent shall, within seven (7) days of the date that this order becomes final, file all documents necessary to perfect and record the Commission's security interest in the property described in Appendix A, in conformity with appropriate state law. The respondent shall, within ten (10) days of the date that this order becomes final, furnish to counsel for the Commission complete documentation evidencing that the Commission's security interest in the property described in Appendix A has been correctly perfected and recorded. The Commission will release this security interest upon receipt of all payments required by Part VIII(A) of this order.

D. The funds paid by respondent, together with accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of Lipitrol in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty or punitive assessment.

E. At any time after this order becomes final, the Commission may direct the escrow agent to transfer funds from the escrow account, including accrued interest, to the Commission to be distributed as herein provided. The Commission, or its representative, shall, in its sole discretion, select the escrow agent.

F. Respondent relinquishes all dominion, control and title to the funds paid into the escrow account, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondent shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondent, respondent acknowledges that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

IX.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration ("FDA"), or under any new drug application approved by the FDA.

X.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990.

XI.

It is further ordered, That respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

A. All advertisements or promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations or other evidence in his possession or control that contradict, qualify or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

XII.

It is further ordered, That respondent shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XIII.

It is further ordered, That respondent shall, for a period of five (5) years after the date of issuance of this order, notify the Commission within thirty (30) days of his affiliation with any business or

employment involving any activities related to the advertising, offering for sale, sale or distribution of any weight loss, fat reduction or cholesterol reduction product or program. The notice shall include respondent's new business address and telephone number, current home address, and a description of the nature of the business or employment, respondent's interest in the new business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XIV.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, and at other such times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

XV.

This order will terminate on June 16, 2017, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the

deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

APPENDIX A

(CONFIDENTIAL APPENDIX A REDACTED FROM PUBLIC RECORD VERSION)

IN THE MATTER OF

WILLIAM PELZER, JR.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3750. Complaint, June 16, 1997--Decision, June 16, 1997*

This consent order prohibits, among other things, the former officer of Interactive Medical Technologies, Ltd. and Effective Health, Inc., which market cellulose-bile products, from assisting entities that he knows or should know are making false, misleading or unsubstantiated claims for any weight loss, fat reduction or cholesterol reduction product or program, and requires the monitoring of the business practices of certain parties to whom assistance is provided.

Appearances

For the Commission: *Nadine Samter* and *Patricia Hensley*.

For the respondent: *William Baker, Baker & Baker*, Santa Ana, CA.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and respondent William Pelzer, Jr., having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents

[1]* Complaint previously published at 123 FTC 1477 (1997).

have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent William Pelzer, Jr., was an officer of Interactive Medical Technologies, Ltd., and Effective Health, Inc. He formulated, directed and controlled the policies, acts and practices of said corporations. His address is at P.O. Box 269006, in the City of San Diego, State of California.

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

It is ordered, That for purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondent"* shall mean William Pelzer, Jr., individually and as a former officer of IMT and EHI.

3. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent shall not provide means and instrumentalities or substantial assistance or support to any person or entity who respondent knows or should know is making any false or misleading benefits, performance, efficacy or safety claim, or any benefits, performance, efficacy or safety claim that is not substantiated by competent and reliable scientific evidence, in

connection with the labeling, advertising, promotion, offering for sale, sale or distribution of any weight loss, fat reduction or cholesterol reduction product or program. "Assistance" includes, but is not limited to, providing:

A. Any tests, analyses, studies or research to determine the benefits, performance, efficacy or safety of any such product or program;

B. The licensing or other contractual rights to market any such product or program;

C. Any technical assistance; or

D. Any advertising, labeling or promotional materials.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division or other device, when providing assistance, as "assistance" is defined in Part I of this order, to any person or entity that is engaged in the labeling, advertising, promotion, offering for sale, sale or distribution of any weight loss, fat reduction or cholesterol reduction product or program, shall:

A. Take reasonable steps sufficient to determine, at the beginning of any business relationship, or with entry of this order if a relationship already exists, and continuing on a regular basis throughout the relationship, whether any labeling, advertising, promotion, offering for sale, sale or distribution of any such product or program by any person to whom respondent is or will be providing assistance involves any false or misleading benefits, performance, efficacy or safety claim or any benefits, performance, efficacy or safety claim that is not substantiated by competent and reliable scientific evidence. Such steps shall include evaluating, on a basis independent of such person, the truthfulness of and substantiation for, representations made to consumers. For purposes of this order, evaluating includes, but is not limited to, reviewing all advertisements and promotional materials and all tests, reports, studies, surveys, demonstrations or other evidence that any such person relies upon in making any benefits, performance, efficacy or safety claims to consumers.

B. Immediately terminate any business relationship with any person who respondent knows or should know, is making any false or misleading benefits, performance, efficacy or safety claim or any benefits, performance, efficacy or safety claim that is not substantiated by competent and reliable scientific evidence.

III.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for any drug under any tentative final or final standard promulgated by the Food and Drug Administration ("FDA"), or under any new drug application approved by the FDA.

IV.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990.

V.

It is further ordered, That respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations or other evidence in his possession or control that contradict, qualify or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

It is further ordered, That respondent shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents and representatives having responsibilities with respect to the subject matter of this order and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order and, for a period of five (5) years thereafter, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

It is further ordered, That respondent shall, for a period of ten (10) years after the date of issuance of this order, notify the Commission within thirty (30) days of his affiliation with any business or employment involving any activities related to the labeling, advertising, offering for sale, sale or distribution of any weight loss, fat reduction or cholesterol reduction product or program. The notice shall include respondent's new business address and telephone number, current home address, and a description of the nature of the business or employment, respondent's interest in the new business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

IX.

This order will terminate on June 16, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order,

whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

INTERACTIVE MEDICAL TECHNOLOGIES, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3751. Complaint, June 16, 1997--Decision, June 16, 1997*

This consent order requires, among other things, the California-based companies, which market cellulose-bile products, to have scientific substantiation for claims regarding the benefits or safety of any product or program, including claims that it reduces the body's absorption of fat or sugar; provides any weight loss benefit, allows consumers to eat high-fat foods without increasing their risk of high cholesterol, clogged arteries, heart disease or other health problems; reduces the risk of these health problems; or can be used safely and beneficially in amounts sufficient to cause diarrhea. The consent order also prohibits the respondents from misrepresenting the existence or results of any test or study, from assisting entities that they know or should know are making false, misleading or unsubstantiated claims for any weight loss, fat reduction or cholesterol reduction product or program, requires them to monitor the business practices of certain parties to whom they provide assistance, and requires Interactive Medical Technologies and Effective Health, Inc. to pay $35,000 in redress over a period of one year.

Appearances

For the Commission: *Nadine Samter* and *Patricia Hensley*.

For the respondents: *Edward Swanson, Swanson & Meepos,* Santa Monica, CA.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and respondents Interactive Medical Technologies, Ltd. ("IMT") and Effective Health, Inc. ("EHI") having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

Respondents IMT and EHI, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents IMT and EHI of all the jurisdictional facts set forth in the aforesaid draft of complaint, a

[1]* Complaint previously published at 123 FTC 1477 (1997).

statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by these respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents IMT and EHI have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Interactive Medical Technologies, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2139 Pontius Avenue, in the City of Los Angeles, State of California.

2. Respondent Effective Health, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 2139 Pontius Avenue, in the City of Los Angeles, State of California.

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

ORDER

It is ordered, That for purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondents"* shall mean Interactive Medical Technologies, Ltd., and Effective Health, Inc., corporations, their successors and assigns and their officers, agents, representatives and employees.

3. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of Lipitrol or any weight loss, fat reduction or cholesterol reduction product or program marketed or sold under any name, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that such product prevents or reduces the body's absorption of fat from consumed food or absorbs any amount of fat from consumed food unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of Lipitrol or any weight loss, fat reduction or cholesterol reduction product or program or any food, drug or dietary supplement, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that any such product:

A. Provides any weight loss benefit;

B. Lowers blood cholesterol levels;

C. Reduces, or reduces the risks associated with, high cholesterol, including clogged arteries, high blood pressure, diabetes, breast cancer and heart disease; or

D. Can be used, beneficially and safely, in amounts or with frequency sufficient to cause diarrhea,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of Lipitrol or any weight loss, fat reduction or cholesterol reduction product or program or any food, drug or dietary supplement, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study or research.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of Lipitrol or any weight loss, fat reduction or cholesterol reduction product or program or any food, drug or dietary supplement, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, efficacy or safety of any such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

V.

It is further ordered, That respondents shall not provide means and instrumentalities or substantial assistance or support to any person or entity who respondents know or should know is making any false or misleading benefits, performance, efficacy or safety claim, or any benefits, performance, efficacy or safety claim that is not substantiated by competent and reliable scientific evidence, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of SeQuester or any weight loss, fat

reduction or cholesterol reduction product or program. "Assistance" includes, but is not limited to, providing:

A. Any tests, analyses, studies or research to determine the benefits, performance, efficacy or safety of any such product or program;

B. The licensing or other contractual rights to market any such product or program;

C. Any technical assistance; or

D. Any advertising, labeling or promotional materials.

VI.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division or other device, when providing assistance, as "assistance" is defined in Part V of this order, to any person or entity that is engaged in the labeling, advertising, promotion, offering for sale, sale or distribution of any weight loss, fat reduction or cholesterol reduction product or program, shall:

A. Take reasonable steps sufficient to determine, commencing with the beginning of any business relationship, or with entry of this order if a relationship already exists, and continuing on a regular basis throughout the relationship, whether any labeling, advertising, promotion, offering for sale, sale or distribution of any such product or program by any person to whom respondents are or will be providing assistance involves any false or misleading benefits, performance, efficacy or safety claim or any benefits, performance, efficacy or safety claim that is not substantiated by competent and reliable scientific evidence. Such steps shall include evaluating, on a basis independent of such person, the truthfulness of and substantiation for, representations made to consumers. For purposes of this order, evaluating includes, but is not limited to, reviewing all advertisements and promotional materials and all tests, reports, studies, surveys, demonstrations or other evidence that any such person relies upon in making any benefits, performance, efficacy or safety claims to consumers.

B. Immediately terminate any business relationship with any person who respondents know or should know is making any false or misleading benefits, performance, efficacy or safety claim or any

benefits, performance, efficacy or safety claim that is not substantiated by competent and reliable scientific evidence.

VII.

It is further ordered, That respondents IMT and EHI, corporations, their successors and assigns, shall deposit into an escrow account, to be established by the Commission for the purpose of receiving payment due under this order ("escrow account"), the sum of thirty-five thousand dollars ($35,000). This payment shall be made in the following manner:

A. By certified or cashier's check made payable to the Federal Trade Commission, in three installments, the first payment of eleven thousand dollars ($11,000) to be made no later than the date that this order becomes final; the second payment of eleven thousand dollars ($11,000) to be made no later than the first day of the sixth month thereafter; and the third payment of thirteen thousand dollars ($13,000) to be made no later than one year from the date that this order becomes final. The checks shall be deliverable to Regional Director, Federal Trade Commission, 915 Second Avenue, Suite 2896, Seattle, Washington.

B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the entire amount due, together with interest, as computed pursuant to 28 U.S.C. 1961 from the date of default to the date of payment, shall immediately become due and payable.

C. In order to secure payment of respondents' indebtedness to the Commission, within seven (7) days of the date that this order becomes final, respondents shall cause to be transferred to the Commission a security interest in the property described in Appendix A, which property has been determined by an independent appraisal to have a value of twenty-four thousand dollars ($24,000) or more in excess of all other perfected security interests, as security for the payments required to be made by respondents in Part VII(A) of this order. The respondents shall, within seven (7) days of the date that this order becomes final, file all documents necessary to perfect and record the Commission's security interest in the property described in Appendix A, in conformity with appropriate state law. The

respondents shall, within ten (10) days of the date that this order becomes final, furnish to counsel for the Commission complete documentation evidencing that the Commission's security interest in the property described in Appendix A has been correctly perfected and recorded. The Commission will release this security interest upon receipt of all payments required by Part VII(A) of this order.

D. The funds paid by respondents, together with accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of Lipitrol in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty or punitive assessment.

E. At any time after this order becomes final, the Commission may direct the escrow agent to transfer funds from the escrow account, including accrued interest, to the Commission to be distributed as herein provided. The Commission, or its representative, shall, in its sole discretion, select the escrow agent.

F. Respondents relinquish all dominion, control and title to the funds paid into the escrow account, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondents shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondents, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

VIII.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration ("FDA"), or under any new drug application approved by the FDA.

IX.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990.

X.

It is further ordered, That respondents shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

A. All advertisements or promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

XI.

It is further ordered, That respondents IMT and EHI shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order and, for a period of five (5) years thereafter, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any change in the corporations that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or change in corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XIII.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, and at other such times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIV.

This order will terminate on June 16, 2017, or twenty years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

APPENDIX A

(CONFIDENTIAL APPENDIX A REDACTED FROM PUBLIC RECORD VERSION)

IN THE MATTER OF

KCD HOLDINGS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3752. Complaint, June 16, 1997--Decision, June 16, 1997

This consent order requires, among other things, the California-based companies, which market cellulose-bile products, and its officers to have scientific substantiation for claims regarding the benefits or safety of any product or program, including claims that it reduces the body's absorption of fat or sugar; provides any weight loss benefit, allows consumers to eat high-fat foods without increasing their risk of high cholesterol, clogged arteries, heart disease or other health problems; reduces the risk of these health problems; or can be used safely and beneficially in amounts sufficient to cause diarrhea. The consent order also prohibits the respondents from misrepresenting the existence or results of any test or study, and requires KCD, KCD Holdings and Richards to pay $150,000 in redress over a period of one year.

Appearances

For the Commission: *Nadine Samter* and *Patricia Hensley*.

For the respondents: *Geoffrey Levitt, Venable, Baetjer, Howard & Civiletti,* Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that KCD, Incorporated, KCD Holdings, Inc., and Deerfield Corporation, corporations, and Clark M. Holcomb, individually and as a former officer of KCD, Incorporated, and KCD Holdings, Inc., and Bonnie L. Richards, individually and as a current officer of KCD, Incorporated, and KCD Holdings, Inc., and Gerald E. Hatto, individually and as an officer of Deerfield Corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent KCD Holdings, Inc. ("KCD Holdings"), is a Nevada corporation with its principal office or place of business at 2835 Townsgate Road, Suite 110, Westlake Village, California.

2. Respondent KCD, Incorporated ("KCD"), is a California corporation with its principal office or place of business at 2835

Townsgate Road, Suite 110, Westlake Village, California. KCD is a wholly-owned subsidiary of KCD Holdings.

3. Respondent Deerfield Corporation ("Deerfield") is a California corporation with its principal office or place of business at 1455 Valley High Avenue, Thousand Oaks, California. Respondent Deerfield is now and has been at all times relevant to this complaint an advertising agency of KCD and KCD Holdings.

4. Respondent Clark M. Holcomb ("Holcomb") was the president, director and a majority shareholder of KCD Holdings and KCD from November 1993 through April 1996. Individually or in concert with others, he has formulated, directed, controlled or participated in the acts and practices of KCD Holdings and KCD, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of KCD Holdings.

5. Respondent Bonnie L. Richards ("Richards") is vice president, secretary, and director of KCD Holdings and KCD. Individually or in concert with others, she formulates, directs, controls or participates in the acts and practices of KCD Holdings and KCD, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of KCD Holdings.

6. Respondent Gerald E. Hatto ("Hatto") is an officer and the owner of Deerfield. Individually or in concert with others, he formulates, directs, controls or participates in the acts and practices of Deerfield Corporation, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Deerfield.

7. Respondents have advertised, labeled, offered for sale, sold and distributed products to the public, including SeQuester, an over-the-counter fat reduction and weight-loss tablet. SeQuester is a "food" and/or "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

8. Since at least May 1994, respondents KCD, KCD Holdings, Holcomb and Richards ("KCD respondents") have advertised, distributed and sold an over-the-counter fat reduction and weight-loss product to the public through, among other means, newspaper and radio advertisements disseminated nationally. The KCD respondents have wholesaled this product to retail drug stores and other retailers for resale to the general public. The product, sold under the name "SeQuester," is a combination of fiber and ox bile extract.

9. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

10. The KCD respondents have prepared and disseminated or have caused to be disseminated advertisements for SeQuester, including but not necessarily limited to the attached Exhibits A through E. Respondents Deerfield and Hatto have prepared and disseminated or have caused to be disseminated advertisements for SeQuester, including but not necessarily limited to the attached Exhibits A through C and E. These advertisements contain the following statements and depictions:

A.

THIS
IS WHAT
SEQUESTER
DOES TO
THE FAT
IN FOOD
YOU
EAT

Introducing SeQuester - the revolutionary tablet that "shrinks" the amount of dietary fat your body absorbs.

SeQuester is a lab-tested formula that neutralizes fat in the food you eat - safely and naturally - *before* it's absorbed, so it won't wind up on your body.

SeQuester's unique, patented ingredients bind fat molecules to vegetable fiber passing them gently and harmlessly through your digestive tract. It's like you never ate them at all. Shrink fat with SeQuester. Take advantage of introductory savings, and discover the safe, natural approach to fat reduction. It's in the diet section, today.

(Exhibit A -- newspaper advertisement)

B. THE FAT STOPS HERE

Dietary fat is a prime cause of overweight, heart disease, high cholesterol, and other major health problems. So imagine a tablet that can "shrink" the amount of fat your body absorbs.

Imagine SeQuester. A revolutionary discovery that lets you "remove" fat from the food you eat before it's absorbed, so it won't wind up on your body. Or in your arteries.

SeQuester is a safe, natural, lab-tested formula, shown to be effective in lowering fat absorption. It's easy. Just take one or more SeQuester tablets 30 minutes before meals. Its unique, patented formula binds fat molecules to natural vegetable fiber (as illustrated), passing it gently and harmlessly through your digestive tract.

SeQuester is intended for use as part of a program of sensible nutrition and exercise. Unlike fad diets that are ineffective at best, unhealthy at worst, SeQuester contributes to a safe, gradual loss of body fat and weight significantly better than what you're likely to accomplish through dieting and exercise alone.

So get control of fat, before fat controls you. Take advantage of our introductory savings on SeQuester, and experience for yourself this patently superior approach to fat reduction. Look for SeQuester in the diet section, today.
(Exhibit B -- newspaper advertisement)

C. For the holidays, don't cut it all out.

Just take SeQuester.

SEQUESTER REDUCES FAT FROM THE FOOD YOU EAT.

Don't look now, weight watchers, but the holidays are gaining on us. So many parties, so much good food, so hard to say, "no." So consider your choices:

Either you can cut out all those rich, delicious foods that make life worthwhile.

Or you can cut out this coupon and introduce yourself to SeQuester - a revolutionary discovery that helps your body minimize fat retention from the food you eat.

With SeQuester, you can plan on enjoying reasonable portions of all those great holiday foods, confident that their entire fat content won't be showing up on your scale - or in your arteries - come January 1st.

SeQuester is a safe, natural dietary supplement. Its unique, patented formula helps bind fat molecules to natural vegetable fiber, so they pass gently and effortlessly through the digestive tract. Just take one or more tablets 30 minutes before meals.

This season, make SeQuester the centerpiece of all your holiday meals. You'll find it in better drugstores and supermarkets, everywhere.

NOTE: SeQuester is intended for use as part of a complete program of sensible nutrition and moderate exercise. By following this program, studies suggest that SeQuester contributes to a safe, gradual loss of body fat and weight significantly more successful than dieting and exercise alone.
(Exhibit C -- newspaper advertisement)

D. . . . .

Q. SHOULD I INCREASE MY DOSAGE?

A: After two or three days, increase your dosage to 2 tablets prior to your largest and fattiest meal of the day. If no diarrhea results from 2 tablets at your largest meal, you may choose to use 2 tablets before every meal. Some people will even use 3 or more SeQuester tablets prior to their fattiest meal. If diarrhea occurs, it is controllable. It does not require medication or any treatment. It just means that there is too much fat in your stool to allow a normal bowel movement. This actually is a condition we regard as desirable as it means the fat is leaving your body. Whatever is appropriate for you depends upon how your body responds to lesser dosages, and upon the advice of your physician.

. . . .
(Exhibit D -- product package insert)

E. SeQuester

Natural Nutritional Fat Sequestrant*

*SeQuester is a specially formulated patented product which, when used as directed, reduces fat and sugar from the foods you eat.

Tests have shown SeQuester effects metabolizable energy, thus increasing fecal energy (calorie) excretion and reduces hunger feelings without increasing total calorie intake.
(Exhibit E -- product package label)

The KCD Respondents

11. Through the means described in paragraph ten, the KCD respondents have represented, expressly or by implication, that:

A. SeQuester prevents or significantly reduces the body's absorption of fat from consumed food.

B. SeQuester significantly reduces the body's absorption of sugar from consumed food.

C. Scientific research demonstrates that SeQuester prevents or significantly reduces the body's absorption of fat from consumed food.

D. Scientific research demonstrates that SeQuester causes significant weight loss.

12. In truth and in fact:

A. SeQuester does not prevent or significantly reduce the body's absorption of fat from consumed food.

B. SeQuester does not significantly reduce the body's absorption of sugar from consumed food.

C. Scientific research does not demonstrate that SeQuester prevents or significantly reduces the body's absorption of fat from consumed food.

D. Scientific research does not demonstrate that SeQuester causes significant weight loss.

Therefore, the representations set forth in paragraph eleven were, and are, false or misleading.

13. Through the means described in paragraph ten, the KCD respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph eleven(A) and(B), at the time the representations were made.

14. In truth and in fact, the KCD respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph eleven(A) and (B), at the time the representations were made. Therefore, the representation set forth in paragraph thirteen was, and is, false or misleading.

15. Through the means described in paragraph ten, the KCD respondents have represented, expressly or by implication, that:

A. SeQuester causes significant weight loss.

B. Use of SeQuester allows consumers to eat high-fat foods without gaining weight.

C. SeQuester causes significantly greater loss of weight and body fat than diet and exercise alone.

D. Use of SeQuester allows consumers to eat high-fat foods without increasing their risk of high cholesterol, clogged arteries, heart disease and other health problems associated with a high-fat diet.

E. SeQuester reduces the risk of high cholesterol, clogged arteries, heart disease, and other health problems associated with a high-fat diet.

F. Use of SeQuester in amounts sufficient to cause diarrhea is beneficial and safe.

16. Through the means described in paragraph ten, the KCD respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph fifteen, at the time the representations were made.

17. In truth and fact, the KCD respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph fifteen, at the time the representations were made. Therefore, the representation set forth in paragraph sixteen was, and is, false or misleading.

Respondents Deerfield and Hatto

18. Through the means described in paragraph ten, including but not limited to the advertisements attached as Exhibits A through C and E, respondents Deerfield and Hatto have represented, expressly or by implication, that:

A. SeQuester causes significant weight loss.

B. Use of SeQuester allows consumers to eat high-fat foods without gaining weight.

C. Use of SeQuester allows consumers to eat high-fat foods without increasing their risk of high cholesterol, clogged arteries,

heart disease and other health problems associated with a high-fat diet.

D. SeQuester prevents or significantly reduces the body's absorption of fat from consumed food.

E. SeQuester reduces the risk of high cholesterol, clogged arteries, heart disease and other health problems associated with a high-fat diet.

F. SeQuester significantly reduces the body's absorption of sugar from consumed food.

19. Through the means described in paragraph ten, including but not limited to the advertisements attached as Exhibits A through C and E, respondents Deerfield and Hatto have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph eighteen, at the time the representations were made.

20. In truth and in fact, respondents Deerfield and Hatto did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph eighteen, at the time the representations were made. Therefore, the representation set forth in paragraph nineteen was, and is, false or misleading.

21. Through the means described in paragraph ten, including but not limited to the advertisements attached as Exhibits A through C and E, respondents Deerfield and Hatto have represented, expressly or by implication, that scientific research demonstrates that SeQuester:

A. Prevents or significantly reduces the body's absorption of fat from consumed food.

B. Causes significant weight loss.

22. In truth and in fact, scientific research does not demonstrate that SeQuester:

A. Prevents or significantly reduces the body's absorption of fat from consumed food.

B. Causes significant weight loss.

Therefore, the representation set forth in paragraph twenty-one was, and is, false or misleading.

23. Respondents Deerfield and Hatto knew or should have known that the representations set forth in paragraphs eighteen, nineteen and twenty-one were, and are, false or misleading.

24. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT D

EXHIBIT D

EXHIBIT E

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 the respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent KCD Holdings, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 2835 Townsgate Road, Suite 110, in the City of Westlake Village, State of California.

2. Respondent KCD, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 2835 Townsgate Road, Suite 110, in the City of Westlake Village, State of California.

3. Respondent Deerfield Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the

State of California, with its office and principal place of business located at 1455 Valley High Avenue, in the City of Thousand Oaks, State of California.

4. Respondent Clark M. Holcomb was an officer of KCD Holdings, Inc., and KCD, Incorporated. He formulated, directed and controlled the policies, acts and practices of these corporations. His home address is at 2190 Upper Ranch Road, in the City of Westlake Village, State of California.

5. Respondent Bonnie L. Richards is an officer of KCD Holdings, Inc., and KCD, Incorporated. She formulates, directs and controls the policies, acts and practices of these corporations. Her home address is at 4791 Parma Lane, in the City of Agoura Hills, State of California.

6. Respondent Gerald E. Hatto is an officer of Deerfield Corporation. He formulates, directs and controls the acts and practices of this corporation. His home address is at 1455 Valley High Avenue, in the City of Thousand Oaks, State of California.

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

ORDER

It is ordered, That for purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. *"KCD respondents"* shall mean KCD Holdings, Inc. ("KCD Holdings"), KCD, Incorporated ("KCD"), corporations, their successors and assigns and their officers; Clark M. Holcomb ("Holcomb"), individually and as a former officer of the corporations; Bonnie L. Richards ("Richards"), individually and as an officer of the corporations; and each of their agents, representatives and employees.

3. *"Deerfield respondents"* shall mean Deerfield Corporation ("Deerfield"), a corporation, its successors and assigns and its officers; Gerald E. Hatto ("Hatto"), individually and as an officer of

the corporation; and each of their agents, representatives and employees.

4. Unless otherwise specified, *"respondents"* shall mean KCD Holdings, KCD and Deerfield, corporations, their successors and assigns and their officers; Holcomb, Richards and Hatto, individually and as officers or former officers of the corporations; and each of the above's agents, representatives and employees.

5. *"Commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. Section 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of SeQuester or any product or program, marketed or sold under any name, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that such product or program prevents or reduces the body's absorption of fat or sugar from consumed food, unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of SeQuester or any product or program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that any such product or program:

A. Provides any weight loss benefit;

B. Causes greater loss of body fat than diet and exercise alone;

C. Allows consumers to eat high-fat foods without increasing their risk of high cholesterol, clogged arteries, heart disease or other health problems associated with a high-fat diet; or

D. Reduces, or reduces the risk of, high cholesterol, clogged arteries, heart disease and other health problems associated with a high-fat diet,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That the KCD respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of SeQuester or any product or program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that any such product or program can be used, beneficially and safely, in amounts or with frequency sufficient to cause diarrhea, unless, at the time the representation is made, the KCD respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of SeQuester or any product or program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study or research.

V.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of SeQuester or any product or program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, efficacy or safety of any such product or program unless, at the time the representation is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

VI.

It is further ordered, That with respect to the Deerfield respondents, it shall be a defense to Sections I, II and V of this order that they neither knew nor had reason to know of an inadequacy of substantiation for any such representation; provided further that it shall be a defense to Section IV of this order that they neither knew nor had reason to know that the test, study or research did not prove, demonstrate or confirm that representation.

VII.

It is further ordered, That KCD Holdings, Inc., KCD Incorporated and Bonnie L. Richards, their successors and assigns, shall deposit into an escrow account, to be established by the Commission for the purpose of receiving payment due under this order ("escrow account"), the sum of one hundred and fifty thousand dollars ($150,000). This payment shall be made in the following manner:

A. By certified or cashier's check made payable to the Federal Trade Commission, in thirteen installments, the first installment of twenty-five thousand dollars ($25,000) to be made no later than the date that this order becomes final; the next eleven payments of ten thousand, four hundred and sixteen dollars ($10,416) to be made no later than the first day of each of the following eleven months; and the final installment of ten thousand, four hundred and twenty-four dollars ($10,424) to be made no later than one year from the date that this order becomes final. The checks shall be deliverable to Regional Director, Federal Trade Commission, 915 Second Avenue, Suite 2896, Seattle, Washington.

B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the entire amount due, together with interest, as computed pursuant to 28 U.S.C. 1961 from the date of default to the date of payment, shall immediately become due and payable.

C. In order to secure payment of respondents' indebtedness to the Commission, within seven (7) days of the date that this order becomes final, respondents shall cause to be transferred to the Commission a security interest in the property described in Appendix A, which property has been determined by an independent appraisal

to have a value of one hundred and twenty-five thousand dollars ($125,000) or more in excess of all other perfected security interests, as security for the payments required to be made by respondents in Part VII(A) of this order. The respondents shall, within seven (7) days of the date that this order becomes final, file all documents necessary to perfect and record the Commission's security interest in the property described in Appendix A, in conformity with appropriate state law. The respondents shall, within ten (10) days of the date that this order becomes final, furnish to counsel for the Commission complete documentation evidencing that the Commission's security interest in the property described in Appendix A has been correctly perfected and recorded. The Commission will release this security interest upon receipt of all payments required by Part VII(A) of this order.

D. The funds paid by respondents, together with accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of SeQuester in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty or punitive assessment.

E. At any time after this order becomes final, the Commission may direct the escrow agent to transfer funds from the escrow account, including accrued interest, to the Commission to be distributed as herein provided. The Commission, or its representative, shall, in its sole discretion, select the escrow agent.

F. Respondents relinquish all dominion, control and title to the funds paid into the escrow account, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondents shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondents, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

VIII.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any drug under any tentative final or final standard promulgated by the Food and Drug Administration ("FDA"), or under any new drug application approved by the FDA.

IX.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990.

X.

It is further ordered, That respondents shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable written request make available to the Commission for inspection and copying:

A. All advertisements or promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

XI.

It is further ordered, That respondents shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order, such

statements to be retained by respondents for a period of five (5) years. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XII.

It is further ordered, That respondents KCD Holdings, KCD and Deerfield, and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporations that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XIII.

It is further ordered, That respondents Holcomb, Richards, and Hatto shall, for a period of five (5) years after the date of issuance of this order, notify the Commission within thirty (30) days of the discontinuance of their current business or employment, and of their affiliation with any new business or employment. The notice shall include the respondents' new business addresses and telephone numbers, current home addresses, and a description of the nature of the business or employment and their duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XIV.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, and at other such times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XV.

This order will terminate on June 16, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

APPENDIX A

(CONFIDENTIAL APPENDIX A REDACTED FROM PUBLIC RECORD VERSION)

IN THE MATTER OF

GUILDWOOD DIRECT LIMITED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3753. Complaint, June 16, 1997--Decision, June 16, 1997

This consent order prohibits, among other things, the use of the name "Slimming Insoles" to represent that a product causes weight loss without scientific substantiation. The consent order requires the respondents to have scientific evidence to substantiate any claims regarding the effectiveness, benefits, and efficacy of any weight loss or fat loss product. In addition, the consent order requires testimonials to represent the typical experience of consumers or to clearly and prominently disclose the generally expected results. Furthermore the order prohibits the respondent from representing that Advance Bio/Natural Research Labs is an independent research organization and from misrepresenting the existence or results of any test or study. In addition the consent order requires the respondent to pay $40,000 in consumer redress, of which all but $7,500 is suspended.

Appearances

For the Commission: *Beth Grossman* and *Jeffrey Bloom.*

For the respondent: *Sheldon S. Lustigman, Lustigman Law Firm,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Guildwood Direct Limited ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Guildwood Direct Limited is a Delaware corporation with its principal office or place of business at 1402 Pine Avenue, MPO Box 2130, Niagara Falls, New York.

2. Respondent has advertised, labeled, offered for sale, sold and distributed to the public Slimming Insoles, shoe insoles purported to cause weight loss by stimulating certain areas of the feet. Slimming Insoles are "devices," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Advertisements for these products have appeared in the following publications: The Salt Lake Tribune, The Denver Post, The Modesto Bee, The New York Post, The St. Louis Post, American Woman, Crochet World, Soap Opera Update,

Women's Own, Low Fat Meals and Beautiful Brides, and have been distributed as free standing inserts by News America.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements for Slimming Insoles, including but not necessarily limited to the attached Exhibits A through C. These advertisements contain the following statements:

A. "REVOLUTIONARY EUROPEAN WEIGHT LOSS METHOD GUARANTEED BY DOCTOR!"

"I LOST 74 POUNDS" Angela Meisel

The first and only massage insole in the world that reduces weight and regulates the digestive system!

Now, join the over 370,000 Europeans who have discovered the secret to weight loss!

For years Dr. Robert Metz, a European doctor and nutritionist, has been studying weight reduction by natural methods. His revolutionary invention Erina Solum (Slimming Insoles) is his brilliant breakthrough.

NOW AVAILABLE IN THE U.S.A.!

The first and only massage insole in the world which reduces weight and regulates the digestion system is now available in the U.S.A.!

ACUPRESSURE - A 5000 YEAR OLD CHINESE THERAPY!

Over 5000 years ago the Chinese discovered a natural way to stimulate the inner organs via the reflex zones of the soles of the feet. (The English neurologists Dr. Head and Dr. Fitzgerald have proved this natural Chinese philosophy). The unique effectiveness of Dr. Metz's Slimming Insoles works on this same completely natural method. With every step you take the insoles massage the reflex zones of the kidneys, bladder and stomach gently but effectively.

Since overweight problems are often linked to the under-performance of the dietary system, it should be stimulated to function effectively so the bodies [sic] metabolism works normally and does not store excess fat!

*No Dieting *No Pills

*No Nervousness

*No Frantic Exercising

*No Strange Formulas

*No Special Foods to Buy

HELP TURN ON YOUR BODY'S FAT BURNING PROCESS!

When the digestive organs are stimulated, the body burns stored up fat in a natural way and digestion returns to normal... You lose weight, simply by everyday walking. The result is a fabulous figure in a natural way.

EVERY STEP GENTLY MASSAGES YOUR REFLEX ZONES KEEPING YOU [sic] METABOLISM WORKING.

...

This effect is based on the principle of Reflexology. All the body's organs have a reflex point on the soles of the feet. When these points are massaged the functions of the corresponding organ are stimulated. Dr. Metz discovered that this massage can also be effected by walking. The insole knobs are arranged so they massage the reflex zones of the body, stimulating the dietary system and metabolic function. So, get in step with this new European technology and start looking and feeling great!
MEDICAL TEST RESULTS * VERY GOOD * 478 PEOPLE TESTED
TESTIMONIALS ABOUND
"During 4 weeks I lost 6 pounds, the same happened to all of my friends." Carmen Schlashter
"I lost 8 pounds within 8 weeks... Above all I like them (Slimming Insoles) because it's so easy to lose weight." Mrs. Petra Jung
"I have lost 10 pounds without torturing myself." Gabriele Geiger
"I can recommend it to everyone because it's not only to lose weight but they make you feel physically fit." Carmen Steffens-Baum
"I'LL STAKE MY MEDICAL REPUTATION ON IT." R. Metz, MD
DR. METZ SLIMMING INSOLES GUARANTEE:
Step by step the Slimming Insoles will help you become slimmer, healthier and feel more alive! You will be able to control your weight, and rid your body of the flab while aiding your dietary system. They WILL work for you, or we'll refund every cent you paid for them. NO questions asked." (Exhibit A - Print Advertisement).

B. [Heading at top of page:]
"ADVANCE BIO/NATURAL RESEARCH LABS RESEARCH REPORTS DATA CONTROL FILE NO 97644KC CASE HISTORIES [illegible] TEST GROUP NC-46009 CASE FILE REGARDING: DR. ROBERT METZ, M.D. SLIMMING INSOLES
STATEMENT: Tens of Thousands of Europeans have lost weight using Dr. Robert Metz's, M.D. [sic] Slimming Insoles
...
CASE 2
Control Weight Loss Evaluation on 478 Europeans Using Dr. Robert Metz's Slimming Insoles.
The Dr. Metz Slimming Insoles were distributed to a control group of 478 individuals. The results are as follows:
58% of the individuals tested lost 14 lbs. or more.
27% of the individuals tested lost 10 lbs. to 14 lbs.
15% of the individuals tested lost up to 10 lbs.
The Medical Weight Loss Evaluation is considered "VERY GOOD"
...
CASE 7
Individual Success Story - Subject Gabriele Geiger
"I have lost 10 lbs. without torturing myself with some kind of diet and without appetite reducers. I always had my difficulties with diets and afterwards I always gained back the weight I lost, sometimes even more than I had lost...I recommend Dr. Metz's Slimming Insoles to everyone.
CONCLUSION

Overall results indicate that Dr. Robert Metz's Slimming Insoles have a positive weight loss result on a large number of individuals." (Exhibit B - Direct Mail Advertisement).

C. "Would you like to lose 10 lbs. like 15% of the test group did...or 14 lbs. like 27% did...or over 14 lbs. like 58% did? Or would you like to lose 20 lbs...30 lbs....50 lbs. or even 74 lbs. like Angela Meisel did -- without dieting or exercising?

Then you must read this important message and join the over 370,000 Europeans who have discovered a NEW secret to weight loss!

Dear Friend,

I am very anxious to tell you the exciting news of a weight loss method that is sweeping Europe. A European Doctor has made what many consider to be a major breakthrough with a natural weight loss method. His name is Dr. Robert Metz and he is a medical doctor specializing in weight loss and control. In Europe, over 370,000 weight conscious individuals are now using Dr. Metz's All Natural Weight Loss Method.

Clinically tested in Europe among a group of 478 people, the medical test results were announced as "Very Good"!. A second controlled and monitored test concluded Dr. Metz's weight loss system "as an effective method to fight off excess pounds" - with a 14 lb. weight loss achieved during the test period!

Happy Europeans have been sending Dr. Metz letters of thanks and appreciation, claiming weight losses of up to 74 lbs. And the losses were all achieved without dieting, strenuous exercising, or taking harmful pills and without buying costly, special foods.

...

Wouldn't you like to lose those extra pounds you put on over the years...And would you like to achieve all this without dieting or strenuous exercising?

...

Trigger Your Body's Natural Fat Burning Process

And Turn Food Into Energy--Not Fat!

After years of weight loss research, Dr. Metz discovered the value of reflexology, a natural method where the body's organs are stimulated to function more efficiently. Specific areas on the bottom of the feet can be massaged to stimulate the body's digestive organs. When the digestive organs are stimulated, the body burns the food we eat, turning it into energy, NOT FAT. In addition, the body's metabolism is activated and in this state it begins to burn stored up fat. The problem was how do you periodically massage the bottom of the feet in a convenient, cost effective manner?

A Weight Loss Method Designed For The 21st Century!

Dr. Metz and a team of specialists brilliantly solved the problem! They developed a pair of insoles with massaging knobs strategically placed on the insoles that come in contact with the bottom of the feet. Called Slimming Insoles, they gently massage the reflex zones on the bottom of the feet and stimulate the body's digestive and metabolic system. These insoles fit comfortably into any normal shoe and with every step you take, the insoles keep your digestive furnace burning fat.

Dr. Metz's Slimming Insoles Are The First And Only Insoles That

Reduce Weight And Regulate The Digestive System.

Now it's your turn to find out what hundreds of thousands of Europeans already know about Dr. Metz's amazing weight loss method. By wearing the Slimming

Insoles, you will experience all day comfort, and begin to lose weight in a sensible, natural, clinically proven way!

I have no doubt that the insoles will work for you as well as they have for thousands of happy, slimmer Europeans. So why not get in step and begin losing weight with every step. Dr. Metz and I are so sure that you will be thrilled with your progress - we both GUARANTEE IT. However, if for any reason you are not 100% satisfied, return the insoles for a complete refund -- no questions asked." (Exhibit C - Direct Mail Advertisement).

5. Through the trade name "Slimming Insoles," and the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. Slimming Insoles cause significant weight loss.

B. Slimming Insoles cause significant weight loss without changes in diet or exercise.

C. Testimonials from consumers appearing in the advertisements for Slimming Insoles reflect the typical or ordinary experience of members of the public who have used the product.

6. Through the trade name "Slimming Insoles," and the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that scientific studies demonstrate that Slimming Insoles cause significant weight loss without changes in diet or exercise.

9. In truth and in fact, scientific studies do not demonstrate that Slimming Insoles cause significant weight loss without changes in diet or exercise. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. Through the means described in paragraph four, respondent has represented, expressly or by implication, that Advance Bio/Natural Research Labs is a *bona fide*, independent research

organization that has published a report containing the results of valid, independent testing of the Slimming Insoles.

11. In truth and in fact, Advance Bio/Natural Research Labs is not a *bona fide*, independent research organization that has published a report containing the results of valid, independent testing of the Slimming Insoles. Advance Bio/Natural Research Labs is a fictitious trading name utilized by Guildwood Direct Limited in its advertising. Therefore, the representation set forth in paragraph ten was, and is, false or misleading.

12. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT C

EXHIBIT C

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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Guildwood Direct Limited, also doing business as Intermed Laboratories, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1402 Pine Avenue, MPO Box 2130, Niagara Falls, New York.

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

DEFINITIONS

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

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. *"Clearly and prominently"* shall mean as follows:

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence and for a duration sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement, the disclosure shall be delivered in a volume and cadence and for a duration sufficient for an ordinary consumer to hear and comprehend it.

C. In a print advertisement, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that the ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or the first page.

D. On a product label, the disclosure shall be in a type size, and in a location on the principal display panel, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. Unless otherwise specified, *"respondent"* shall mean Guildwood Direct Limited, a corporation, its successors and assigns and its officers, agents, representatives and employees.

4. *"Commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Such product causes significant weight loss, with or without changes in diet or exercise; or

B. Such product provides any weight loss, fat loss, weight regulation, weight control or weight maintenance benefit,

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not use the name "Slimming Insoles" or any other name in a manner that represents, expressly or by implication, that the product causes weight loss, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, drug, device, or weight loss product or program, as "food," "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or

ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondent discloses, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that Advance Bio/Natural Research Labs is a *bona fide*, independent research organization or that it has published a report containing the results of valid, independent testing of such product.

V.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, drug, device, or weight loss product or program, as "food," "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

A. The existence, contents, validity, results, conclusions or interpretations of any test, study, or research; or

B. The existence, nature, purpose or activities of any organization.

VI.

It is further ordered, That:

A. Respondent shall pay to the Commission as consumer redress the sum of forty thousand dollars ($40,000); provided however, that this liability will be suspended, subject to the provisions of subparts B and D below, upon the payment of seven thousand and five hundred dollars ($7,500) no later than the date this order becomes final. Such payment shall be deposited into an escrow account to be designated by the Commission for the purpose of receiving payment due under this order.

B. In the event of respondent's default on the $7,500 payment set forth in subpart A above, the amount of forty thousand dollars ($40,000), less the sum of payments made pursuant to subpart A above, shall become immediately due and payable without any notice required to be given to the respondent, and interest computed at the rate prescribed under 28 U.S.C. 1961, as amended, shall immediately begin to accrue on the unpaid balance.

C. Any funds paid by respondent pursuant to subparts A and B above shall be paid into a redress fund administered by the Commission and shall be used to provide direct redress to purchasers of the Slimming Insoles. If the Commission determines, in its sole discretion, that redress to purchasers is wholly or partially impracticable, any funds not so used shall be paid to the United States Treasury. Respondent shall be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Commission.

D. The Commission's acceptance of this order is expressly premised upon the financial statements and related documents provided by respondent to the Commission on November 18, 1996. After service upon respondent of an order to show cause, the Commission may reopen this proceeding to make a determination whether there are any material misrepresentations or omissions in said financial statements and related documents. Respondent shall be given an opportunity to present evidence on this issue. If, upon consideration of respondent's evidence and other information before it, the Commission determines that there are any material misrepresentations or omissions in said financial statements and

related documents, that determination shall cause the entire amount of monetary liability of forty thousand dollars ($40,000), less the sum of any payments made under subpart A above, to become immediately due and payable to the Commission, and interest computed at the rate prescribed in 29 U.S.C. 1961, as amended, shall immediately begin to accrue on the unpaid balance. Proceedings initiated under this subpart are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any proceedings the Commission may initiate to enforce this order.

VII.

It is further ordered, That respondent Guildwood Direct Limited, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

It is further ordered, That respondent Guildwood Direct Limited, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

IX.

It is further ordered, That respondent Guildwood Direct Limited, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

It is further ordered, That respondent Guildwood Direct Limited, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

XI.

This order will terminate on June 16, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not effect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

BODYWELL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3754. Complaint, June 16, 1997--Decision, June 16, 1997

This consent order prohibits, among other things, the use of the name "Slimming Soles" to represent that a product causes weight loss without scientific substantiation. The consent order requires the respondents to have scientific evidence to substantiate any claims regarding the effectiveness, benefits, and efficacy of any weight loss or fat loss product. In addition, the consent order requires testimonials to represent the typical experience of consumers or to clearly and prominently disclose the generally expected results. Furthermore the order prohibits misrepresentations about the existence or results of any test or study, violations of the FTC Mail or Telephone Order Merchandise Rule, and requires the respondents to pay $100,000 in redress.

Appearances

For the Commission: *Beth Grossman* and *Jeffrey Bloom.*

For the respondents: *Linda A. Goldstein* and *Jeffrey S. Edelstein, Hall, Dickler, Kent, Friedman & Wood,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that BodyWell, Inc., a corporation, and Gerard du Passage, individually and as an officer of the corporation ("respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent BodyWell, Inc. is a New York corporation with its principal office or place of business at 27 West 20th Street, Suite 1001, New York, New York.

2. Respondent Gerard du Passage is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, controls or participates in the policies, acts or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of BodyWell, Inc.

3. Respondents have advertised, offered for sale, sold and distributed products to the public, including Slimming Soles, shoe insoles purported to cause weight loss by stimulating certain areas of

the feet. Slimming Soles are "devices," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Advertisements for these products have appeared in the following publications: Cosmopolitan, Redbook, McCall's, Family Circle, The Denver Post, The National Enquirer, The Globe/ National Examiner, The Star, Woman's Day, Woman's Own, Diets & Exercise, Grit, Woman's World, Soap Opera Weekly, Capper's, Soap Dish, Soap Opera Digest, True Story, Weekly World News, The Sun, First For Women, Craft Works, Senior Citizens, Flower & Garden, TV Host, Soap Opera Magazine, Popular Magazine Group, Family, Woman's Day Low Fat Meals, USAir, American Legion, Walking Magazine, Good Cooks' Companion, Northwest, Retired Military Family, TV Blue Print, Almanac for Farmers, Farmers Almanac and Blum's Almanac, and have been distributed as free standing inserts through Valassis FSI and News America.

4. The acts and practices of the respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have disseminated or have caused to be disseminated advertisements for Slimming Soles, including but not necessarily limited to the attached Exhibits A through C. These advertisements contain the following statements:

A. "The discovery of a German Doctor has revolutionized the field of weight loss!...

LOSE WEIGHT FAST AS YOU WALK!

SEE HOW DOCTOR METZ' SLIMMING SOLES CAN MAKE YOU LOSE OVER 15 LBS WITHOUT THE SLIGHTEST EFFORT!

...and without dieting! You walk all the time... When you go shopping, at home, at work... Well did you know that just by walking, you can lose over 15 lbs without any diet or without doing any extra exercise? And that's what Dr. Robert Metz, a German weight loss expert and inventor of the first Slimming Soles, has discovered!

Guarantee

In asking to use Dr. Metz' Slimming Soles on a trial basis, you are not taking any risk except to see your body, day after day, becoming healthier and rejuvenated, (excess weight is dangerous to your health). However, if for any reason whatsoever, you were not 100% satisfied with the results obtained, all you have to do is to return your pair of Slimming Soles in its original box, and you will be immediately reimburse [sic], no questions asked. This is a full Guarantee.

A revolutionary discovery...

You certainly know the basic principles of Reflexology. It's that Chinese technique that consists of stimulating specific points on the sole of the feet, which correspond to a specific organ of the body.

A wide variety of disorders can be treated in this way: headaches, back pain and many other symptoms.
But what you don't know, it's what Dr. Robert Metz, a weight loss expert, has discovered.
This doctor has discovered that under your feet existed certain points that make you lose weight automatically if you stimulate them!
* These points "force" your body to get rid of its surplus fat.
* These points can make you lose over 15 lbs in just 6 weeks without dieting or doing any extra exercise!
From these observations, Dr. Metz invented and designed the first pair of Slimming Soles based on the technique of Reflexology. These sole [sic] will make you lose weight with every step you take!

Amazing results, scientifically proven!

A recent medical test has been conducted with 478 people who had all failed to lose weight using any known method. After 6 weeks, 58% of these people had lost 15 lbs or more, 27% had lost between 13 and 15 lbs., and 15% had lost 13 lbs. None of these people altered their eating habits, they didn't do any exhausting exercises or any particular form of gymnastics; all they did was slip Dr. Metz' Slimming Soles into their shoes!
And now put your body in a constant weight loss mode without any effort and without any diet, by Dr. Metz.
Now, you too can lose weight rapidly, without going on a special diet and without having to do any extra exercise. All you have to do is slip Dr. Metz' Slimming Soles into your everyday shoes and live normally.
Every time you walk, whether you're going shopping or you're simply around the house or at work, you'll be losing weight!
You don't have to change a thing in your eating habits, all you have to do is walk as you normally do, (without excess).

6 weeks to lose 16 lbs.

After 6 weeks, you should have already lost between 13 and 16 pounds (as proven by the tests!). And no one will know your secret since you were not on a diet!
...
By simply slipping the new Dr. Metz' Slimming Soles into your shoes, you should quickly lose between 13 to 16 lbs. If it's not the case and you lost only between 6 and 8 lbs instead of the 16 lbs you were looking for, all you have to do is to return your Dr. Metz' Slimming Soles in their original box and we will reimburse you immediately, no questions asked. It means that the trial won't have cost you a penny. But believe me with the Dr. Metz' Slimming Soles you will [sic] thrilled about the weight you have lost."
[In red type:] COUPON TO LOSE 16 LBS NO EFFORT!"
(Exhibit A - Print Advertisement)

B. [Large script:] "Lose 13 to 15 lbs.! With no Effort!
IT IS FINALLY POSSIBLE, THANKS TO DR. METZ' ASTONISHING SLIMMING SOLES, WHICH CAN MAKE YOU LOSE 13 TO 15 LBS. WITHOUT THE LEAST EFFORT!
(script) and without dieting!
...

[A]re you aware that the simple fact of walking can make you to lose up to 15 lbs., without dieting or working out?
Yes, 15 lbs. can simply vanish by just walking the same number of steps that you normally do, no more, no less.
...
What Dr. Metz has discovered is that under your feet there are certain particular points which, when stimulated, automatically make you lose weight!
* Points which "compel" your body to get rid of excess fat.
* Points which can make you to lose 15 pounds in 6 weeks, without dieting and without exercising!
In light of these observations, Dr. Metz developed and refined the first Slimming Soles based on the technique of Reflexology; they will make you lose weight every time you take a step!
ASTONISHING RESULTS, SCIENTIFICALLY PROVEN!
Listen carefully to this:
A recent medical test was conducted with 478 people who had been unable to lose weight, regardless of what techniques they tried.
These 478 people were each given a pair of Slimming Soles, with these 2 recommendations:

1. Don't walk more than usual
2. Don't make any changes in your eating habits.

After 6 weeks of tests, 58% of these people had lost 15 lbs. or more, 27% had lost between 11 and 15 lbs., and 15% had lost 11 lbs. These people made no changes in their eating habits and didn't do any strenuous exercise or workout regimen. All they did was slip a pair of Dr. Metz' Slimming Soles into their regular shoes!
. . .
'I lost 9 pounds in six weeks. You are telling the truth when you write...that you can have the body you've always dreamed of the natural way!' Mr. Peter Wintherthur
...
'I have had your insoles now for 7 days. I have lost 5 lbs.' BFB, Norristown, PA
AND NOW PUT YOUR BODY IN A CONSTANT WEIGHT LOSS MODE, WITHOUT EFFORT, AND WITHOUT DIETING!
Now you too can lose weight - quickly, easily, without a special diet and without any extra exercise. All you have to do is slip a pair of Dr. Metz' Slimming Soles inside your regular shoes, and go on about your normal life.
...
You do not have to change any of your eating habits, or your lifestyle - all you have to do is walk normally (without excess).
...
Say goodbye to austere diets, say goodbye to strenuous and often ineffective workout sessions. With your "Erina Solum" Slimming soles, all you have to do is walk, just walk normally.
...
After 6 weeks, you should already have lost between 13 and 15 pounds (The tests prove it). You should find a new zest for life and a new energy.
...
RESULTS ARE GUARANTEED!

In slipping these new Slimming Soles into your shoes, you should quickly lose between 13 and 15 pounds. If, for whatever reason that does not happen, even if you lose only 7 or 8 pounds instead of 15, all you have to do is return your Slimming Soles, with their original packaging, and we will refund your money immediately, no questions asked. Your experiment will not have cost you a penny. But believe me, with the Dr. Metz' Slimming Soles you will be thrilled about the weight you have lost.

...

Our Guarantee for a 90 Day Risk Free-Trial

In asking to try out the Dr. Metz' Slimming Soles, you risk nothing except seeing your body being transformed daily, each day becoming more gracious and healthier (Excess weight is dangerous to your health). However, if after 90 days, for whatever reason, you are not 100% delighted with the results, all you have to do is return your pair of Slimming Soles in its original packaging, and you will be immediately given a full refund, no questions asked.

This is our written pledge." (Exhibit B - Direct Mail Advertisement).

C. "COUPON TO LOSE 15 LBS. WITH NO EFFORT!

Yes, I want to lose 13 to 15 lbs. With no effort, just by slipping Dr Metz' Slimming Soles into my shoes.

I understand that I don't have to do anything else - no diet, no workout.

....

Allow 2-3 weeks for delivery."

(Exhibit C - Direct Mail Advertisement).

6. Through the trade name "Slimming Soles," and the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. Slimming Soles cause significant weight loss.

B. Slimming Soles cause significant weight loss without changes in diet or exercise.

C. Consumers using Slimming Soles will lose 13 to 16 pounds within six weeks, and will do so without changes in diet or exercise.

D. Testimonials from consumers appearing in the advertisements for Slimming Soles reflect the typical or ordinary experience of members of the public who have used the product.

7. Through the trade name "Slimming Soles," and the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in

paragraph six, at the time the representations were made. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. Through the means described in paragraph five, respondents have represented, expressly or by implication, that scientific studies demonstrate that Slimming Soles cause significant weight loss, including 13 to 16 pounds within six weeks, without changes in diet or exercise.

10. In truth and in fact, scientific studies do not demonstrate that Slimming Soles cause significant weight loss, including 13 to 16 pounds within six weeks, without changes in diet or exercise. Therefore, the representation set forth in paragraph nine was, and is, false or misleading.

11. In connection with the sale of Slimming Soles to consumers, respondents have represented, expressly or by implication, that Slimming Soles would be delivered to purchasers within a reasonable period of time.

12. In truth and in fact, in numerous instances, the Slimming Soles that were sold to purchasers have not been delivered to such purchasers within a reasonable period of time. Further, in numerous instances, respondents have failed to provide refunds of money paid by such purchasers within a reasonable period of time. Therefore, the representation set forth in paragraph eleven was, and is, false or misleading.

13. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT C

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent BodyWell, Inc., also doing business as BodyWell U.S.A., 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 27 West 20th Street, Suite 1001, New York, New York.

Respondent Gerard du Passage is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his office and principal place of business is located at the above stated address.

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

ORDER

DEFINITIONS

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

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondents"* shall mean BodyWell, Inc., a corporation, its successors and assigns and its officers; Gerard du Passage, individually and as an officer of the corporation; and each of the above's agents, representatives and employees.

3. *"Commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Such product causes significant weight loss, with or without changes in diet or exercise;

B. Such product causes weight loss at any particular rate or speed, or within any time period; or

C. Such product provides any weight loss, fat loss, weight regulation, weight control or weight maintenance benefit,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not use the name "Slimming Soles" or any other name in a manner that represents, expressly or by implication, that the product causes weight loss, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, drug, device, or weight loss product or program, as "food," "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, drug, device, or weight loss product or program, as "food," "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

V.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not violate any provision of the Mail or Telephone Order Merchandise Rule, 16 CFR Part 435, as amended, effective March 1, 1994, 58 Fed. Reg. 49095.

VI.

It is further ordered, That respondents shall pay to the Commission as consumer redress the sum of one hundred thousand dollars ($ 100,000.00) no later than the date this order becomes final. Such payment shall be deposited into an escrow account, to be established by the Commission for the purpose of receiving payment due under this order.

The funds paid by respondents shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of Slimming Soles in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission.

At any time after this order becomes final, the Commission may direct the escrow agent to transfer funds from the escrow account to the Commission to be distributed as herein provided. The Commission, or its representative, shall, in its sole discretion, select the escrow agent.

Respondents relinquish all dominion, control and title to the funds paid into the escrow account, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondents shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondents, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

VII.

It is further ordered, That respondent BodyWell, Inc., and its successors and assigns, and respondent Gerard du Passage shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

It is further ordered, That respondent BodyWell, Inc., and its successors and assigns, and respondent Gerard du Passage shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each

such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

IX.

It is further ordered, That respondent BodyWell, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

It is further ordered, That respondent Gerard du Passage, for a period of four (4) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment whose activities relate to the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any dietary supplement, drug, device, or weight loss product or program, as "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, for which any health or weight loss claim is made. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required

by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

It is further ordered, That respondent BodyWell, Inc., and its successors and assigns, and respondent Gerard du Passage shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XII.

This order will terminate on June 16, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not effect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

DEAN DISTRIBUTORS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3755. Complaint, June 16, 1997--Decision, June 16, 1997

This consent order requires, among other things, the California-based company to substantiate any weight-loss and weight-loss maintenance claims, sets out the standards for the type of evidence required to support various weight-loss maintenance claims, requires a specified statement for advertisements with maintenance claims, and a disclosure statement regarding the need for physician monitoring to minimize potential health risks.

Appearances

For the Commission: *Walter Gross* and *James Dolan.*

For the respondent: *Ted J. Hannig, Miller, Starr & Regalia,* Redwood City, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Dean Distributors, Inc., a corporation, through Advanced Health Care Systems, an operating division of Dean Distributors, Inc., has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Dean Distributors, Inc. (hereinafter "respondent"), is incorporated in California, with its offices and principal place of business located at 1350 Bayshore Hwy., Suite 400, Burlingame, California. Advanced Health Care Systems, an operating division of Dean Distributors, Inc., has its offices and principal place of business located at 2801 Salinas Hwy., Building F, Monterey, California. Advanced Health Care Systems also does business as Cambridge Direct Sales and as MediBase.

PAR. 2. Respondent advertises, offers for sale and sells, and otherwise promotes throughout the United States, weight loss and weight-loss maintenance services and products, including the "Food for Life Weight Management System" and "MediBase," and makes

them available to the public through a multilevel distribution system and through direct sales to physicians and medical clinics.

PAR. 3. The Food for Life Weight Management System diet programs include the "Cambridge Diet Plan," the "Food for Life" programs, the "Maintain for Life" program, and related nutritional products. Certain Food for Life Weight Management System diet programs provide 420 calories per day, obtained by drinking three formula drinks per day, and are referred to as very-low-calorie diet ("VLCD") programs. VLCDs are rapid weight loss, modified fasting diets of 800 calories or less per day requiring medical supervision. Other Food for Life Weight Management System diet programs allow an additional 400 calories per day in conventional food products. These programs, consisting of 820 calories per day, are referred to as low-calorie diets ("LCDs"). In addition, the Food for Life Weight Management System diet programs consist of behavior modification, motivational counseling, exercise, and weight-loss maintenance. The Food for Life Weight Management System diet programs consist of products which are "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52, 55.

PAR. 4. The MediBase diet program is a medically-supervised three step program. The first step is a VLCD program providing 420 calories per day, obtained by drinking three formula drinks per day. The second step is an LCD program combining 420 calories per day, obtained by drinking three formula drinks per day, and an additional 400 calories per day, in conventional food products. The third step is a weight-loss maintenance program. In addition, the MediBase diet program consists of behavior modification, motivational counseling, and exercise. The MediBase diet program consists of products which are "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52, 55.

PAR. 5. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 6. Respondent has disseminated or has caused to be disseminated advertisements for weight reduction and weight control products and programs. Respondent has created and provided camera-ready advertising copy to its participating distributors, referred to as "counselors," for placement in various periodicals that are in general

circulation to the public, to promote the Food for Life Weight Management System diet programs to prospective customers. Respondent has further advertised its weight loss programs and products through the use of promotional materials, including pamphlets and brochures, given to customers and prospective customers by individual distributors referred to as "counselors."

PAR. 7. Respondent's advertisements include but are not necessarily limited to the advertisements and promotional materials entitled "Program Guide" ©1992 (attached hereto as Exhibit A); "Program Guide" ©November 1992 (attached hereto as Exhibit B); "Physician Monitoring Guidelines" (attached hereto as Exhibit C); "A taste for success!" (attached hereto as Exhibit D); "Treat Your Body With Ultimate Respect" (attached hereto as Exhibit E); two issues of "Breakthrough" (attached hereto as Exhibits F and G); and "If You Have Weight-Related Health Problems and Must Lose Weight . . ." (attached hereto as Exhibit H).

SAFETY CLAIMS

PAR. 8. Respondent's advertisements referred to in paragraphs six and seven, including but not necessarily limited to attached Exhibits A-H, include the following statements:

(a) "The Food for Life Weight Loss Programs deliver their promise. You can lose weight safely. ... as much as 7 pounds in just one week." (Exhibit A, page 2)

(b) "Nothing is as Simple ... Safe ... Effective ..." (Exhibit B, page 3)

(c) "Fast, effective, safe weight reduction!" (Exhibit E)

(d) "If You Have Weight-Related Health Problems And Must Lose Weight... ...There Is A Medically Directed Program For You ... Nutritionally complete, excellent tasting MediBase® meal replacement ... Proven safe and effective in University testing" (Exhibit H) (emphasis in original)

PAR. 9. Through the use of the statements contained in the advertisements referred to in paragraph eight, including but not necessarily limited to the statements in the advertisements attached as Exhibits A, B, E, and H, respondent has represented, directly or by implication, that the Food for Life Weight Management System and MediBase VLCD diet programs are unqualifiedly free of serious health risks.

PAR. 10. Respondent has failed to disclose adequately that physician supervision is required to minimize the potential risk of the development of health complications to consumers on very-low-

calorie diet programs. In view of the representation that the Food for Life Weight Management System and MediBase VLCD diet programs are free of serious health risks, the disclosure as to the requirement for medical supervision is necessary. The failure to adequately disclose this fact, in light of the representation as set forth in paragraph nine, was, and is, false and misleading.

PAR. 11. Respondent has provided purchasers and prospective purchasers who elect to follow a very-low calorie diet protocol with a pamphlet, entitled "Physician Monitoring Guidelines" (Exhibit C), which contains the following statement:

"Occasional side effects have been reported in association with the use of a VLCD. In general, these symptoms are mild and transient.
Fatigue
Cold intolerance
Headache
Orthostatic hypotension
and, with less frequency, halitosis, dry mouth, constipation, diarrhea, epigastric discomfort, flatulence, muscle cramps, amenorrhea, temporary hair loss, and decreased libido.
Most symptoms subside after the initial phase of dieting, or upon resumption of a normal eating pattern. Many of the side effects can be avoided by maintaining adequate fluid intake (i.e. two liters of water or non-caloric, low-sodium, decaffeinated liquid)."

Purchasers were instructed to give the pamphlet to the physician that they asked to monitor their progress through the very-low- calorie diet protocol that they chose to follow.

PAR. 12. Through the use of the statements contained in the advertisement referred to in paragraph eleven, including but not necessarily limited to the statements in the advertisement attached as Exhibit C, respondent has represented, directly or by implication, that the Food for Life Weight Management System diet programs have a risk of only mild side effects.

PAR. 13. In truth and in fact, VLCD diet programs such as the Food for Life Weight Management System diet programs do not have only mild side effects, and entail the risk of developing serious adverse side effects. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

SUCCESS CLAIMS

PAR. 14. Respondent's advertisements referred to in paragraphs six and seven, including but not necessarily limited to attached Exhibits A-H, include the following statements:

(a) "No matter what your goal... just a few pounds or more weight than you care to think about... you'll find a Food For Life weight loss program that exactly suits your needs." (Exhibit A, page 2)

(b) "Most people fail... because they can't maintain their weight loss for long periods of time. ... [y]ou [as a Food For Life dieter] will be in 'Control for Life.'" (Exhibit A, page 2)

(c) "The Cambridge Food For Life Nutrition and Weight Management System is remarkably effective in providing long-term weight management." (Exhibit B, page 11)

(d) "Andrea Ileo has good reason to show off... she is a product of the product! Ten years ago Andrea went from 170+ lbs. ['before' photo] to ... WOW! ['after' photo]" (Exhibit F, page 7)

(e) "... Marie Carner, an inspiration to many, who lost 40 pounds and has kept it off for 2 years. Recently Marie sole sourced, losing an additional 12 pounds. She's fit, feels tremendous, and looks fantastic!" (Exhibit G, page 1)

PAR. 15. Through the use of the statements contained in the advertisements or promotional materials referred to in paragraph fourteen, subparagraphs (a)-(c), including but not necessarily limited to the statements in the advertisements attached as Exhibit A and B, respondent has represented, directly or by implication, that most Food for Life Weight Management System customers reach and maintain their weight loss goals either long-term or permanently.

PAR. 16. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, subparagraphs (a)-(c), including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that at the time respondent made the representation set forth in paragraph fifteen, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 17. In truth and in fact, at the time respondent made the representation set forth in paragraph fifteen, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph sixteen was, and is, false and misleading.

PAR. 18. Through the use of the statements referred to in paragraph fourteen, subparagraphs (d) and (e), including but not necessarily limited to the advertisements attached as Exhibits F and

G, respondent has represented, directly or by implication, that testimonials from consumers appearing in the advertisements and promotional materials for Food for Life Weight Management System reflect the typical or ordinary experience of members of the public who have used the program.

PAR. 19. Through the use of the statements referred to in paragraph fourteen, subparagraphs (d) and (e), including but not necessarily limited to the advertisements attached as Exhibits F and G, respondent has represented, directly or by implication, that at the time they made the representation set forth in paragraph eighteen, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 20. In truth and in fact, at the time respondent made the representation set forth in paragraph eighteen, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph nineteen was, and is, false and misleading.

PAR. 21. Respondent's advertisements referred to in paragraphs six and seven, including but not necessarily limited to attached Exhibits A-H, include the following statement:

"A study conducted by Opinion Research Corporation of 600 users who had lost 60 pounds or more showed that of the 400 who could be contacted after two years, more than 80% of the weight loss had been maintained." (Exhibit C, page 2)

PAR. 22. Through the use of the statement referred to in paragraph twenty-one, including but not necessarily limited to the advertisement attached as Exhibit C, respondent has represented, directly or by implication, that the study results referred to were based on a valid statistical sample of all Food for Life Weight Management System customers who had lost 60 pounds or more.

PAR. 23. In truth and in fact, the study results referred to in paragraph twenty-one were not based upon a valid statistical sample of all Food for Life Weight Management System customers who had lost 60 pounds or more. Therefore, the representation set forth in paragraph twenty-two was, and is, false and misleading.

RATE OF WEIGHT LOSS CLAIMS

PAR. 24. The advertisements referred to in paragraphs six and seven, including but not necessarily limited to attached Exhibits A-H, include the following statements:

(a) "You can lose 2 to 5 pounds per week on the Regular Program." (Exhibit A, page 3; Exhibit B, page 10)

(b) "You can lose weight safely, quickly, and easily. ... as much as 7 pounds in just one week." (Exhibit A, page 2)

PAR. 25. Through the use of the statement contained in the advertisements referred to in paragraph twenty-four, subparagraph (a), including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that consumers following the Food for Life Weight Management System LCD weight loss program lose weight at a rate of two to five pounds per week.

PAR. 26. Through the use of the statement contained in the advertisement referred to in paragraph twenty-four, subparagraph (b), including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that an appreciable number of consumers following the Food for Life Weight Management System LCD weight loss program lose weight at a rate of seven pounds per week.

PAR. 27. Through the use of the statements referred to in paragraph twenty-four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that at the time respondent made the representations set forth in paragraphs twenty-five and twenty-six, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 28. In truth and in fact, at the time respondent made the representations set forth in paragraphs twenty-five and twenty-six, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twenty-seven was, and is, false and misleading.

PAR. 29. In providing advertisements and promotional materials such as those referred to in paragraphs six and seven to its individual distributors, referred to as "counselors," and to physicians, respondent has furnished the means and instrumentalities to those individual

distributors to engage in the acts and practices alleged in paragraphs eight through twenty-eight.

PAR. 30. The acts and practices of respondent alleged in this complaint constitute deceptive acts or practices in or affecting commerce and "false advertisements" in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. 45(a) and 52.

EXHIBIT A

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EXHIBIT H

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have violated the said Act, 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. Respondent Dean Distributors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its offices and principal place of business located at 1350 Bayshore Hwy., Suite 400, Burlingame, California. Advanced Health Care Systems, an operating division of Dean Distributors doing business as Cambridge Direct Sales and MediBase, has its offices and principal place of business at 2801 Salinas Hwy., Building F, Monterey, California.

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

ORDER

DEFINITIONS

A. For purposes of this order, *"competent and reliable scientific evidence"* shall mean those tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

B. *"Weight loss program,"* or *"diet program,"* shall mean any program designed to aid consumers in weight loss or weight maintenance; including, but not limited to, the "Food for Life Weight Management System," which includes the "Cambridge Diet Plan," the "Food for Life" weight loss programs, the "Maintain for Life" weight maintenance program; the "MediBase" medically-monitored weight management program; and related weight loss and weight maintenance programs and related food products and/or nutritional products.

C. *"Very low calorie diet,"* or *"VLCD,"* shall mean any dietary regimen that provides 800 calories or less per day.

D. *"Distributor"* shall mean any purchaser or other transferee of any weight loss product or program who acquires or has acquired, with or without valuable consideration, said product or program and who is or has been engaged in the resale of said product or program to other distributors or to end-use consumers. "Distributor" shall include, but is not limited to, any "counselor," "unit leader," "division manager," "area distributor," "circle of champions" member and all other providers of respondent's weight loss programs.

E. For any order-required disclosure in print media that is disseminated, either directly from respondent, or indirectly through respondent's distributors, to be made "clearly and prominently," or in a "clear and prominent manner," it must be given both in the same type style and in: (1) twelve (12) point type where the representation that triggers the disclosure is given in twelve (12) point or larger type; or (2) the same type size as the representation that triggers the disclosure where the representation is given in a type size smaller than twelve (12) point type.

F. For any order-required disclosure given orally in a broadcast medium to be made "clearly and prominently," or in a "clear and

prominent manner," the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure.

I.

It is ordered, That respondent Dean Distributors, Inc., a California corporation, its successors and assigns, officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the safety of respondent's very-low-calorie diet ("VLCD") programs unless respondent clearly and prominently discloses in close proximity to any such representation that physician monitoring is required to minimize the potential for health risks, or otherwise misrepresenting any health risk of any weight loss program.

B. Failing to provide to end-use consumers documents prepared for physicians that clearly and prominently disclose the health risks and complications that have been associated with very-low-calorie diets, including but not limited to the fact that VLCDs have been associated through published clinical studies with an increased risk of developing gallstones.

C. Misrepresenting the likelihood that participants of respondent's diet program(s) will regain all or any portion of lost weight.

D. Using any advertisement containing an endorsement or testimonial about weight loss or weight-loss maintenance success by a customer or customers of respondent's weight loss programs if the weight loss or weight-loss maintenance success depicted in the advertisement is not representative of what customers of respondent's weight loss programs generally achieve, unless respondent discloses, clearly and prominently, and in close proximity to the endorser's statement of his or her weight loss or weight-loss maintenance success the following statement:

"Results not typical."

Provided that if the endorsements or testimonials covered by this paragraph are in a broadcast medium, the disclosure required by this paragraph must be communicated in a clear and prominent manner and in immediate conjunction with the representation that triggers the disclosure;

E. Making any representation, directly or by implication, about the success of customers on any diet program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence substantiating the representation; provided, further, that for any representation that:

1) Any weight loss achieved or maintained through any diet program is typical or representative of all or any subset of customers using the program, said evidence shall, at a minimum, be based on a representative sample of:

(a) All customers who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those customers who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(b) All customers who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of customers who were followed for a period of at least two years after completion of respondent's program (including any periods of participation in active maintenance); and

3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of customers who were followed for a period of time after completing the program that is either: (a) generally recognized by experts in the field of treating obesity as being of sufficient length to constitute a reasonable basis for predicting that weight loss will be permanent; or (b) demonstrated

by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

F. Representing, directly or by implication, that any customers of any diet program have successfully maintained weight loss, unless respondent discloses, clearly and prominently, and in close proximity to such representation, the following information:

(1) The average percentage of weight loss maintained by those customers;

(2) The duration, over which the weight loss was maintained, measured from the date that customers ended the active weight loss phase of the program,

provided, however, that if any portion of the time period covered includes participation in respondent's maintenance program(s) that follows active weight loss, such fact must also be disclosed;

(3) The statement: "[respondent] makes no claim that this [these] result[s] is [are] representative of all customers in the [respondent's diet] programs;" and

provided, however, that if the customer population referred to is representative of the general customer population for that program, respondent is not required to make this statement;

(4) The statement: "For many dieters, weight loss is temporary,"

provided, however, that respondent shall not represent, directly or by implication, that this statement does not apply to dieters in respondent's programs.

G. Misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or survey; the rate or speed at which any participant in any weight loss program has experienced or will experience weight loss; or the performance, efficacy, safety, or benefits of any weight loss program or weight loss product.

H. Representing, directly or by implication, that prospective participants in respondent's weight loss programs will reach a specified weight within a specified time period, unless at the time of making such representation, respondent possesses and relies upon

competent and reliable scientific evidence substantiating the representation.

II.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries, or any other change in the corporation(s) that may affect compliance obligations arising out of this order.

III.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors or assigns, shall maintain and upon request make available to the Federal Trade Commission staff for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question any such claim or representation, or the basis relied upon for such representation, including complaints from consumers.

IV.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its officers, agents, representatives, independent contractors, and employees, that, directly or through any other corporation, subsidiary, division, or any other device, are engaged in the preparation and placement of advertisements or promotional materials, who communicate with customers or prospective customers, or who have any responsibilities with respect to the subject matter of this order. Respondent shall also distribute a copy of this order to all future officers, agents, representatives, independent contractors, and employees for a period of ten (10) years from the date of entry of this order. This paragraph shall not apply to distributors, who are addressed in paragraph V.

V.

It is further ordered, That:

A. Respondent shall distribute, within thirty (30) days after service of this order, a copy of this order to, and obtain a signed and dated acknowledgment of receipt thereof from, each distributor who has acquired at least 300 cans of respondent's product in any one year;

B. Respondent shall distribute a copy of this order to each future distributor who acquires at least 25 cans of respondent's product in any one month within thirty (30) days of the month in which that individual or entity acquires those cans, and shall obtain a signed and dated acknowledgment of receipt thereof;

C. Respondent shall institute a reasonable program of surveillance adequate to reveal whether any of respondent's distributors are engaging in acts or practices prohibited by this order;

D. Respondent further shall (1) take reasonable steps to notify promptly any distributor that respondent determines is failing materially or repeatedly to comply with any order provision; (2) provide the Federal Trade Commission with the name and address of the distributor and the nature of the noncompliance if the distributor fails to comply promptly with the relevant order provision after being so notified; and (3) in cases where that distributor has been notified as required by subparagraph V.D.(1) and continues conduct that constitutes a material or repeated violation of the order, terminate the distributor, as permitted by applicable state law; and

E. Respondent shall retain and make available to the Commission upon request the originals of the signed and dated acknowledgments required under subparagraphs V.A and V.B.

VI.

It is further ordered, That this order will terminate on June 16, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

VII.

It is further ordered, That respondent and its successors or assigns shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

AUTODESK, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3756. Complaint, June 18, 1997--Decision, June 18, 1997

This consent order permitted Autodesk's acquisition of Softdesk, requires Softdesk to divest its own computer-aided design ("CAD") software engines, "IntelliCADD," to Boomerang Technology, Inc., and prohibits, among other things, the combined firm from reacquiring the IntelliCADD product or any entity that owns or controls it, without prior notice to the Commission, for a 10-year period. In addition, the consent order prohibits Autodesk from interfering with Boomerang's ability to recruit or hire Softdesk employees who worked on the development of IntelliCADD

Appearances

For the Commission: *Daniel Ducore.*

For the respondents: *Charles T. Compton* and *Neil Nathanson, Wilson, Sonsini, Rosati & Goodrich*, Palo Alto, CA. and *John Christie* and *Scott E. Pueschel, Hale & Dorr*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Autodesk, Inc. ("Autodesk") entered into an Agreement and Plan of Merger with Softdesk, Inc. ("Softdesk"), whereby Autodesk agreed to acquire all of the outstanding shares of Softdesk, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would have violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

A. THE RESPONDENTS

1. Respondent Autodesk, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 111 McInnis Parkway, San Rafael, California.

2. Respondent Softdesk, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Liberty Hill Road, Henniker, New Hampshire.

3. At all times relevant herein, respondents Autodesk and Softdesk have been and are now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and are corporations whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

B. THE PROPOSED ACQUISITION

4. In December 1996, Autodesk and Softdesk entered into an Agreement and Plan of Reorganization whereby Autodesk would acquire 100% of the voting securities of Softdesk in exchange for shares of Autodesk common stock with a value of $90 million (the "Acquisition").

5. Autodesk is a public company that develops and markets computer-aided design ("CAD") software for the architecture, engineering and construction (the "AEC") industries. Autodesk offers a portfolio of software products including a CAD engine marketed and sold under the name "AutoCAD," for use with Windows operating systems on personal computers. Autodesk has had annual sales in excess of $530 million.

6. Softdesk is a public company that also develops and markets CAD software for the AEC market. Softdesk has had annual sales in excess of $40 million. Softdesk offers a portfolio of applications software that are used in conjunction with and to supplement CAD engines, primarily Autodesk's AutoCAD. Softdesk was also developing a CAD engine, known as "IntelliCADD."

C. RELEVANT MARKET

7. One relevant line of commerce within which to analyze the effects of Autodesk's acquisition of Softdesk is the market for CAD engines for Windows-based personal computers.

8. CAD engines are used by professional engineers to design and draw structures or other building projects for a variety of industries. CAD engines are the software platform which allows draftsmen to draw lines, shapes, and objects with their computer. CAD engines can be a stand-alone product or used in conjunction with application software that enhances and increases the capabilities of the CAD system.

9. Customers using Windows-based CAD engines would not be likely to switch to UNIX-based CAD systems even if the price of Windows-based CAD engines increased substantially. Professional engineers at one time used CAD engines designed for use on UNIX-based mainframe computers. With the increase in the power of personal computers and their decline in price, engineers now principally use Windows-based CAD engines. Unix-based CAD software is still in use today, but is primarily limited to use in highly technical and sophisticated projects involving three-dimensional rendering of drawings. UNIX-based CAD software, and the hardware necessary to operate it is substantially more costly than Windows-based CAD software and hardware.

10. The relevant geographic market within which to analyze the effects of Autodesk's acquisition of Softdesk is either the United States or the world. While software is easily transported, there are no significant imports into the United States of Windows-based CAD engines.

D. MARKET STRUCTURE

11. The relevant market for Windows-based CAD engines is highly concentrated. Autodesk commands a dominant market share of the Windows-based CAD engines in North America, controlling nearly 70% of the installed base with approximately 1.4 million seats.

12. Among CAD engines in the marketplace for use on Windows-based personal computers, Autodesk's AutoCAD product is viewed by many in the industry as the de facto standard for Windows-based CAD systems. There are other CAD engines available in the market for use on personal computers, with varying degrees of file compatibility and transferability with AutoCAD, which is necessary to be an effective competitor in this market.

E. CONDITIONS OF ENTRY

13. *De novo* entry or fringe expansion into the relevant market would require an expenditure of substantial sunk costs and would be time-consuming and, therefore, such entry is not likely.

14. Entry sufficient to deter or defeat reductions in competition resulting from Autodesk's acquisition of Softdesk's IntelliCAD product requires developing a CAD engine that offers file compatibility and transferability with AutoCAD. The large installed base of AutoCAD users necessitates that any new CAD engine developed and offered in the market offer file compatibility and transferability to AutoCAD in order to gain sales. Users of AutoCAD have a large number of drawings in the AutoCAD format. Moreover, many users must share files they create with others who must be able to read and edit those files using their CAD software. Since most engineers use AutoCAD any alternative CAD engine must have the capability to read and be compatible with AutoCAD files without losing substantial amounts of data or information.

F. SOFTDESK'S ENTRY INTO THE CAD ENGINE MARKET

15. Softdesk, although historically a developer and seller of CAD application software, was developing and had tested a CAD engine, referred to as "IntelliCADD," for use on Windows-based personal computers. IntelliCADD provides file transferability and compatibility with Autodesk's AutoCAD generated files and application software. The IntelliCADD product is a direct competitor to and substitute and replacement for AutoCAD.

16. Softdesk had developed the IntelliCADD product for more than two years and was testing its IntelliCADD product with customers until sometime prior to the proposed merger with Autodesk. In approximately June 1996, Softdesk determined that it no longer had the financial ability to support continued development and marketing of the IntelliCADD product. The head of the team that had developed the product proposed to purchase the technology and formed Boomerang Technology, Inc. ("Boomerang") for the purpose of acquiring the product, completing its development, and bringing the product to market. Boomerang negotiated with Softdesk for the purchase of the IntelliCADD product and exchanged draft purchase agreements with Softdesk. Softdesk, however, terminated those negotiations at around the time that Autodesk agreed to acquire

Softdesk. Softdesk representatives previously told Boomerang that Softdesk would sell the IntelliCADD product to Boomerang if Softdesk were purchased by someone other than Autodesk, but would not sell it to Boomerang if Softdesk were purchased by Autodesk.

17. After being advised by Commission staff that Autodesk's acquisition of Softdesk raised competitive concerns in the market for personal computer-based CAD engines, Softdesk resumed negotiations with Boomerang and divested and sold all of its rights in the IntelliCADD product to Boomerang pursuant to a Technology Transfer Agreement dated February 21, 1997. On that same date, Boomerang assigned and sold all of its rights to the IntelliCADD product to Visio Corporation.

18. Softdesk's development of the IntelliCADD product provided the market with a potential CAD engine that offered file compatibility and transferability with AutoCAD, thus providing direct head-to-head competition to AutoCAD.

19. Customers who had tested the IntelliCADD product reacted favorably to it. Some customers delayed or postponed the purchase of AutoCAD in anticipation of IntelliCADD being made available in the market. By the time Autodesk agreed to acquire Softdesk, the IntelliCADD product was within months of being introduced in the market.

G. EFFECTS OF THE PROPOSED ACQUISITION

20. The acquisition by Autodesk of Softdesk's IntelliCADD product would have substantially lessened competition in the market for Windows-based CAD engines by, among other things:

a. Eliminating substantial, direct head-to-head competition between Autodesk and Softdesk;

b. Eliminating actual potential competition from Softdesk in the relevant market;

c. Preserving and maintaining Autodesk’s market power;

d. Substantially increasing the risk of unilateral exercise of market power;

e. Maintaining high prices, or preventing the lowering of prices, for Windows-based CAD engines; and

f. Reducing service to customers of Windows-based CAD engines.

H. VIOLATIONS CHARGED

21. The agreement described in paragraph four violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

22. The acquisition of Softdesk's IntelliCADD product by Autodesk, if consummated, would have violated 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.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Autodesk, Inc., a corporation organized and existing under the laws of the State of Delaware ("Autodesk"), Softdesk, Inc., a corporation organized and existing under the laws of the State of Delaware ("Softdesk"), and the Federal Trade Commission, an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (the "Commission").

PREMISES

Whereas, Autodesk has proposed to acquire all of the voting securities of Softdesk pursuant to the Agreement and Plan of Reorganization by and among Autodesk, Inc., Autodesk Acquisition Corporation and Softdesk, Inc., dated December 10, 1996 ("the proposed Acquisition");

Whereas, the Commission is now investigating the proposed Acquisition to determine if it would violate any of the statutes the Commision enforces; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm; and

Whereas, the entering into this Interim Agreement by Autodesk and Softdesk shall in no way be construed as an admission by Autodesk and Softdesk that the proposed Acquisition constitutes a violation of any statute; and

Whereas, Autodesk and Softdesk understand that no act or transaction contemplated by this Interim Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Interim Agreement.

Now, therefore, Autodesk and Softdesk agree, upon the understanding that the Commission has not yet determined whether the proposed Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Autodesk and Softdesk agree to execute the Consent Agreement and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Autodesk and Softdesk sign the Consent Agreement.

2. Autodesk and Softdesk agree that, from the date Autodesk and Softdesk sign the Consent Agreement until the first of the dates listed in subparagraphs 2.a and 2.b, they will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date the order is final.

3. Autodesk and Softdesk waive all rights to contest the validity of this Interim Agreement.

4. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege, and upon written request, an on reasonable notice, Autodesk and Softdesk shall permit any duly authorized representative or representatives of the Commission:

a. Access, during the office hours of Autodesk and Softdesk 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 Autodesk and Softdesk relating to compliance with this Interim Agreement; and

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

5. This Interim Agreement shall not be binding until accepted by the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of Autodesk, Inc. ("Autodesk"), and Softdesk, Inc. ("Softdesk"), and it now appearing that Autodesk and Softdesk, hereinafter sometimes referred to as the "respondents," are willing to enter into an agreement containing an order to refrain from certain acts and providing for other relief, and respondents having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 respondents have 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 Section 2.34 of its Rules, makes the following jurisdictional findings and enters the following order:

A. Respondent Autodesk, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 111 McInnis Parkway, San Rafael, California.

B. Respondent Softdesk, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Liberty Hill Road, Henniker, New Hampshire.

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

ORDER

I.

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

A. *"Respondent Autodesk"* or *"Autodesk"* means Autodesk, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries (including, after the Acquisition, Softdesk, Inc.), divisions, groups and affiliates controlled by Autodesk, Inc., and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. *"Respondent Softdesk"* or *"Softdesk"* means Softdesk, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Softdesk, Inc., and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

C. *"Boomerang"* means Boomerang Technology, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 241 Kalbaugh Street, Ramona, California.

D. The *"Acquisition"* means the purchase of Softdesk by Autodesk pursuant to the Agreement and Plan of Reorganization by

and among Autodesk, Inc., Autodesk Acquisition Corporation and Softdesk, Inc., dated December 10, 1996.

E. *"Respondents"* means Autodesk and Softdesk.

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

G. *"IntelliCADD Products"* means the IntelliCADD software product and all technical system documentation and user documentation relating thereto identified as the "Acquired Assets" in the Technology Transfer Agreement entered into between Softdesk and Boomerang dated February 21, 1997.

H. *"Documentation"* means all supporting documentation associated with the IntelliCADD Products provided by Softdesk identified in the Technology Transfer Agreement entered into between Softdesk and Boomerang dated February 21, 1997.

II.

It is further ordered, That respondents shall take no action to interfere with the ability of Boomerang to recruit or employ respondents' employees whose primary responsibility at respondents was the development and/or programming of the IntelliCADD Products.

III.

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

A. Acquire the IntelliCADD Products;

B. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in the IntelliCADD Products.

IV.

It is further ordered, That the prior notification required by paragraph III of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in

accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating 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, respondents 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.

Provided, however, that prior notification shall not be required by paragraph III of this order 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.

V.

It is further ordered, That one (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs II and III of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and reasonable notice, respondents shall permit any duly authorized representative of the Commission:

A. Access, during normal 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 respondents relating to any matters contained in this order; and

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

VII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporations that may affect compliance obligations arising out of this order.

VIII.

It is further ordered, That this order shall terminate on June 18, 2007.

IN THE MATTER OF

COOPERATIVE COMPUTING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3757. Complaint, June 20, 1997--Decision, June 20, 1997

This consent order requires Cooperative Computing, Inc., among other things, to divest its electronic parts catalog to MacDonald Computer Systems through an exclusive, royalty-free and perpetual license with the right to sublicense and to transfer or assign its PartFinder® electronic catalog database, its J-CON® application program interface, and support software and documentation.

Appearances

For the Commission: *Daniel Ducore.*

For the respondent: *Thomas A. Roberts* and *Debra J. Pearlstein, Weil, Gotshal & Manges,* New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Cooperative Computing, Inc. ("CCI") has entered into an Agreement and Plan of Merger with Triad Systems Corporation ("Triad"), whereby CCI has agreed to acquire all of the outstanding shares of Triad and that CCI has commenced a tender offer for the outstanding shares of Triad, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

A. THE RESPONDENT

1. Respondent Cooperative Computing, Inc. ("CCI") is a corporation organized, existing, and doing business under and by

virtue of the laws of the State of Texas with its office and principal place of business located at 6207 Bee Cave Road, Austin, Texas.

2. At all times relevant herein, respondent has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

B. THE PROPOSED ACQUISITION

3. In October 1996, CCI entered into a merger agreement with Triad Systems Corporation ("Triad") and announced its intention to commence a tender offer for all of the outstanding voting securities of Triad. Under the terms of the tender offer, Triad shareholders will receive $9.25 per share, or a total of approximately $181 million. Immediately prior to the CCI acquisition of Triad, Hicks, Muse, Tate & Furst ("Hicks Muse"), a private investment firm based in Dallas, Texas, will acquire over 50 percent of CCI stock and gain control of CCI.

4. CCI is a privately-held company that develops and markets management information system software for the automotive aftermarket. CCI offers a portfolio of software products that assist auto parts distributors and retailers to track their parts inventory. CCI has developed and markets with its software a proprietary database of auto parts for domestic and foreign automobiles. CCI has had annual sales of approximately $43 million.

5. Triad, a publicly-held Livermore, California-based company, develops and markets management information system software for the automotive aftermarket and for the hardlines and lumber industries. Triad has had annual sales of approximately $175 million, including approximately $90 million attributable to sales to the automotive parts aftermarket. Triad offers a portfolio of applications software that allows automotive parts distributors and retailers to efficiently manage their businesses. Triad also develops and sells a proprietary database of auto parts for domestic and foreign automobiles.

C. RELEVANT LINES OF COMMERCE

6. Warehouse distributors and jobbers are businesses that distribute and sell automotive parts and accessories into the

replacement market, known as the automotive aftermarket. Warehouse distributors are large automotive aftermarket wholesalers and distributors of automotive parts and accessories. A warehouse distributor typically purchases automotive parts directly from manufacturers, carries an inventory of tens of thousands of parts, and distributes those parts to jobbers. Jobbers are generally smaller distributors of automotive aftermarket parts and accessories which purchase parts from warehouse distributors. A jobber typically carries an inventory of a few thousand automotive parts and distributes those parts to professional automotive repair service dealers. The functions of traditional warehouse distributors and jobbers are today sometimes combined in what are known as two-step distributors, which are automotive aftermarket distributors who purchase automotive parts and accessories directly from manufacturers and sell those parts directly to automotive repair service dealers.

7. A management information system or "MIS" system is a computer system, including software, and sometimes including hardware, used by warehouse distributors and jobbers to manage their business including managing the inventory of the millions of aftermarket automotive parts manufactured for domestic and foreign-built automobiles. An MIS system performs many functions including inventory control, point-of-sale purchase ordering, accounts receivable, accounts payable, payroll, and general ledger, and aids the warehouse distributor or jobber in managing the business.

8. An electronic automotive parts catalog or "electronic catalog" is a database of aftermarket automotive part numbers that is searchable by make, model and year of car. An electronic catalog quickly and efficiently determines, with make, model and year of automobile information, which automotive part number, and hence, which automotive part is needed for a particular automobile. An electronic catalog is a very extensive database, containing millions of part numbers for domestic and foreign cars.

9. One relevant line of commerce within which to analyze the effects of CCI's acquisition of Triad is the market for electronic catalogs. There are no economic substitutes for electronic catalogs. Paper catalogs, the only possible substitute for an electronic catalog, are inadequate substitutes because paper catalogs are cumbersome and time consuming to use. The ability of warehouse distributors and jobbers to access information about parts availability and supply the

required product is critical to their success, since the industry standard for same day repair service causes service dealers to require delivery of needed parts within 30 minutes. Electronic catalogs are sold as stand-alone products and as parts of integrated MIS systems.

10. Another relevant line of commerce within which to analyze the effects of CCI's acquisition of Triad is the market for MIS systems integrated with an electronic catalog. An MIS integrated with an electronic catalog enables users to access the vast inventory of automotive part numbers of hundreds of automotive part manufacturers on the same computer terminal as the MIS. Customers often demand an MIS integrated with an electronic catalog to be able to electronically transfer automotive parts data from the electronic catalog to a purchase order in the MIS. This transfer of data is important because it saves time and eliminates any risk of human error during the process of rekeying automotive part numbers into purchase orders.

11. The relevant geographic market within which to analyze the effects of CCI's acquisition of Triad is either the United States or North America. Many automotive parts and part numbers are unique to the United States and Canada. While software is easily transported, there are no imports into the United States of either electronic catalogs or integrated MIS systems with electronic catalogs.

D. CONCENTRATION

12. The relevant U.S. or North American markets for electronic catalogs and for MIS systems integrated with an electronic catalog are highly concentrated.

13. There are only a limited number of providers of electronic catalogs. In addition to CCI and Triad, there is only one other firm, Profit-Pro, Inc. ("Profit-Pro"), which develops and sells an electronic catalog for the independent automotive aftermarket. Triad sells both a stand- alone catalog and a catalog integrated with an MIS system, while CCI only sells its catalog integrated with an MIS system. CCI and Triad are, nonetheless, substantial, direct competitors. The electronic catalog offered by Profit Pro, Inc. is considered inferior compared to the CCI and Triad catalogs, in the size of its database, the accuracy of the part numbers in the database, and the speed with which it is updated. Profit-Pro is a weak, fringe competitor with a small market share.

14. One closed automotive aftermarket distribution network and one large automotive aftermarket retail chain of stores have their own, internally developed electronic catalog. These two electronic catalogs are not available to the independent automotive aftermarket. Moreover, these two electronic catalogs are designed to meet the specific needs of those firms and therefore they have a very limited database of automotive parts compared to the electronic catalogs of CCI and Triad. Therefore, these two catalogs do not constrain the pricing of electronic catalogs by CCI or Triad.

15. Triad and CCI are the dominant providers of MIS systems integrated with an electronic catalog, together controlling approximately 70% of the market The merger of CCI and Triad would increase the Herfindahl-Hirschmann Index ("HHI") over 1200 points to over 3900. Aside from CCI and Triad, all other firms selling a MIS integrated with an electronic catalog rely upon Triad or Profit-Pro for their electronic catalog. These fringe firms do not constrain pricing nor in any other way substantially impact competition for the development and sale of MIS systems integrated with an electronic catalog.

E. CONDITIONS OF ENTRY

16. *De novo* entry or fringe expansion into the relevant markets which would be sufficient to deter or defeat reductions in competition resulting from the CCI acquisition of Triad would not be timely or likely. Developing an electronic catalog would require an expenditure of substantial sunk costs and would be time-consuming. Electronic catalog data must be entered manually into a database because the electronic parts data is received in a different format from each of hundreds of automotive parts manufacturers. Entry with a catalog covering only a fraction of available automotive parts would not be acceptable to most warehouse distributors and jobbers.

F. EFFECTS OF THE PROPOSED ACQUISITION

17. The proposed acquisition by CCI of Triad may substantially lessen competition in the United States or North American markets for electronic catalogs and for MIS systems integrated with an electronic catalog by, among other things:

a. Increasing concentration substantially in highly concentrated markets;

b. Eliminating substantial, direct head-to-head competition between CCI and Triad;

c. Substantially increasing the risk of unilateral exercise of market power;

d. Increasing prices for electronic catalogs and MIS systems integrated with an electronic catalog; and

e. Reducing service to customers of electronic catalogs and MIS systems integrated with an electronic catalog.

G. VIOLATIONS CHARGED

18. The agreements described in paragraph three violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

19. The acquisition of the outstanding shares of Triad by CCI, if consummated, would violate 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.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of Cooperative Computing, Inc. ("CCI"), and Triad Systems Corporation ("Triad"), and it now appearing that CCI, hereinafter sometimes referred to as the "respondent," is willing to enter into an agreement containing an order to divest certain assets and providing for other relief, and respondent having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Clayton Act and Federal Trade Commission Act; 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 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, and having duly considered the comments received, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, makes the following jurisdictional findings and enters the following order:

1. Respondent Cooperative Computing, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 6207 Bee Cave Road, Austin, Texas.

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 *"CCI"* means Cooperative Computing, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Cooperative Computing, Inc., and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. *"Triad"* means Triad Systems Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 3055 Triad Plaza, Livermore, California.

C. *"MacDonald"* means MacDonald Computer Systems, a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its office and

principal place of business located at 25031 Avenue Stanford, Valencia, California.

D. The *"Acquisition"* means the purchase of shares of Triad common stock pursuant to the Offer to Purchase by CCI dated October 23, 1996.

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

F. *"CCI Products"* means the CCI Database, Database Technology, and Documentation, and all technical system documentation and user documentation relating thereto, including, but not limited to, a description of all data elements and all other information necessary for the Acquirer to use and operate the products.

G. *"CCI Database"* means the CCI PartFinder® Electronic Catalog Database data current as of the date of delivery to the Acquirer, for all the product lines and data elements contained in the database as of the date of the Acquisition.

H. *"Database Technology"* means the API, Server Software, Support Software, and TIMDD.

I. *"API"* means CCI's J-CON® application program interface for the CCI PartFinder® Electronic Database, including all related documentation, current as of the date of the Acquisition.

J. *"Server Software"* means the CCI software utilized to retrieve vehicle data from the CCI Database when a valid request is received from a user, including all related documentation, current as of the date of the Acquisition.

K. *"Support Software"* means the CCI software and all related documentation or data, including, but not limited to, all documentation current as of the date of the Acquisition, and utilized to distribute, maintain or support the CCI Database, including but not limited to, all software for data entry, data extraction, and media creation.

L. *"TIMDD"* means all Triad Integration Module data definitions current as of the date of the Acquisition.

M. *"Documentation"* means all end user documentation associated with the CCI Products provided by CCI.

N. *"Updates"* means all additions, deletions and modifications to the CCI Database, which shall include updated data and information made available by respondent to any of respondent's customers as part of the respondent's standard, commercially available electronic

catalog product. Upon delivery of an update, such update shall be considered to be included in the term "CCI Database."

O. *"VAR"* means a person or entity in the business of distributing hardware and/or software systems to warehouses, jobber/retail stores and/or service dealers in the automotive aftermarket but excludes any person or entity whose primary business is the distribution, sale, or installation of automotive parts and accessories.

P. *"Acquirer"* means either MacDonald or the person or entity approved by the Commission to acquire the CCI Products pursuant to paragraph II.B of this order.

Q. *"Proprietary Rights"* means all patents, patent applications, trade secrets, copyrights, trademarks and service marks, know-how, confidential information and other proprietary rights.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, at no minimum price, through a perpetual, royalty-free, transferable, assignable, and exclusive license with the right to use for any purpose, combine with other information, reproduce, modify, market and sublicense, the CCI Products in the United States and Canada. Provided, however, respondent may retain the right to sell, license or otherwise provide the CCI Products to customers of CCI MIS systems until such time as CCI is able to integrate the Triad electronic catalog database to CCI's MIS systems, but in no event for more than six (6) months from the date of delivery of the Database, and provided, however, respondent may retain the right to utilize the CCI Database Technology and Documentation to update, support and maintain an electronic catalog database for any CCI customer licensed by CCI prior to the end of the aforementioned six (6) month period.

B. Respondent shall divest the CCI Products as set forth in paragraph II.A to MacDonald, in accordance with the License Agreement entered into between CCI and MacDonald, dated February 13, 1997 (the "License Agreement"), no later than ten (10) days after the date on which this order is made final. Provided, however, that in the event respondent fails to divest the CCI Products to MacDonald because MacDonald, unilaterally and through no fault of respondent, breaches the License Agreement, respondent shall divest the CCI

Products as set forth in paragraph II.A to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, within sixty (60) days after the date on which this order is made final. The purpose of the divestiture of the CCI Products is to ensure the continued use of the CCI Products in the same business in which the CCI Products are used at the time of the Acquisition, in competition with respondent, and to remedy any lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the CCI Products, respondent shall take such actions as are necessary to maintain the viability and marketability of the CCI Products, including but not limited to updating the CCI Database on a regular schedule, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the CCI Products.

III.

It is further ordered, That:

A. If respondent has not divested the CCI Products, as required by paragraph II of this order, the Commission may appoint a trustee to divest the CCI Products. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

a. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld.

The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent 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 respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

b. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the CCI Products.

c. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

d. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.c to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture 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 this period only two (2) times.

e. The trustee shall have full and complete access to the personnel, books, records and facilities related to the CCI Products or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such 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 divestitures. Any delays in divestiture caused by respondent shall extend the time for 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.

f. 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 in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

g. 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 shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the CCI Products.

h. 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.

i. 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 III.A of this order.

j. 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.

k. The trustee shall have no obligation or authority to operate or maintain the CCI Products.

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

IV.

It is further ordered, That:

A. Respondent shall deliver the CCI Products to the Acquirer in machine-readable or other appropriate usable form.

B. After the CCI Products have been divested, respondent shall not exercise any right it may have, whether at common law, in equity, or in bankruptcy or reorganization (including through obtaining any equity interest in a reorganized debtor) or otherwise, to terminate the license granted pursuant to this order or to seek to have such license terminated, or to require, or seek to require, the Acquirer or its successor or assignee to return the CCI Products.

C. Respondent shall make no claim to ownership, title, or interest in any modifications of the CCI Products developed by Acquirer and any copies (in whole or part) thereof and any documentation developed by Acquirer relating thereto, and all Proprietary Rights therein, shall be the property of Acquirer.

D. Respondent shall provide to the Acquirer, updates to the CCI Database on a monthly basis, no later than the time that respondent provides updates to any of respondent's customers, in accordance with the License Agreement, for no more than two (2) years.

E. Upon reasonable notice to respondent from the Acquirer, respondent shall provide such assistance to the Acquirer as is reasonably necessary to ensure that the purpose of the divestiture of the CCI Products is accomplished. Such assistance shall include reasonable consultation with knowledgeable employees of respondent for a period of time sufficient to ensure that the Acquirer's personnel are adequately trained in the sources and processing of the data contained in the CCI Products. Respondent, however, shall not be required to continue providing such assistance for more than twelve (12) months from the date of the divestiture and for no more than three hundred and fifty (350) hours during that twelve month period of time. Respondent may not charge Acquirer for such assistance,

except for documented, out-of-pocket expenses (such as food, travel and lodging) incurred by respondent, which shall be billed to Acquirer as they occur.

F. Respondent shall not, for a period of twenty-four (24) months from the date of the divestiture, enter into or enforce non-competition agreements that have the purpose or effect of interfering with the ability of Acquirer to recruit or employ respondent's employees whose primary responsibility at respondent is, or during the six months prior to the Acquisition was, the development, programming, input and/or support of the CCI Database or Database Technology, provided that respondent may enter into or enforce existing confidentiality agreements with any of its employees.

G. Respondent, for a period of eighteen (18) months from the date of the divestiture, (1) shall not enter into any agreement with a VAR to provide, in the United States or Canada, any electronic catalog database, unless such agreement permits the VAR to terminate such agreement during the thirty (30) day period immediately preceding the first anniversary of such agreement; and (2) shall permit any existing agreement with a VAR to provide in the United States or Canada, any electronic catalog database, to be terminated by such VAR during the thirty (30) day period immediately prior to the first anniversary of the effective date of the License Agreement.

V.

It is further ordered, That within fifteen (15) days after the date this order is made final and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraph II of this order, and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs III and IV. A, D, E, F and G of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written

communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and reasonable notice, respondent shall permit any duly authorized representative of the Commission:

A. Access, during normal 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 the respondent, and without restraint or interference, to interview officers, directors, or employees of the respondent, who may have counsel present.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate 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 corporations that may affect compliance obligations arising out of the order.

IN THE MATTER OF

THE STOP & SHOP COMPANIES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3649. Consent Order, April 2, 1996--Modifying Order, June 20, 1997

This order reopens a 1996 consent order -- that required the respondents to divest specific supermarkets -- and this order modifies the consent order by terminating the requirement that Stop & Shop divest, among other stores, two Purity Supreme supermarkets in Massachusetts, in part, because increased competition from other entrants has made it extremely unlikely that the stores can be divested.

ORDER REOPENING AND MODIFYING ORDER

On January 6, 1997, respondent The Stop & Shop Companies, Inc. ("Stop & Shop")[1] filed a Petition To Reopen and Modify Consent Order (Purity Supreme) ("Petition"). In its Petition, Stop & Shop requests that the Commission reopen the order in Docket No. C-3649 ("order") to set aside paragraphs II.A.3.a and II.A.6.a, which require Stop & Shop to divest Purity Supreme Store number 41 located at 630 American Legion Highway, Roslindale, Massachusetts ("the Roslindale store") and Purity Supreme store number 20 located at 525 Harvard Street, Brookline, Massachusetts ("the Brookline store"). The Petition addresses the remaining 2 of 17 supermarket divestitures required by the order. The Commission previously approved Stop & Shop's applications for divestiture of the other 15 supermarkets.

For the reasons discussed below, the Commission has determined that Stop & Shop has demonstrated that it is in the public interest to reopen and modify the order to set aside these divestiture obligations.

I. THE COMPLAINT AND ORDER

This matter arose out of the 1995 acquisition by Stop & Shop of all of the supermarkets and related assets owned and operated by Purity Supreme, Inc. ("Purity"). The complaint in this matter charged that Stop & Shop's acquisition of Purity violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade

[1] On July 21, 1996, Koninklijke Ahold N.V., a Netherlands corporation, acquired substantially all of the outstanding voting shares of Stop & Shop.

Commission Act, 15 U.S.C. 45. Specifically, the complaint alleged that the effects of the acquisition may be substantially to lessen competition "in the retail sale of food and grocery products in supermarkets, and narrower markets contained therein"[2] in, among other markets, "Brookline [and] the Roslindale neighborhood in Boston . . . ."[3] At the time of Stop & Shop's acquisition of Purity, Stop & Shop and Purity directly competed in Brookline and Roslindale. The concern thus arose that Stop & Shop would likely be able unilaterally to raise prices in the Brookline and Roslindale markets.

The Commission accepted a consent agreement with Stop & Shop on October 18, 1995, and the resulting consent order became final on April 2, 1996.[4] Under the terms of the order, Stop & Shop is required to divest, among other stores, "absolutely and in good faith," the Roslindale and Brookline, Massachusetts supermarkets.[5] The purpose of these divestitures, as of the others, is to ensure the continuation of the Roslindale and Brookline stores as ongoing, viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.[6]

II. THE PETITION

In its Petition,[7] Stop & Shop requests that the Commission modify the order to eliminate the remaining required divestitures under the order, the Roslindale and Brookline stores.[8] Stop & Shop bases its

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[2] Complaint ¶ 9.

[3] *Id.* ¶ 12.c.

[4] Stop & Shop also entered into a separate consent agreement with the Massachusetts Attorney General. Generally, this agreement mirrors the terms of the Commission's consent agreement. *See Commonwealth of Massachusetts v. SSC Associates, L.P. and Stop & Shop Companies, Inc.*, No. 95-12377NG (D. Mass. Oct. 18, 1995) (Consent Decree).

[5] Order ¶ II.A.

[6] *Id.* ¶ II.B.

[7] In support of its Petition, Stop & Shop provided the affidavits of Brian Hotarek, Vice President in charge of Real Estate and Development for the Stop & Shop Companies, Inc. ("Hotarek Affidavit"), and William C. Hamlin, Vice President, Chief Financial Officer and Secretary of C&S Wholesale Grocers, Inc. ("Hamlin Affidavit").

[8] Order ¶¶ II.A.3.a. and II.A.6.a.

Petition on changed conditions of fact and public interest considerations.[9]

Stop & Shop claims that there is no serious interest by potential acquirers in either store to be divested because of the increased competition surrounding each store and because of the decreased sales volume of the two stores. Stop & Shop claims that new entry has made it difficult for the Roslindale and Brookline stores to compete effectively in their respective markets.[10] The record shows that a new Sav-A-Lot supermarket was opened immediately adjacent to the Roslindale store on January 20, 1996. Likewise, a new Star Markets superstore was opened less than one mile north of the Brookline store approximately 5 months before the order was issued by the Commission. In addition, a Trader Joe's store has opened less than one mile south of the Brookline store. There has been a significant decline in sales at both stores to be divested, which is likely to continue.[11]

Stop & Shop asserts that operating the Roslindale and Brookline stores has caused significant losses to Stop & Shop and that it needs to end the losses being sustained by the Roslindale and Brookline stores to maintain Stop & Shop's competitive vigor in the relevant markets. Removing the divestiture requirement would enable Stop & Shop to close the stores, halting any further losses.[12]

III. STANDARD FOR REOPENING AND MODIFYING FINAL ORDERS

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp.,

[9] Stop & Shop does not assert that any change of law requires reopening the order.

[10] Petition at 7-10.

[11] Petition at 12-14.

[12] Petition at 17. *See also* Hotarek Affidavit, ¶¶ 16 and 18.

Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[13]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), 1979-83 Transfer Binder, FTC complaints and orders (CCH) ¶22,007 at 22,585 ("Damon Letter"), at 2. For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet

[13] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

IV. REOPENING AND MODIFYING THE ORDER IS IN THE PUBLIC INTEREST

Based on the record in this matter, Stop & Shop has not demonstrated changes of fact that justify eliminating the remaining divestiture requirement. However, public interest considerations warrant ending the requirement to divest the Roslindale and Brookline supermarkets. Stop & Shop has demonstrated an affirmative need for the change, and the reasons to modify the order outweigh the reasons to retain the divestiture requirement as written.

A. Stop & Shop Has Not Demonstrated Changes of Fact

Reopening is not required for changes in circumstances that were reasonably foreseeable at the time the consent order was entered. *See* Pay Less Drug Stores Northwest, Inc., Docket No. C-3309, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship, and eliminate the dangers that the order sought to remedy). With respect to the Roslindale market, the record shows that Sav-A-Lot's entry[14] took place shortly before the order was issued by the Commission. Consequently, Sav-A-Lot's entry, as a factual matter, does not constitute the requisite significant change in circumstances that requires reopening of the order. Likewise, with respect to the Brookline market, Star's entry took place approximately five months before the order in this matter was issued by the Commission. Thus, as a factual matter, Star's entry does not constitute a changed fact that would warrant modification of the order with respect to the Brookline store.

Trader Joe's entry in Brookline also does not constitute a changed fact that eliminates the need for the divestiture of the Brookline store.

[14] Although Sav-A-Lot offers many items sold through supermarkets, Stop & Shop has not demonstrated that the Sav-A-Lot carries all relevant product categories identified in paragraph I.E of the order. Nor has it demonstrated that the Sav-A-Lot carries the variety of brands and sizes within a category that would be found in Stop & Shop's comparable supermarkets. Nonetheless, it is evident that the Sav-A-Lot is attracting business away from Stop & Shop's supermarkets.

Trader Joe's potential entry into the relevant market was not an unforeseen event; the record indicates that Trader Joe's was actively looking for sites for stores in the relevant Boston metropolitan area market, which includes Roslindale and Brookline, considerably before the order was issued by the Commission. More important, however, the Commission does not consider the Trader Joe's store to be a "supermarket" as that term is defined in the order and its entry into the Brookline market thus does not remedy the competitive harm resulting from Stop & Shop's acquisition of the Purity supermarket in Brookline. *See* order ¶ I.E.

B. Public Interest Considerations

Stop & Shop has demonstrated an affirmative need to modify the order. The record in this case shows that Stop & Shop has made good faith efforts to locate purchasers for both the Roslindale and Brookline stores, but has been unable to divest the two stores. Stop & Shop engaged the services of a well-known investment banking firm to prepare offering packages to potential acquirers. Subsequently, Stop & Shop contacted numerous potential buyers regarding these supermarkets including, among others, parties who ultimately acquired other stores Stop & Shop was required to divest under the order. Stop & Shop offered the Roslindale and Brookline stores as part of larger packages, but the potential acquirers desired only the other assets. Stop & Shop also offered to divest the stores' equipment and fixtures for $1 and to subsidize the rent, but again no acquirers expressed interest. In sum, none of the parties contacted was interested in acquiring either the Roslindale or the Brookline store.

When the order was entered, the Commission believed that the Roslindale and Brookline stores were divestable, and there is no indication that Stop & Shop has not properly maintained and operated these stores since entry of the order. The declining sales and losses experienced by the Roslindale and Brookline supermarkets thus do not appear to be caused by any failure of Stop & Shop to maintain them. Rather, the declining sales and losses appear to be primarily related to the recent entry by Star and Sav-A-Lot. Although the entries occurred prior to the order becoming final, neither Commission staff nor Stop & Shop anticipated the extent of competitive impact these two entrants have had on the Roslindale and the Brookline store, respectively.

The increased competition in Roslindale and Brookline has adversely affected the Roslindale and Brookline supermarkets' viability and marketability, and it appears that the two stores will continue to sustain significant losses. Consequently, continuation of the requirement to divest and the requirement to maintain the viability and marketability of the stores, which are steadily losing sales, imposes unanticipated costs on Stop & Shop that it asserts impede its ability to compete in the relevant markets. *See* Promodes, S.A., et al., Order Granting Request to Reopen and Modify Order Issued May 17, 1990 (January 28, 1994). This constitutes the affirmative need showing under the public interest test.

The remedial purpose of the order was to restore and increase competition in, among other markets, the Boston metropolitan area through the sale of a specified number of supermarkets, including the Roslindale and Brookline stores. Stop & Shop was able to divest all of the specified stores except the stores located in Roslindale and Brookline. These two stores could not be divested in more than fifteen months[15] of serious efforts by Stop & Shop and the investment banker it retained to assist it in its divestiture efforts. Given Stop & Shop's efforts to divest, and the limited time remaining on the Brookline store's lease, it is extremely unlikely that the stores can be divested consistent with the terms of the order.

Stop & Shop asserts that it is suffering continuing losses due to the operation of the Roslindale and Brookline stores, which are competitively harming Stop & Shop. Because it is extremely unlikely that the stores can be divested, whether by Stop & Shop or by a trustee appointed by the Commission, the remedial purpose of the order will not be achieved. Accordingly, on balance, the need to achieve the marginal benefit of divesting two non-competitive supermarkets is outweighed by the continuing costs that the divestiture obligation is imposing on Stop & Shop.

Therefore, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's order be, and it hereby is, modified to set aside paragraph II.A.3.a and paragraph II.A.6.a, as of the effective date of this order.

Commissioner Azcuenaga dissenting, and Commissioner Starek concurring in the result only.

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[15] Stop & Shop began its divestiture efforts immediately after signing the consent agreement in October 1995.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today permits Stop and Shop to avoid its obligation under the order to divest two stores in the Boston, Massachusetts, area, because Stop and Shop has failed to divest the stores and the continuing effort to do so is costly. Although I did not agree that these two stores should be required to be divested,[1] the respondent's obligation under a final order of the Commission should not be so readily excused. The Commission's action opens the door for all respondents to postpone divestiture, claim that the effort is costly, and avoid the obligation under the order.

The order in this matter provides for the appointment of an independent trustee to accomplish divestiture if Stop and Shop fails to do so in a timely manner, but no trustee has been appointed. In Promodes, S.A.,[2] cited as precedent for modifying this order, the obligation to divest was set aside only after a trustee had been appointed and had failed to locate an acquirer for the stores required to be divested. The inability of the trustee to find an acquirer was cited in Promodes as "evidence that divestiture of the two stores [was] extremely unlikely." I concurred in Promodes,[3] on the ground that "[i]f the trustee cannot identify potential buyers, continued imposition of the divestiture requirement no longer serves the public interest." Comparable evidence of the public interest is not available here, because no independent trustee has been appointed. We have instead allegations of burden resulting from costs that surely were anticipated at the time the order was signed. *See Louisiana-Pacific Corporation*, 112 FTC 547 (1989).

I dissent.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to reopen and modify the order, relieving the respondents of the obligation to divest certain supermarkets in Chattanooga, Tennessee. The Commission-appointed trustee, during a 21-month period, has not accomplished the required divestitures.

[1] *See* Separate Statement of Commissioner Mary L. Azcuenaga, Concurring in Part and Dissenting in Part, in The Stop and Shop Companies, Inc., Docket C-3649 (April 8, 1996).

[2] Promodes, S.A., Order Granting Request To Reopen and Modify Order Issued May 17, 1990 (Jan. 28, 1994), reprinted in 5 Trade Reg. Rep. (CCH) ¶ 23,540.

[3] A copy of my concurring statement in Promodes is attached.

In classic understatement, the Commission concludes that the trustee's lack of success is "evidence that divestiture of the two stores is extremely unlikely."

A Commission-appointed trustee serves as a neutral arbiter to establish whether the divestiture required by the order can be accomplished (assuming the trustee's good faith and diligence and the absence of evidence that the respondent has frustrated the trustee's efforts). If the trustee cannot identify potential buyers, continued imposition of the divestiture requirement no longer serves the public interest. In these circumstances, the requirement imposes costs, and the respondent need not make a particularized showing of those costs.

The Commission has in the past recognized that an obligation to divest particular assets may be modified in the public interest when the respondent "has been unable to find an acquirer [for those assets] at any price." *RSR Corporation*, 98 FTC 872 (1981); compare *Louisiana-Pacific Corporation*, 112 FTC 547, 561 (1989) (asserted financial disadvantage distinguished from impossibility). The trustee having failed to effect divestiture, the requirement now should be lifted.

Re: Altmeyer Home Stores, Inc. Petition to Quash or Limit Civil Investigative Demands. File No. 962-3063.

February 12, 1997

Dear Mr. Farnan:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Quash Civil Investigative Demands ("Petition") that you filed on behalf of your client, Altmeyer Home Stores, Inc. ("Altmeyer" or "Petitioner"), in the above-referenced matter.

The ruling set forth below has been made by Commissioner Roscoe B. Starek, III, pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4), 16 CFR 2.7(d)(4). Pursuant to Rule 2.7(f), 16 CFR 2.7(f), within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review. The timely filing of such request shall not stay the return date in this ruling unless the Commission otherwise specifies.

Commissioner Starek has carefully reviewed the petition and the accompanying materials. He has also considered the oral presentation on the Petition conducted on January 21, 1997. The Petition is granted in part and denied in part for the reasons discussed below.

I. BACKGROUND

The Civil Investigative Demands ("CIDs") in this matter arise in the context of a Commission investigation to determine whether Altmeyer may have engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, and the Fair Credit Reporting Act ("FCRA") provisions regarding the use of credit reports for employment purposes.[1] On March 22, 1995, staff of the FTC's Chicago Regional Office sent a letter to Altmeyer requesting that the company voluntarily provide certain information and documents regarding its policies and procedures for the FCRA in connection with Altmeyer's use of consumer reports for employment purposes. By letter dated May 2,

[1] The relevant provision of the FCRA is Section 615(a), 15 U.S.C. 1681m(a), which requires users of consumer credit reports, who deny employment applications based in whole or in part on those reports, to provide consumers with the name and address of the consumer reporting agency from which they obtained the report.

1995, you, as counsel for Altmeyer, agreed to permit FTC staff to inspect the requested information and documentation at your Pittsburgh law office between May 8, and May 25, 1995. Letter from Thomas J. Farnan to John Hallerud, FTC Chicago Regional Office (May 2, 1995). According to FTC staff, you then indicated in a conversation with John Hallerud, the FTC attorney responsible for the investigation at the time, that Altmeyer lacked the necessary policies and procedures for complying with the FCRA. Based on the information from this purported conversation, FTC staff decided to forgo inspecting Altmeyer's documents. Instead, FTC staff offered Altmeyer the opportunity to enter into a consent agreement resolving the investigation without further expense to the company. You have strongly denied that you ever made such a statement to FTC staff, and maintain that Altmeyer is and was in compliance with the law. Letter from Thomas Farnan to Commissioner Roscoe B. Starek, III (Jan. 23, 1997). *See also* Letter from Thomas Farnan to C. Steven Baker, FTC Chicago Regional Office (November 6, 1996).

Later FTC staff renewed its request for access to Altmeyer's documents and information regarding compliance with the FCRA and, once again, you (acting on behalf of the company) agreed to cooperate voluntarily with the request. Instead of providing FTC staff with access to the requested materials from the entire period under investigation (January 1994 to the present), however, Altmeyer submitted only materials from the months of October 1995, March 1996, and September 1996. FTC staff considered this response unsatisfactory because it provided information about Altmeyer's practices and procedures that occurred after the company learned that a Commission investigation was underway. At this point, you withdrew Altmeyer's offer to produce the requested materials voluntarily.

When the prospects for further cooperation between Altmeyer and FTC staff in the investigation appeared remote, the Commission issued two CIDs on December 2, 1996. The CIDs were authorized by the Commission's resolution of June 27, 1990, directing the use of compulsory process in FTC investigations to determine whether unnamed consumer reporting agencies or others are engaged in unfair or deceptive acts or practices in violation of Section 5 of the FTC Act and in violation of the FCRA. One of the CIDs required the

production of 16 categories of documents. The other CID required the oral testimony of Altmeyer's Vice President, Judy Altmeyer.[2]

On December 18, 1996, the Secretary of the Commission received the Petition from Altmeyer objecting to the CIDs. Pursuant to the Commission's Rules of Practice, a petition to quash or limit a CID must be filed within 20 days after service of the CID (or, if a return date is less than 20 days after service, before the return date). 16 CFR 2.7(d)(l). Because the return date for the CID requesting the production of documents was December 16, the instant Petition (received by the Commission on December 18) was not timely as to this CID. Petitioner neither requested additional time to file a response to that CID nor advanced any explanation for the late filing. The Petition, however, was timely with respect to the CID requesting oral testimony. Despite Petitioner's failure to comply fully with the Commission's procedural requirements for submitting a timely petition to quash, the Commission has determined that it will not dismiss the petition on this basis and will consider each of Petitioner's objections.

II. SPECIFIC OBJECTIONS

A. *Petitioner alleges that before it must produce the requested documents and testimony, the Commission is required to present evidence that Altmeyer violated the law.*

At the oral presentation, you stated that FTC's demand for access to information relating to Altmeyer's practices for complying with the FCRA amounted to a "fishing expedition." Oral Presentation Transcript at 5 (Jan. 21, 1997). You asserted that it is improper for the Commission to order production of the information covered by the CIDs without first advising Altmeyer of the evidence already in the Commission's possession that Altmeyer has engaged in unlawful activity. You also asserted a right to conduct discovery depositions relating to the bases for the Commission's investigation of Altmeyer. Oral Presentation Transcript at 6. Your argument is incorrect and does not take into account the broad scope of the Commission's investigatory powers and the procedural safeguards that are applicable to this agency's pre-complaint investigations.

[2] The CID requesting production of documents indicated a return date of December 16, 1996, and the CID for oral testimony specified a return date of December 27, 1996.

The Commission has broad investigatory powers to secure relevant information in order to determine whether a law violation has occurred. *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950) (analogizing FTC's compulsory process powers to those of a grand jury). As the Supreme Court stated, the FTC "does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Morton Salt*, 338 U.S. at 642-43. *Accord, FTC v. Carter,* 636 F.2d 781, 786 (D.C. Cir. 1980); *FTC v. Texaco, Inc.*, 555 F.2d 862, 873, n.23 (D.C. Cir.)(*en banc), cert. denied*, 431 U.S. 974 (1977). The Commission's power to compel the production of documents and testimony from the target of an investigation through a subpoena is not conditioned on the possession of a specific quantum of evidence or a showing of probable cause to believe that the law has been violated. *United States v. Powell*, 379 U.S. 48, 57 (1964) (rejecting a probable cause requirement); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216 (1946) (same).[3] Indeed, it is well established that the Commission may compel the production of information provided that it is sought for a legitimate purpose and is "reasonably relevant" or not "plainly irrelevant" to that purpose, and that the inquiry is not too indefinite or unduly burdensome. *Morton Salt*, 338 U.S. at 652-53, *FTC v. Anderson*, 631 F.2d 741, 744-45 (D.C. Cir. 1979). Finally, with respect to the issue of relevance, courts have ruled that these standards are far less rigid in the context of an agency investigation than in an adjudicative matter, *FTC v. Green*, 252 F. Supp. 153 (S.D.N.Y. 1966), and have generally deferred to an agency's appraisal of relevance which "must be accepted so long as it is not obviously wrong." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992), *cert, denied*, 113 S. Ct. 1255 (1993).[4]

[3] You have stated that you are unaware of any legal decision in which a court has required a corporation to open its private files to a government agency without articulating a reason to believe that the law is being violated. Oral Presentation Transcript at 14. As support for this view, you cited (*id.* at 15) to *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990), a patent infringement case involving two private parties engaged in a discovery dispute. In that case, the appellate court ruled that one of the private parties to the lawsuit could not obtain discovery of certain information held by a non-party based on only "a bare allegation of wrongdoing." That private discovery decision case is not relevant to the FTC matter at hand, which involves the exercise of the agency's power to gather evidence in an investigation by subpoena.

[4] The relevance of a CID is measured against the scope and purpose of an agency's investigation, which in this instance are set forth in the Commission's Resolution authorizing issuance of compulsory process, attached to the CIDs. *FTC v. Texaco*, 555 F.2d at 874. Moreover, it is respondent's burden to

It is clear that the target of a Commission investigation such as Petitioner does not have the rights accorded to a litigant in an adjudicative proceeding. In carrying out its investigative functions, the Commission may proceed on a non-public, *ex parte* basis against targets without according adjudicative procedures such as discovery of any evidence that my have been gathered or the right to confront witnesses called by the agency. *Hannah v. Larche,* 363 U.S. 420, 440-41, 446 (1960); *Genuine Parts Co. v. FTC,* 445 F.2d 1382, 1387-88 (5th Cir. 1971); *see SEC v. Jerry T. O'Brien, Inc.,* 467 U.S. 735, 742 (1984). Due process rights do not apply in this context because the agency's investigation does not involve an allegation of wrongdoing or an adjudication of legal rights. *SEC v. Jerry T. O'Brien,* 467 U.S. at 742. Such procedural rights will attach only if and when the Commission determines to issue a complaint against Altmeyer. *See Hannah v. Larche,* 363 U.S. at 446.

The CIDs at issue in this matter seek production of relevant information to help the Commission to determine whether Altmeyer may have engaged in conduct that violates the FTC Act and the FCRA. Accordingly, at the pre-complaint phase of the investigation, Altmeyer is not entitled to the procedural rights that would apply to an adjudication. No formal charges against Altmeyer need be formulated in order to secure information relevant to the Commission's investigation. Further, the Commission is under no obligation to divulge to Altmeyer any evidence of wrongdoing that it might have in its possession as a prerequisite to demanding the information from Altmeyer covered by the CID. Accordingly, Petitioner's objection to the CIDs on this basis is denied.

B. *Petitioner argues that the CIDs violate the Fourth Amendment.*

Petitioner also seeks to quash the CIDs on the ground that they violate the Fourth Amendment prohibition against unreasonable search and seizure. Petitioner argues that the Federal Government is held to a higher standard when it seeks to enter the premises of a private citizen and gain access to private documents. Petition at 2. Petitioner further contends that, in defining the Federal Government's right to enter the private property of a citizen to conduct an investigation, courts have required that the government have "some

show that the information sought by the investigative demand is irrelevant. *FTC v. Invention Submission Corp.,* 965 F.2d at 1090.

kind of probable cause or even reasonable suspicion that a violation is taking place." *Id. See also* Oral Hearing Transcript at 8-10.

In raising this objection, Petitioner has overlooked the critical distinction between an actual search and an agency subpoena, as well as the difference between rights of privacy for a corporation and an individual. The Fourth Amendment standards applicable to a search are more stringent than those governing an agency subpoena. *Donovan v. Lone Star, Inc.,* 464 U.S. 408, 413-15 (1984); *FTC v. Carter,* 636 F.2d at 787. As the Supreme Court explained in *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. at 195, agency subpoenas "present no question of actual search and seizure, but raise only the question whether orders of the court for production of specified records have been validly made ***." *Accord, FTC v. Carter,* 636 F.2d at 787-88. It is thus clear that when the Commission investigates by subpoena, the Fourth Amendment simply is not implicated.

The CID requiring Altmeyer to produce specified documents does not require the company to submit to anything resembling a search within the meaning of the Fourth Amendment. Furthermore, Instruction 10 of the CID requesting production of documents permits Altmeyer to avoid the presence of FTC staff on its premises simply by sending the responsive materials to the Commission.[5] In fact, the instructions to this CID state that Altmeyer may comply with the demand by producing documents and information by mail if it prefers that Commission staff not enter its business premises. Altmeyer declined to pursue either of these options with Commission staff, choosing instead to file this Petition.

The instant case also does not implicate the privacy concerns that might arise if the agency were seeking to compel the production of private personal financial records from an individual who was not the target of the investigation. *In re McVane,* 44 F.3d 1127, 1136 (2d Cir. 1995). Here, the Commission is seeking corporate records and the testimony of a corporate officer in order to determine whether Altmeyer has complied and is complying with federal statutes that the agency is charged by Congress with enforcing. Thus, any assertion of personal privacy interests is misplaced. *See id.* at 1137. It has long been established that so long as a federal agency's demand for

[5] Section 20(c)(3)(B) of the FTC Act requires the recipients of a CID only to make documents "available for inspection and copying or reproduction." 15 U.S.C. 57b-1(c)(3)(B).

information issued to a corporation (or its agents) is not unreasonable, it will be enforced. *Morton Salt*, 338 U.S. at 652. The CID requiring Judy Altmeyer to present oral testimony seeks information regarding matters within the scope of her official position as an owner of Altmeyer. This information is clearly relevant to the FTC's inquiry to determine whether Altmeyer is in compliance with the law and does not implicate a Fourth Amendment privacy concern. Similarly, no Fourth Amendment concerns is implicated by the CID requesting production of corporate document. Petitioner's challenge to the CIDs based on Fourth Amendment protection is thus denied.

C. *Petitioner asserts that the CIDs are unduly burdensome and overbroad.*

Petitioner also argues that Altmeyer has already made the documents covered by the CIDs available to the Commission voluntarily. The Petition states that requiring the company to prodcue the same materials again, for a second time, is "patently harassing, oppressive and vexatious."[6] Petition at 2. In raising this objection, Petitioner appears to assert that FTC staff's decision not to follow up on Altmeyer's initial offer to inspect the documents on a voluntary basis precludes the Commission from seeking them on a compulsory basis later. In addition, Petitioner argues that the CID requesting production of materials seeks access to documents and categories of documents that exceed the scope of the FTC staff's investigation of Altmeyer. *See* Petition at 3. You also raised these arguments on behalf of your client at the oral presentation.

Petitioner has not met the heavy burden to sustain either of these allegation, which the Commission construes as objections to the reasonableness of the CIDs. As the court stated in *FTC v. Texaco Inc.*, ". . . the question is whether the demand is unduly burdensome or unreasonably broad." 555 F.2d at 882 (emphasis in original). The court said:

> Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. Further, the burden is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose ***. Thus, courts

[6] Because the holiday season is over, Petitioner's argument regarding the burden of complying with the CIDs during Christmas has become moot.

have refused to modify investigative subpoenas unless compliance threatens to disrupt or seriously hinder normal operations of a business.

Id. (footnotes omitted).

Petitioner simply asserts, without either factual or legal support, that Altmeyer will be harmed by having to undertake the task of producing documents for the Commission a second time and presenting Judy Altmeyer for testimony. You stated at the oral presentation that it had been burdensome and costly for the company to gather the records the first time because "there are hundreds and thousands of them," and that it would be similarly burdensome to do so again. Oral Presentation Transcript at 11-12. You also stated that requiring Judy Altmeyer to appear to give testimony would be burdensome because "you are asking a woman to take a day off" (*Id.* at 12) and that "[a]ny endeavor that takes Judy Altmeyer or anyone else at Altmeyers out of their normal management duties is oppressive." *Id.* at 9.

Neither of these objections, however, even comes close to the standard articulated in Texaco -- that the burden of compliance must "threaten[] to disrupt or seriously hinder normal operations." More significantly, there is no indication that at any time you told FTC staff that complying with the CID timetables would cause great hardship to Altmeyer or Ms. Altmeyer. You never asked FTC staff for an extension of time to respond to the CIDs in order to lessen the alleged burden of production.

It should be noted that Altmeyer's initial agreement to make the requested corporate documents available to FTC staff voluntarily, and its production of a portion of these materials, do not make clear why complying with the CIDs at this time would be unduly burdensome for the company. In fact, the previous willingness of the company to produce these documents voluntarily suggests that collecting and providing them to staff at the present time is not unduly time-consuming.[7]

Petitioner has also failed to demonstrate that the CID seeking access to documents is unreasonably broad in light of the Commission's need for such materials. The Petition did not indicate

[7] In rendering a decision on Petitioner's assertion of undue burden, the Commission need not resolve the factual dispute between Petitioner and the FTC staff regarding the circumstances surrounding the staff decision not to review Altmeyer's documents when voluntarily offered for inspection in May 1995. Oral Presentation Transcript at 6, 19-25. This dispute raises the issue of Altmeyer's substantive compliance with the law, which is not ripe for determination at this stage of the investigation.

which specific aspect of the CID is alleged to be overbroad. At the oral presentation, you objected only to Specification 1's requirement to produce articles of incorporation, bylaws, minutes, and annual reports for Altmeyer as examples of excessively broad requests. Oral Presentation Transcript at 10. On its face, this CID calls only for minimal information on Altmeyer's corporate organization and management (Specifications 1-6). The remaining specifications (7-16) call for information specifically directed to Altmeyer's policies and procedures for complying with the FCRA. For example, it is certainly necessary for the Commission to seek information on related entities (Specification 3) to determine what entities might possess information relevant to the investigation and who is legally responsible for any violations that may be uncovered. Similarly, information on corporate management and compliance with the FCRA (Specifications 6 and 12) is essential for obtaining relevant testimony and information on compliance and for assessing personal responsibility for any violations that might be uncovered. Each of the specifications is narrowly tailored to obtain information germane to the Commission's investigative purpose as set forth in the Resolution.

Further, the CID seeking document production is itself self-limiting in significant respects and provides Altmeyer with various options for minimizing its scope. For instance, Instruction 6 of the CID permits substitution of written statements in lieu of documents for certain specifications. In addition, Instruction 11 specifically permits Altmeyer to submit a negotiated sample of applicant files if the required response to Specification 16 involves more than 500 files. Instruction 11 also provides that, if Altmeyer believes the scope of the demand can be narrowed consistent with the FTC's need for information, the company is encouraged to discuss possible modifications with FTC staff. Finally, Instruction 12 provides that documents that have previously been provided to the Commission need not be produced again.

However, in recognition of the fact that Altmeyer has incurred some expense in providing documents to the Commission, Specification 1 of the CID requiring production of documents is modified to delete the requirement to produce corporate "by-laws." Specification 1 is also modified to require the production of corporate "minutes" only insofar as the minutes discuss the FCRA, "Altmeyer['s]" (as this term is defined in the CID) compliance with

that statute, or any change in corporate policy or policies relating to the FCRA.

D. *Petitioner asserts that a cease and desist order is unnecessary.*

Petitioner also argues that because Altmeyer has supplied documents to the Commission that allegedly demonstrate its current compliance with the FCRA, there is no need for a cease and desist order, and presumably there is no basis for the CIDs to be upheld. Petition at 3. It is premature for Altmeyer to raise the defense of subsequent compliance with the law at this stage, when the Commission has yet to consider whether a law violation has occurred. Once the Commission has gathered the necessary information, the agency can turn to the task of assessing whether the company violated or has ceased violating the FCRA and what the appropriate remedy for such practices might be.

In addition, in raising this argument, Petitioner overlooks the fact even if Altmeyer did bring itself into compliance with the FCRA upon learning of the Commission's investigation, neither is that a defense to liability for violating the FCRA nor does it relieve the company of its responsibility to comply with a validly issued subpoena. "Voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the cases, *i.e.*, does not make the case moot," unless the defendant meets the heavy burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated." *SCM Corp. v. FTC,* 565 F.2d 807, 812 (2d Cir. 1977) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). Accordingly, Petitioner's argument that a cease and desist order is unnecessary because Altmeyer is in compliance with the FCRA does not provide a basis for quashing the CIDs.

III. CONCLUSION

For the foregoing reasons, the Petition is granted in part and denied in part. Pursuant to Rule 2.7(e), Petitioner is directed to comply with the CID for documentary evidence (except as modified *supra* at 8) on or before February 26, 1997 and with the CID for oral testimony on or before March 12, 1997.

Pursuant to Rule 2.7(f), 16 CFR 2.7(f), within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review. The timely filing of such request shall not stay the return date in this ruling unless the Commission otherwise specifies.

Re: Altmeyer Home Stores, Inc. Petition for Review by Full Commission Pursuant to Rule 2.7(f). File No. 962-3063.

February 21, 1997

Dear Mr. Farnan:

The Commission has considered (a) the Petition to Quash the Civil Investigative Demands ("CID") that you filed on behalf of Altmeyer Home Stores, Inc. ("Petition"); (b) the transcript of the oral presentation on the Petition, held on January 21, 1997; (c) the February 12, 1997 letter ruling by Commissioner Roscoe B. Starek, III, granting in part and denying in part the Petition; (d) your request, filed on February 14, 1997, for full Commission review of that letter ruling; and (e) the CIDs at issue.

The Commission has determined that your request for full Commission review does not raise any new issues regarding the Petition, and that the Petition was properly denied in part and granted in part for the reasons stated in the February 12, 1997 ruling. Accordingly, the full Commission concurs with, and hereby adopts, the February 12 letter ruling in this matter.

The February 12 letter ruling specified a February 26, 1997 return date for the CID for documentary evidence and a return date of March 12, 1997 for the CID for oral testimony. Your request for full Commission review did not stay those return dates. Altmeyer Home Stores, Inc. is thus directed to comply with the CIDs by those dates.