

## IN THE MATTER OF

GERALD S. FRIEDMAN, M.D., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3290. Complaint, June 18, 1990—Decision, June 18, 1990*

This consent order prohibits, among other things, the California physician and his dialysis centers from: requiring physicians to use his in-patient dialysis service for their patients as a condition for using respondents' out-patient dialysis facilities; barring physicians who want to treat their patients at respondents' out-patient dialysis facilities from owning or operating a competing in-patient dialysis service; and denying, revoking, suspending, or otherwise impairing a physician's staff privileges at one of respondents' out-patient dialysis facilities because the physician has used or operated an in-patient dialysis service other than one owned by respondents. In addition, the consent order requires that respondents distribute a copy of the order and complaint to each physician with privileges at any of the dialysis facilities.

*Appearances*For the Commission: *Garry Gibbs.*For the respondents: *Kendall H. MacVey, Best, Best & Krieger,*  
Riverside, CA.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Gerald S. Friedman, M.D., individually and doing business as the Dialysis Center of Upland, the Dialysis and Transplant Center of Pomona Valley, and the Dialysis Center of Pomona, has violated and is violating Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

## RESPONDENTS

PARAGRAPH 1. Respondent Gerald S. Friedman, M.D. ("Dr. Friedman") is a physician licensed to practice medicine in the State of

California. Dr. Friedman engages in the practice of nephrology in the Upland and Pomona areas of California. Nephrology is a sub-specialty of internal medicine that concerns the diagnosis of patients with impaired kidney function and their treatment using dialysis. Dialysis is the removal of fluids and waste products from the bloodstream by artificial methods, such as by using an artificial kidney machine. Dr. Friedman's principal office is located at 600 N. 13th Avenue, Upland, California.

PAR. 2. Dialysis Center of Upland ("DCU") is an outpatient dialysis facility located at 600 N. 13th Avenue, in Upland, California. Outpatient dialysis facilities provide dialysis to patients on an outpatient basis, most of whom have chronic renal failure, using an artificial kidney machine that is permanently fixed to a dialysis facility. Chronic renal failure is the permanent impairment of normal kidney function which requires dialysis treatments several times each week, usually for the rest of a patient's life. DCU is a 25 "station" facility, which means that it has the space, dialysis machines, and auxiliary equipment capable of dialyzing 25 patients at one time. DCU is a sole proprietorship owned by Dr. Friedman.

PAR. 3. Dialysis and Transplant Center of Pomona Valley ("DTCP") is an outpatient dialysis facility located at 2475 North Garey Avenue, in Pomona, California. DTCP began operations in August 1987 as a replacement facility for the Dialysis Center of Pomona. DTCP is a 36-station facility that provides outpatient dialysis services to patients with chronic renal failure. DTCP is a sole proprietorship owned by Dr. Friedman.

PAR. 4. Dialysis Center of Pomona ("DCP") is an outpatient dialysis facility located at 800 N. Park Avenue, in Pomona, California. DCP is a 19-station facility that provided outpatient dialysis services to patients with chronic renal failure. Although still standing, DCP ceased operations in August 1987 when it was replaced by DTCP. DCP is a sole proprietorship owned by Dr. Friedman.

PAR. 5. Inland Dialysis Services is an inpatient dialysis service located at 600 N. 13th Avenue in Upland, California. Inpatient dialysis services provide dialysis, using a portable artificial kidney machine, to hospital inpatients who have chronic or acute renal failure. Acute renal failure is the temporary loss of kidney function. Inland Dialysis Services ("IDS" or "Dr. Friedman's inpatient dialysis service") has contracts or agreements with approximately eight hospitals in the Upland and Pomona area to provide inpatient dialysis

services to patients who have been hospitalized and who have acute or chronic renal failure. IDS is a sole proprietorship owned by Dr. Friedman.

#### JURISDICTION

PAR. 6. Dr. Friedman is a person within the meaning of the Federal Trade Commission Act and derives substantial revenues from his dialysis business. Dr. Friedman and his dialysis facilities at all times relevant herein, have been and are now in or affect commerce as commerce is defined in the Federal Trade Commission Act.

#### THE RELEVANT MARKETS

PAR. 7. The provision of outpatient dialysis services constitutes a relevant product market. Outpatient dialysis services are provided to patients with chronic renal failure who need to be dialyzed several times each week. Outpatient dialysis services are generally provided by artificial kidney machines that are permanently fixed to a location. Patients with chronic renal failure are generally cared for by a nephrologist who oversees their outpatient dialysis treatments. Medicare provides coverage for outpatient dialysis treatments provided to any person, regardless of age, who has chronic renal failure and has required dialysis treatments for at least three consecutive months. Approximately 90 percent of all outpatient dialysis treatments in the United States are provided to such persons and are covered by Medicare. Medicare sets a maximum price for outpatient dialysis treatments that providers will receive. Medicare also pays a separate medical fee to nephrologists for their medical services in treating patients with chronic renal failure.

PAR. 8. The provision of inpatient dialysis services constitutes a relevant product market that is separate from the market for outpatient dialysis services. Inpatient dialysis services are provided to hospital inpatients who have impaired kidney function. Inpatient dialysis services are generally provided by portable artificial kidney machines which can be transported from hospital to hospital. Inpatient dialysis services typically cost about three times as much as outpatient dialysis services. Medicare does not reimburse providers for inpatient dialysis services apart from the payments it makes to hospitals for each patient admission under its prospective payment system.

PAR. 9. The Upland and Pomona areas is the geographic area consisting of the cities of Upland, California and Pomona, California

as well as the surrounding towns of Etiwanda, Alta Loma, Cucamonga, Ontario, Chino, Diamond Bar, Claremont, La Verne and Montclair, California. The Upland and Pomona area constitutes a relevant geographic market for outpatient dialysis services. People residing in the Upland and Pomona area who have chronic renal failure generally use outpatient dialysis facilities in the Upland and Pomona area and do not consider other outpatient dialysis facilities as alternatives for several reasons. Medi-Cal, California's Medicaid program, will only supply patients with ambulance transportation to the outpatient dialysis facility nearest their residence. Because a large percentage of outpatient dialysis patients in the Upland and Pomona area use Medi-Cal ambulances to transport them to outpatient dialysis facilities, many patients have no practical alternative and must go to the nearest facility. In addition, patients requiring outpatient dialysis services are often unable, because of their physical condition, to travel long distances. Furthermore, nephrologists generally see their patients at an outpatient dialysis facility before, during, or after dialysis, and generally limit their practice to a local area because of the inconvenience of traveling great distances. Consequently, nephrologists will usually recommend that their patients use a particular outpatient dialysis facility that is convenient for both patient and physician.

PAR. 10. Through the Dialysis Center of Upland, the Dialysis and Transplant Center of Pomona Valley, and the Dialysis Center of Pomona ("Dr. Friedman's outpatient dialysis facilities" or "the outpatient dialysis facilities"), Dr. Friedman owns a substantial share of the outpatient dialysis services market in the Upland and Pomona area. Dr. Friedman currently owns approximately 80 percent of the capacity of outpatient dialysis facilities in the Upland and Pomona area, measured by number of stations. In 1987, Dr. Friedman's outpatient dialysis facilities provided approximately 90 percent of the outpatient dialysis services in the Upland and Pomona area, measured by number of outpatient dialysis treatments.

#### RESPONDENT'S OPERATIONS IN THE OUTPATIENT DIALYSIS MARKET

PAR. 11. Dr. Friedman's outpatient dialysis facilities have granted some nephrologists "medical staff privileges." Such privileges allow the nephrologists to order dialysis services at the outpatient dialysis facilities for their patients and to visit their patients at the outpatient dialysis facilities before, during, or after their dialysis treatments. Each of these outpatient dialysis facilities allows only nephrologists

with privileges at the facility to order dialysis treatments for their patients at the facility.

PAR. 12. There are five nephrologists, other than Dr. Friedman, who currently practice in the Upland and Pomona area. One or more of Dr. Friedman's outpatient dialysis facilities have granted medical staff privileges to all five of these nephrologists at one time or another. Currently, four of these five nephrologists have staff privileges at one or more of Dr. Friedman's outpatient dialysis facilities.

PAR. 13. Since 1982, Dr. Friedman, through his professional corporation, has entered into contracts with four of the five nephrologists to whom Dr. Friedman's outpatient dialysis facilities have granted medical staff privileges. Pursuant to these contracts, Dr. Friedman pays the nephrologists, as independent contractors, to provide medical services to Dr. Friedman's patients. These four contracts contain provisions whereby the nephrologist agrees, for the duration of the contract and for two years afterward, not to compete with Dr. Friedman's outpatient dialysis facilities or inpatient dialysis service in the provision of outpatient or inpatient dialysis services and to refer all patients needing outpatient or inpatient dialysis services to Dr. Friedman's outpatient or inpatient dialysis facilities. The contractual restrictions on the ability to compete with Dr. Friedman's outpatient dialysis facilities and the requirement that the nephrologists refer all their patients to these facilities have impeded independent entry into the outpatient dialysis services market in this area.

PAR. 14. Additional impediments to entry to the outpatient dialysis services market in the Upland and Pomona area exist for the following reasons:

- (a) Substantial excess capacity currently exists in the market;
- (b) Economies of scale make entry with less than 12-15 stations, or approximately 15-20 percent of current supply, unprofitable;
- (c) Substantial "sunk costs" of entry exist due to the extensive plumbing and other installation costs necessary for outpatient dialysis stations; and
- (d) An outpatient dialysis facility must be designed, licensed and constructed. This process usually takes one to two years. To be profitable, a facility must then develop a sufficient physician and patient base.

#### ILLEGAL TYING ARRANGEMENT

PAR. 15. As a result of Dr. Friedman's 90 percent share of the

outpatient dialysis services market in the Upland and Pomona area, by virtue of his ownership of DCU, DTCP, and DCP, and the impediments to entry that exist in this market, Dr. Friedman has market power in the market for outpatient dialysis services in the Upland and Pomona area.

PAR. 16. Dr. Friedman is unable to exercise his market power in the outpatient dialysis services market directly by raising his outpatient dialysis prices because Medicare, which pays for approximately 90 percent of all outpatient dialysis services, sets the maximum price it will reimburse for outpatient dialysis services.

PAR. 17. Dr. Friedman has indirectly exercised his market power in the outpatient dialysis services market by tying the use of his inpatient dialysis service, the price of which is not set by Medicare, to the use of his outpatient dialysis facilities. Since 1984, Dr. Friedman's outpatient dialysis facilities have required all four of the nephrologists who presently have medical staff privileges at these facilities to sign a statement whereby they agree to adhere to the policies and procedures of the outpatient dialysis facilities. One of these policies requires, as a condition of using Dr. Friedman's outpatient dialysis facilities, that the nephrologist agrees to use IDS (Dr. Friedman's inpatient dialysis service) whenever any of his or her patients are in a hospital with which IDS has a contract to provide inpatient dialysis services.

PAR. 18. The purpose, effect, tendency, or capacity of Dr. Friedman's tying arrangement described in paragraph 17 above, given Dr. Friedman's market power in the outpatient dialysis services market in the Upland and Pomona area, has been to restrain trade unreasonably, and injure consumers of inpatient dialysis services in the Upland and Pomona area in the following ways, among others:

(a) By enabling Dr. Friedman to exercise his market power and, in effect, to evade the price ceiling Medicare has set for outpatient dialysis services, by tying inpatient dialysis services to outpatient dialysis services and charging higher than competitive prices for inpatient dialysis services in the Upland and Pomona area;

(b) By forcing nephrologists to select IDS (Dr. Friedman's inpatient dialysis service) for their patients when the nephrologists might otherwise choose a competing inpatient dialysis service; and

(c) By preventing inpatient dialysis services other than IDS from competing for the business generated by nephrologists in the Upland and Pomona area unless such competing inpatient dialysis services also enter the outpatient dialysis services market in Upland and

Pomona, thereby providing nephrologists with a source of outpatient dialysis services other than Dr. Friedman's facilities.

PAR. 19. The acts and practices alleged herein constitute an illegal tying arrangement and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

#### DECISION AND ORDER

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

The proposed respondent, and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all of the jurisdictional facts set forth in the aforesaid 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 the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedures prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent Gerald S. Friedman, M.D. is a physician licensed and doing business under and by virtue of the laws of the State of California. The Dialysis Center of Upland, Dialysis and Transplant Center of Pomona Valley, Dialysis Center of Pomona, and Inland Dialysis Services are sole proprietorships owned and operated by proposed respondent Gerald S. Friedman, M.D., doing business under and by virtue of the laws of the State of California. The mailing

address and principal place of business of proposed respondent Gerald S. Friedman, M.D. is: 600 North 13th Avenue, Upland, California.

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

#### ORDER

##### I.

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

1. "*Respondent*" or "*Dr. Friedman*" means Gerald S. Friedman, M.D., individually and doing business as the Dialysis Center of Upland, the Dialysis and Transplant Center of Pomona Valley, and the Dialysis Center of Pomona;

2. "*Dialysis*" means the use of an artificial kidney machine to remove waste products from the bloodstream;

3. "*Outpatient dialysis services*" mean the provision of dialysis on an outpatient basis, to persons who have permanently impaired kidney function and require regular dialysis;

4. "*Dr. Friedman's outpatient dialysis facilities*" mean all facilities that provide outpatient dialysis services and, in whole or in part, are managed, operated, or owned by Dr. Friedman, including, but not limited to, the Dialysis Center of Upland, the Dialysis and Transplant Center of Pomona Valley, and the Dialysis Center of Pomona;

5. "*Staff privileges*" mean the privileges granted to a physician to use Dr. Friedman's outpatient dialysis facilities;

6. "*Inpatient dialysis service*" means an entity that provides dialysis to hospital inpatients and emergency room patients who have impaired kidney function; and

7. "*Dr. Friedman's inpatient dialysis services*" mean all inpatient dialysis services that, in whole or in part, are managed, operated, or owned by Dr. Friedman, including, but not limited to, Inland Dialysis Services.

##### II.

*It is further ordered,* That respondent, and his successors and



assigns, in connection with the provision of outpatient dialysis services and inpatient dialysis services in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith directly or indirectly, or through any corporation or other device, cease and desist from:

A. Entering into, attempting to enter into, offering, renewing, or continuing any contract, agreement, policy, or understanding with any physician, either express or implied, which requires, as a condition of using any of Dr. Friedman's outpatient dialysis facilities to treat the physician's patients, that the physician, or any member of the physician's medical practice (1) use Dr. Friedman's inpatient dialysis services for any patients of the physician or of the physician's medical practice or (2) not operate, acquire an interest in, or maintain an interest in an inpatient dialysis service; and

B. Denying, revoking, suspending, or otherwise impairing staff privileges, in whole or in part, or threatening to deny, revoke, suspend, or otherwise impair staff privileges, in whole or in part, of any physician or any member of the physician's medical practice because that physician (1) in treating his own patients, has used an inpatient dialysis service other than one of Dr. Friedman's inpatient dialysis services, or (2) operates, has an interest in, or proposes to operate or acquire an interest in, an inpatient dialysis service.

Provided that nothing in this order shall prohibit Dr. Friedman from entering into an agreement with any physician with whom Dr. Friedman practices medicine in partnership or in a professional corporation, or who is employed by Dr. Friedman, which requires that such partner or employee use Dr. Friedman's outpatient dialysis facilities and Dr. Friedman's inpatient dialysis service or prohibits such partner or employee from operating or acquiring an interest in a dialysis service or facility other than Dr. Friedman's outpatient dialysis facilities and Dr. Friedman's inpatient dialysis service.

### III.

*It is further ordered,* That respondent Dr. Friedman:

A. Distribute a copy of this order and the accompanying complaint, by first class mail within thirty (30) days after this order becomes final, to each physician with staff privileges at any of Dr. Friedman's outpatient dialysis facilities and to each hospital administrator of a

hospital with which any of Dr. Friedman's inpatient dialysis services has entered into a contract to provide inpatient dialysis services.

B. For a period of three (3) years after the date this order becomes final, provide a copy of this order and the accompanying complaint to (1) each physician who has completed an application for or is granted staff privileges at any of Dr. Friedman's outpatient dialysis facilities, within thirty (30) days after such physician has submitted a completed application for staff privileges, or within thirty (30) days after such physician has obtained staff privileges, whichever is sooner, and (2) to each hospital administrator of a hospital with which Dr. Friedman or any of Dr. Friedman's inpatient dialysis facilities enters into a contract to provide inpatient dialysis services, within thirty (30) days of the date such inpatient dialysis facility signs such a contract.

C. File a written report with the Commission within sixty (60) days after this order becomes final, and annually for three (3) years on the anniversary of the date this order becomes final, and at any other time the Commission, by written notice, may require, setting forth in detail the manner and form in which he has complied and is complying with this order.

D. For a period of five (5) years after this order becomes final, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order.

E. For a period of seven (7) years from the date this order becomes final, notify the Commission at least thirty (30) days prior to (1) any affiliation with a dialysis related business or employment; (2) any change in his business address set forth in this order; (3) any change to any of Dr. Friedman's outpatient dialysis facilities or inpatient dialysis services, such as incorporation, discontinuance, dissolution, assignment, or sale resulting in the emergence of a successor organization; or (4) any other change which may affect compliance with this order. Notice under subsections (1) and (2) of this paragraph shall include respondent's new business address and a statement of the nature of the business or employment in which respondent is newly engaged as well as a description of the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision in this paragraph shall not affect any other obligation arising under this order.

IN THE MATTER OF  
EMERSON ELECTRIC CO., ET AL.

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

*Docket C-3291. Complaint, June 22, 1990—Decision, June 22, 1990*

This consent order requires, among other things, a Missouri producer of mounted ball bearings to divest McGill Manufacturing Company's mounted ball bearing business to a Commission approved acquirer, within twelve months after the consent order becomes final, or else consent to the appointment of a trustee by the Commission. Respondents are also required to offer to the prospective acquirer a contract to buy from respondents any necessary machinery, equipment and tooling. In addition, respondents are prohibited from selling, for a period of 18 months, mounted ball bearings under the McGill name.

*Appearances*

For the Commission: *Howard M. Morse and Steven A. Newborn.*

For the respondents: *Arthur F. Golden, Davis, Polk & Wardwell,*  
New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents, Emerson Electric Company, a corporation, and Emerson Power Transmission Co., a corporation, (collectively "Emerson"), both subject to the jurisdiction of the Federal Trade Commission, propose to acquire substantially all of the common stock of McGill Manufacturing Co., Inc. ("McGill") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Emerson Electric Co. is a corporation organized and existing under the laws of the State of Missouri with its office and

principal place of business at 8000 West Florissant Avenue, St. Louis, Missouri.

2. Respondent Emerson Power Transmission Corporation is a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business at 620 South Aurora Street, Ithaca, New York.

3. McGill Manufacturing Co., Inc. is a corporation organized and existing under the laws of the State of Indiana with its office and principal place of business at 909 North Lafayette Street, Valparaiso, Indiana.

4. Respondents at all times herein have been and now are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business or practices are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

#### II. THE ACQUISITION

5. On or about December 11, 1989, Emerson entered into an agreement and plan of merger with McGill, in which Emerson agreed to purchase substantially all of McGill's common stock. Purchase of substantially all of McGill's common stock would give Emerson control of McGill. The total value of the proposed acquisition is approximately \$137 million.

#### III. THE RELEVANT MARKET

6. For purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition of McGill is the production and distribution of mounted ball bearings.

7. For purposes of this complaint, the relevant geographic market is the United States.

8. Production and distribution of mounted ball bearings is highly concentrated, whether measured by Herfindahl-Hirschmann indices or two-firm and four-firm concentration ratios.

9. Entry into both production and distribution of mounted ball bearings is very difficult and time consuming.

10. Emerson is the leading firm and Emerson and McGill are actual competitors in the production and distribution of mounted ball bearings.

#### IV. EFFECTS

11. The effect of the acquisition may be substantially to lessen

competition in the relevant market described above in paragraphs 6 and 7 in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, by, among other things:

- a. Eliminating substantial actual competition between Emerson and McGill;
- b. Significantly enhancing the likelihood of collusion or interdependent coordination between or among the firms that produce or sell the relevant products; and
- c. Tending to create a dominant firm in the relevant market.

#### V. VIOLATION CHARGED

12. The acquisition as set forth in paragraph 5 herein violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section

2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Emerson Electric Co. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Missouri, with its principal executive offices located at 8000 W. Florissant Avenue, St. Louis, Missouri.

2. Respondent Emerson Power Transmission Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware with its principal executive offices located at 620 S. Aurora Street, Ithaca, New York.

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

#### ORDER

##### I.

As used in this order, the following definitions shall apply:

a. "*Emerson*" means Emerson Electric Co., a Missouri corporation, its predecessors, any other corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates that Emerson controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns. "*EPT*" means Emerson Power Transmission Corp., a Delaware corporation which is a wholly-owned subsidiary of Emerson.

b. "*McGill*" means McGill Manufacturing Company, Inc., an Indiana corporation, as it was constituted prior to the acquisition, its predecessors, any other corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates McGill controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

c. "*Acquisition*" means Emerson's acquisition of any or all voting securities of McGill.

d. "*Respondents*" means Emerson and EPT.

e. "*Mounted ball bearings*" means and includes ball bearings

incorporated into a housing for attachment to a piece of machinery or equipment, including pillow blocks, flange units, take up blocks, take up frame assemblies, and screw conveyor hanger bearings; and ball bearing inserts, cartridge units, and adapter bearings, normally used in mounted ball bearing assemblies.

f. The "*McGill Mounted Ball Bearing Business*" means the mounted ball bearing manufacturing facility owned and operated by McGill which is located in Malden, Indiana (the "Malden Plant") and all of McGill's assets, title, properties, interests, rights and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, machinery, equipment, tooling, and other property of whatever description at the Malden Plant or used exclusively in the manufacture or sale of mounted ball bearings, and including, insofar as they relate to mounted ball bearings, customer and supplier lists, business records, trademarks (including, but not limited to Krown Regal, Centrik-Lok, Nyla-K, and Nylaplate-K) other than the name McGill, and the exclusive rights, insofar as they relate to mounted ball bearings, to any patents or knowhow used by McGill in conjunction with the manufacture or sale of mounted ball bearings, and including McGill's mounted ball bearing inventory wherever located.

g. "*Acquirer*" shall have the meaning given to the term in Section II.

h. "*Commission*" means the Federal Trade Commission.

## II.

*It is ordered, That:*

A. Respondents shall, within twelve (12) months after the date this order becomes final, divest, absolutely and in good faith, to an acquirer that receives the prior approval of the Commission (the "acquirer"), the McGill Mounted Ball Bearing Business.

B. The divestitures required by this order shall be made only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture required by this order is to ensure the continuation of an ongoing viable enterprise and to remedy the lessening of competition alleged in the Commission's complaint.

C. Respondents shall take such action as is necessary to maintain the viability and marketability of the McGill Mounted Ball Bearing

Business, and to prevent the destruction, removal or impairment of any assets subject to possible divestiture pursuant except in the ordinary course of business and except for ordinary wear and tear.

### III.

*It is further ordered, That:*

A. If respondents have not divested the McGill Mounted Ball Bearing Business as required by Section II within the twelve-month period provided for in Section II, respondents shall consent to the appointment of a trustee by the Commission to divest the McGill Mounted Ball Bearing Business. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, for any violation of this order, respondents shall similarly consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

B. If a trustee (the "trustee") is appointed by the Commission or a court pursuant to Section III of this order, the following terms and conditions shall apply:

(1) The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustees shall be a person with experience and expertise in acquisitions and divestitures.

(2) The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to accomplish the divestiture required by Section II of this order. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of such twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended for such reasonable period of time by the Commission, or by the court for a court-appointed trustee; *provided, however*, that the Commission or court may only extend the divestiture period two (2) times.



(3) Respondents shall make available to the trustee and the trustee shall have full and complete access to the personnel, books, records, and facilities relating to the assets (*i.e.*, the McGill Mounted Ball Bearing Business) that the trustee has the duty to divest. Respondents shall develop such financial or other information as the trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture by the trustee caused by the respondents shall extend the time for divestiture under this Section III in an amount equal to the delay, as determined by the Commission, or the court for a court-appointed trustee.

(4) The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in Section II of this order and subject to the prior approval of the Commission. If the trustee receives bona fide offers from more than one prospective acquirer, and if the Commission approves more than one such acquirer, the trustee shall divest to the acquirer selected by respondents from among those approved by the Commission.

(5) The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ such consultants, accountants, attorneys or other persons reasonably necessary to carry out the trustee's duties and responsibilities and respondents shall bear the expense for such services. The trustee shall account for all monies derived from the divestiture and for all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's accomplishing the divestiture of the McGill Mounted Ball Bearing Business.

(6) Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission, and, in the case of a court-appointed trustee, of the court, the respondents shall, consistent with the provisions of this order, execute a trust agreement that

transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

(7) Except for cases of misfeasance, negligence, willful or wanton acts, or bad faith by the trustee, the trustee shall not be liable to respondents for any action taken or not taken in the performance of the trusteeship. Respondents shall indemnify the trustee and hold the trustee harmless against any liabilities, claims, or expenses arising out of performance of the trusteeship, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, claims, or expenses result from misfeasance, negligence, willful or wanton acts, or bad faith by the trustee.

(8) If the trustee ceases to act or fails to act diligently, one or more substitute trustees shall be appointed in the same manner as provided in this order.

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

(10) The trustee shall have no obligation or authority to operate or maintain the McGill Mounted Ball Bearing Business.

#### IV.

*It is further ordered, That:*

In connection with any divestiture of McGill's Mounted Ball Bearing Business, respondents will offer, and a trustee appointed pursuant to this order shall have the authority to offer, to any prospective acquirer, a contract to buy from respondents for use in said mounted ball bearing business, machined and heat treated rings and locking collars of the types currently supplied by McGill to the Malden plant, which contract will include reasonable commercial terms and provisions substantially as follows:

- (a) The contract will, at the acquirer's request, continue for a period of as much as eighteen (18) months following the closing of a transaction in satisfaction of the divestiture required by this order;
- (b) Prices will not exceed McGill's standard cost plus 15 percent;
- (c) Quantities offered for sale in each year will equal at least the total quantity of said rings heretofore supplied to said plant during

1989, or four times the quantity so supplied in the fourth quarter of 1989, whichever is greatest;

(d) The acquirer will lease or consign to respondents for the period of the contract, any necessary machinery, equipment and tooling not located at the Malden Plant, which is used in the production of mounted ball bearings, and which is divested to the acquirer pursuant to Section II hereof.

V.

*It is further ordered, That:*

A. The Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I, shall continue in effect until respondents' divestiture obligations under Sections II and III of the order are satisfied, or until such other time as the Agreement to Hold Separate provides, and the respondents shall comply with all terms of said agreement.

B. Respondents shall not offer for sale mounted ball bearings under the McGill name for a period of 18 months following the closing of a transaction in satisfaction of the divestiture required by this order.

VI.

*It is further ordered, That* within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully satisfied the divestiture obligation of this order, respondents shall submit to the commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying or have complied with the order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of all contacts or negotiations with prospective acquirers for the divestiture required by this order, including the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning the required divestiture.

VII.

*It is further ordered, That* for the purposes of determining or securing compliance with this order, and subject to any legally

recognized privilege, upon written request and on reasonable notice to respondents made to their principal offices, respondents shall make available to any duly authorized representatives of the Commission:

A. All books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession of under the control of respondents relating to any matters contained in this order, for inspection and copying during office hours and in the presence of counsel; and

B. Upon five (5) days' notice to respondents, and without restraint or interference from respondents, for interview, officers or employees of respondents, who may have counsel present, regarding such matters.

Any information or documents obtained by the Commission from respondents shall be accorded such confidential treatment as is available under Sections 6(f) and 21 of the Federal Trade Commission Act, 15 U.S.C. 46(f) and 57b-2.

#### VIII.

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

#### IX.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, each respondent shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, assets used in, or more than 1% of the stock or share capital of, or interest in, any company engaged in, the manufacture or sale of mounted ball bearings in the United States. (This paragraph shall not apply to the acquisition of new machinery or equipment or of used machinery or equipment from suppliers of or brokers for such machinery or equipment, by means of normal transactions customary in the used equipment market.) One year from the date this order becomes final and annually thereafter for nine (9) years, respondents shall file with the Commission a verified written report of their compliance with this paragraph.

IN THE MATTER OF  
PHARMACEUTICAL SOCIETY OF ORANGE COUNTY, INC.

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

*Docket C-3292. Complaint, July 9, 1990—Decision, July 9, 1990*

This consent order prohibits, among other things, the pharmaceutical society from organizing or entering into any agreement among pharmacy firms to withdraw from or refuse to enter into a third-party payer prescription drug plan; for ten years, from continuing any meeting of representatives of pharmacy firms at which any person makes any statement concerning whether any firm will enter into or refuse to enter into any third-party payer prescription drug plan; and for eight years, from providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of entering into or refusing to enter into any third-party payer prescription drug plan.

*Appearances*

For the Commission: *Karen G. Bokar and Michael D. McNeely.*

For the respondent: *Alan Lewis, Newburg, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Pharmaceutical Society of Orange County, Inc. has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Pharmaceutical Society of Orange County, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, whose principal place of business is at the place of business or home of one of its officers. Respondent is an association of pharmacists who are employed in business for themselves, employed by other pharmacists, or retired. In 1986, respondent was affiliated with the Pharmaceutical Society of the State of New York, Inc. ("PSSNY").

PAR. 2. Members of respondent hold ownership interests in pharmacy firms that, except to the extent that competition has been restrained as alleged herein, have been and now are in competition with each other and with other pharmacy firms and other health care providers in the State of New York.

PAR. 3. Respondent's general business or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent is and has been, at all times relevant to this complaint, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy for the prescription according to a predetermined formula. The New York State Employees Prescription Program is a prescription drug benefit plan made available by the State of New York to its employees, its retirees, certain other persons, and their dependents. There were approximately 500,000 beneficiaries covered by the Employees Prescription Program in 1986. Since July 1, 1986, The Equitable Life Assurance Society of the United States has insured the Employees Prescription Program, and PAID Prescriptions, Inc., a wholly-owned subsidiary of Medco Containment Services, Inc., has administered it.

PAR. 6. Pharmacies are solicited to participate in the Employees Prescription Program. Pharmacies that participate in the Employees Prescription Program accept as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. The Employees Prescription Program provides a formula for determining the reimbursement of the ingredient cost of drugs dispensed.

PAR. 7. Absent collusion between or among pharmacy firms, each pharmacy firm would decide independently whether to participate in the Employees Prescription Program, and the State of New York would enjoy the benefits of competition among pharmacy firms.

PAR. 8. In May 1986, PAID Prescriptions, Inc. formally solicited pharmacy participation in the Employees Prescription Program under terms to become effective on July 1, 1986. Among the proposed terms were changes in the reimbursement level for ingredient costs, an increase in the professional fee, and the offer of additional reimburse-

ment for the use of generic drugs. The proposed terms were intended to reduce the price the State paid for the Employees Prescription Program, and thus minimize costs, and yet to offer reimbursement high enough to attract a sufficient number of participating pharmacies to ensure that Employees Prescription Program beneficiaries would have adequate access to medication.

PAR. 9. In 1986, members of respondent held ownership interests in pharmacy firms that participated in many prescription drug benefit plans offered by third-party payers, including the Employees Prescription Program as it existed prior to July 1. Such pharmacy firms would have suffered a significant loss of customers had their competitors participated in the Employees Prescription Program at a time when they were not participating.

PAR. 10. New York State informed respondent PSSNY of the proposed terms of the Employees Prescription Program and respondent PSSNY communicated this information to its affiliated societies, including respondent. Respondent held meetings at which owners of pharmacy firms informed other owners of pharmacy firms that they would not participate in the proposed Employees Prescription Program. Respondent communicated to pharmacists and pharmacy owners information regarding the intentions of pharmacy firms located throughout the state concerning participation in the Employees Prescription Program. Through these exchanges of information and other acts, and through the activities of respondent, pharmacy-owning members of respondent and other owners of pharmacy firms agreed to refuse to participate in the Employees Prescription Program at the proposed reimbursement level, for the purpose of increasing the level of reimbursement offered by the State of New York under the Employees Prescription Program.

PAR. 11. Respondent has restrained competition among pharmacy firms by conspiring among its members and with others, and respondent has restrained competition by acting as a combination of its members, to increase the price paid to participating pharmacies under the Employees Prescription Program and to deny to the State the benefits of competition.

PAR. 12. The combination or conspiracies and the acts and practices described above have unreasonably restrained and continue unreasonably to restrain competition among pharmacists and pharmacies in New York, and have injured consumers in the following ways, among others:

A. Price competition among pharmacy firms with respect to third-party prescription benefit plans has been and continues to be reduced;

B. The State of New York was coerced into raising the prices paid to pharmacies under the Employees Prescription Program; and,

C. The State of New York has been and continues to be forced to pay substantial additional sums for prescription drugs provided to Employees Prescription Program beneficiaries, including approximately seven million dollars for the eighteen-month period beginning on July 1, 1986.

PAR. 13. The combination or conspiracies and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination of conspiracies, or the effects thereof, are continuing, will continue, or will recur in the absence of the relief herein requested.

Commissioner Azcuenaga dissenting.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of the complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of 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, 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 Pharmaceutical Society of Orange County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at the place of business or home of one of its officers.

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

#### ORDER

##### I.

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

A. "*PSOC*" means the Pharmaceutical Society of Orange County and its directors, committees, officers, representatives, agents, employees, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("*Covered Persons*"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefits programs for government employees, retirees and dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharma-

cies, including the directors, officers, employees, and agents, of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "*subsidiary*", "*affiliate*", and "*joint venture*" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

## II.

*It is ordered*, That PSOC, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, organizing, encouraging, continuing, cooperating in, or carrying out any agreement between or among pharmacy firms, either express or implied, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, continuing a formal or informal meeting of representatives of pharmacy firms after 1) any person makes any statement concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement and PSOC fails to eject such person from the meeting, or 2) two persons make such statements;

C. For a period of ten (10) years after the date this order becomes final, communicating to any pharmacist or pharmacy firm any information concerning any other pharmacy firm's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; and

D. For a period of eight (8) years after the date this order becomes final, providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit PSOC from communicating purely

factual information describing the terms and conditions of any participation agreement or operations of any third-party payers.

*Provided*, that nothing in this order shall be construed to prevent PSOC from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body, concerning legislation, rules, programs or procedures, or to participate in any federal or state administrative or judicial proceeding.

### III.

*It is further ordered*, That PSOC:

A. Distribute by first-class mail a copy of this order and the accompanying complaint to each of its members within thirty (30) days after the date this order becomes final;

B. Publish this order and the accompanying complaint in an issue of the PSOC newsletter or in any successor publication published no later than sixty (60) days after the date this order becomes final, in the same type size normally used for articles that are published in the PSOC newsletter or successor publication;

C. For a period of five (5) years after the date this order becomes final, provide each new PSOC member with a copy of this order at the time the member is accepted into membership;

D. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to PSOC, require, setting forth in detail the manner and form in which it has complied and is complying with the order;

E. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including, but not limited to, all documents generated by PSOC or that come into PSOC's possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

F. Notify the Commission at least thirty (30) days prior to any proposed change in PSOC such as, assignment or sale resulting in the emergence of a successor corporation or association, change of name,

change of address, dissolution, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting.

IN THE MATTER OF  
WESTCHESTER COUNTY PHARMACEUTICAL SOCIETY, INC.

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

*Docket C-3293. Complaint, July 9, 1990—Decision, July 9, 1990*

This consent order prohibits, among other things, the pharmaceutical society from organizing or entering into any agreement among pharmacy firms to withdraw from or refuse to enter into a third-party payer prescription drug plan; for ten years, from continuing any meeting of representatives of pharmacy firms at which any person makes any statement concerning whether any firm will enter into or refuse to enter into any third-party payer prescription drug plan; and for eight years, from providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of entering into or refusing to enter into any third-party payer prescription drug plan.

*Appearances*

For the Commission: *Karen G. Bokart* and *Michael D. McNeely*.

For the respondent: *Marvin Lange, Roesnman & Colin*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Westchester County Pharmaceutical Society, Inc. has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Westchester County Pharmaceutical Society is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office located at 111 Main Street, Dobbs Ferry, New York. Respondent is an association of pharmacists who practice or reside in Westchester County, New York, or adjacent areas. In 1986, respondent was affiliated with the Pharmaceutical Society of the State of New York, Inc. ("PSSNY").

PAR. 2. Members of respondent hold ownership interests in pharmacy firms that, except to the extent that competition has been restrained as alleged herein, have been and now are in competition with each other and with other pharmacy firms and other health care providers in the State of New York.

PAR. 3. Respondent's general business or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent is and has been, at all times relevant to this complaint, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy for the prescription according to a predetermined formula. The New York State Employees Prescription Program is a prescription drug benefit plan made available by the State of New York to its employees, its retirees, certain other persons, and their dependents. There were approximately 500,000 beneficiaries covered by the Employees Prescription Program in 1986. Since July 1, 1986, The Equitable Life Assurance Society of the United States has insured the Employees Prescription Program, and PAID Prescriptions, Inc., a wholly-owned subsidiary of Medco Containment Services, Inc., has administered it.

PAR. 6. Pharmacies are solicited to participate in the Employees Prescription Program. Pharmacies that participate in the Employees Prescription Program accept as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. The Employees Prescription Program provides a formula for determining the reimbursement of the ingredient cost of drugs dispensed.

PAR. 7. Absent collusion between or among pharmacy firms, each pharmacy firm would decide independently whether to participate in the Employees Prescription Program, and the State of New York would enjoy the benefits of competition among pharmacy firms.

PAR. 8. In May 1986, PAID Prescriptions, Inc. formally solicited pharmacy participation in the Employees Prescription Program under terms to become effective on July 1, 1986. Among the proposed terms were changes in the reimbursement level for ingredient costs, an increase in the professional fee, and the offer of additional reimburse-

ment for the use of generic drugs. The proposed terms were intended to reduce the price the State paid for the Employees Prescription Program, and thus minimize costs, and yet to offer reimbursement high enough to attract a sufficient number of participating pharmacies to ensure that Employees Prescription Program beneficiaries would have adequate access to medication.

PAR. 9. In 1986, members of respondent held ownership interests in pharmacy firms that participated in many prescription drug benefit plans offered by third-party payers, including the Employees Prescription Program as it existed prior to July 1. Such pharmacy firms would have suffered a significant loss of customers had their competitors participated in the Employees Prescription Program at a time when they were not participating.

PAR. 10. New York State informed respondent PSSNY of the proposed terms of the Employees Prescription Program and respondent PSSNY communicated this information to its affiliated societies, including respondent. Respondent held meetings at which owners of pharmacy firms informed other owners of pharmacy firms that they would not participate in the proposed Employees Prescription Program. Respondent communicated to pharmacists and pharmacy owners information regarding the intentions of pharmacy firms located throughout the state concerning participation in the Employees Prescription Program. Respondents exhorted pharmacy owners to refuse to participate in the proposed Employees Prescription Program. Through these exchanges of information and other acts, and through the activities of respondent, pharmacy-owning members of respondent and other owners of pharmacy firms agreed to refuse to participate in the Employees Prescription Program at the proposed reimbursement level, for the purpose of increasing the level of reimbursement offered by the State of New York under the Employees Prescription Program.

PAR. 11. Respondent has restrained competition among pharmacy firms by conspiring among its members and with others, and respondent has restrained competition by acting as a combination of its members, to increase the price paid to participating pharmacies under the Employees Prescription Program and to deny to the State the benefits of competition.

PAR. 12. The combination or conspiracies and the acts and practices described above have unreasonably restrained and continue unreasonably to restrain competition among pharmacists and pharmacies in New York, and have injured consumers in the following ways, among others:

A. Price competition among pharmacy firms with respect to third-party prescription benefit plans has been and continues to be reduced;

B. The State of New York was coerced into raising the prices paid to pharmacies under the Employees Prescription Program; and,

C. The State of New York has been and continues to be forced to pay substantial additional sums for prescription drugs provided to Employees Prescription Program beneficiaries, including approximately seven million dollars for the eighteen-month period beginning on July 1, 1986.

PAR. 13. The combination or conspiracies and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination of conspiracies, or the effects thereof, are continuing, will continue, or will recur in the absence of the relief herein requested.

Commissioner Azcuenaga dissenting.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of the complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of 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, 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 Westchester County Pharmaceutical Society, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 111 Main Street, Dobbs Ferry, New York.

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

#### ORDER

##### I.

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

A. "*WCPS*" means the Westchester County Pharmaceutical Society and its directors, committees, officers, representatives, agents, employees, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("*Covered Persons*"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefits programs for government employees, retirees and dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharma-

cies, including the directors, officers, employees, and agents, of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "*subsidiary*", "*affiliate*", and "*joint venture*" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

## II.

*It is ordered*, That WCPS, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, organizing, encouraging, continuing, cooperating in, or carrying out any agreement between or among pharmacy firms, either express or implied, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, continuing a formal or informal meeting of representatives of pharmacy firms organized, sponsored or encouraged by WCPS after 1) any person makes a statement concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement and WCPS fails to eject such person from the meeting, or 2) two persons make such statements;

C. For a period of ten (10) years after the date this order becomes final, communicating to any pharmacist or pharmacy firm any information concerning any other pharmacy firm's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; and

D. For a period of eight (8) years after the date this order becomes final, providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit WCPS from communicating purely

factual information describing the terms and conditions of any participation agreement or operations of any third-party payers.

*Provided*, that nothing in this order shall prevent WCPS from exercising rights protected under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules, procedures, plans or programs, or to participate in any federal or state administrative or judicial proceeding.

### III.

*It is further ordered*, That WCPS:

A. Distribute by first-class mail a copy of this order and the accompanying complaint to each of its members within thirty (30) days after the date this order becomes final;

B. Publish this order and the accompanying complaint in an issue of the WCPS newsletter or in any successor publication published no later than sixty (60) days after the date this order becomes final, in the same type size normally used for articles that are published in the WCPS newsletter or successor publication;

C. For a period of five (5) years after the date this order becomes final, provide each new WCPS member with a copy of this order at the time the member is accepted into membership;

D. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to WCPS, require, setting forth in detail the manner and form in which it has complied and is complying with the order;

E. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including, but not limited to, all documents generated by WCPS or that come into WCPS' possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

F. Notify the Commission at least thirty (30) days prior to any proposed change in WCPS such as, assignment or sale resulting in the emergence of a successor corporation or association, change of name,

change of address, dissolution, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting.

IN THE MATTER OF

PHARMACEUTICAL SOCIETY OF THE  
STATE OF NEW YORK, INC.

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

*Docket C-3294. Complaint, July 9, 1990—Decision, July 9, 1990*

This consent order prohibits, among other things, the pharmaceutical society from organizing or entering into any agreement among pharmacy firms to withdraw from or refuse to enter into any third-party payer prescription drug plan; for ten years, from continuing any meeting of representatives of pharmacy firms at which any person makes any statement concerning whether any firm will enter into or refuse to enter into any third-party payer prescription drug plan; and for eight years, from providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of entering into or refusing to enter into any third-party payer prescription drug plan.

*Appearances*

For the Commission: *Karen G. Bokat and Michael D. McNeely.*

For the respondent: *Paul Collins, Hinman, Straub, Pigors & Manning, PC, Albany, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Pharmaceutical Society of the State of New York, Inc. has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Pharmaceutical Society of the State of New York, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office located at Pine West Plaza IV, Washington Avenue Extension, Albany, New York. Respondent is an association of pharmacists who practice or reside in New York state. In 1986,

respondent was affiliated with numerous local, county, and specialty pharmacy societies.

PAR. 2. Members of respondent hold ownership interests in pharmacy firms that, except to the extent that competition has been restrained as alleged herein, have been and now are in competition with each other and with other pharmacy firms and other health-care providers in the State of New York.

PAR. 3. Respondent's general business or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent is and has been, at all times relevant to this complaint, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy for the prescription according to a predetermined formula. The New York State Employees Prescription Program ("Employees Prescription Program") is a prescription drug benefit plan made available by the State of New York to its employees, its retirees, certain other persons, and their dependents. There were approximately 500,000 beneficiaries covered by the Employees Prescription Program in 1986. Since July 1, 1986, The Equitable Life Assurance Society of the United States has insured the Employees Prescription Program, and PAID Prescriptions, Inc., a wholly-owned subsidiary of Medco Containment Services, Inc., has administered it.

PAR. 6. Pharmacies are solicited to participate in the Employees Prescription Program. Pharmacies that participate in the Employees Prescription Program accept as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. The Employees Prescription Program provides a formula for determining the reimbursement of the ingredient cost of drugs dispensed.

PAR. 7. Absent collusion between or among pharmacy firms, each pharmacy firm would decide independently whether to participate in the Employees Prescription Program, and the State of New York would enjoy the benefits of competition among pharmacy firms.

PAR. 8. In May 1986, PAID Prescriptions, Inc. formally solicited pharmacy participation in the Employees Prescription Program under terms to become effective on July 1, 1986. Among the proposed terms

were changes in the reimbursement level for ingredient costs, an increase in the professional fee, and the offer of additional reimbursement for the use of generic drugs. The proposed terms were intended to reduce the price the State paid for the Employees Prescription Program, and thus minimize costs, and yet to offer reimbursement high enough to attract a sufficient number of participating pharmacies to ensure that Employees Prescription Program beneficiaries would have adequate access to medication.

PAR. 9. In 1986, members of respondent held ownership interests in pharmacy firms that participated in many prescription drug benefit plans offered by third-party payers, including the Employees Prescription Program as it existed prior to July 1. Such pharmacy firms would have suffered a significant loss of customers had their competitors participated in the Employees Prescription Program at a time when they were not participating.

PAR. 10. New York State informed respondent of the proposed terms of the Employees Prescription Program and respondent communicated this information to its members and its affiliated societies. Respondent held meetings at which owners of pharmacy firms informed other owners of pharmacy firms that they would not participate in the proposed Employees Prescription Program. Respondent communicated to pharmacists and pharmacy owners information regarding the intentions of pharmacy firms located throughout the state concerning participation in the Employees Prescription Program. Respondent exhorted pharmacy owners to refuse to participate in the proposed Employees Prescription Program. Through these exchanges of information and other acts, and through the activities of respondent, pharmacy-owning members of respondent and other owners of pharmacy firms agreed to refuse to participate in the Employees Prescription Program at the proposed reimbursement level, for the purpose of increasing the level of reimbursement offered by the State of New York under the Employees Prescription Program.

PAR. 11. Respondent has restrained competition among pharmacy firms by conspiring among its members and with others, and respondent has restrained competition by acting as a combination of its members, to increase the price paid to participating pharmacies under the Employees Prescription Program and to deny to the State the benefits of competition.

PAR. 12. The combination or conspiracies and the acts and practices described above have unreasonably restrained and continue unreason-

ably to restrain competition among pharmacists and pharmacies in New York, and have injured consumers in the following ways, among others:

A. Price competition among pharmacy firms with respect to third-party prescription benefit plans has been and continues to be reduced;

B. The State of New York was coerced into raising the prices paid to pharmacies under the Employees Prescription Program; and,

C. The State of New York has been and continues to be forced to pay substantial additional sums for prescription drugs provided to Employees Prescription Program beneficiaries, including approximately seven million dollars for the eighteen-month period beginning on July 1, 1986.

PAR. 13. The combination or conspiracies and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracies, or the effects thereof, are continuing, will continue, or will recur in the absence of the relief herein requested.

Commissioner Azcuenaga dissenting.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of the complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of 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, 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 Pharmaceutical Society of the State of New York, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at Pine West Plaza IV, Washington Avenue Extension, Albany, New York.

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

#### ORDER

##### I.

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

A. "PSSNY" means the Pharmaceutical Society of the State of New York and its directors, committees, officers, representatives, agents, employees, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("*Covered Persons*"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and any of the above which contract with the State of New York or other governmental units to provide health benefits programs for government employees, retirees and dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment

from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents, of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "*subsidiary*", "*affiliate*", and "*joint venture*" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

## II.

*It is ordered*, That PSSNY, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, organizing, encouraging, continuing, cooperating in, or carrying out any agreement between or among pharmacy firms, either express or implied, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, organizing, sponsoring, or facilitating a meeting that PSSNY expects or reasonably should expect will facilitate communications concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement, or from continuing a meeting of representatives of pharmacy firms at which: 1) PSSNY fails to eject from the meeting a person who makes any such communication; or 2) two persons make any such communications;

C. For a period of ten (10) years after the date this order becomes final, communicating to any pharmacist or pharmacy firm any information concerning any other pharmacy firm's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to

withdraw from, or withdrawing from any existing or proposed participation agreement;

D. For a period of eight (8) years after the date this order becomes final, providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit PSSNY from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payers; and

*Provided*, that nothing in this order shall be construed to prevent PSSNY from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body, concerning legislation, rules, programs or procedures, or to participate in any federal or state administrative or judicial proceeding.

### III.

*It is further ordered*, That PSSNY:

A. Distribute by first-class mail a copy of this order and the accompanying complaint to each of its members within thirty (30) days after the date this order becomes final;

B. Publish this order and the accompanying complaint in an issue of the PSSNY newsletter or in any successor publication published no later than sixty (60) days after the date this order becomes final, in the same type size normally used for articles that are published in the PSSNY newsletter or successor publication;

C. For a period of five (5) years after the date this order becomes final, provide each new PSSNY member with a copy of this order at the time the member is accepted into membership;

D. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to PSSNY, require, setting forth in detail the manner and form in which it has complied and is complying with the order;

E. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by

Parts II and III of this order, including, but not limited to, all documents generated by PSSNY or that come into PSSNY's possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

F. Notify the Commission at least thirty (30) days prior to any proposed change in PSSNY such as, assignment or sale resulting in the emergence of a successor corporation or association, change of name, change of address, dissolution, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting.

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Complaint

IN THE MATTER OF

LONG ISLAND PHARMACEUTICAL SOCIETY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3295. Complaint, July 9, 1990—Decision, July 9, 1990*

This consent order prohibits, among other things, the pharmaceutical society from organizing or entering into any agreement among pharmacy firms to withdraw from or refuse to enter into a third-party payer prescription drug plan; for ten years, from continuing any meeting of representatives of pharmacy firms at which any person makes any statement concerning whether any firm will enter into or refuse to enter into any third-party payer prescription drug plan; and for eight years, from providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of entering into or refusing to enter into any third-party payer prescription drug plan.

*Appearances*

For the Commission: *Karen G. Bokat* and *Michael D. McNeely*.

For the respondent: *Scott Malin, Goldberg & Connolly*, Rockville Center, N.Y.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Long Island Pharmaceutical Society, Inc. has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Long Island Pharmaceutical Society, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office located at 66 North Village Avenue, Rockville Centre, New York. Respondent is an association of pharmacists who maintain a community pharmacy in the State of New York, and the supervising pharmacists of pharmacies owned by corporations or other nonphar-

macists. In 1986, respondent was affiliated with the Empire State Pharmaceutical Society, Inc., as well as the Pharmaceutical Society of the State of New York, Inc. ("PSSNY").

PAR. 2. Members of respondent hold ownership interests in pharmacy firms that, except to the extent that competition has been restrained as alleged herein, have been and now are in competition with each other and with other pharmacy firms and other health care providers in the State of New York.

PAR. 3. Respondent's general business or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent is and has been, at all times relevant to this complaint, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy for the prescription according to a predetermined formula. The New York State Employees Prescription Program ("Employees Prescription Program") is a prescription drug benefit plan made available by the State of New York to its employees, its retirees, certain other persons, and their dependents. There were approximately 500,000 beneficiaries covered by the Employees Prescription Program in 1986. Since July 1, 1986, The Equitable Life Assurance Society of the United States has insured the Employees Prescription Program, and PAID Prescriptions, Inc., a wholly-owned subsidiary of Medco Containment Services, Inc., has administered it.

PAR. 6. Pharmacies are solicited to participate in the Employees Prescription Program. Pharmacies that participate in the Employees Prescription Program accept as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. The Employees Prescription Program provides a formula for determining the reimbursement of the ingredient cost of drugs dispensed.

PAR. 7. Absent collusion between or among pharmacy firms, each pharmacy firm would decide independently whether to participate in the Employees Prescription Program, and the State of New York would enjoy the benefits of competition among pharmacy firms.

PAR. 8. In May 1986, PAID Prescriptions, Inc. formally solicited pharmacy participation in the Employees Prescription Program under

terms to become effective on July 1, 1986. Among the proposed terms were changes in the reimbursement level for ingredient costs, an increase in the professional fee, and the offer of additional reimbursement for the use of generic drugs. The proposed terms were intended to reduce the price the State paid for the Employees Prescription Program, and thus minimize costs, and yet to offer reimbursement high enough to attract a sufficient number of participating pharmacies to ensure that Employees Prescription Program beneficiaries would have adequate access to medication.

PAR. 9. In 1986, members of respondent held ownership interests in pharmacy firms that participated in many prescription drug benefit plans offered by third-party payers, including the Employees Prescription Program as it existed prior to July 1. Such pharmacy firms would have suffered a significant loss of customers had their competitors participated in the Employees Prescription Program at a time when they were not participating.

PAR. 10. New York State informed PSSNY of the proposed terms of the Employees Prescription Program and PSSNY communicated this information to its affiliated societies, including respondent. Respondent held meetings at which owners of pharmacy firms informed other owners of pharmacy firms that they would not participate in the proposed Employees Prescription Program. Respondent communicated to pharmacists and pharmacy owners information regarding the intentions of pharmacy firms located throughout the state concerning participation in the Employees Prescription Program. Through these exchanges of information and other acts, and through the activities of respondent, pharmacy-owning members of respondent and other owners of pharmacy firms agreed to refuse to participate in the Employees Prescription Program at the proposed reimbursement level, for the purpose of increasing the level of reimbursement offered by the State of New York under the Employees Prescription Program.

PAR. 11. Respondent has restrained competition among pharmacy firms by conspiring among its members and with others, and respondent has restrained competition by acting as a combination of its members, to increase the price paid to participating pharmacies under the Employees Prescription Program and to deny to the State the benefits of competition.

PAR. 12. The combination or conspiracies and the acts and practices described above have unreasonably restrained and continue unreasonably to restrain competition among pharmacists and pharmacies in

New York, and have injured consumers in the following ways, among others:

A. Price competition among pharmacy firms with respect to third-party prescription benefit plans has been and continues to be reduced;

B. The State of New York was coerced into raising the prices paid to pharmacies under the Employees Prescription Program; and,

C. The State of New York has been and continues to be forced to pay substantial additional sums for prescription drugs provided to Employees Prescription Program beneficiaries, including approximately seven million dollars for the eighteen-month period beginning on July 1, 1986.

PAR. 13. The combination or conspiracies and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracies, or the effects thereof, are continuing, will continue, or will recur in the absence of the relief herein requested.

Commissioner Azcuenaga dissenting.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of the complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of 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, 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 Long Island Pharmaceutical Society, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 66 North Village Avenue, Rockville Centre, New York.

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

#### ORDER

##### I.

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

A. "*LIPS*" means the Long Island Pharmaceutical Society and its directors, committees, officers, representatives, agents, employees, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("*Covered Persons*"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefits programs for government employees, retirees and dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or

corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents, of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "*subsidiary*", "*affiliate*", and "*joint venture*" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

## II.

*It is ordered*, That LIPS, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, organizing, encouraging, continuing, cooperating in, or carrying out any agreement between or among pharmacy firms, either express or implied, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, continuing a formal or informal meeting of representatives of pharmacy firms after 1) any person makes any statement concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement and LIPS fails to eject such person from the meeting, or 2) two persons make such statements;

C. For a period of ten (10) years after the date this order becomes final, communicating to any pharmacist or pharmacy firm any information concerning any other pharmacy firm's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; and

D. For a period of eight (8) years after the date this order becomes final, providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of participating in any

existing or proposed participation agreement. However, nothing in this paragraph shall prohibit LIPS from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payers.

*Provided*, that nothing in this order shall be construed to prevent LIPS from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body, concerning legislation, rules, programs or procedures, or to participate in any federal or state administrative or judicial proceeding.

### III.

*It is further ordered*, That LIPS:

A. Publish this order and the accompanying complaint in an issue of the LIPS newsletter or in any successor publication published no later than sixty (60) days after the date this order becomes final, in the same type size normally used for articles that are published in the LIPS newsletter or successor publication;

B. For a period of five (5) years after the date this order becomes final, provide each new LIPS member, at the time the member is accepted into membership, with a copy of the LIPS newsletter in which this order and the accompanying complaint was published as required by Paragraph III.A.;

C. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to LIPS, require, setting forth in detail the manner and form in which it has complied and is complying with the order;

D. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including, but not limited to, all documents generated by LIPS or that come into LIPS' possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

E. Notify the Commission at least thirty (30) days prior to any proposed change in LIPS such as, assignment or sale resulting in the

emergence of a successor corporation or association, change of name, change of address, dissolution, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting.

## IN THE MATTER OF

TV INC., ET AL.

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

*Docket C-3296. Complaint, July 25, 1990—Decision, July 25, 1990*

This consent order prohibits, among other things, a Largo, Fla. advertiser of bee pollen products from misrepresenting that any advertisement is an independent program and not an advertisement, from claiming that bee pollen will not cause allergic reactions, and from representing that the product has been used as an effective allergy treatment or analgesic. Respondents are required, for a period of ten years, to present, at the beginning of any television advertisement that is fifteen minutes or more in length and prior to any ordering instructions, a disclosure statement that the program is a paid advertisement. In addition, respondents are required to have competent and reliable scientific evidence for all future claims concerning any product's effect on the user's health or physical condition.

*Appearances*

For the Commission: *Brinley H. Williams* and *Mark D. Kindt*.

For the respondents: *James H. Sneed, McDermott, Will & Emery*,  
Washington, D.C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that TV Inc., a corporation, and William Thompson, individually and as an officer of said corporation, "respondents," have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent TV Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office or principal place of business located at #7, 11100 66th Street North, Largo, Florida.

Respondent William Thompson is an officer of the corporate respondent named herein. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and

practices hereinafter set forth. His address is the same as that of said corporation.

PAR. 2. Respondents have advertised, offered for sale, sold or distributed food products, including bee pollen products (various products containing bee pollen, and/or bee propolis, and/or royal jelly) intended for human consumption.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondents have disseminated or caused to be disseminated advertisements for bee pollen products, which are "foods" within the meaning of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52. These advertisements have been disseminated by various means in or affecting commerce, including but not limited to television broadcasts transmitted across state lines, for the purpose of inducing the purchase of such foods by members of the public.

PAR. 5. Typical of respondent's advertisements, but not necessarily all-inclusive thereof, is the advertisement attached hereto as Exhibit A (the audio portion of which has been transcribed and attached hereto as Exhibit B). The aforesaid advertisement and others contain the following statements and depictions:

(A) Title of 30-minute television program: *TV Insiders*. (Exhibits A and B, audio and video portions of television commercial.)

(B) MR. INNEO: "Hello, my name is Vince Inneo, your inside information investigator. Welcome to this very special edition of *TV Insiders*. No matter what walk of life or what the subject, it's no secret that having inside information keeps you steps ahead of the others. That's why we're here. This installment is critically important. Many of you have written possibly the most valuable inside information we have yet uncovered. Here are some of the hundreds of letters asking us or telling us about a 73 year old Phoenix, Arizona man who many have claimed has rediscovered nature's formula for youth. Listen to some of these amazing stories." (Exhibits A and B, audio and video portions of television commercial.)

(C) MR. INNEO: "I may restate something. It's your cards and your letters alerting *TV Insiders* to new discoveries, interesting people and inside information. We need inside information. You tell me the stories and what you've heard; we will research it, investigate it, and then we will share our findings with everyone. If we use your information, we will send you a *TV Insider* investigator's card. This you can count on. So until next mission, this is your inside investigator, Vince Inneo, wishing you good health and God's blessings." (Exhibits A and B, audio and video portions of television commercial.)

(D) Statements and depictions of apparent, unpaid, spontaneous, and unscripted interviews between Vince Inneo and "Dr." Gary Null, Ms. Carol Brown, and Mr. Royden Brown. (Exhibits A and B, audio and video portions of television commercial.)

(E) Statements and depictions that users of bee pollen products have submitted

unsolicited testimonials to *TV Insiders* and that the testimonials presented on the program are fairly representative of general responses to bee pollen products. (Exhibits A and B, audio and video portions of television commercial.)

(F) "All materials, whether real or recreated, represent factual events." (Exhibit A, video portion of television commercial.)

PAR. 6. Through the use of the statements and depictions referred to in paragraph five, above, and others in advertisement and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that *TV Insiders* is not a paid-for advertisement, but rather is an independent and objective consumer or news program.

PAR. 7. In truth and in fact, *TV Insiders* is a paid-for advertisement and not an independent and objective consumer or news program.

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

PAR. 8. Typical of respondents' advertisements, but not necessarily all-inclusive thereof, are the advertisements attached hereto as Exhibit A (the audio portion of which has been transcribed and attached hereto as Exhibit B) and Exhibit C. The aforesaid advertisements and others contain the following statements and depictions:

(A) MR. NULL: "Bee pollen is one of the most perfect foods ever found in nature. In fact, it's probably the most concentrated in enzymes. You see, our body functions because of enzymes. You age because you don't produce enough enzymes. So one way to slow down the aging process is to have more enzyme-rich foods. Well, you can't get any better food than bee pollen because it's not cooked, it's not processed; it is loaded with vitamins, minerals, enzymes. In fact, there's one nutrient that it has that can help the inside of your body prevent the capillaries from aging." (Exhibits A and B, audio and video portions of television commercial.)

(B) MR. NULL: "So it's anti-aging." (Exhibits A and B, audio and video portions of television commercial.)

(C) MR. NULL: "There have been a lot of medical studies and scientific studies on the benefit of bee pollen and especially when it comes to aging." (Exhibits A and B, audio and video portions of television commercial.)

(D) MR. INNEO: "...if you, like the people we've heard from and talked to today, want to live a longer, healthier and more vital life, if you want that second chance at life, there is something we can do about it after all." (Exhibits A and B, audio and video portions of television commercial.)

(E) MR. BROWN: "Well, if I were you, I would get three things. First, I would get the Bee-Young tablets. Bee-Young tablets will prevent you from losing your memory. You certainly want to have your memory all the rest of your life. Loss of memory is the first step into the nursing home, and you certainly don't want to do that. The second thing I would get would be the Mountain-High Royal Jelly. Royal Jelly is the greatest rejuvenating and sex stamina food known to man. And you certainly want to

be sexually active all the rest of your life." (Exhibits A and B, audio and video portions of television commercial.)

(F) UNIDENTIFIED SPEAKER: "Pollen Energy 520 capsules restore that missing energy and 24-hour Royal Jelly tablets to keep sexually active at any age." (Exhibits A and B, audio and video portions of television commercial.)

(G) MR. INNEO: "For those people who are allergic to pollen, will they be able to use Mountain-High bee pollen?"

MR. BROWN: "Bee pollen, according to Leo N. Conway, M.D. in Denver, Colorado, an allergist, says that bee pollen is the best reliever of allergies that he's ever found. He's had over sixty thousand patients documented and 94 percent of them were completely relieved of the symptoms by ingesting the bee pollen."

MR. INNEO: "Never have pollen-related allergies again?"

MR. BROWN: "Never have pollen allergy symptoms again, rest of your life." (Exhibits A and B, audio and video portions of television commercial.)

(H) MR. INNEO: "I've heard from people that Mountain-High bee pollen helps them lose weight. Can you tell me how?"

MR. BROWN: "Well, Mountain-High bee pollen has all the nutrients you need for perfect health. So when you eat the Mountain-High bee pollen before each meal, it satisfies your appetite. As a result, you eat a little less food with each meal and you lose weight constantly as long as you're eating Mountain-High bee pollen." (Exhibits A and B, audio and video portions of television commercial.)

(I) "100% Natural Pain Relief—A Health Alternative to Aspirin" (Exhibit C.)

(J) "With just the right blend of Bee Pollen and amino acids in an herbal base, independent research at Energy Factors, Inc. of Florida provides evidence that Alpine Supreme Brand® Arthritis-Strength Pain Relief has what it takes for quick relief of headache or body pain. This food tablet may be taken like aspirin,..." (Exhibit C.)

PAR. 9. Through the use of the statements and depictions referred to in paragraph eight, above, and others in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that:

(A) Consumption of any bee pollen product(s) can not result in an allergic reaction;

(B) Consumption of any bee pollen product(s) such as those advertised on *TV Insiders* has been used to successfully treat allergy patients;

(C) Alpine Supreme Brand Arthritis-Strength Pain Relief is an effective analgesic for human use; and

(D) Respondents possessed and relied upon a reasonable basis, consisting of competent and reliable scientific evidence, for the representations set forth in this paragraph.

PAR. 10. In truth and in fact:

(A) Consumption of bee pollen products can result in an allergic reaction;



(B) Consumption of bee pollen products such as those advertised on *TV Insiders* has not been used to successfully treat allergy patients;

(C) Alpine Supreme Brand Arthritis-Strength Pain Relief is not an effective analgesic for human use; and

(D) Respondents did not possess and rely upon a reasonable basis consisting of competent and reliable scientific evidence for making each representation set forth in paragraph nine.

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

PAR. 11. Through the use of the statements and depictions referred to in paragraph eight, above, and others in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that:

(A) Consumption of any bee pollen product(s) such as those advertised on *TV Insiders* can cure, prevent, or alleviate allergy symptoms;

(B) Consumption of bee pollen products can slow, prevent or reverse the aging process;

(C) Consumption of bee pollen products can cure or prevent impotence and sexual dysfunction;

(D) Consumption of bee pollen products can promote weight loss; and

(E) Consumption of bee pollen products provides effective relief for pain, including arthritis, headache and "body pain."

PAR. 12. Through the use of the statements and depictions set forth in paragraph eight and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph eleven, respondents possessed and relied upon a reasonable basis, consisting of competent and reliable scientific evidence, for each such representation.

PAR. 13. In truth and in fact, at the time respondents made the representations set forth in paragraph eleven, they did not possess and rely upon a reasonable basis, consisting of competent and reliable scientific evidence, for making each such representation. Therefore, respondents' representation as set forth in paragraph twelve were and are false and misleading.

PAR. 14. The acts and practices of respondents as alleged in this complaint, and the placement in the hands of others of the means and instrumentalities by and through which others may have used said

acts and practices, constitute unfair and deceptive acts or practices in or affecting commerce, and the dissemination of false advertisements, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

## EXHIBIT A

Physical exhibit submitted by the Commission—Video tape containing television commercial.

## EXHIBIT B

Transcript of video tape containing television commercial:

## United States Federal Trade Commission

In Re: *TV Insiders*, Video Tape

MR. INNEO: Hello. I'm Vince Inneo, your inside information investigator. Welcome to this very special edition of *TV Insiders*.

No matter what walk of life or what the subject, it's no secret that having inside information keeps you steps ahead of the others. That's why we're here. This installment is critically important. Many of you have written possibly the most valuable inside information we have yet uncovered.

Here are some of the hundreds of letters asking us or telling us about a 73-year-old Phoenix, Arizona man who many of you have claimed has rediscovered nature's formula for youth. Listen to some of these amazing stories.

REV. D.A.L.'s LETTER: I had arthritis in a very painful state in my left foot to the extent that I was limping quite noticeably. Now the arthritic pain has vanished completely. I am now able to walk normally.

PAT PATTEN, HOMEMAKER: I've been using it about a year now. I had dry patches on my face, they are gone. My energy level has increased. I feel great all over. Even my fingernails have grown. It's been a godsend.

FROM DR. F.M.'s LETTER: It helped me a lot. I'm telling the patients that are interested in their health, Keep up the good work.

MR. INNEO: These are only a sampling of the letters from people around the world who want to share this information.

Here is one from Mr. Magnice Beanson in Iceland. He writes that his health had deteriorated to being confined 24 hours a day to a wheelchair. However, today he has regained his health, has left the wheelchair behind, exercises and works a ten-hour day and he is 70 years old.

Mrs. Ragner Breeford of Norway writes of how she suffered ten to twelve days every month with PMS. She would be bedridden for several days at a time. Now she is free of pain for the first time of her adult life. Some have written books. Nohl Johnson's autobiography tells us that at the age of 70 he was about to be committed to a nursing home because he could no longer care for himself. But something

happened. Eighteen years later at the age of 88 he is now participating in the 26-mile New York Marathon and leads a healthy, happy and more vital life.

Look at these letters from advocates the world over who are sharing this discovery, hundreds of them, all documented and some quoted in this book "The World's Only Perfect Food."

But this is the most exciting, a copy of December's Parade Magazine. President Ronald Reagan was asked how he keeps so youthful and why he doesn't have gray hair. The President said his secret comes from something he obtains in Phoenix, Arizona.

President Reagan is the only president I can remember who looks so good, if not better, after eight years as President of the United States in what many claim to be the world's toughest job.

Think about this for a second. Presidents Johnson, Nixon, Ford and Carter all seem to have aged after only four years in the White House.

Stay with me as we fly to Phoenix to meet this mysterious man and uncover the Reagan secret.

But first, let me share with you this interview I had earlier with Miss Carol Brown. Miss Brown was the liaison in the Reagan White House.

MR. INNEO: Hi, Carol. I'm Vince Inneo from TV Insiders.

MS. BROWN: Hi, Vince. It's nice to meet you. Have a seat.

MR. INNEO: Thank you. We have letters from people all over the world telling us that former President Reagan and Mrs. Reagan know about something that reportedly makes people live longer and healthier lives. As liaison to the White House in this area, do you know about this and are you able to talk about it?

MS. BROWN: Yes. I'll be happy to tell you anything you need to know.

MR. INNEO: Is it true then? Is there really something to all this?

MS. BROWN: It's absolutely true.

MR. INNEO: And former President Ronald Reagan and Mrs. Reagan are ardent advocates?

MS. BROWN: That's also true. I have a letter here from Mrs. Reagan and her picture. She's a wonderful lady.

MR. INNEO: Okay. Carol, what is it? What is the Reagan secret?

MS. BROWN: It's Bee Pollen much of which comes from mountainous areas.

MR. INNEO: Bee Pollen will really do all this for you?

MS. BROWN: That and more.

MR. INNEO: Now, you say mountainous areas of the world. Does this really make a difference?

MS. BROWN: Oh, yes. Bee Pollen from high altitudes is much richer there and more potent. Just ask Dr. Gary Null. He knows everything Bee Pollen can do for you.

MR. INNEO: Who else knows about this secret?

MS. BROWN: The Queen of England and the Royal family have been consuming Bee Pollen products for generations. In a recent January article they reported about Lady Di's consumption of Royal Jelly.

MR. INNEO: Can I walk into any health food store and purchase Mountain-High Bee Pollen?

MS. BROWN: Mountain-High Bee Pollen is rather an exclusive item and you must contact the maker directly.

MR. INNEO: Well, thank you, Carol. This inside information has really been of tremendous help to us. I appreciate the time that you spent with us.

MS. BROWN: Thank you. It's been my pleasure.

MR. INNEO: Now you know why we're going to Phoenix. Mountain-High Bee Pollen. Listen to what health and nutritional expert Dr. Gary Null has to say about it.

In the last 20 years Gary Null has written not less than 51 books, three of which are presently on the best seller's list. He is a research scientist in the field of nutrition, and publishes the Natural Living Newsletter. He's a world class lecturer at colleges and universities. He has appeared on such shows as the Phil Donahue Show, the Tonight and Today shows and has his own radio and TV shows.

He is also a health food columnist for national publications.

Materials from his investigations have been used by 20/20 and 60 Minutes.

Gary Null knows his stuff. He practices what he preaches. Via satellite this is my Insider interview with Dr. Gary Null.

Gary, this is Vince Inneo with TV Insiders. Thank you for giving us the opportunity to talk to you.

MR. NULL: Thank you very much for inviting me. I'm happy to share any information on Bee Pollen that might help the people in the audience. What questions do you have?

MR. INNEO: To be very honest with you, Gary, until the Insider team received so many letters about Mountain-High Bee Pollen's Company, I'd never heard of it. My question is why, if Mountain-High Bee Pollen is supposed to be so good for you, why haven't we heard more about it?

MR. NULL: The reason that we haven't heard more about Bee Pollen is that we have taken a pharmaceutical look at disease, we haven't emphasized wellness, and it's only now that we're beginning to examine the role of vitamins and minerals, Vitamin C and Vitamin E and B-6 and even some of the exotic nutrients like Conizon Q-10, Germanian and Carnitine for our good health.

Well, if there is not a way of profiting by exclusively being able to patent a product and market it under your own brand name, then why promote it? You don't want something that everyone can find that's inexpensive—Bee Pollen's inexpensive, Royal Jelly's inexpensive—that's readily available, but also there's not a supply enough for everyone. That's why the pharmaceutical industry has not jumped on the bandwagon. With a drug you can take even an herb, and you can make a chemical extract.

And here's something you should know. This substantiates Bee Pollen's importance. Time and again they've tried to chemically in a laboratory duplicate Bee Pollen and Royal Jelly, and they have failed every time. They can't get the same results, which is telling us that nature provided the Bee Pollen and Royal Jelly was some intrinsic factor, some mysterious factor, that science cannot duplicate. And that's why it's so perfect.

But again you don't have enough Bee Pollen and you don't have enough Royal Jelly to feed everyone who can benefit from it. So it's kind of an Insiders' health secret.

MR. INNEO: What exactly is Bee Pollen?

MR. NULL: Bee Pollen is one of the most perfect foods ever found in nature. In fact, it's probably the most concentrated in enzymes. You see, our body functions because of enzymes. You age because you don't produce enough enzymes. So one way to slow down the aging process is to have more enzyme-rich foods. That's why fresh juices and raw foods are better than over-processed and cooked foods.

Well, you can't get any better food than Bee Pollen because it's not cooked, it's not processed; it is loaded with vitamins, minerals, enzymes. In fact, there's one nutrient that it has that can help the inside of your body prevent the capillaries from aging.

Did you ever notice when you hit at yourself you bruise? Well, it could be a deficiency of biofabnoids, and one way of getting the biofabnoids is through Bee Pollen because you're getting rutin.

Rutin has been shown to help the fergilities capillaries. Therefore, you don't get those little splotches on the legs and wherever you might bruise. So it's anti-aging.

Now, the bees go out, they collect from these beautiful flowers, they collect the pollen. They bring the pollen back, and 60 percent to 70 percent is kept for the person collecting it and 30 percent is allowed to remain with the bees because that's what they eat. Because after all, as good as it is for humans, it's the life thread for the bees, and that's what we benefit from.

MR. INNEO: TV Insiders' investigation team has seen letters from people throughout the world claiming they not only look and feel younger, but their friends and family have noticed changes. Is it reasonable for people to really expect to live longer and healthier lives by adding Mountain-High Bee Pollen to their daily regimen?

MR. NULL: I think it's entirely reasonable. Gloria Swanson, the famous actress who's a very good friend of mine, she looked magnificent with no facelifts. Her skin, if you saw her up close, her hands and her face were very, very smooth, almost like a baby's. She had Bee Pollen and Royal Jelly twice a day, and she would rely and say, Gary, this is part of my secret. It wasn't the only thing, but it was a primary part.

And throughout centuries people who have lived around bee hives or who have been the aviary keepers, people who have farmed bees, these are the people who have had really long, vital lives and have looked better.

And Loni Anderson commented in an article that one of the reasons she keeps her health, along with a good diet and the exercise, is she includes Bee Pollen.

MR. INNEO: Okay. Let me put it to you directly. I start using Mountain-High Bee Pollen today, what can I look forward to? What can I honestly expect?

MR. NULL: I think reasonably we could expect to enhance our overall well-being. It's not always easy to measure because some of the changes are subtle.

For instance, when you're ten years older and you've been eating right and you've been exercising and you've been taking the Bee Pollen or Royal Jelly and you don't look the same age as your contemporaries, when you don't feel the same way, when you have boundless energy, when you don't go through those up-and-downs, those peaks and valleys that you normally would, when instead of needing a cup of coffee, you have sustained energy, when your sex life is improved, do you ascribe that just to Bee Pollen?

Well, you can ascribe some of it possibly to Bee Pollen. It certainly will do two things. It will certainly enhance our overall well-being because we are what we eat, we're what we breathe, we're what we drink and we're what we think. Positive living, positive diet and a positive amount of Bee Pollen, I feel, enhances the total quality of life.

MR. INNEO: The Insiders' message is becoming clear. If you do nothing else, if you can't or won't exercise, if you're interested in your well-being but you're not willing to jump on the health food mega-vitamin bandwagon, if you're concerned about the side effects of adding unnatural, manufactured or artificial vitamins or chemical supplements to your diet, if you, like the other people we've heard from and spoken to,

want to live longer, healthier and happier lives, if you want that second chance at life, there is something you can do.

I'll be right back after this message.

UNIDENTIFIED SPEAKER: Mountain-High Bee Pollen is available exclusively from the maker. It is not sold in stores. Call now to receive your whole 30-day supply of Mountain-High Bee-Young Wafers. Stay young and alert throughout your life. Pollen Energy 520 capsules restore that missing energy and 24-hour Royal Jelly tablets to keep sexually active at any age.

Also receive as our gift a President's and a First Lady's lunch bar. To start feeling young, energetic and vital again, simply take one Bee-Young Wafer and one Pollen Energy 520 capsule with each meal. Take one Royal Jelly capsule before bedtime. Unlock nutrient shortages in your body and reawaken parts of your system long neglected.

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Have your credit card handy and call now 1-800-423-1800. 1-800-423-1800. That's 1-800-423-1800. Call now.

MR. INNEO: Welcome back to TV Insiders and our conversation with Dr. Gary Null.

Gary, is Mountain-High Bee Pollen a drug, and are there any side effects to worry about?

MR. NULL: Oh, absolutely not. Bee Pollen is not a drug. It's 100 percent natural. It's organic. It's loaded with good nutrition. The only side effect of eating Bee Pollen is improved well-being.

MR. INNEO: Can you cite specific medical or scientific studies which are proof positive that Mountain-High Bee Pollen leads to a longer, healthier life?

MR. NULL: There have been a lot of medical studies and scientific studies on the benefit of Bee Pollen and especially when it comes to the aging.

One of the men who first studied Bee Pollen was a man named Dr. Price. And Dr. Price studied a group of people called the Hunzacotts. The Hunzacotts lived in an area called Hunza.

Now, if you remember Hilton's movie, Lost Horizons, the movie with Ronald Calbin, well, that Shagri-la was actually a real place, it was called Hunsu. Now, that doesn't mean everything that was in the movie actually happened, but it was based upon real people and those people still exist today. There's some 70,000 who live at an altitude of 10,000 feet in that area of the world, and they have as a part of their diet, and I know because I've interviewed the Premier, the ruler's family Sietkon, and he told me about what they eat, and they eat almost everyday Bee Pollen and Royal Jelly.

So there you had a whole culture that benefited over the centuries, the last 2,000 years, from eating this.

MR. INNEO: With all due respect, isn't there an age level where sexual dysfunction is automatic no matter what you do?

MR. NULL: There is no age to where the sexual apparatus diminishes or dies.

MR. INNEO: Our inside information shows that some Bee Pollen could be better than others. Can Mountain-High Bee Pollen make this claim? Is it really the best?

MR. NULL: No Bee Pollen is the same; please keep that in mind. Much of the pollen in the United States is from the Florida and Texas area, in California where a lot of pesticides can be used and pesticides can get on the Bee Pollen.

The best Bee Pollen comes from your mountainous areas, the mountains of Arizona, the mountains of Wisconsin, of the high area of Indiana, where you have very little pesticides or none at all. In fact, in some of the states they've forbidden pesticides because of the dairy law, which is good, and so you want that. Also the bees are heartier at a higher altitude.

MR. INNEO: So you were saying that Bee Pollen from the mountains is the best?

MR. NULL: The mountainous area is the best.

MR. INNEO: Why would you recommend that people use Mountain-High Bee Pollen over other nutritional supplements?

MR. NULL: Because you're starting off with the best. You're starting off with the most potent, the most balanced, the most whole food that we could take in as a nutritional supplement, and then all the other changes you make in addition to that are only going to enhance your total well-being.

MR. INNEO: Gary, sum up the Insider information for us.

MR. NULL: There is something to this that the American public is not aware of that the rest of the world seems to be taking and has been for a long time. We should be allowed in on this very important nutrient.

MR. INNEO: Thank you for being our guest today, Dr. Null. Your inside information has been invaluable.

MR. NULL: Thank you.

MR. INNEO: As I said, Dr. Gary Null is the authority on health and nutrition. He really does know his stuff.

UNIDENTIFIED SPEAKER: Please fasten your seat belt. We are now arriving in Phoenix.

MR. INNEO: Now we're going to meet who developed Mountain-High Bee Pollen. His name is Mr. Royden Brown. Mr. Brown.

MR. BROWN: Yes, sir.

MR. INNEO: Hi, Mr. Brown. My name is Vince Inneo with TV Insiders. How are you, sir?

MR. BROWN: I'm perfect, thank you, sir. Would you have a chair?

MR. INNEO: Thank you. According to what we found out about you, you've really come up with something. Can you tell us when you learned about the effects of Mountain-High Bee Pollen?

MR. BROWN: It was in 1943 in the Officers Madison, London, England. I was a pilot at the RAF at the time. Another pilot gave me an article in some newspaper, and I think it was the London Sunday Times, about Bee Pollen. It described this miraculous food that had all the nutrients you needed for perfect health, and it would do everything for you. Well, frankly, I must admit I didn't think any food was that good food.

MR. INNEO: Mountain-High Bee Pollen does all that?

MR. BROWN: Yes, sir. It's a marvelous food. If it has all the nutrients, and I know it does, for perfect health, it will do everything for you. It will move you toward perfect health. It's mentioned 68 times in the Bible. It was given to the original Jesus Christ after the resurrection and that was symbolically, in my opinion, that every person on earth should make Bee Pollen a staple part of their diet every day of their life.

MR. INNEO: I understand former President Ronald Reagan is one of your best customers?

MR. BROWN: He certainly is. He's been eating Bee Pollen since 1961, and we've been furnishing the Bee Pollen since he was governor. He's the best specimen I know of that's what Bee Pollen does for you.

President Reagan has had the toughest job in the world. He's had the most responsibility than anybody in the world. He was shot and near death, and look where he is; he's in perfect health, sharp as a tack. Bee Pollen, perfect example of ingesting Bee Pollen.

MR. INNEO: Why haven't we heard more about Mountain-High Bee Pollen?

MR. BROWN: Because Mountain-High Bee Pollen is a food and not a drug. It can't be patented. There's not 50 or 100 times markup in the price of it, so the pharmaceutical companies can't make money on selling Bee Pollen. That's why we haven't heard about it.

MR. INNEO: For those people who are allergic to pollen, will they be able to use Mountain-High Bee Pollen?

MR. BROWN: Bee Pollen according to Leo N. Kogoin, M.D. in Denver, Colorado, an allergist, says that Bee Pollen is the best reliever of allergies that he's ever found. He's had over 60 thousand patients documented and 94 percent of them were completely relieved of the symptoms by ingesting the Bee Pollen.

MR. INNEO: Never have pollen-related allergies again?

MR. BROWN: Never have pollen allergy symptoms again, rest of their life.

MR. INNEO: Mr. Brown, what if someone were taking vitamins, would they have to continue them or will Mountain-High Bee Pollen alone be enough?

MR. BROWN: Well, the only problem with the individual taking vitamins, he doesn't know how much Vitamin C to take or how much Vitamin E. If you take Bee Pollen, it's all in the Bee Pollen. God made Bee Pollen the perfect balance of perfect nutrients of all the nutrients, so you don't need to take vitamins when you take Bee Pollen.

MR. INNEO: I've heard from people that Mountain-High Bee Pollen helps them lose weight. Can you tell me how?

MR. BROWN: Well, Mountain-High Bee Pollen has all the nutrients you need for perfect health. So when you eat the Mountain-High Bee Pollen before each meal, it satisfies your appetite. As a result, you eat a little less food with each meal you eat and you lose weight constantly as long as you're eating Mountain-High Bee Pollen.

MR. INNEO: I have never taken Mountain-High Bee Pollen. Start me off. I mean, what do I get?

MR. BROWN: Well, if I were you, I would get three things. First, I would get the Bee-Young tablets. Bee-Young tablets will prevent you from losing your memory. You certainly want to have your memory all the rest of your life. Loss of memory is the first step into the nursing home, and you certainly don't want to do that.

The second thing I would get would be the Mountain-High Royal Jelly. Royal Jelly is the greatest rejuvenating and sex standard food known to man. And you certainly want to be active sexually all the rest of your life.

The third thing you want to get is the Pollen Energy 520 capsules. The Mountain-High Bee Pollen is the greatest energy source, greatest energy food known to man.

With these three things, I guarantee you that you will have a higher quality of life the last half of your life than you had the first half.

MR. INNEO: Thank you, Mr. Brown. I really thank you for giving TV Insiders this inside information. Not only has it been inspirational to me, but I'm sure motivational not only to myself but to our viewers. Thank you again from all of us.



MR. BROWN: Any time. My pleasure.

MR. INNEO: That was simply amazing. I told you in the beginning that this edition of TV Insiders would be critically important. The message is clear. If you do nothing else, if you can't or won't exercise, if you're interested in your well-being but you're not willing to jump on the health food mega-vitamin bandwagon, if you're concerned about adding unnatural manufactured or artificial vitamins or chemical supplements to your diet, if you like the people we've heard from and talked to today, want to live a longer, healthier and more vital life, if you want that second chance at life, there is something we can do about it after all.

UNIDENTIFIED SPEAKER: Mountain-High Bee Pollen is available exclusively from the maker. It is not sold in stores. Call now to receive your whole 30-day supply of Mountain-High Bee-Young Wafers. Stay young and alert throughout your life. Pollen Energy 520 capsules restore that missing energy, and 24-hour Royal Jelly tablets to keep sexually active at any age. Also receive as our gift a President's and a First Lady's lunch bar.

To start feeling young, energetic and vital again, simply take one Bee-Young Wafer and one Pollen Energy 520 capsule with each meal. Take one Royal Jelly capsule before bedtime. Unlock nutrient shortages in your body and reawaken parts of your system long neglected.

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Have your credit card handy and call now 1-800-423-1800. 1-800-423-1800. That's 1-800-423-1800. Call now.

FROM MRS. V.M.O.'s LETTER: I'm a senior citizen and I thought I felt good, but now I feel wonderful. I'm never tired. Mountain-High Bee Pollen is the best money I ever spent.

FRITS FORRER: Every year I used to suffer from ragweed allergies. I tried everything; nothing worked. I used to hate the fall season.

Since I'm in health insurance, it really looks bad when I'm sick. Now my allergies disappeared. It's been wonderful and I owe my recovery to Bee Pollen.

MYRNA HAAG: I compete in Triatholons. I just finished the Hawaiian Iron Man, which is a two-and-a-half-mile ocean swim, 112-mile bike ride and a 26-mile run. I don't believe in any kind of diets. Diets really don't work for me. What worked for me was Mountain-High Bee Pollen. It worked great during Iron Man.

FROM REV. D.A.L.'s LETTER: I had arthritis in a very painful state in my left foot to the extent that I was limping quite noticeably. After eating Mountain-High Bee Pollen, the arthritic pain vanished completely. Now I'm able to walk normally.

FROM DR. F.M.'s LETTER: Mountain-High Bee Pollen helped me a lot. I'm telling most of the patients that are interested in good health, Keep up the good work.work.

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Complaint

113 F.T.C.

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MR. INNEO: I may restate something. It's your cards and your letters alerting TV Insiders to new discoveries, interesting people and inside information. We need inside information. You tell me the stories and what you've heard, we will research it, investigate it, and then we will share your findings with everyone. If we use your information, we will send you a TV Insider investigator's card. This you can count on.

So until next mission, this is your inside investigator, Vince Inneo, wishing you good health and God's blessings.

## CERTIFICATE

I, Sheri L. Foster, a Stenographic Reporter, do hereby certify that I listened to an audiotape of the foregoing proceedings in its entirety; that I wrote the same in stenotypy, which was subsequently transcribed into typewriting by means of computer-aided transcription under my direction; and that the foregoing Transcript is a true and correct transcript of my stenotype notes.

Signed this 14th day of June, 1989.

/s/

Sheri L. Foster  
Mizanin Reporting Service  
540 Terminal Tower  
Cleveland, OH 44113

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OCTOBER, 1989



## 100% Natural Pain Relief A Healthy Alternative to Aspirin

Is headache pain ruining your day? For some, this is a simple problem to solve. But for those who suffer adverse reactions to any chemical pain-relievers like aspirin, a simple headache can become quite an ordeal. Which is worse, a throbbing headache or an upset stomach? There must be a better way.

There is. Alpine Supreme® Arthritis-Strength Pain Relief may be used as a substitute for aspirin, or other namebrand analgesics. Devoted Bee Pollen enthusiasts say this non-chemical product works fast and naturally to help relieve pain throughout

the body. For those who suffer from chronic pain but dislike harsh chemical pain-relievers, or for those who are averse to traditional non-prescription medicines, Arthritis-Strength Pain Relief may be just the ticket for a pain-free existence.

With just the right blend of Bee Pollen and amino acids in an herbal base, independent research at Energy Factors, Inc. of Florida provides evidence that Alpine Supreme Brand® Arthritis-Strength Pain Relief has what it takes for quick relief of headache or body pain. This food tablet may be taken like aspirin, although it is always recommended that any Bee Pollen product be taken with or after a meal.

For the months of October and November only, buy Alpine Supreme Brand® Arthritis-Strength Pain Relief at a special two-for-one price with a thirty day money-back guarantee. What have you got to lose, except the pain?

## Introducing Alpine Supreme Brand®

You may have noticed a few changes around here already. The newsletter, twice as big and bursting with valuable discounts now appears monthly. Our new catalog is even more attractive and informative than before. (If you don't already have your complimentary copy, write to us.) And you'll be seeing less of the name Mountain-High and more of our improved product line Alpine Supreme Brand® Bee Pollen.

We are proud to introduce to you our superior line of Bee Pollen products. The names may have changed, but our dedication to quality is still virtually the same, just the purest Bee Pollen available. We have searched long and hard to come up with a product line even better than our Mountain-High, and we have finally done it. We believe Alpine Supreme Brand® is the finest, purest Bee Pollen on the market today, and you are sure to notice the difference. With a fresh, new look and a bold, new package, Alpine Supreme Brand® surpasses even our own Mountain-High Bee Pollen in quality, and taste. Try it!

Everything is changing, except the price. We are improving the quality of our health foods, but the prices will remain the same. More for your dollar, because we feel you deserve it.

We will be introducing the new brand as it becomes available, so keep an eye out for it. And watch out for all-new health food products to be added to our catalog soon. We are growing to serve you better. Thanks for your patronage.

**WHAT'S INSIDE?**  
• TWO FOR ONE SALE  
Arthritis-Strength Pain Relief  
• BEE POLLEN IN  
THE BIBLE  
• DR. SCHECHTER  
Answers Your Questions  
• NOW EIGHT FULL  
PAGES EVERY MONTH!

## DECISION AND ORDER

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

The respondents, their 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, makes the following jurisdictional findings, and enters the following order:

1. Proposed respondent TV Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office or principal place of business located at #7, 11100 66th Street North, Largo, Florida.

Proposed respondent William Thompson is an officer of the corporate respondent named herein. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

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

The following definition shall apply throughout this order:

*Bee pollen product(s)* means any product(s) intended for human consumption consisting in whole or in part of bee pollen, and/or bee propolis, and/or royal jelly in any form.

## I.

*It is ordered*, That respondents TV Inc., a corporation, and William Thompson, individually and as an officer of said corporation, 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, offering for sale, sale or distribution of any product or service in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating:

(A) Any commercial or other advertisement for any such product or service that misrepresents, directly or by implication, that it is an independent program and not a paid advertisement; and

(B) For a period of ten (10) years from the date of service of this order, any commercial or other advertisement for any such product or service fifteen (15) minutes in length or longer or intended to fill a broadcasting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

THE PROGRAM YOU ARE WATCHING  
IS A PAID ADVERTISEMENT FOR  
[THE PRODUCT OR SERVICE].

*Provided, however*, that if more than two products or services are advertised, the following disclosure may be used:

THE PROGRAM YOU ARE WATCHING  
IS A PAID ADVERTISEMENT FOR THE  
PRODUCTS/SERVICES OF [NAME OF ADVERTISER].

## II.

*It is further ordered,* That respondents TV Inc., a corporation, and William Thompson, individually and as an officer of said corporation, 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, offering for sale, sale or distribution of any bee pollen product(s) in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

(A) That consumption of any bee pollen product(s) cannot or will not result in an allergic reaction;

(B) That consumption of any bee pollen product(s) such as those advertised on *TV Insiders* has been used to successfully treat allergy patients; and

(C) That Alpine Supreme Brand Arthritis-Strength Pain Relief, or any other product of substantially similar composition or possessing substantially similar properties, is an effective analgesic.

## III.

*It is further ordered,* That respondents TV Inc., a corporation, and William Thompson, individually and as an officer of said corporation, 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, offering for sale, sale or distribution of any product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

(A) Consumption of any bee pollen product(s) cures, prevents, or alleviates any allergy symptoms;

(B) Consumption of any bee pollen product(s) slows, prevents, or reverses the aging process;

(C) Consumption of any bee pollen product(s) cures or prevents impotence or sexual dysfunction;

(D) Consumption of any bee pollen product(s) promotes weight loss;

(E) It is an effective analgesic; and

(F) It will have any effect on the user's health or physical condition; *unless*, at the time such representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of the order, for any test, analysis, research, study or other evidence to be "competent and reliable," the test, analysis, research, study or other evidence shall be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate and reliable results.

#### IV.

*It is further ordered*, That respondents TV Inc., a corporation, and William Thompson, individually and as an officer of said corporation, their successors and assigns, shall, in the manner and subject to the conditions described below, notify the purchasers of bee pollen products who ordered after viewing, in whole or in part, the advertisement entitled *TV Insiders*:

(A) Within thirty (30) days after service of this order, respondents shall send, by first-class mail, to each person who purchased bee pollen products from them prior to the date of service of this order, a copy of the letter set forth in Appendix A.

(B) The envelope in which all of the above materials are sent shall have as its return address:

FTC/TV Inc. Notification Program  
[-Street Address-]  
[-City, State, ZIP Code-]

(C) No other information or materials shall be included in the mailings required by this paragraph.

#### V.

*It is further ordered*, That respondent TV Inc., a corporation, shall distribute a copy of this order to each of its operating divisions and to each officer and other person responsible for the preparation or review of advertising materials at the time this order becomes effective.

## VI.

*It is further ordered,* That respondent TV Inc., a corporation, shall, for at least three (3) years after service of this order, maintain and make available to Federal Trade Commission upon request, for inspection and copying, at a place designated by the Commission, complete records regarding respondent's compliance with this order, such records to include, but not be limited to:

- (A) The name and last known address of each purchaser to whom a Notice letter was sent; and
- (B) All Notice letters returned as undeliverable.

## VII.

*It is further ordered,* That for a period of three (3) years from the date that a representation covered by this order is last disseminated, respondents TV Inc., a corporation, and William Thompson, individually and as an officer of said corporation, shall maintain and upon request make available to the Commission for inspection and copying all advertising, promotional and/or sales materials containing the representations covered in this order, and all materials that were relied upon to substantiate such representations and all test reports, studies, surveys, demonstrations or other evidence in respondents' possession or control, that contradict, qualify, or call into question such representations or the basis upon which respondents relied in making such representations.

## VIII.

*It is further ordered,* That respondent TV Inc., a corporation, shall:

- (A) Notify the Commission at least thirty (30) days prior to the effective date of 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 this order; and
- (B) Require, as a condition precedent to the closing of the sale or other disposition of 50 percent of the stock or assets of TV Inc., that the acquiring party file with the Commission, prior to the closing of



such sale or other disposition, a written agreement to be bound by the provisions of this order.

## IX.

*It is further ordered,* That respondents TV Inc., a corporation, and William Thompson, individually and as an officer of said corporation, shall within one hundred twenty (120) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, including but not limited to the names and addresses of all recipients of materials pursuant to Part IV of this order.

## APPENDIX A

[TV INC., LETTERHEAD]

IMPORTANT NOTICE

[Date]

[Customer Name  
Address  
City, State ZIP Code]

Dear

We at TV Inc. have voluntarily entered into an agreement with the Federal Trade Commission. We have agreed to a cease and desist order under which we are writing to each of our purchasers of bee pollen products. The purpose of this letter is to inform you that, according to the FTC, claims that consumption of bee pollen products cannot cause an allergic reaction, and that bee pollen can cure allergies are false. According to the FTC, the other health claims made for bee pollen products are unsubstantiated by competent and reliable scientific evidence. We also agree with the FTC that you should be notified that the television program *TV Insiders* is a commercial advertisement for bee pollen, and not an independent consumer or news program.

Sincerely,

William Thompson  
President  
TV Inc.

IN THE MATTER OF  
AMERICAN INSTITUTE OF CERTIFIED  
PUBLIC ACCOUNTANTS

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

*Docket C-3297. Complaint, July 26, 1990—Decision, July 26, 1990*

This consent order prohibits, among other things, the American Institute of Certified Public Accountants (AICPA) from restricting CPAs from providing professional services for a contingent fee or a disclosed commission to any person for whom the CPA is involved in any particular situation is not also performing an attest service. Respondent also is prohibited from restricting CPAs' use of referral fees that are disclosed and from preventing CPAs' use of truthful, nondeceptive advertising, solicitation, or trade names. In addition, AICPA is required to distribute a copy of the order and any revised ethics rules to its members.

*Appearances*

For the Commission: *Anthony L. Joseph* and *Michael D. McNeely*.

For the respondent: *Louis A. Craco, Willkie, Farr & Gallagher*,  
New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the American Institute of Certified Public Accountants, a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Federal Trade Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent American Institute of Certified Public Accountants ("respondent" or "AICPA") is a corporation formed pursuant to the laws of the District of Columbia. Respondent is a voluntary association of approximately 264,000 certified public accountants ("CPAs"), who comprise approximately three-quarters of the CPAs in the United States. Its principal business office is located at 1211 Avenue of the Americas, New York, New York.

PAR. 2. For purposes of this complaint, the following definitions shall apply:

A. "*Attest service*" means providing (1) any audit, (2) any review of a financial statement, (3) any compilation of a financial statement when the certified public accountant ("CPA") expects, or reasonably might expect, that a third party will use the compilation and the CPA does not disclose a lack of independence, and (4) any examination of prospective financial information;

B. "*Commission*" means compensation, except a referral fee, for recommending or referring any product or service to be supplied by another person;

C. "*Contingent fee*" means a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service; and

D. "*Referral fee*" means compensation for recommending or referring any service of a CPA to any person.

PAR. 3. Except to the extent competition has been restrained as herein alleged, many of respondent's members in the practice of public accounting have been and are now in competition among themselves and with other CPAs.

PAR. 4. Respondent is a corporation organized for the purpose, among others, of guarding and fostering its members' economic interests, and is engaged in substantial activities that further its members' pecuniary interests. As a result of such purpose and activities, respondent is a "corporation," within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. The acts and practices of AICPA, including those herein alleged, are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. Respondent has agreed, combined or conspired with its members or other persons, or has acted as a combination of its members, to restrain competition among CPAs in the United States by, among other things:

A. Restricting the methods CPAs may use to set their fees, including prohibiting the offering or rendering of professional services

for a contingent fee or a commission to a person for whom the CPA is not also performing attest services. Under these restrictions, CPAs are or may be deterred from, among other things, (1) assisting a state government to obtain a Medicare refund from the United States Government pursuant to a contract whereby the CPA receives no fee if the state receives no refund, or (2) assisting a consumer by preparing a financial plan pursuant to a contract under which the CPA will be compensated by receiving commissions from the sellers of any products that are purchased by the consumer;

B. Restricting truthful, nondeceptive advertising by CPAs, including, but not limited to:

1. Self-laudatory or comparative advertising;
2. Testimonial or endorsement advertising; and
3. Advertising not considered by AICPA to be professionally dignified or in good taste.

Under these restrictions, CPAs are or may be deterred from, among other things, truthfully advertising that they are "real tax experts," that they offer "the expertise of a large national firm," or that "John Smith says that their CPA firm was particularly responsive to his needs."

C. Restricting solicitation of clients by CPAs, including, but not limited to, (1) restricting direct solicitation of potential clients, and (2) prohibiting the payment or acceptance of referral fees. Under these restrictions, CPAs are or may be deterred from, among other things, soliciting clients by mail, paying marketing firms to assist in soliciting potential clients, and granting discounts to clients for referring other clients to them; and

D. Restricting the use of nondeceptive trade names by CPAs. Under this restriction, CPAs are or may be deterred from, among other things, using names like "Suburban Computer Services" or "Smith and Jones, CPAs, Tax Services," even when the name truthfully reflects the services provided by the CPAs.

PAR. 7. In furtherance of the agreement, combination, or conspiracy described in paragraph six, AICPA has promulgated, maintained, and enforced a Code of Professional Conduct, including, but not limited to, Rules 302, 502, 503 and 505, and Interpretations 502-1 and 502-2 thereof.

PAR. 8. Respondent's actions described in paragraphs six and seven have had, or have the tendency and capacity to have, the following effects, among others:

A. Restraining competition among CPAs with respect to price, quality, and other terms of service;

B. Depriving consumers of information about the availability, price, and quality of CPA services; and

C. Injuring consumers by depriving them of the benefits of free and open competition among CPAs.

PAR. 9. The agreement, combination, or conspiracy and the acts and practices described above constitute unfair methods of competition and unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such agreement, combination or conspiracy, or the effects thereof, is continuing and will continue absent the entry against respondent of appropriate relief.

Commissioners Azcuenaga and Owen dissented.

#### DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, and having duly considered the recommendations of its staff to modify the consent agreement pursuant to the comments

received and the supplemental letter agreement executed by the respondent's counsel, 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, as modified:

1. Respondent American Institute of Certified Public Accountants is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at 1211 Avenue of the Americas, New York, New York.

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

#### ORDER

##### I.

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

A. "*AICPA*" means American Institute of Certified Public Accountants and its Board of Directors, Council, committees, task forces, officers, representatives, agents, employees, successors, and assigns;

B. "*Attest service*" means providing (1) any audit, (2) any review of a financial statement, (3) any compilation of a financial statement when the certified public accountant ("CPA") expects, or reasonably might expect, that a third party will use the compilation and the CPA does not disclose a lack of independence, and (4) any examination of prospective financial information;

C. "*Audit*" means an examination of financial statements of a person by a CPA, conducted in accordance with generally accepted auditing standards, to determine whether, in the CPA's opinion, the statements conform with generally accepted accounting principles or, if applicable, with another comprehensive basis of accounting;

D. "*Commission*" means compensation, except a referral fee, for recommending or referring any product or service to be supplied by another person;

E. "*Compilation of a financial statement*" means presenting in the form of a financial statement information that is the representation of

any other person without the CPA's undertaking to express any assurance on the statement;

F. "*Contingent fee*" means a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service;

G. "*Disciplinary action*" means revocation or suspension of, or refusal to grant, membership, or the imposition of a reprimand, probation, constructive comment, or any other penalty or condition;

H. "*Examination of prospective financial information*" means an evaluation by a CPA of (1) a forecast or projection, (2) the support underlying the assumptions in the forecast or projection, (3) whether the presentation of the forecast or projection is in conformity with AICPA presentation guidelines, and (4) whether the assumptions in the forecast or projection provide a reasonable basis for the forecast or projection;

I. "*Forecast*" means prospective financial statements that present, to the best of the responsible party's knowledge and belief, an entity's expected financial position, results of operations, and changes in financial position or cash flows that are based on the responsible party's assumptions reflecting conditions it expects to exist and the course of action it expects to take;

J. "*Person*" means any natural person, corporation, partnership, unincorporated association, or other entity;

K. "*Projection*" means prospective financial statements that present, to the best of the responsible party's knowledge and belief, given one or more hypothetical assumptions, an entity's expected financial position, results of operations, and changes in financial position or cash flows that are based on the responsible party's assumptions reflecting conditions it expects would exist and the course of action it expects would be taken given such hypothetical assumptions;

L. "*Referral fee*" means compensation for recommending or referring any service of a CPA to any person;

M. "*Review*" means to perform an inquiry and analytical procedures that permit a CPA to determine whether there is a reasonable basis for expressing limited assurance that there are no material modifications that should be made to financial statements in order for them to be in conformity with generally accepted accounting principles or, if applicable, with another comprehensive basis of accounting; and

N. "*Trade name*" means a name used to designate a business enterprise.

## II.

*It is further ordered*, That AICPA, directly, indirectly, or through any person or other device, in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Restricting, regulating, impeding, declaring unethical, advising members against, or interfering with any of the following practices by any CPA:

1. The offering or rendering of professional services for, or the receipt of, a contingent fee by a CPA, provided that AICPA may prohibit the engaging to render or rendering by a CPA for a contingent fee: (a) of professional services for, or the receipt of such a fee from, any person for whom the CPA also performs attest services, during the period of the attest services engagement and the period covered by any historical financial statements involved in such attest services; and (b) for the preparation of original or amended tax returns or claims for tax refunds;

2. The offering or rendering of professional services for, or the receipt of, a disclosed commission by a CPA, provided that the engaging to render or rendering of professional services by a CPA for a commission for, or the receipt of a commission from, any person for whom the CPA also performs attest services may be prohibited by the AICPA during the period of the attest services engagement and the period covered by any historical financial statements involved in such attest services;

3. The payment or acceptance of any disclosed referral fee;

4. The solicitation of any potential client by any means, including direct solicitation;

5. Advertising, including, but not limited to:

(a) any self-laudatory or comparative claim;

(b) any testimonial or endorsement; and

(c) any advertisement not considered by AICPA to be professionally dignified or in good taste; and

6. The use of any trade name;



*Provided*, that nothing contained in this order shall prohibit AICPA from formulating, adopting, disseminating, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to solicitation, advertising or trade names, including unsubstantiated representations, that AICPA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act;

B. Taking or threatening to take formal or informal disciplinary action, or conducting any investigation or inquiry, applying standards in violation of this order;

C. Adopting or maintaining any rule, regulation, interpretation, ethical ruling, concept, policy, or course of conduct that is in violation of this order;

D. Inducing, urging, encouraging, or assisting any association of accountants to engage in any act that would violate this order if done by AICPA *provided, however*, that nothing in this order shall prohibit AICPA from soliciting action by any federal, state or local governmental entity; and

E. Applying or interpreting any other language contained in the Code of Professional Conduct or its successors in a manner that would violate this order;

*Provided*, that this order shall not prohibit AICPA from:

(a) suspending membership in AICPA if:

i. a member's certificate as a CPA or license or permit to practice as such or to practice public accounting is suspended as a disciplinary measure by any governmental entity;

ii. a member's registration as an investment adviser is suspended by the SEC;

iii. a member's registration as a broker-dealer is suspended by the SEC or by any state agency acting pursuant to any applicable state law or regulation relating to the issuance, registration, purchase or sale of securities; or

iv. a member is suspended from practicing before the IRS,

but any such suspension by AICPA shall terminate upon reinstatement of any such certificate, license, permit, registration, or authorization to practice; or

(b) terminating membership in AICPA if:

i. a member's certificate as a CPA or license or permit to practice as

such or to practice public accounting is revoked, withdrawn or cancelled as a disciplinary measure by any governmental entity;

ii. a member's registration as an investment adviser is revoked by the SEC;

iii. a member's registration as a broker-dealer is revoked by the SEC or by any state agency acting pursuant to any applicable state law or regulation relating to the issuance, registration, purchase or sale of securities;

iv. a member is subject to a final judgment of conviction for criminal fraud or for a crime punishable by imprisonment for more than one year; or

v. a member is disbarred from practicing before the IRS.

### III.

*It is further ordered, That AICPA shall:*

A. Distribute a copy of this order and an announcement in the form shown in Appendix A, within thirty (30) days after this order becomes final, to all personnel, agents, or representatives of AICPA having responsibilities with respect to the subject matter of this order and secure from each such person a signed statement acknowledging receipt of this order and said announcement;

B. Distribute by mail a copy of this order and an announcement in the form shown in Appendix A, within thirty (30) days after this order becomes final, to each of its members and to each state society of certified public accountants;

C. Publish this order and an announcement in the form shown in Appendix A, within sixty (60) days after this order becomes final, in an issue of the "Journal of Accountancy," AICPA's monthly journal, or in any successor publication, in the same type size normally used for articles which are published in the "Journal of Accountancy" or in any successor publication;

D. Within ninety (90) days after this order becomes final, publish and distribute to all members of AICPA and to all personnel, agents, or representatives of AICPA having responsibilities with respect to the subject matter of this order revised versions of AICPA's Code of Professional Conduct, Bylaws, concepts of professional ethics, interpretations, ethical rulings, or other policy statements or guidelines of AICPA which (1) delete any material that is inconsistent with Part II of this order and (2) otherwise comply with this order;

E. File with the Federal Trade Commission within sixty (60) days after this order becomes final, one (1) year after this order becomes final, and at such other times as the Federal Trade Commission may by written notice to AICPA request, a report in writing setting forth in detail the manner and form in which it has complied and is complying with this order;

F. For a period of five (5) years after this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Parts II and III of this order, including any written communications and any summaries of oral communications, and any disciplinary action; and

G. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in AICPA, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

Commissioners Azcuenaga and Owen dissented.

APPENDIX A

[Date]

ANNOUNCEMENT

As you may be aware, the American Institute of Certified Public Accountants ("AICPA") has entered into a consent agreement with the Federal Trade Commission that became final on [date]. The order issued pursuant to the consent agreement provides that AICPA may not interfere if its members wish to engage in any of the following activities:

- (1) accepting contingent fees from nonattest clients;
- (2) accepting disclosed commissions for products or services supplied by third parties to nonattest clients;
- (3) engaging in advertising and solicitation;
- (4) making or accepting disclosed payments for referring potential clients to a CPA; or
- (5) using trade names.

The order allows AICPA to prohibit its members from accepting contingent fees for preparing original or amended tax returns or claims for tax refunds.

The order does not prevent AICPA from formulating reasonable ethical guidelines prohibiting solicitation, advertising or trade names that it reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

In particular, without attempting to be all-inclusive, the agreement between AICPA and the Federal Trade Commission means that as long as its members do not engage in falsehood or deception, AICPA cannot prevent or discourage them from engaging in the following practices, among others:

- (a) in-person solicitation of prospective clients;
- (b) self-laudatory advertising;
- (c) comparative advertising;
- (d) testimonial or endorsement advertising;
- (e) advertising that some members may believe is "undignified" or lacking in "good taste";
- (f) assisting any state government that is not an attest client in claiming a Medicare refund pursuant to a contingent fee contract;
- (g) preparing financial plans for nonattest clients for which members will be compensated by commissions from the sellers of products or services that such clients purchase;
- (h) using trade names, such as "Suburban Tax Services";
- (i) paying referral fees to marketing firms that assist members in soliciting potential clients; and
- (j) offering clients a discount for referring a prospective client.

For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed.

Philip B. Chenok  
President  
American Institute of Certified  
Public Accountants

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA,  
CONCURRING IN PART AND DISSENTING IN PART

The Commission today accepts a consent order that, among other things, prevents the American Institute of Certified Public Accountants ("AICPA"), through its Code of Professional Conduct, from requiring that its members refrain from using coercion, overreaching or harassment to solicit clients and from requiring that its members forgo certain fee arrangements that may create conflicts of interest. The Commission challenges provisions in the AICPA code that have no anticompetitive effect, that are far removed from the *per se* category of legal offenses and for which AICPA arguably has good reason.<sup>1</sup> I dissent.

<sup>1</sup> Some of the provisions in AICPA's Code that the Commission challenges can be shown to be anticompetitive and unlawful, and the corresponding remedies imposed by the Commission are appropriate. I agree with the majority that there is reason to believe that AICPA's restrictions on contingent fees (II.A.1) and advertising (II.A.5 and II.A.6) unlawfully restrain competition. I dissent from Paragraphs II.A.2, II.A.3 and II.A.4 of the order.

AICPA's rule on solicitation prohibits "the use of coercion, overreaching or harassing conduct." The rule is not unlawful on its face, nor is there any evidence that the rule has been used improperly, much less unlawfully. The majority invalidates the rule, apparently on the theory that the purpose of the rule is to discourage all forms of solicitation. The Commission lacks even the proverbial shred of evidence to support this theory. The sparse information we have shows instead that AICPA consistently responds to inquiries about the rule by stating unequivocally that it does not prohibit all direct, uninvited solicitation, by advising members to consult the dictionary definitions of "coercion," "overreaching" and "harassment" for general guidance and by offering to analyze particular facts relating to a proposed or questionable solicitation.

AICPA promulgated the rule as an attempt to balance the concerns of its members about certain kinds of direct, uninvited solicitation<sup>2</sup> with the need for a rule that would not offend the antitrust laws (hardly probative evidence of an unlawful purpose). AICPA's refusal to interpret the solicitation rule except in the context of a specific fact situation also stems from its efforts to comply with the antitrust laws and is not indicative of an unlawful purpose. The implication of the Commission's prohibition is that a professional association may not, under any circumstances, bar its members from engaging in coercion, overreaching or harassment. I cannot join in this unfortunate message.

AICPA has maintained that many of its ethical rules, including the rules against referral fees and commissions, are intended to preserve the fact as well as the appearance of independence and objectivity of its members. This asserted justification has substantial credibility particularly in the context of attest services. The Securities and Exchange Commission prohibits auditors from having joint business arrangements with their audit clients for this reason, and the majority itself partly concedes the validity of AICPA's justification by not challenging AICPA's ban on commissions and contingent fees for attest clients.

Referral fees and commissions pose the same potential harm—a conflict between the financial interests of the CPA and his client. Although consumer search costs may be reduced by permitting these practices, referral fees and commissions do not necessarily lead to

<sup>2</sup> Compare *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (state may ban in-person solicitation by lawyers for profit).

lower overall costs for consumers. To further their own economic self-interest, CPAs may refer consumers for services they otherwise might not recommend, and any profit-maximizing CPA presumably will pass on the cost of referral fees to consumers. AICPA's rule against third-party commissions does not eliminate price competition or restrict the prices that the CPA charges his or her clients. Instead, the rule prohibits a method of payment that seems to invite a CPA to recommend a financial plan that would serve his own financial interests at least as well as those of his client. *See Vogel v. American Society of Appraisers*, 744 F.2d 598, 602 (7th Cir. 1984) ("[T]he challenged bylaw does not limit the fee [but] it merely outlaws a method of fee setting that seems to invite the appraiser to practice a fraud on his customer . . .").

One-stop financial service is an option that some consumers presumably may want. This service, however, is readily available from other providers and, indeed, from CPAs in those states that permit CPAs to work on commission.<sup>3</sup> CPAs who act as independent financial advisers, without an economic interest in their own recommendations, provide a differentiated product in the financial services market.<sup>4</sup> In its haste to endorse the one-stop financial service concept, the Commission does not pause to consider that it is eliminating the ability of AICPA to create a differentiated service featuring independence and objectivity.

The Commission also does not linger over the possibility that eliminating AICPA's option to promote this market niche in connection with non-attest services may have adverse effects in the market for attest services. We are told that the independence of CPAs is of critical importance in capital formation. When the independence of CPAs is compromised by their involvement with corporate management in non-attest services, public confidence in their independent auditor function may be diminished. *See Report of the Securities and Exchange Commission to Congress On the Accounting Profession and the Commission's Oversight Role 145-46 (July 1978)*. If true, this consent order could harm consumers.

Although there may be value in allowing CPAs to work on

<sup>3</sup> AICPA is a voluntary association; CPAs who prefer not to observe AICPA's Code of Professional Ethics need not join.

<sup>4</sup> Dean Williams of the University of Southern California School of Accounting wrote that "[t]he single criterion that sets CPA firms apart from providers of non-audit services (e.g., financial planners, consulting firms, etc.) is the profession's reputation for independence and objectivity. It is in the public's interest that this reputation be perceived as an alternative in the market place. Otherwise, third party reliance on all services, and hence the very essence of capital formation, will be threatened." Letter to FTC staff (July 30, 1986).

commission and to accept referral fees, the argument that the Federal Trade Commission is the appropriate institution to rewrite AICPA's restrictions is substantially less than compelling, particularly in the face of AICPA's concern with maintaining the fact and appearance of independence and objectivity for its members. The Commission does not have the expertise to make that judgment, and the better and wiser course is to let the market sort it out.<sup>5</sup>

This case presents important questions about what constitutes a violation of Section 5 of the Federal Trade Commission Act. The mandate of the Commission is to prevent unfair methods of competition, not to prescribe particular modes of competition in the absence of a violation of law. We should not engage in social engineering under the guise of law enforcement. AICPA's ethical rules reflect longstanding tenets of professionalism and could facilitate procompetitive alternatives in CPA services. The Commission should have attempted to understand the value of those tenets before changing the rules by fiat.

SEPARATE STATEMENT OF COMMISSIONER DEBORAH K. OWEN  
CONCURRING IN PART AND DISSENTING IN PART

In the consent order accepted today in this matter, the Commission prohibits the American Institute of Certified Public Accountants ("AICPA"), by way of its Code of Professional Conduct, from restricting its members from: (1) adopting certain referral fee and commission arrangements that may create conflicts of interest, and (2) using coercion, overreaching or harassment to solicit clients. I join Commissioner Azcuenaga in dissenting from this action.<sup>1</sup>

The Commission's achievements in protecting the public from anticompetitive restraints imposed by professional associations have earned the justified praise of antitrust observers. These accomplishments are exemplified by the provisions of this order governing restrictions on advertising. The application of antitrust doctrine in changing times necessarily demands some imagination on the part of federal law enforcers. However, this consent illustrates the dangers of going beyond "pushing the envelope" with insufficient evidentiary support.

<sup>5</sup> To the extent that state laws may inhibit the use of commissions and referral fees by CPAs, the Commission's order has no effect.

<sup>1</sup> Along with Commissioner Azcuenaga, I dissent from Paragraphs II.A.2, II.A.3, and II.A.4 of the order, and concur in the majority holding that AICPA's restrictions on advertising (Paragraphs II.A.5 and II.A.6) and certain contingent fees (Paragraph II.A.1) unlawfully restrain competition.

Referral fees and commissions raise serious potential conflicts of interest between the CPA and his client, which could result in damaging financial consequences. The competitive effects of prohibiting such fees are not clear—either facially or in terms of how the prohibitions actually operate—and good economic evidence as to both is lacking. There are plausible efficiency arguments for such restraints, relating both to the elimination of potentially damaging conflicts of interest, and to preserving public confidence in the integrity and independence of members of the AICPA, in both attest and non-attest functions. The lack of evidence suggesting that these restrictions are anticompetitive stands in marked contrast to the evidence that has been compiled in connection with advertising bans,<sup>2</sup> and the plethora of evidence in cases like *Detroit Auto Dealers*.<sup>3</sup> Accordingly, it has not been demonstrated to my satisfaction that the prohibition of commission and referral fee arrangements by the AICPA is inherently suspect under the Commission's analysis in *Massachusetts Board of Registration in Optometry*, 110 FTC 541 (1988).

The available evidence as to the market power of the AICPA is not compelling. The AICPA is a voluntary association. Membership and adherence to its particular Code are not prerequisites to practice as a CPA. In states that prohibit CPAs from accepting referral fees or commissions, today's order has no effect. In states without such restrictions, it is hard to envision any competitive problem; CPAs are free to undertake actions prohibited by the AICPA ethical standards by simply leaving the organization. In addition, CPAs apparently already face intense competition for non-attest services from non-CPAs, such as non-CPA accountants, tax preparers, and financial planners.<sup>4</sup> While addressing what may be an illusory competitive problem, this order opens the door to potentially serious conflicts of interest, that may cause substantial consumer injury.

It has been suggested that disclosure of the fee arrangement itself solves the conflict of interest. There are several reasons why this may not be true. First, the relationship between the client and the CPA is of a sensitive, fiduciary nature, in which the trusting client seeks advice in areas where the client is untutored. That relationship may

<sup>2</sup> See, e.g., Calvani, Langenfeld, & Shuford, *Attorney Advertising and Competition at the Bar*, 41 Vand. L. Rev. 761 (1988).

<sup>3</sup> Docket No. 9189, 5 Trade Reg. Rep. (CCH) ¶12,653 (Feb. 22, 1989).

<sup>4</sup> By contrast, CPAs collectively may have substantial market power for attest services, since only CPAs can offer such services. Ironically, the majority correctly recognizes the efficiency of preventing potential conflicts of interest between CPAs and clients for attest services.



color the client's willingness to accept such a fee arrangement, even after disclosure, possibly to the client's considerable detriment. A client in this situation, because of the trust relationship involved, might not view such a fee arrangement with the same skepticism as disclosure of a similar arrangement from another type of salesman. In fact, it is entirely possible that the client does not view the CPA as a salesman at all. If a CPA discloses to his regular client that the CPA has received a fee for referring the client to another CPA for other services, the client may assume that the fiduciary's motive was to refer him to the best person for the job.<sup>5</sup> That may not be true. Presumably, the purpose of the referral fee was to generate the referral, whether or not made to the best person for the job.

The fact that many consumers seek out a CPA for various non-attest services, rather than alternate service providers, suggests that the objectivity of the CPA may be a highly important factor in the decision. This objectivity legitimately may be what the AICPA may seek to protect with its ban on referral fees and commissions. The ability to identify a trustworthy, objective service provider through membership in a professional association would plausibly decrease search costs and the risk of an adverse experience for consumers. Regrettably, the order ultimately prevents this alternative; the overriding benefits resulting from such a restriction are not clear.

Second, disclosure of only the fact of a referral fee or commission may prove insufficient to protect consumers, unless they are also informed of other relevant information. For instance, there might be less expensive alternatives where the commission would be smaller, but the return to the client might be the same or greater. While the Commission's order would require the CPA to disclose that he would receive a commission, the CPA would not be required under the order to advise the client of those other alternatives. The information that would have to be disclosed to protect consumers from a conflict of interest would vary from situation to situation, and does not seem amenable to listing exhaustively in a Commission order. However, it does seem that only disclosing the fact that the commission or referral fee is to be paid is insufficient to vitiate the conflict of interest.

The benefits claimed for the consent order provisions on referral fees and commissions do not hold up under close scrutiny. For example, it is suggested that consumers now will be able to do "one-

<sup>5</sup> Referral fees paid to commercial referral services may present different competitive questions and levels of efficiencies.

stop shopping," *i.e.*, obtain accounting services, as well as other financial services, from the same individual. This alternative was already available, so long as an AICPA member did not violate the Code's restrictions on referral fees and commissions. Consumers could also obtain accounting services from a CPA, not a member of the AICPA, and, in those states that permit it, the CPA could also sell them financial products of any imaginable type, with any fee arrangement. Furthermore, with the lifting of the restrictions on contingent fees for many non-attest services in the instant order, such a fee alternative would be available for clients who might have difficulty affording an hourly rate or set fee up front.

In sum, I have identified several plausible efficiencies stemming from prohibitions against intra-professional referral fees and commissions, that seem at least as likely, if not significantly more likely, to benefit consumers than the proposed remedy. Before agreeing to any consent of this nature, I would need to see more evidence to conclude that prohibiting restrictions on referral fees and commissions is in the public interest.

Finally, the AICPA Code prohibits solicitation through "the use of coercion, overreaching, or harassing conduct." I concur in the opinion of Commissioner Azcuenaga that there is no evidentiary basis for challenging this rule.<sup>6</sup> The restriction is not unlawful on its face, and, if it were demonstrated that it was enforced in an anticompetitive manner, the appropriate remedy would be to prohibit that offensive conduct, not the restriction itself. This order sends the wrong signal to other organizations that may wish, and indeed should even be encouraged, to adopt a legitimate rule of this nature.

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<sup>6</sup> Paragraph II.A.4 of the order prohibits the AICPA from "[r]estricting, regulating, impeding, declaring unethical, advising members against, or interfering with . . . [t]he solicitation of any potential client by any means, including direct solicitation. . . ."