IN THE MATTER OF

NUTRONICS CORPORATION, ET AL.

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

Docket C-3281. Complaint, Jan. 16, 1990—Decision, Jan. 16, 1990

This consent order requires, among other things, a Longmont, Co. manufacturer of the Alter-Brake System (ABS) to have competent and reliable scientific research to substantiate its increased fuel-saving claims, to cease misrepresenting that its ABS device has been approved by the government for sale to the public, and to display a disclaimer when making any representation of improved fuel economy or performance through the use of any such device.

Appearances

For the Commission: *R. Norman Cramer, Jr., Claude C. Wild III* and *Mitchell B. Davis.*

For the respondents: *Paul A. Morris,* Boulder, CO.

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 Nutronics Corporation and Gary Kelsay, individually and as an officer of Nutronics Corporation (collectively the "respondents"), 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 as follows:

PARAGRAPH 1. Respondent Nutronics Corporation is a corporation organized and existing under the laws of the State of Nevada. It is qualified to do business in the State of Colorado as a foreign corporation with its office and principal place of business located at 700 Weaver Park Road, Suite A, Longmont, Colorado.

PAR. 2. Respondent Gary Kelsay is President and CEO of corporate respondent Nutronics Corporation. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth.

PAR. 3. Respondents are now and for sometime in the past have been engaged in the advertising, offering for sale, sale, and distribution of a product known as the "Alter Break System" ("ABS") to the public at retail and to distributors. The ABS is an "automobile retrofit device", as the term is defined in Section 511 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2011.

PAR. 4. In the course and conduct of their business, the respondents have disseminated and caused the dissemination of sales materials and other advertisements for the ABS throughout the United States by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including without limitation the insertion of advertisements in magazines and newspapers with national circulations for the purpose of inducing, and which have induced, directly or indirectly, the purchase of said product in commerce.

PAR. 5. Among the advertisements disseminated by respondents are those identified as Exhibits 1-7 attached hereto.

PAR. 6. Through the use of the advertisements referred to in paragraph five and other advertisements and sales materials, respondents have represented and now represent, expressly or by implication, that:

a. The ABS increases gas mileage from 12-28%;

b. The ABS, through increased fuel economy, "will pay for itself in only a few months."

c. The ABS has been endorsed by the Department of Energy for consumer use;

d. The ABS has been endorsed by the Department of Commerce for consumer use;

e. The Department of Energy has conducted scientific tests on the ABS which substantiate a gas mileage increase of 24%;

f. The Department of Commerce has conducted scientific tests on the ABS which substantiate a gas mileage increase of 24%.

PAR. 7. In truth and in fact:

a. The ABS does not increase gas mileage by 12-28%;

b. The ABS, through increased fuel economy, will not "pay for itself in only a few months."

c. The ABS has not been endorsed by the Department of Energy for consumer use;

d. The ABS has not been endorsed by the Department of Commerce for consumer use;

e. The Department of Energy has not conducted scientific tests on the ABS which substantiate an increase in gas mileage of 24%;

f. The Department of Commerce has not conducted scientific tests on the ABS which substantiate an increase in gas mileage of 24%.

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

PAR. 8. At the time respondents made the representations set forth in paragraph six, respondents represented, directly or by implication, that they possessed and relied upon a reasonable basis for those representations.

PAR. 9. In truth and in fact, at the time respondents made the representations set forth in paragraph six, they did not possess and rely upon a reasonable basis for such representations. Therefore, the representation set forth in paragraph eight was and is false and misleading.

PAR. 10. The aforesaid false and misleading representations were and are all to the prejudice and injury of the public and have constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act. The said acts or practices are continuing and will continue in the absence of the relief herein requested.

EXHIBIT 1

U.S. Department of Energy
Washington, DC 20585

April 21, 1988

. . ."We are needless to say, very excited at the prospect of a device which offers such a dramatic improvement in fuel efficiency for the nation's vehicles. At a time when incremental improvements in automobile fuel efficiency are increasingly difficult to achieve, a device offering savings of this magnitude would be a tremendous boon to the nation both from the standpoint of the balance of trade as well as from an environmental perspective."

June 29, 1988

. . ."In a recent conversation with (an official of an independent testing organization which is herein unnamed per their request as tests are continuing), we were informed that the FTP (EPA's Federal Test Procedure) and HFET (Highway Fuel Economy Test) have been completed. . . and show statistically significant reductions in fuel consumption for highway driving. The tests also indicate that emissions are reduced as a function of fuel consumption reduction associated with the use of ABS (Alter-Break Systems)."

Director
Inventions and Innovation Programs
Conservation and Renewable Energy

Savings per year with "Alter-Break" Based on 15,000 miles driven per year. Gas price $1.00 per gallon

Present gas mileage per gallon	Increase in mileage with Alter-Break			
	10%	15%	20%	25%
10	$136.00	$195.00	$250.00	$300.00
15	$91.00	$130.00	$176.00	$200.00
20	$68.00	$98.00	$125.00	$150.00
25	$54.00	$78.00	$100.00	$120.00
30	$45.00	$65.00	$83.00	$100.00
35	$39.00	$56.00	$72.00	$86.00

Manufactured by:

Nutronics Corp

Nutronics Corporation

700 Weaver Park Road
Longmont, Colorado 80501

Telephone (303) 678-5553

INTRODUCING

Alter-Break: An Engine Load Management System

- ☐ Improves fuel economy
- ☐ Eliminates unnecessary alternator drag
- ☐ Improves acceleration
- ☐ Reduces auto emissions
- ☐ Easily installed

Alter-Break™

General Description

The ALTER-BREAK SYSTEM is a unique Electrical Engine Load Management system that provides substantially increased miles per gallon, more power to the drive train during acceleration, reduction of air pollution through reduction of fuel consumed, and theoretically longer battery and alternator life.

In the present vehicle battery charging system, all electrical power required for the ignition system, battery charging, lights, blower, and numerous other accessories, is taken directly from the alternator, rather than the battery, when the engine is running. The alternator, while producing this electrical power, places a heavy load on the engine of the vehicle. Furthermore, the greater demand for electrical power, the greater the load on the engine. The result of this load is less miles per gallon.

The ALTER-BREAK SYSTEM removes this load and thereby improves gas mileage. With this patented system, the alternator is electrically disabled during acceleration on heavy engine load so that all electrical power is taken directly from the vehicle battery. Although the alternator is always being rotated by the engine, it is merely free-wheeling during the time it is disabled. Therefore, no alternator load is placed on the engine during normal driving.

Battery charging is accomplished by re-enabling the alternator during vehicle deceleration or low engine load such as at stop lights. Since the alternator only operates during these periods, the wasted momentum of the vehicle as well as otherwise unused energy during idle is utilized to absorb the load of the energy-producing alternator. This frees the engine of the extra demand of driving the alternator during high engine load and that, in turn, contributes to improved fuel economy.

During normal city and suburban driving, deceleration and breaking is so frequent that the battery is kept fully charged. However, during extended highway driving at night with headlights and other electrical accessories on and with less frequent deceleration, the battery voltage could fall to an unsafe level. To prevent this from happening, the system is equipped with special electronic circuitry that monitors the battery constantly. If the battery voltage falls below a predetermined level due to infrequent deceleration or because of a heavy electrical load, this circuit automatically re-enables the alternator but only allows it to produce just enough output to maintain the battery voltage at a safe level until the electrical load is reduced or until deceleration occurs again. The next time deceleration or braking raises the battery voltage, the alternator is once again disabled as required by the engine load.

The ALTER-BREAK SYSTEM goes into a third mode of operation in cases where nearly every electrical accessory in the vehicle has to be turned on and where a low voltage condition might exist because of the heavy current demand on the battery. In this mode, the system allows the alternator to provide all of the electrical power that is needed but again automatically disables the alternator as soon as the electrical load is reduced.

Another desirable feature of this system is the built-in protection that prevents battery discharge in the event of a circuit failure. The system is designed so that any failure within the circuit will automatically reconnect the alternator to produce a controlled amount of current to keep the battery charged.

The ALTER-BREAK SYSTEM is strictly an electronic control device which is connected to the alternator and the vacuum line of the intake manifold. It will not harm an automobile's electrical system in any way. ALTER-BREAK can withstand the harsh elements of the automobile environment. It is not affected by tempera-

ture (−40 F to +212 F), vibration or moisture (it is silicone encapsulated). It can easily be installed by the individual car owner.

Test results have shown mileage increases of up to 28%, but most ALTER-BREAK users will find they average 12 to 19% fuel savings. In order for ALTER-BREAK to give you optimum results, it is important that the car's battery and alternator are in good operating condition.

ALTER-BREAK is made in the United States by Nutronics Corporation of Longmont, Colorado and has a 5 year 150,000 mile warranty.

U.S. Government Reports

The ALTER-BREAK SYSTEM (ABS) was evaluated by the United States Government through the U.S. Department of Commerce and the National Bureau of Standards. The ABS was studied and evaluated by U.S. Government Engineers as well as outside engineering consultants hired by the government and specializing in the automotive field. Some of the statements made by the government in their report to the Department of Energy are as follows:

1. "The design of the ALTER-BREAK SYSTEM is straight forward and technically valid."
2. "The circuit will perform the function claimed."
3. "The ALTER-BREAK SYSTEM is particularly attractive due to the magnitude of fuel savings for such a modest price."
4. "The fuel savings potential of the ALTER-BREAK SYSTEM is impressive."
5. "The electronic aspect of the ALTER-BREAK SYSTEM is not an evaluation issue. *The unit has been built, tested, and it works.*"

EXHIBIT 2

The Revolutionary Alter-Break ™ System

An engine load management system that
increases fuel economy and improves performance by redistributing alternator load

The revolutionary Alter-Break™ System dramatically increases vehicle gas mileage, reduces emissions and improves performance, especially during heavy stop-and-go urban driving

As the result of a recent evaluation by the Department of Commerce, a glowing recommendation was forwarded to the Department of Energy (DOE) to further develop the system.

What does the U. S. Department of Commerce say about the ABS?

1. "Utilization of the invention in one-third of the U. S. population of manual-shift transmission automobiles" (5% of all cars in the U. S.) " would produce an energy savings of at least 190 million gallons of fuel annually."
2. "The fuel savings potential of the Alter-Break System is impressive. A 19% potential fuel savings at the pump for a city-driven Audi Fox is worth serious consideration."
3. "The Alter-Break System is particularly attractive due to the magnitude of fuel savings for such a modest price."
4. "The design of the Alter-Break System is straightforward and technically valid."
5. "The circuit will preform the function claimed."
6. "The electronic aspect of the Alter-Break System is not an evaluation issue. The unit has been built, tested, and it works."

The Alter-Break System Works!

In it's report to the DOE, the U. S. Department of Commerce recommended the Alter-Break System for financial support and marketing assistance. A maximum of two inventions in 100 receive federal funding from this program annually, and the Alter-Break System has been one of the chosen few.

Q&A Product Overview

Q. What is an Alter-Break System (ABS)?
A. An electrical engine load management system that provides dramatic improvements in the following areas, especially in stop and go driving conditions:

1. increased power and acceleration
2. improved fuel economy
3. reduced emissions

Q. What vehicles does the Alter-Break fit?
A. Over 90% of the gas power passenger cars and light trucks on the road today. It works equally well on manual or automatic transmission vehicles.

Q. How does the ABS work?
A. Through an easily-installed vacuum sensor, the ABS detects a demand for power. Under acceleration, the ABS temporarily disengages the alternator, thereby reducing drag on the engine and allowing it to operate more efficiently. When acceleration is completed, the ABS automatically re-engages the alternator to maintain full electrical charge to the battery. The ABS is transparent to drivers; they only notice increased fuel economy and better acceleration.

Q. Does the alternator really have that much effect on performance?
A. Absolutely! To illustrate the point, we attached a standard GM alternator and two sealed-beam headlights to an exercycle. When the alternator is engaged, a noticeable drag is placed on normal pedaling, and the headlights create even more drag.

Q. Is the ABS difficult to install?
A. No. It usually takes 10 to 12 minutes. and all parts are included in the package.

	Features	Benefits
1.	Solid state IC design	reasonable cost
2.	Compact size	more placement options under hood
3.	Fast, easy installation	maximum profits
4.	Extensive coverage; fits 90% of vehicles on the road	minimum investment in inventory; total of five part numbers to stock
5.	Fail-safe circuitry	maintains predetermined charge level; minimizes customer returns
6.	Patented product	no competition; assures continuous supply
7.	Increases gas mileage Increases power/acceleration Reduces emissions	improves saleability

General Overview

In vehicles presently on the road, all electrical power required for the ignition system, lights, blowers, and all other accessories, is taken directly from the alternator when the engine is running. In producing this power, the alternator places a tremendous load on the engine, causing it to work harder. The result: poor gas mileage, slow acceleration.

The Alter-Break System removes this load., thereby increasing gas mileage and improving acceleration.

How? Under high load, i.e. during acceleration, the ABS disengages the alternator and transfers the vehicles electrical power requirements to the battery. During deceleration, braking and idling, the ABS automatically re-engages the alternator to fulfill the vehicles electrical power requirements and simultaneously recharges the battery by recapturing kinetic energy. This greatly reduces engine load during acceleration, allowing it to work easily and more efficiently. The result: drastically improved fuel economy, reduced emissions, and better acceleration.

The benefits of the ABS are most apparent during stop-and-go urban driving, effecting noticeable performance improvements.

Built-in fail-safe

During extended highway driving -- especially at night, when the headlights and other accessories are used, and where deceleration is infrequent -- performance improvements are not as noticeable. Under such conditions, it would be possible for the battery charge to fall to an unsafe level, if not for a built-in fail-safe in the ABS. The system constantly monitors the battery, and automatically re-engages the alternator as need to maintain a predetermined electrical charge in the battery. When deceleration or breaking occurs, the alternator engages as usual until the battery is fully recharged. Again, this operation is transparent to the driver.

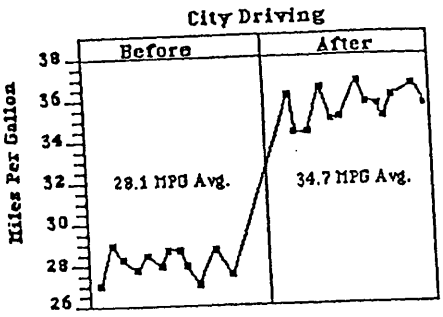
In cases where nearly every electrical accessory is being used, causing heavy electrical demand on the battery and engine, the ABS activates the alternator as needed to maintain a safe electrical charge. The same is true in cases of circuit failure.

The Alter-Break System Works!

The Alter-Break System engages the alternator only when it's needed to ensure full electrical charge to the battery. It fits over 90% of the gas-powered passenger cars and light trucks on the road today, whether manual or automatic transmission, and it's easily installed and attractively priced for ultimate saleability.

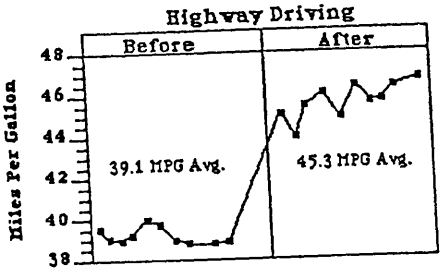
ABS Test #1

Vehicle: 1977 Audi Fox
Test Miles: 85,000 total
Environment: Colorado Springs, CO
Configuration: ABS installed at 11K mi.
EPA Rating: 24 MPG city
Dates of test: 11/78 to 8/81
Findings: 23% increase in MPG



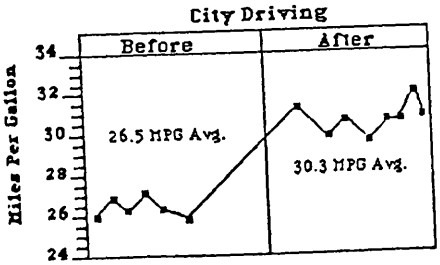
ABS Test #2

Vehicle: 1977 Audi Fox
Test Miles: 85,000 total
Environment: Colorado highways
Configuration: ABS installed at 11K mi.
EPA Rating: 36 MPG highway
Dates of test: 11/78 to 8/81
Findings: 16% increase in MPG



ABS Test #3

Vehicle: 1981 Toyota Corolla Station Wgn
Test Miles: 25,000 total
Environment: Colorado Springs, CO
Configuration: ABS installed at
EPA Rating:
Dates of test: 10/81 to 11/82
Findings: 14% increase in MPG



Alternator Load/Engine RPMs

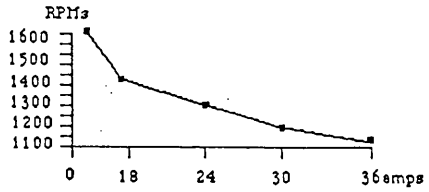
Alternator power, as a percentage of total available vehicle road load power, for various engine/vehicle speeds is illustrated in the following chart*:

Engine (RPM)	Vehicle (MPH)	Horsepower Requirements Alternator	Road Load	Alternator Load % of Road Load
Idle	0	1.1	3.0	36.7
1000	22	1.2	4.5	26.7
1500	38	1.4	11.0	12.7
2000	52	1.6	17.2	9.3
2500	67	1.8	29.5	6.1

* Source: Test data on a 3,490-pound vehicle, 318 CID-V8 by Southwest Research Institute.
Calculated for Dept of Energy by S.W. Research Institute Aug 1.6

The following chart illustrates the amperage draw created by typical vehicle accessories. The Alter-Break System redistributes these amperage draws between the alternator and engine battery as needed.

Accessory	Amps	Accessory	Amps
radio tape deck	1	hazard lights	7
electronic fuel pump	3	blower (heat, A/C, defrost)	7
back-up lights	3	electric rear window defroster	7
turn signals	3	electric radiator/cooling fan	7
parking lights	4	electric windows, seat, etc.	8
elec. windshield wipers	4	standard ignition system	9
cigarette lighter	4	headlights (low-beam)	12
horn	6	headlights (high-beam)	14



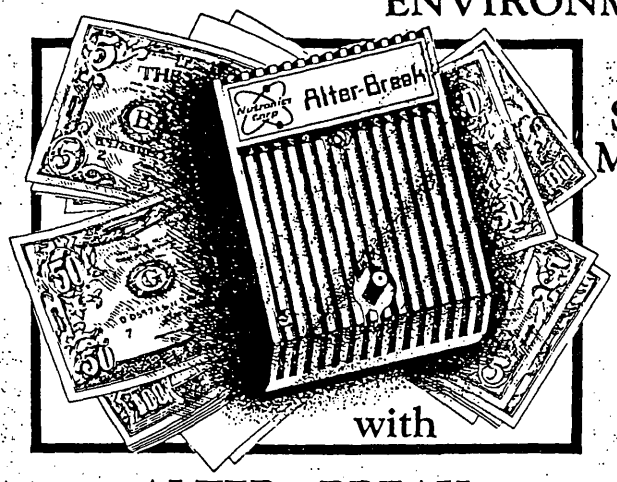
Effect of Alternator Load on RPMs
1977 Audi Fox

For more information on the revolutionary Alter-Break System, contact: Nutronics Corporation, 700 Weaver Park Road, Longmont, Colorado, 80501 (303)678-5553

EXHIBIT 3

SAVE FUEL

SAVE OUR ENVIRONMENT



SAVE MONEY

ALTER—BREAK

•Simple patented device • Works on gas and diesel vehicles

•Do-it-yourself one-time adjustment • Easy to install

• 5-Year Warranty • Will pay for itself in only a few months

This inexpensive electronic device—Hardly bigger than a pack of cigarettes—can give your vehicle up to 24% improvement in gasoline mileage.

Don't believe it? Ask the U.S. Government!

✓ "A very convincing method of improving motor vehicle economy...The unit has been built, tested, and it works."
—Report by the Energy-Related Inventions Program, U.S. Department of Energy

✓ "Our evaluation has been completed and we recommend (ALTER—BREAK) as technically valid and worthy of consideration."
National Bureau of Standards U.S. Department of Commerce

ALTER—BREAK WILL PROVIDE IMMEDIATE AND DIRECT BENEFITS BY:

- Yielding significant fuel savings.
- Delivering stronger vehicle-to-road performance.
- Reducing vehicle engine strain.

ALTER—BREAK ALSO HELPS OUR ECONOMY AND ENVIRONMENT BY:

- Substantially reducing exhaust emissions to the atmosphere.
- Contributing to: our national oil-resource conservation program (by consuming fewer gallons of fuel per the miles we drive).

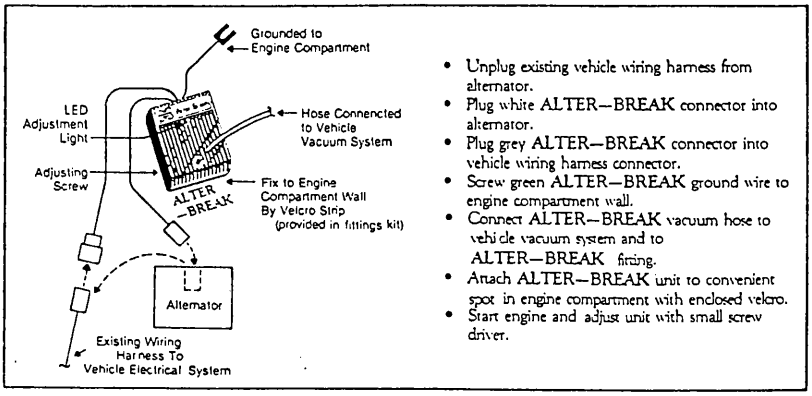
A SIMPLE CONCEPT: HOW ALTER—BREAK WORKS

A vehicle keeps its battery charged and run its' accessories by converting mechanical engine power to electricity. This task is accomplished by the alternator, a device linked to the engine by a moving belt. While an engine without ALTER—BREAK is running, the belt spins a set of coils inside the alternator to constantly generate electricity.

With ALTER—BREAK installed, the engine performance is improved by ALTER—BREAK electronically disabling the alternator except when it's really needed—either to restore reduced battery charge or to supplement the battery electrical supply during periods of heavy electrical accessory load such as during use of your head lights, air-conditioner, radio, heater, etc. Since less of the engine's mechanical power now needs to be converted into electricity, more of its power is available to go to the road and/or less fuel is consumed. Road tests show that ALTER—BREAK can improve your vehicle's miles per gallon by up to 24% depending on the engine size, accessory load, and operator driving habits.

SIMPLE INSTALLATION

The ALTER—BREAK comes in models that can be installed on most popular makes or models of vehicles, whether gas or diesel, automatic or manual transmission, and regardless of age. Just follow these quick and easy steps:



- Unplug existing vehicle wiring harness from alternator.
- Plug white ALTER—BREAK connector into alternator.
- Plug grey ALTER—BREAK connector into vehicle wiring harness connector.
- Screw green ALTER—BREAK ground wire to engine compartment wall.
- Connect ALTER—BREAK vacuum hose to vehicle vacuum system and to ALTER—BREAK fitting.
- Attach ALTER—BREAK unit to convenient spot in engine compartment with enclosed velcro.
- Start engine and adjust unit with small screw driver.

SPECIFICATIONS...AND A WARRANTY TOO

ALTER—BREAK measures 1" thick by 2.5" wide by 3.5" high and weighs just 13.5 ounces. It can operate within a temperature range of -40° to 225° F. Nominal operating voltage is 12 VDC, with a low-voltage override of 11.8 VDC. All wiring and vacuum fittings are provided for installation. And ALTER—BREAK is warrantied for 5 years or 50,000 miles under normal operating conditions.

AVAILABLE THROUGH:

NUTRONICS CORPORATION
700 WEAVER PARK DR. SUITE A
LONGMONT, CO 80501
303 678-5553

EXHIBIT 4

CORPORATE PROFILE

NUTRONICS CORPORATION

MA[illegible]

"There are three elements that I feel are necessary for corporate success: people, product and marketing. Nutronics is fortunate to have all three elements, to a greater degree than most expansion-oriented companies. For example,

1. Our people are outstanding. Our team consists of the best people we could find in all of the areas necessary for our growth and achievement . Our management has vast experience in marketing, finance and engineering research and development. Several members of our staff joined the Company after conducting original due diligence on our Alter-Break System. Our management consists of people who strongly believe in both our product and our Company. The are dedicated to making our business a success.

2. The Alter-Break System is simply an outstanding product. It has no competition. Our critical test data has demonstrated that we can both increase gasoline economy and reduce pollution.

3. From a marketing perspective, we have an immense market, both foreign and domestic. We also have an outstanding marketing program in place. We are implementing most of it directly. Plus, a national marketing company, experienced in direct marketing and in the distribution of automotive parts through warehouse distributors, will oversee those two significant segments of our marketing effort.

These three elements combine to form Nutronics' business philosophy: We are all dedicated to working together for the

success of the Company. All of the people on our team view Nutronics as more than a job; it's a way of life."

—Gary Kelsey,
President, Chief Executive Officer

N[illegible]PRODUCT: TH[illegible]EM

The Alter-Break System is a unique, revolutionary sensor/controller, which greatly increases automobile fuel economy. While accelerating, the Alter-Break disengages the alternator, removing the heavy load of the alternator from the engine. While decelerating or braking, the alternator is again engaged by the Alter-Break, which recharges the battery.

In the event that an engine is subjected to a high load for a very long time, the voltage monitor within the Alter-Break System will override all control signals to cause the alternator to charge the battery in its normal mode of operation.

The Alter-Break System is patented, with Nutronics controlling world-wide rights to manufacture and distribute the product. The retail price of the Alter-Break is approximately $50. Research shows the Alter-Break generally pays for itself within three to four months.

The benefits of using the Alter-Break System include:

—Up to 24% increased fuel economy.
—Increased alternator and battery life.
—More power to the drive train during acceleration.
—Reduction of air pollution through reduction of fuel consumed.
—Installation within minutes by mechanical do-it-yourselfers.
—Warranted for five years or 50,000 miles.
—Engineered to operate for many hundreds of thousands of miles.

C[illegible]

The Company began manufacture and delivery of production model Alter-Break Systems in September of 1987. All of its production for the balance of 1987, (36,000 units) is committed to partial fulfillment of a domestic contract totalling 536,000 Alter-Break System units through December of 1988.

It is anticipated that gross revenue from this one contract alone will exceed $6 million, with gross profits exceeding $2 million.

The Alter-Break System also has been installed in a variety of vehicles, under widely varying driving and climatic conditions. Currently, Alter-Breaks are being used in park and recreation district vehicles in two large cities in the U.S.

As a result of earlier, positive evaluations, two large commercial concerns, a taxicab company and a petroleum pipeline servicing firm, have committed to retrofit their entire fleet of vehicles with Alter-Break Systems.

BUSINESS HISTORY

Nutronics Corporation, traded Over-the-Counter in the U.S., is an 11-year-old company, which changed management and business direction in April, 1987, to begin concentrating [illegible] development, manufacturing and marketing of [illegible] System.

BUSINESS HISTORY (cont'd)

The Alter-Break System was invented by David E. Hicks in 1982. It has been tested for more than five years on a variety of vehicles for hundreds of thousands of miles. Mileage tests consistently show a significant increase in fuel economy.

The U.S. Government, through the U.S. Department of Commerce and the National Bureau of Standards, also evaluated the Alter-Break System. The Alter-Break was studied by both government and outside engineer-consultants specializing in the automobile field.

As a result of those studies, the Alter-Break System was one of only very few inventions to receive positive response and recommendation for financial assistance by the consultants who studied it.

One consultant said, "The device's simplicity and ease of installation lends itself to department store distributorship," while another said, "The investor has presented a very convincing method of improving motor vehicle fuel economy."

In 1984, The Department of Commerce forwarded its report on the Alter-Break System to the U.S. Department of Energy, along with a recommendation for financial support and marketing assistance. The Department of Energy subsequently awarded the inventor a $53,000 grant for further development and commercialization preparation.

FUTURE PLANS

The management of Nutronics is fully committed to production and marketing of the product at this time, and does not intend to commit their resources to any other products. However, management has viewed other areas of opportunity, where the basic technology of the Alter-Break System could be adapted to other situations. Therefore, management says the first and most likely expansion of company business would be horizontal—for example, to use the Alter-Break technology in a variety of other load management systems, including the marine, military, industrial and aviation fields.

The Company has also signed option agreements to license distributors in Canada, Mexico, Europe, Asia, South America and Australia/New Zealand. The first of these agreements is expected to be exercised in Canada and Mexico in December of 1987, and these, as well as subsequent option exercises, will be coordinated with production capacities. Expansion of marketing commitments will be controlled to correspond with step increases in production capacity to a benchmark goal of 1 million Alter-Break units per month by January, 1989.

MANAGEMENT

Gary Kelsay, President and Chief Executive Officer of Nutronics Corporation, has longtime experience in marketing and sales, as well as international trade and development. Previous to his position in Nutronics, he was Co-founder and director of Sport-Tech International Corp. (a high-tech sporting products firm), Director and Consultant to Emtech, a regional telecommunications company, and President and joint CEO for KB Marketing, Inc. One of that company's products received the DIY Innovative Product of 1985 award at the National Hardware Show.

Vernon O. Robbins, Executive Vice President, Director of Marketing, has been an independent financial consultant and vice president and stock broker for several major firms in Anchorage, Alaska. He has international trade experience in general stock analysis, financial planning and investment counseling.

[redacted] Vice President, Chief Financial Officer, was a longtime employee of Central Bank & Trust Company in Denver, Colo., where he initiated and marketed the CHEXTRA, the only guaranteed check system in the State of Colorado at that time. He later became a stock broker, specializing in quality and intermediate investments. He also is experienced in investment banking and financial consulting. Additionally, he was chairman of the fundraising drive for the Denver 1976 Olympics.

CORPORATE INFORMATION

COMPANY OFFICES
700 Weaver Park Road, Suite A
Longmont, Colo 80501
(303) 678-5553

COMPANY CONTACTS
Gary L. Kelsay
(303) 678-5553
Vernon O. Robbins
(303) 678-5553
[redacted]
(303) 678-5553

AUDITORS
Brock, Buckholz and Stow, CPA

REGISTRAR & TRANSFER AGENT
Nevada Stock Transfer Corporation
5025 S. Eastern #16
Las Vegas, Nev. 89119

MARKET MAKERS
1st Eagle Securities
Denver, Colo.
(303) 694-0088
Richard Christman, Lavigne
Spokane, Wa.
(800) 237-4910
Greentree Securities
Boca Raton, Fl.
(800) 327-5000
R. Writer Securities
Colo. Springs, Colo.
(303) 574-1421
Tri-Bradley Securities
Denver, Colo.
(303) 773-9199
Gildcore Financial Services
San Diego, Ca.
(800) 682-7355

OFFICERS & DIRECTORS

Gary L. Kelsay ..... President, Chief Executive Officer, Chairman
Vernon O. Robbins ..... Executive Vice President, Director of Marketing, Director
[redacted] ..... Vice President, Chief Financial Officer, Director
Paul A. Morris ..... Secretary/Treasurer, Director
Louis T. Yoshida ..... Director of Research and Development

FINANCIAL SUMMARY
Shares Outstanding 30,580,000
Float 8,080,000
Current Share Price Range ..... 1 3/8 bid, 1 3/4 ask (October, 1987)

This Corporate Profile was prepared as of October, 1987, as a public relations service, by Corporate Financial Communications, Inc. from material previously released by NUTRONICS CORPORATION.

TRADING INFORMATION
The common Stock of NUTRONICS CORPORATION is publicly traded in the U.S. Over-the-Counter market.

For additional copies of this Corporate Profile please write:

The CFC Building
7880 E. Berry Place
Englewood, CO 80111
(303) 694-1155

Corporate Financial Communications, Inc.

Nutronics Corporation
700 Weaver Park Road, Suite A
Longmont, CO 80501
(303) 678-5553

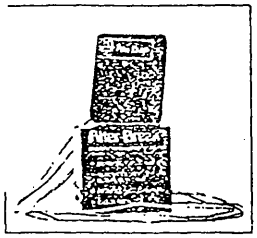
EXHIBIT 5

NEWS FROM
OTC AMERICA INC.

OCTOBER 19, 1987

OTC America Announces New Portfolio Client
— Nutronics Corporation —

October 19, 1987—OTC America is pleased to announce the addition of Nutronics Corporation to its portfolio of over-the-counter stocks.



The Alter-Break System.

Nutronics Corporation (listed in the Pink Sheets) is an 11-year-old company which, after a management change in April 1987, began concentrating all of its resources on development, manufacturing and marketing of the Alter-Break, a patented automotive product to which worldwide manufacturing, distribution and patent rights were acquired in March 1987. This invention is unique, not an improvement over an existing product, and there is no known competition.

Unique Patented Product

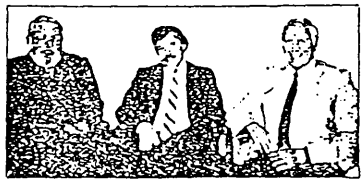
This revolutionary new automotive device is an electronic state-of-the-art sensor controller designed to remove the alternator load factor from total engine load during any occasion that the engine is accelerating or otherwise performing work at levels above normal engine idle. Engine load is detected by a proprietary load sensor developed especially for the Alter-Break system. When the sensor determines that load is high, the alternator is disabled, allowing the engine to run more efficiently and with more power to the drive train. As engine load decreases, the Alter-Break system allows the alternator to charge the battery and maintain system voltage. In the event that an engine is subjected to a high load for a long time, the voltage monitor within the Alter-Break system will override all control signals to allow the alternator to charge the battery in its normal mode of operation. Use of the product has a significant impact on increased fuel efficiency and reduced automotive emissions.

Contracts and Licensing

Nutronics Corporation began manufacture and delivery of production unit Alter-Break systems in September 1987. All of its production for the balance of 1987, 36,000 units, is committed to partial fulfillment of a domestic contract order aggregating 536,000 units through calendar 1988. Gross profit on this one contract of over $6.5 million should be in excess of 33⅓ percent. The company has also signed option agreements to license distributors in Canada, Europe, Asia, South America and the South Pacific.

Trading Information

Prior to last spring's changes, the company had not shown a profit, and the stock was trading at less than a dime. After the announcement of the change in management and acquisition of the automotive product, the stock began actively trading again at $0.50 to $0.60. It has increased steadily for the past six months and, as of Oct. 7, 1987, is listed in the pink sheets at $1.38 bid, $1.75 asked.



Directors of Nutronics Corp. (L to r.) Vernon Robbins (V.P.), Gary Kelsay (Pres.), [redacted]

Nutronics Corporation has purchased consulting and marketing services from OTC America with 8,000 shares of its common stock. These shares are restricted lettered stock and under certain circumstances may in the future be sold in compliance with Rule 144 adopted under the Securities Act of 1933.

OTC America, Inc. Now Owns 8,000 Shares of Nutronics Corporation

Nutronics Corp. 700 Weaver Park Drive, Suite A Longmont, CO 80501 (303) 678-5553

OTC America, Inc.
Terry Freeman — President
1780 S. Bellaire St., Suite 400, Denver, CO 80222, (303) 758-9131

OTC America, Inc. Trades Over-the-Counter Pink Sheet Listed

EXHIBIT 6

US DEPARTMENT OF ENERGY SUPPORTS NEW SPACE-AGE GAS SAVING DEVICE...ALTER-BREAK!

After evaluating over 23,600 energy saving ideas through the Energy Related Inventions Program (ERIP), the National Bureau of Standards and the US Department of Energy awarded $53,000 for commercialization of the Nutronics "ALTER-BREAK". Documented tests show that up to a 19% fuel savings can be obtained with this easily installed electronic unit.

Here is what the US Government said concerning this Innovative American made product:

"One of the inventions with which the program has worked for several years now is the ALTER-BREAK, a device which controls the operation of an automotive alternator under various engine operating conditions. The concept behind the ALTER-BREAK is that by reducing the output of the alternator when the engine is under load, engine drag is reduced and fuel efficiency improvements are thereby achieved. When the engine load is removed, the alternator is allowed to work at capacity to provide operating current and recharge the battery. The ALTER-BREAK retrofits easily to most gasoline powered automotive engines.

We have received from the manufacturer numerous reports of substantial fuel efficiency improvements (10-25%) from individuals using the device on their private vehicles. We are, needless to say, very excited at the prospect of a device which offers such a dramatic improvement in fuel efficiency for the nation's vehicles. At a time when incremental improvements in automotive fuel efficiency are increasingly difficult to achieve, a device offering savings of this magnitude would be a tremendous boon to the nation both from the standpoint of the balance of trade as well as from environmental perspective."

After evaluation by US Government Engineers and outside Engineering Consultants specializing in the automotive field, the US Government stated that:

1. "The design of the ALTER-BREAK system is straightforward and technically valid."

2. "The circuit will perform the functions claimed."

3. "It requires the connection of four small wires with the intent that the purchaser could perform the installation himself."

4. "The inventor has presented a very convincing method of improving motor fuel economy."

5. "The ALTER-BREAK is particularly attractive due to the magnitude of fuel savings for such a modest price."

6. "The fuel savings potential of the ALTER-BREAK is impressive. A 19% potential fuel savings at the pump for a city driven Audi fox is worth serious consideration. Even a 2% to 3% fuel savings (let alone the 12% to 19% of this device) has tremendous leverage on a National scale."

7. "The electronic aspect of the ALTER-BREAK system is not an evaluation issue. The unit has been built, tested, and it works."

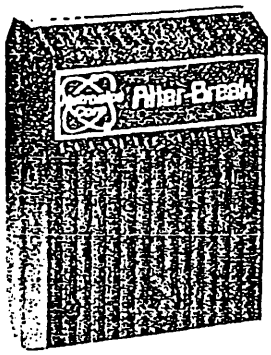
In addition to increased gas mileage, the ALTER-BREAK is expected to extend the life of both the alternator and the vehicle battery. The alternator life expectancy is increased because of the short duty cycle. The system also increases the life of the battery by minimizing the build-up of deposits on the positive plates. It is these deposits that flake off and build up in the battery case until they eventually short out the battery.

MADE IN AMERICA using Space-Age Technology, the ALTER-BREAK can withstand the harsh elements of the automobile environment. Not affected by temperature (-40F to +221F), vibration or moisture (silicone encapsulated) the ALTER-BREAK is compact in size (1"x2½"x3½") and easy to install by most do-it-yourselfers.

The ALTER-BREAK will not harm your automobile's electrical system in any way! The special electronic circuitry monitors the battery voltage constantly, keeping the battery well charged at all times.

Why not try ALTER-BREAK now RISK FREE and Save Gas, Extend the life of your battery and alternator. If you're not happy with your results, return the unit to us within 90 days of purchase for a full refund.

- Increase Mileage up to 19%
- US Government Tested
- Good for the Life of the Vehicle
- Will Not Harm Your Vehicle's Electrical System
- Risk Free Guarantee



RISK FREE GUARANTEE
If you are not perfectly satisfied with ALTER-BREAK, please return it to us within 90 days of purchase for a FULL REFUND. We have been in business for 10 years and intend to keep our customers happy.

Buy now at our special introductory price of $59.95.

For purchase or further information call TOLL FREE 1-800-227-5425 (In Colorado, 1-303-772-4797) or send to: ALTER-BREAK, 407 Del Rio Road, Berthoud, Colorado 80513.

.....

Send me one ALTER-BREAK for $59.95 plus $3 Shipping.
Send me_____ALTER-BREAKS for $59.95 each plus FREE SHIPPING (2 or more).
☐ Check ☐ COD ☐ Visa/MC

Card - _____Exp_____

Name _____

Address _____
(give street address for UPS delivery)

City _____

State _____Zip_____

Vehicle Yr. Make, Model

_____

EXHIBIT 7

97


WHEEL
OFF ROAD
1989 BUYERS GUIDES
4WD
24
PAGES
SUPER PARTS
SPECTACULAR
SUSPENSIONS
ENGINES
ROLL CAGES
INTERIORS
GEAR SWAP
HOW TO
Ring And Pinion
Installation
KICKER STEREO
500 Watts, 14 Speakers
Page 64 January 1989
Engine Goodies
Take a Break

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 Denver 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 attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 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 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 Nutronics Corporation is organized and exists under the laws of the State of Nevada. It is qualified to do business in the State of Colorado as a foreign corporation with its office and principal place of business located at 700 Weaver Park Road, in the City of Longmont, State of Colorado.

Respondent Gary Kelsay is President and CEO of respondent Nutronics Corporation. He formulates, directs and controls the acts and practices of said corporate respondent.

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 respondents Nutronics Corporation and Gary Kelsay, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of the "Alter Break System" or any other "automobile retrofit device" (as that term is defined in Section 511 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2011), in or affecting commerce (as that term is defined in the Federal Trade Commission Act), do forthwith cease and desist from:

a. Misrepresenting, directly or by implication, that the government has approved such device for sale to the public; or

b. Misrepresenting, directly or by implication, that any person or entity has confirmed that such device increases gas mileage, unless such person or entity has, in fact, confirmed that such device increases gas mileage in the stated percentages.

II.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any automobile retrofit device in or affecting commerce do forthwith cease and desist from representing, directly or by implication, that any such device will or may improve fuel economy when installed in an automobile, truck, recreational vehicle, or other motor vehicle, unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; provided, however, that:

(a) With respect to such representation, "competent and reliable" scientific evidence means tests, demonstrations, research, studies, surveys or other evidence 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.

Respondents may use tests such as the then current Environmental Protection Agency Federal Test Procedure, 40 CFR 86, or Highway Fuel Economy Test, 40 CFR 600, or other tests of equivalent competency or reliability;

(b) When making any such representation, any material limitation on the applicability of the representation to certain vehicles, including but not limited to any limitation regarding the number of cylinders a vehicle must have in order for it to benefit from use of an automobile retrofit device, and any limitation regarding the minimum number of miles a vehicle must be driven before the represented benefits can be expected, shall be clearly and conspicuously disclosed.

III.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any automobile retrofit device in or affecting commerce shall clearly and conspicuously display the following disclaimer when making any representation, directly or by implication, of improved fuel economy or performance through the use of any such device: "Reminder: The actual fuel savings or level of performance attained may vary, depending on the kind of driving you do, how you drive, and the condition of your car."

IV.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any automobile retrofit device in or affecting commerce do forthwith cease and desist from making any fuel savings which use the phrase "up to" or words of similar import unless the maximum level of savings or performance claimed can be achieved by an appreciable number of consumers, and, further, in any instances where consumers could not reasonably foresee the major factors or conditions affecting the maximum level of savings or performance, cease and desist from failing to disclose clearly and prominently the

class of consumers who can achieve the maximum level of savings or performance.

V.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any automobile retrofit device in or affecting commerce do forthwith cease and desist from making any claim regarding the length of time required to realize fuel savings equivalent to the cost of such automobile retrofit device, unless such claim is substantiated by results pursuant to Part II of this order.

VI.

It is further ordered, That respondents, their successors and assigns, shall, for three (3) years from the date any representation covered by this order is disseminated, maintain and make available to the Federal Trade Commission for inspection and copying the following records:

(1) Dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials containing the representation;

(2) All materials that were relied upon to substantiate the representation; and

(3) All tests, demonstrations, research, studies, surveys, or other evidence in respondents' possession or control that contradict, qualify, or call into question such representation or the basis upon which respondents relied for such representation.

VII.

It is further ordered, That the respondents shall distribute a copy of this order without delay to all present and future personnel, agents, or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed statement acknowledging receipt of this order.

VIII.

It is further ordered, That each respondent shall notify the Commission of any discontinuance of its present business and/or affiliation with any new business or employment for a period of three (3) years from the effective date of this order. Such notice shall include the respondent's 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 respondent's duties and responsibilities in connection with such business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

IX.

It is further ordered, That the corporate respondent 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 out of the order.

X.

It is further ordered, That respondents 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

NEW JERSEY MOVERS TARIFF BUREAU, INC., ET AL.

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

Docket C-3282. Complaint, Jan. 19, 1990—Decision, Jan. 19, 1990

This consent order prohibits, among other things, the Highland Park, N.J. based movers from entering into or maintaining any agreement to fix, maintain, or interfere with the prices charged by movers. The order also prohibits respondents from discussing or formulating agreements among movers concerning intrastate prices to be charged for the transportation of property or related services.

Appearances

For the Commission: *Eugene Lipkowitz* and *Michael J. Bloom.*

For the respondents: *Thomas F.X. Foley,* Holmdel, N.J.

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 New Jersey Movers Tariff Bureau, Inc., a corporation, and the New Jersey Warehousemen and Movers Association, a corporation (hereinafter sometimes referred to as "Tariff Bureau" and "Movers Association," respectively, or as "proposed respondents," collectively), have violated and are violating Section 5 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 as follows:

PARAGRAPH 1. Respondent New Jersey Movers Tariff Bureau, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey. Respondent New Jersey Warehousemen and Movers Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey. Both respondents have their offices and principal places of business located at 24 North Third Avenue, Highland Park, New Jersey.

PAR. 2. Except to the extent that competition has been restrained as alleged herein, respondents' members have been and are now in competition among themselves and with other public movers.

PAR. 3. Respondents are and have been, at all times relevant to this complaint, corporations organized for the profit of their members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. Respondents share common officers and directors, including a common President. The Tariff Bureau's General Manager serves as Executive Director of the Movers Association. Individuals serving on the Tariff Bureau's Board of Directors are also officers of the Movers Association. Respondents' memberships are also largely overlapping; in 1987-1988, each consisted of approximately 300 public movers engaged in the intrastate transportation of property in New Jersey. The members receive substantial compensation for such intrastate moves.

PAR. 5. Respondents maintain and have maintained a substantial course of business, including the acts and practices as hereinafter set forth, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Prior to 1981, New Jersey's public moving industry was regulated by the Board of Public Utilities, which was empowered, pursuant to the 1968 Public Movers Act, to "fix just and reasonable" rates. During much of the 1970's, respondent Tariff Bureau filed, on behalf of its members, a joint and common tariff that was subject to the approval of the Board of Public Utilities. In 1978, however, after the Board determined that the Tariff Bureau had acted anticompetitively and injured consumers, public movers who had been members of the Tariff Bureau began to file their rates individually instead of through a joint and common tariff. In 1981, the State of New Jersey decided to abandon rate regulation in favor of a regulatory system that provides greater freedom for public movers and consumers. The 1981 New Jersey Public Movers and Warehousemen Licensing Act replaced the 1968 Public Movers Act. The 1981 Act provides that each mover must file tariffs semiannually with the Director of the New Jersey Division of Consumer Affairs, but allows each mover to choose the rates it will charge for its moving services subject to a requirement that the rates be in accord with its filed tariff.

PAR. 7. In 1982, respondent Movers Association corresponded with its members and members of the Tariff Bureau, inviting them to stop

filing their tariffs individually and to participate in the filing of a new joint tariff. The Movers Association then re-activated the Tariff Bureau to design and implement the joint tariff. Acting in conjunction with the Movers Association through, among other things, joint meetings and the involvement of common employees and officers, the Tariff Bureau designed and implemented the joint tariff in a manner that had the natural tendency and effect of raising the prices of moving services. Since the inception of this effort to create a joint tariff, respondents have acted as a combination of their members or in a conspiracy with at least some of their members, and with each other, to hinder, restrain, restrict, suppress, or eliminate price and service competition among public movers in the intrastate transportation of household goods, office goods, and special commodities.

PAR. 8. In furtherance of said combination or conspiracy, respondents and their members have engaged in the following acts, policies, and practices, among others, to coordinate and raise prices for public moving services in New Jersey:

(A) Beginning in the fall of 1982, respondents surveyed their membership concerning the rates that members wanted to have published in the new joint tariff. Respondents then rejected the price preferences of their members reflected in the survey results and created instead a joint tariff containing menus of rates in tabular form. For each of several categories of moving services, members were then invited to and did select one of the tariff rate tables created by respondents.

(B) The joint tariff created by respondents to some extent allowed movers to "take exception" to the tariff tables and to select rates and terms of service that were not reflected in the tables. In general, however, respondents designed and operated the tariff, including the exception process, in a way that discouraged and suppressed movers' taking of exceptions to implement their unilateral pricing decisions. Thus, for example, some movers complained to the Tariff Bureau that the tariff tables did not contain their desired rates, but nevertheless declined to use an exception in order to obtain their desired rates.

(C) In the fall of 1987, the Tariff Bureau modified several of the tariff tables. In general, the modifications eliminated lower rates and added higher rates. The Tariff Bureau eliminated tables containing lower rates from the fall 1987 tariff even where the lower rates had been, during the most recent tariff period and before, movers' most popular choice of rates for their moving services.

(D) With respect to the fall 1987 tariff and subsequent tariffs embodying the new and higher rate tables, movers' rate selections revealed a marked price increase for several categories of moving services. Movers who had previously selected lower rates that were now no longer presented as rate options in the tariff generally did not seek to use the exception process to continue charging lower rates. Rather, they generally selected the tariff tables containing higher rates—in some instances rates that were several rate levels higher than those they had selected prior to the fall of 1987. In addition, the Tariff Bureau often ignored movers' requests for the same rates that they had selected in the previous tariff, and assigned them to the new higher rate tables.

PAR. 9. The aforesaid acts and practices of respondents, their members and others have been and are now having the effects, among others, of:

(A) Raising, fixing, stabilizing, or otherwise interfering or tampering with the prices of intrastate movers of household goods, office goods, and special commodities;

(B) Restricting or frustrating price competition in the intrastate transportation of household goods, office goods, and special commodities; and

(C) Depriving consumers of the benefits of price and service competition.

PAR. 10. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, or the effects thereof, are continuing and will continue or recur in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the New Jersey Movers Tariff Bureau, Inc., a corporation, and the New Jersey Warehousemen and Movers Association, a corporation (hereinafter sometimes referred to as "Tariff Bureau" or "Movers Association," respectively, or as "respondents," collectively), and respondents named in the caption hereof 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, 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, making the following jurisdictional findings, and enters the following order:

(1) Respondent New Jersey Movers Tariff Bureau, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey. Respondent New Jersey Warehousemen and Movers Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey. Both respondents have their offices and principal places of business located at 24 North Third Avenue, Highland Park, New Jersey.

(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.

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

(A) *"Household goods"* means personal effects, fixtures, equipment, stock and supplies, or other property usually used in or as part of the stock of a dwelling.

(B) *"Intrastate transportation"* or *"intrastate moves"* means the pickup or receipt, transportation and delivery of property for compensation within the State of New Jersey by a mover authorized by state law to engage therein.

(C) *"Member"* means any mover or other person which pays dues or belongs to the New Jersey Movers Tariff Bureau, Inc. or to the New Jersey Warehousemen and Movers Association, or to any successor corporation.

(D) *"Office goods"* means personal effects, fixtures, furniture, equipment, stock and supplies, or other property usually used in or as part of the stock of any office, or commercial, institutional, professional, or other type of establishment.

(E) *"Person"* means any individual, copartnership, association, company, or corporation, and includes any trustee, receiver, assignee, lessee, or personal representative of any person herein defined.

(F) *"Mover"* means any person engaged in the transportation of household goods, office goods, or special commodities by motor vehicle for compensation in intrastate commerce between points in the State of New Jersey.

(G) *"Special commodities"* means uncrated or unboxed works of art, fixtures, appliances, business machines, electronic equipment, displays, exhibits, home, office, store, theatrical or show equipment, musical instruments, or other articles.

(H) *"Tariff Bureau"* means the New Jersey Movers Tariff Bureau, Inc.

(I) *"Movers Association"* means the New Jersey Warehousemen and Movers Association.

(J) *"Tariff"* means a publication stating the prices charged by movers for services rendered in the transportation of household goods, office goods, and special commodities, within the State of New Jersey.

II.

It is ordered, That respondents Tariff Bureau and Movers Association, their successors and assigns, and their directors, officers, committees, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the transportation of property, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, jointly and individually, do forthwith cease and desist from:

A. Entering into, adhering to, or maintaining, directly or indirectly, any contract, agreement, understanding, plan, program, combination, or conspiracy to construct, fix, stabilize, raise, maintain, or otherwise interfere or tamper with the prices charged by movers;

B. Suggesting, urging, encouraging or persuading in any way movers to charge, file, or adhere to any existing or proposed tariff provision, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided;

C. Inviting, coordinating, or providing a forum for any discussion or agreement between or among movers concerning intrastate prices charged or proposed to be charged by movers for the intrastate transportation of property or related services, goods, or equipment; and

D. Formulating, compiling, filing, or maintaining any tariff derived in whole or in part from price information that respondents or others have collected on forms that contain pre-selected prices or that use or refer to tables of prices.

Provided, however, that nothing contained in subpart II. D. of this order shall prevent respondents from collecting and publishing individual tariffs or tariff information that movers have communicated to respondents on forms, other than forms devised, established or circulated to movers by respondents that contain pre-selected prices or that use or refer to tables of prices, in which each mover inserts or sets forth prices that are unilaterally determined by the mover, for the purpose of facilitating each mover's satisfaction of the tariff filing requirements of the State of New Jersey. And *provided further*, that, after a period of one year from the effective date of this order, nothing contained in this subpart shall prevent respondents from presenting to state regulatory authorities tariff filings that contain a tabularized or consolidated display of unilaterally determined mover prices.

III.

It is further ordered, That respondents Tariff Bureau and Movers Association each shall:

(A) At the first opportunity after this order becomes final, but in no case later than six (6) months thereafter, cancel all tariffs and any supplements thereto on file with the Director of the Division of

Consumer Affairs in the New Jersey Department of Law and Public Safety that establish prices for transportation of property or related services, goods, or equipment by movers in New Jersey and take such action as may be necessary to effectuate cancellation and withdrawal.

(B) Within thirty (30) days after this order becomes final, distribute a copy of the order to each of their members.

(C) Within thirty (30) days after this order becomes final, amend their by-laws, rules and regulations, and other of their materials to conform to the provisions of this order and provide each of their members with a copy of the amended by-laws, rules and regulations, and other materials.

(D) Within thirty (30) days after this order becomes final, amend their by-laws to require each of their members to observe the substantive provisions of the order as a condition of their membership.

(E) At the first opportunity after this order becomes final, but in no case later than six (6) months thereafter, terminate all previously executed powers of attorney and tariff service agreements between the Tariff Bureau and any mover utilizing its services that authorizes the publication and/or filing of intrastate tariffs within the State of New Jersey; *provided, however*, that nothing contained in this subpart shall prevent any new executions of such agreements or powers of attorney.

(F) For a period of three (3) years after this order becomes final, furnish a copy of the order to each of their new members within thirty (30) days of each new member's admission.

IV.

It is further ordered, That respondents Tariff Bureau and Movers Association each shall:

(A) Within sixty (60) days after this order becomes final, file a verified written report with the Federal Trade Commission setting forth in detail the manner and form in which the respondent has complied and is complying with this order.

(B) In addition to the report required by Paragraph IV(A), annually for a period of three (3) years on or before the anniversary date on which this order becomes final, and at such other times as the Federal Trade Commission or its staff may by written notice to respondent require, file a verified written report with the Federal Trade

Commission setting forth in detail the manner and form in which the respondent has complied and is complying with this order.

(C) For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which the respondent has complied and is complying with this order.

(D) Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in 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 respondent that may affect compliance obligations arising out of this order.

IN THE MATTER OF

ROBERT G. KOSKI, D.O.

Docket 9225. Initial Decision, January 25, 1990*

INITIAL DECISION BY

LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

JANUARY 25, 1990

INITIAL DECISION ON RESPONDENT'S APPLICATION FOR AWARD OF FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT[1]

I. INTRODUCTION

On February 13, 1989, the Commission issued its complaint in this proceeding, charging that the respondent, Robert G. Koski, D.O., had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. 45, by conspiring with other health care providers in the Dickinson County, Michigan area to coerce, intimidate, threaten to boycott, or boycott Marquette General Hospital and its physicians to prevent its proposed new medical office from offering services to consumers in competition with the providers (Cplt., ¶10).

On September 13, 1989, complaint counsel moved to dismiss the complaint against Dr. Koski because post-complaint discovery revealed that he had left a meeting of his alleged co-conspirators before a boycott vote was taken. Since the principal allegation of the complaint connecting Dr. Koski to the alleged conspiracy was his participation in this meeting, complaint counsel concluded that they had no evidence that he joined the alleged conspiracy at this meeting, and that the remaining evidence in their possession was not sufficient to show that Dr. Koski joined the conspiracy at any other time.

On October 10, 1989, the Commission dismissed the complaint. Thereafter, Dr. Koski filed an application for the award of fees and expenses under the EAJA. Complaint counsel filed their response to

*Dismissal Order issued October 10, 1989 (112 FTC 500).

[1]Section 3.83(g) of the Rules of Practice requires the entry of an initial decision on an application for award of fees and expenses filed pursuant to the Equal Access to Justice Act, 5 U.S.C.A. 504 ("EAJA").

this motion on December 8, 1989, and Dr. Koski filed his answer on January 8, 1990.

II. Findings of Fact

A. *The Reason For Dismissal Of The Complaint*

1. Respondent Robert G. Koski, D.O. is a doctor of osteopathy licensed by the State of Michigan who specializes in the practice of anesthesiology in the Upper Peninsula of Michigan in Dickinson County. His office is located at Dickinson County Memorial Hospital, Iron Mountain, Michigan ("the Hospital") (Cplt., ¶1; Ans., ¶1).

2. Dr. Koski has been on the Hospital's medical staff, and has been an associate member of the Dickinson—Iron County Medical Society ("the Society") since September 1986. His answer denied that he was, as the complaint alleged, a member of the Society (Cplt., ¶¶2, 3; Ans., ¶¶2, 3).

3. Dr. Koski is engaged in the business of providing health care services to patients for a fee, but denied, as the complaint alleged, that he was in actual or potential competition with other physicians or health care providers in or near Dickinson County (Cplt., ¶4; Ans., ¶4).

4. The complaint alleged that, on September 3, 1986, Marquette General Hospital announced plans to build a multispecialty medical office in Kingsford, Michigan, the second largest city in Dickinson County (Cplt., ¶9) and that Dr. Koski and other health care practitioners in the Dickinson County area saw as a competitive threat the prospect of increased competition from Marquette General Hospital's planned office in Dickinson County. Therefore, the complaint alleged, they conspired to suppress competition from Marquette General's proposed new facility (Cplt., ¶10).

5. The principal allegation of the complaint connecting Dr. Koski to the alleged conspiracy was Paragraph 13, which charged that:

> On September 13, 1986, the Medical Staff [of the Hospital] met and the physicians and other health care practitioners present, including respondent Koski, voted unanimously to approve the following commitment and to seek a written commitment to that effect from each Medical Staff member:
>
> > We the Medical Staff of DCH, support the right of the individual practitioner to be non-aligned to any specific institution and, therefore, pledge that we will not cooperate or be hired by the Marquette Hospital Clinic or any subsidiary thereof (Cplt., ¶13).

6. Dr. Koski's answer to the complaint denied that he was present when the September 13, 1986 vote was taken (Ans., ¶13) and the motion to dismiss the complaint states that: "Recently completed post-complaint discovery shows that Dr. Koski left the September 13th meeting before the boycott vote, and that he did not return before the meeting adjourned" (Motion to dismiss, p. 1).

7. Without proof that Dr. Koski was present when the vote was taken at the September 13th meeting, there is insufficient evidence that he joined the alleged conspiracy (Motion to dismiss, pp. 1-2).

B. *Dr. Koski's Eligibility Under The Act*

8. Dr. Koski seeks an award of attorney fees and other expenses under the EAJA because of the charges against him as the named party in the Matter of Robert G. Koski, D.O., Docket No. 9225.

9. Dr. Koski was the prevailing party in Docket No. 9225. *Order Dismissing Complaint,* FTC Docket No. 9225 (October 10, 1989). The Secretary's office informs me that Dr. Koski received a copy of the dismissal order on October 14, 1989. His application, dated November 9, 1989, was received by the Secretary on or about November 13, 1989 and was accepted for filing by the Secretary on November 16, 1989.

10. Complaint counsel do not dispute the claim that Dr. Koski is eligible under the EAJA's net worth provision. *Rules of Practice,* Section 3.81(d)(2)(i) (*Complaint Counsel's Response to Dr. Koski's Motion,* p. 3, n. 1 (hereinafter "Response")).

11. Dr. Koski claims attorney's fees and expenses of $22,597.98.

C. *The Merits of Dr. Koski's Claim*

12. Dr. Koski seeks an award of fees and expenses under the Act for the following reasons:

a. Prior to the issuance of the complaint, FTC investigators knew that he did not refer patients.

b. FTC investigators failed to make a thorough investigation of the facts used as a basis for the complaint's allegations.

c. FTC investigators confused Dr. Koski with his wife during the investigation and depositions even though they were told of this fact.

d. FTC investigators did not determine who was actually present at the meetings mentioned in the complaint and whether Dr. Koski voted at the meetings.

e. FTC investigators ignored Dr. Koski's statement to them that he had in the past applied for employment at Marquette General.

f. FTC investigators were told that Dr. Koski was not a member of medical societies involved in the alleged conspiracy.

13. Dr. Koski does not seek an award because of complaint counsel's conduct after the complaint issued, and the affidavit of Gary Gibbs satisfies me that after Dr. Koski filed his answer to the complaint, complaint counsel promptly and thoroughly investigated his claim, made for the first time in his answer, that he left the boycott meeting before the boycott vote was taken. Once complaint counsel were satisfied that Dr. Koski's claim was true, they promptly moved for dismissal of the complaint (Affidavit of Gary Gibbs, Response).

14. The principal factual complaint allegation related to the formation of the alleged conspiracy was that the medical staff of the Hospital voted unanimously on September 13, 1986, not to cooperate with or be hired by the Marquette Hospital Clinic (Cplt., ¶13).

15. This allegation was based on the minutes of the September 13 meeting which state that Dr. Koski was present, that the meeting was "called to plan strategy to counteract the move by Marquette General to construct a clinic in the Kingsford area" and that the motion referred to in paragraph 13 was unanimously approved (Affidavit of Paul Nolan, Exhibit 1, Response).

16. Other evidence gave complaint counsel reason to conclude that Dr. Koski knew of and approved the alleged conspiracy:

a. He was a member of the medical staff which voted on the motion referred to in paragraph 13 of the complaint.

b. He had indicated during investigational hearings that he was a member of the Dickinson-Iron County Medical Society which joined the alleged boycott:

(1) Dr. Koski's September 21, 1987 investigational hearing, at 7-8.

> Q. Are you the member of any professional associations?
> A. . . . the county medical society or I guess its Dickinson/Iron County Medical Society . . . .
> I'm not even sure I'm an official member of society . . . I don't know if I'm a member of the society or not to tell you the truth . . . . But I pay my dues so I suspect I am.

(2) In his answer to the complaint, ¶3, Dr. Koski denied that he was

a member of the Society but admitted that he was an associate member, a distinction without any significant difference in this case.

c. Dr. Koski signed a statement opposing the clinic (Nolan Affidavit, Exhibit 6).

d. Dr. Koski, his wife and another doctor attended, as guests, a meeting of the Tri-County Medical Society where support was sought in opposing the clinic (Nolan Affidavit, Exhibit 7).

17. Paragraph 13 of the complaint contains the most significant allegation relating to the boycott theory: that the medical staff of Dickinson County Memorial Hospital voted unanimously to not cooperate with or be hired by the Marquette Hospital Clinic.

18. Dr. Koski knew, before the complaint issued, that his apparent participation in the meeting, as evidenced by the minutes, was a central issue in the investigation, for the minutes were shown to him at an investigational hearing and he was questioned about them; furthermore, a draft complaint sent to him during settlement negotiations referred to the boycott motion and he and his attorneys were told by complaint counsel prior to issuance of the complaint that they believed his participation in the meeting proved that he had violated the law (Nolan Affidavit).

19. At no time prior to issuance of the complaint did Dr. Koski or anyone else inform complaint counsel that he did not attend the boycott meeting (Nolan Affidavit).[2]

20. That Dr. Koski might not have attended the boycott meeting was revealed for the first time in his answer to the complaint (Ans., ¶13), and shortly thereafter, complaint counsel sought evidence from Dr. Koski supporting his claim. Dr. Koski refused to supply this information voluntarily and complaint counsel began to seek evidence either supporting or refuting his claim. When complaint counsel were satisfied that Dr. Koski's claim was true, they moved to dismiss the complaint (Gibbs Affidavit).

21. Dr. Koski's motion lists several reasons why the Commission's claim that he joined and supported the boycott was not substantially justified, but, with the exception of the argument relating to the September 13th meeting, they are irrelevant even if true, for they have nothing to do with allegations of paragraph 13 which alone gave the Commission sufficient reason to issue the complaint.

22. Dr. Koski's refusal to discuss voluntarily with complaint counsel

[2]Dr. Koski's answer to complaint counsel's response to his motion claims that he told complaint counsel during the investigation that he did not believe he was present for any boycott vote (p. 3), but this claim is unsupported since Dr. Koski has filed no affidavit describing his interviews with complaint counsel.

his statement that he was not present at the meeting when the boycott vote was taken protracted this proceeding, but the extent of delay is unknown, for it is not clear that complaint counsel would have moved to dismiss the complaint on the basis of Dr. Koski's unsworn statements.

III. Conclusions of Law

A. *Dr. Koski's Application Was Untimely Filed*

Complaint counsel argue that Dr. Koski's application should be rejected as untimely filed because under the EAJA, a party seeking an award "shall, within thirty days of a final disposition in the adversary adjudication," submit his application to the agency. 5 U.S.C.A. 504(a)(2). Courts have construed this requirement of the EAJA strictly and have rejected applications under the EAJA which have been 12, 11 and only one day late, *ASH v. C.A.B.*, 724 F.2d 211, 225 (D.C. Cir. 1984); *Clay v. Secretary of HHS*, 639 F. Supp. 1322, 1324 (D.N.H. 1986), *aff'd*, 823 F.2d 679 (1st Cir. 1987); *Monark Boat Co. v. N.L.R.B.*, 708 F.2d 1322, 1324 (8th Cir. 1983).

The Commission issued its dismissal order on October 10, 1989, which was the date of final disposition of this proceeding (*Rules of Practice*, Section 3.82(d)(3)). Dr. Koski received notice of the dismissal order on October 14, 1989, and his application was received by the Secretary on or about November 13, 1989, but was only accepted for filing on November 16, 1989 because of his attorney's failure to file an original and 10 copies.

Complaint counsel argue that documents in EAJA proceedings are deemed to be served on the Commission on the date they are accepted for filing by the Secretary—either the 13th or 16th of October in the case of Dr. Koski's application. In either case, the application, if complaint counsel's theory is correct, was not timely filed because it was received more than 30 days after the Commission's final disposition of this case. *Rules of Practice*, Section 3.82(d)(1); EAJA, 5 U.S.C.A. 504(a)(2).

On the other hand, if service of the order was completed only when Dr. Koski received it (October 14, 1989) and service of his application was accomplished when Dr. Koski's attorney mailed the application on November 10, 1989, the EAJA's 30-day requirement would be satisfied.

Complaint counsel emphasize that courts construing the 30-day provision of the EAJA strictly interpret its requirements. *See*

Columbia Mfg. Corp. v. N.L.R.B., 715 F.2d 1409, 1410 (9th Cir. 1983), in which the Ninth Circuit found that, despite the agency's rule adding three extra days to the limitation period when an order was served on respondent by mail, an application was untimely filed even though it was filed 30 days after the applicant received notice of the dismissal of the complaint. *See also Long Island Radio Co. v. N.L.R.B.*, 841 F.2d 474, 478 (2d Cir. 1988).

Under the Commission's rules governing an EAJA application, the relevant time period began to run when the dismissal order was issued and service of the application was not accomplished when it was mailed (which, in this case, was apparently on November 9th) but when it is received by the Secretary (in this case either November 13th or 16th), for Section 4.4(b) of the Rules of Practice, which applies in this case, states:

> Documents served in adjudicative proceedings under Part III of the Commission's Rules of Practice shall be deemed served on the day of personal service or the day of mailing. All other documents shall be deemed served on the day of personal service or on the day of delivery by the Post Office (emphasis added).

Therefore, I find that respondent's application under the EAJA was untimely filed since its service was not accomplished until the Secretary received it—*i.e.*, on November 13, 1989, more than 30 days after the Commission issued its dismissal order.

B. *The Commission's Position In Issuing The Complaint Was Substantially Justified*

Dr. Koski, who prevailed in this proceeding, is entitled to attorney fees and expenses under the EAJA unless the position of the agency in the proceeding—that is, "the action . . . by the agency upon which the adversary adjudication is based" and "the position taken by the agency in the adversary adjudication," 5 U.S.C.A. 504(b)(1)(E)" was substantially justified or . . . special circumstances make an award unjust." 5 U.S.C.A. 504(a)(1).

Dr. Koski's application challenges only the Commission's actions prior to issuance of the complaint. Those actions, which led to the issuance of the complaint, were substantially justifiable because they had a "reasonable basis in law and fact." *Pierce v. Underwood*, 108 S. Ct. 2541, 2550, n. 2 (1988).

The Commission's decision to issue the complaint was reasonable because it appeared that Dr. Koski had joined the alleged conspiracy

by voting to boycott Marquette General Hospital, and proof of his action would justify charging him with participation in the boycott. *U.S. v. Moya-Gomez,* 860 F.2d 706, 758-61 (7th Cir. 1988), *cert. denied,* 109 S. Ct. 322 (1989); *United States v. Marsh,* 747 F.2d 7 (1st Cir. 1984):

> In other words, if the government proves, beyond a reasonable doubt at least a slight, though willing and knowing, connection between a defendant and a conspiracy, an appellate court will affirm the defendant's conviction for participation in that conspiracy. *Id.* at 13.

Dr. Koski did not, in fact, cast a vote in favor of the alleged boycott, but the minutes of the September 13th staff meeting indicated that he did, and complaint counsel justifiably assumed that the minutes were accurate. Dr. Koski and his attorney, who were, or should have been, aware of the significance of these minutes, did nothing until the complaint issued to clear up this misunderstanding. Since complaint counsel were given no reason to suspect that the minutes were inaccurate, *see Leeward Auto Wreckers, Inc. v. N.L.R.B.,* 841 F.2d 1143, 1147 (D.C. Cir. 1988), I find that the Commission's position was substantially justified when it issued the complaint.

Complaint counsel also argues that Dr. Koski's protraction of this proceeding makes an award to him unjust, that he seeks an award of fees and expenses which are not allowed under the EAJA, and that the expenses sought are insufficiently documented.

Since the Commission's position in this proceeding was substantially justified and Dr. Koski untimely filed his application, the subsidiary issues raised by complaint counsel need not be resolved.

Therefore, *it is ordered,* That respondent's application for award of fees and expenses pursuant to the Equal Access to Justice Act be, and it hereby is, denied.

IN THE MATTER OF

OKLAHOMA STATE BOARD OF VETERINARY MEDICAL EXAMINERS

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

Docket C-3283. Complaint, Jan. 31, 1990—Decision, Jan. 31, 1990

This consent order prohibits, among other things, the five member board, that is the sole licensing authority for veterinarians in Oklahoma, from restricting any veterinarian from being partners with, employed by or otherwise associating with non-veterinarians or veterinarians licensed in other states. Respondent also is prohibited from restricting any veterinarian from providing testimonials or making endorsements regarding veterinary products and services.

Appearances

For the Commission: *James E. Elliott* and *Thomas B. Carter.*

For the respondent: *Janie Simms Hipp, Assistant Attorney General,* Oklahoma City, OK.

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 Oklahoma State Board of Veterinary Medical Examiners has violated 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 in that respect as follows:

RESPONDENT

PARAGRAPH 1. Respondent Oklahoma State Board of Veterinary Medical Examiners ("the Board") is organized, exists and transacts business under the laws of the State of Oklahoma, and has its principal office and place of business at 5629 North Pennsylvania, Oklahoma City, Oklahoma. The Board is subject to the Commission's jurisdiction pursuant to Section 5 of the Federal Trade Commission Act.

PAR. 2. The Board is composed of five members who are appointed by the governor to staggered five-year terms. No more than one member of the Board may be appointed from a single congressional district. All of the members of the Board must have practiced veterinary medicine continuously for at least three years prior to their appointment to the Board, and the members must continue to practice veterinary medicine while on the Board. 59 Okla. Stat. 698.3, 698.4. Board members spend a relatively small percentage of their time on Board matters, and compensation is limited to a per diem and transportation allowance for days of actual service. 59 Okla. Stat. 698.6.

PAR. 3. The Board has exclusive authority to license veterinarians in Oklahoma. It is unlawful to practice veterinary medicine in Oklahoma without first obtaining a license from the Board. 59 Okla. Stat. 698.8. The Board is authorized to adopt rules and regulations necessary for the performance of its duties. 59 Okla. Stat. 698.7. The Board also is authorized to suspend or revoke an existing license of any person found guilty of any of seven enumerated offenses or to refuse to issue a license to a new applicant. 59 Okla. Stat. 698.7(8), 698.14(A).

TRADE AND COMMERCE

PAR. 4. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, veterinarians in Oklahoma compete with one another and with the members of the Board.

PAR. 5. The acts and practices of the Board described below are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

STATE POLICY CONCERNING VETERINARY ADVERTISING AND BUSINESS ARRANGEMENTS

PAR. 6. The State of Oklahoma has no articulated and affirmatively expressed policy to restrict either truthful, nondeceptive advertising by veterinarians or the business arrangements under which veterinarians may practice.

UNLAWFUL BOARD CONDUCT

PAR. 7. The Board has restrained competition among veterinarians by combining or conspiring with its members or others, or by acting as a combination of its members or others, to restrict unreasonably the

business arrangements under which veterinarians may practice. In furtherance of this combination or conspiracy, the Board has, among other things:

(A) Adopted, maintained, and enforced a Rule of Professional Conduct that prohibits a veterinarian from forming a partnership with a non-veterinarian if any of the partnership employment involves the practice of veterinary medicine (Rule 6);

(B) Interpreted and enforced a Rule of Professional Conduct governing the relationship between veterinarians and their clients as prohibiting not merely lay interference with a veterinarian's professional judgment, but any employment by a non-veterinarian (Rule 7); and

(C) Adopted, maintained, and enforced a Rule of Professional Conduct that prohibits a veterinarian from accepting employment from a nonlicensed person, company, firm or corporation which involves the sale of the veterinarian's services to the public (Rule 8).

PAR. 8. The Board has restrained competition among veterinarians by combining or conspiring with its members or others, or by acting as a combination of its members or others, to restrict unreasonably the dissemination of truthful, nondeceptive information about veterinary products. In furtherance of this combination or conspiracy, the Board has, among other things, adopted and maintained a Rule of Professional Conduct that declares it to be unprofessional conduct for a veterinarian to write testimonials about or endorse proprietary remedies, instruments, equipment, or food except to report the results of properly controlled experiments or clinical studies to scientific journals and/or meetings (Rule 20).

CONSUMER AND COMPETITIVE INJURY

PAR. 9. The combination or conspiracy and the acts and practices described above have restrained and continue to restrain truthful, nondeceptive advertising about veterinary products and to restrict the business arrangements under which veterinarians may practice, and thereby have restrained and have the tendency and capacity to restrain competition unreasonably and to injure consumers in the following ways, among others:

(A) Depriving consumers of the benefits of competition among veterinarians;

(B) Depriving consumers of the benefits of, and preventing

veterinarians from offering, potentially more efficient business arrangements that may result in lower prices; and

(C) Depriving consumers of the benefits of, and preventing veterinarians as well as sellers of veterinary products from providing, truthful, nondeceptive information about veterinary products.

PAR. 10. The acts and practices described above constitute unfair methods of competition and unfair acts or practices that violate Section 5 of the Federal Trade Commission Act. The acts and practices, or the effects thereof, are continuing and will continue in the absence of the relief herein requested.

Commissioner Owen not participating.

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 which the Dallas 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 jurisdictional facts set forth in the aforesaid draft 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 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 Oklahoma State Board of Veterinary Medical Examiners is organized, exists and transacts business under the laws of the State of Oklahoma, with its principal place of business located at 5629 North Pennsylvania, Oklahoma City, 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 for the purposes of this order, the following definitions shall apply:

A. *"Board"* shall mean the Oklahoma State Board of Veterinary Medical Examiners, its members, officers, agents, representatives, employees, successors, and assigns.

B. *"Disciplinary action"* shall mean: (1) a refusal to grant, or the revocation or suspension of, a license to practice veterinary medicine in Oklahoma; (2) a refusal to admit a person to examination for a license to practice veterinary medicine; (3) the issuance of a formal or informal warning, reprimand, censure, or cease and desist order against any person or organization; (4) the imposition of a fine, probation, or other penalty or condition; or (5) the initiation of an administrative, criminal, or civil court proceeding against any person.

C. *"Person"* shall mean any natural person, corporation, partnership, governmental entity, association, organization, or other entity.

D. *"Veterinary product"* shall mean any remedy, instrument, equipment, or food that is sold by veterinarians or utilized by veterinarians in the care or treatment of animals.

II.

It is further ordered, That the Board, directly or indirectly, or through any device, in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Prohibiting, restricting, impeding or discouraging any person from displaying, offering, publishing or advertising any testimonial or endorsement with respect to any veterinary product. The practices

from which the Board shall cease and desist include, but are not limited to:

(1) Adopting or maintaining any rule, regulation, policy, or course of conduct that prohibits or seeks to prohibit advertising information about any veterinary product;

(2) Taking or threatening to take any disciplinary action against any person for advertising information about any veterinary product; or

(3) Declaring it to be an illegal, unethical, unprofessional, or otherwise improper or questionable practice for any person to advertise information about any veterinary product.

B. Prohibiting, restricting, impeding, or discouraging any veterinarian from associating with, being employed by or forming and maintaining a partnership with any non-veterinarian. The practices from which the Board shall cease and desist include, but are not limited to:

(1) Adopting or maintaining any rule, regulation, policy, or course of conduct that prohibits or seeks to prohibit any veterinarian from associating with, being employed by or forming a partnership with any non-veterinarian;

(2) Taking or threatening to take any disciplinary action against any veterinarian for associating with, being employed by or forming a partnership with any non-veterinarian; or

(3) Declaring it to be an illegal, unethical, unprofessional, or otherwise improper or questionable practice for any veterinarian to associate with, be employed by or form a partnership with any non-veterinarian.

C. Inducing, urging, encouraging or assisting any nongovernmental person to take any action that if taken by the Board would be prohibited by part IIA or B above.

Provided that, nothing contained in this part shall prohibit the Board from formulating, adopting, disseminating and enforcing reasonable rules or taking disciplinary or other action to prohibit advertising that the Board reasonably believes to be false, misleading or deceptive within the meaning of 59 Okla. Stat. 698.7(9) and 698.14(A)(6), as limited by the First and Fourteenth Amendments to the United States Constitution.

III.

It is further ordered, That the Board shall:

A. Distribute by first-class mail a copy of the announcement attached hereto as Appendix A, a copy of this order, and a copy of the accompanying complaint in the following manner:

(1) Within thirty (30) days after the date this order becomes final, to each person licensed to practice veterinary medicine in Oklahoma as of the date this order becomes final and to each person whose application for, or a request for reinstatement of, a license is pending on such date; and

(2) For five (5) years after the date this order becomes final, to each person who applies for a license to practice veterinary medicine in Oklahoma within (30) days after the Board received such application;

B. Within thirty (30) days after the date this order becomes final, revise, repeal or revoke Rules 6, 8, and 20 of the Rules of the Board; revise, repeal or revoke Rule 7 of the Rules of the Board or issue an interpretation of Rule 7 of the Rules of the Board that is consistent with Part II of this order; and revise, repeal or revoke any other provision of the Rules of the Board and any policy statement or guideline, provision, interpretation or statement that is inconsistent with Part II of this order;

C. For a period of five (5) years after the date this order becomes final, maintain and upon request make available to the Federal Trade Commission (or its staff), for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Part II of this order relating to advertising or the business arrangements under which veterinarians may practice, including but not limited to written communications and any summaries of oral communications to or from the Board regarding the displaying, offering, publishing or advertising of information about any veterinary product or regarding the business arrangements under which veterinarians may practice;

D. Notify the Federal Trade Commission at least thirty (30) days in advance if possible, or otherwise as soon as possible, of any change in the Board's authority to regulate the practice of veterinary medicine in Oklahoma that may affect compliance obligations arising out of this order, such as the complete or partial assumption of that authority by another governmental entity, or the dissolution of (or other relevant change in) the Board; and

E. Within sixty (60) days after the date of service of this order, submit to the Federal Trade Commission a written report setting forth in detail the manner and form in which the Board has complied and is complying with this Order.

Commissioner Owen not participating.