IN THE MATTER OF

EGGLAND'S BEST, INC.

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

Docket C-3520. Complaint, Aug. 15, 1994--Decision, Aug. 15, 1994

This consent order prohibits, among other things, a Pennsylvania company from misrepresenting the amount of nutrients or other ingredients, such as cholesterol and fat, that is in its eggs or foods containing egg yolks, and requires the respondent to have competent and reliable scientific evidence to substantiate future health-benefit claims for such foods and, for one year, to label certain egg packages with a corrective notice stating that no studies show Eggland's eggs are different from other eggs in their effect on serum cholesterol.

Appearances

For the Commission: *Michelle K. Rusk, Anne V. Maher* and *Beth M. Grossman.*

For the respondent: *Eugene I. Lambert, Covington & Burling,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Eggland's Best, Inc. ("respondent"), a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a Pennsylvania corporation with its offices and principal place of business at 842 First Street, King of Prussia, Pennsylvania.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed Eggland's Best eggs and other egg products to consumers. These products are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for Eggland's Best eggs, including but not necessarily limited to the attached Exhibits A-E. These advertisements contain the following statements:

A. **Eggland's Best. Eggs that won't increase your serum cholesterol.** Imagine! Fresh, delicious, 100% real eggs that won't increase your serum cholesterol. You read it right.
In recent clinical tests as part of a low-fat diet, even a dozen Eggland's Best eggs a week caused no increase in serum cholesterol even though they contain about as much cholesterol as other eggs.
Know what that means? Now you can eat real eggs again.
So go ahead, enjoy! Cut out the coupon below and save 35¢ on real eggs that won't increase your serum cholesterol.
Eggland's Best. Now you can eat real eggs again.
[Exhibit A (Print: "Eggs That Won't Increase Your Serum Cholesterol")]

B. You can eat eggs again . . . and not increase your serum cholesterol.
Introducing Eggland's Best. They're fresh, real eggs. And in clinical tests in a low-fat diet even twelve a week caused no increase in serum cholesterol ....
They're special eggs from specially fed hens. . . .
Eggland's Best. Now, you can eat real eggs again.
[Exhibit B (TV: "Egg Dishes," Ver. 3)]

C. Do you remember eating eggs every day? Then there was all this cholesterol business. Well, now we can eat eggs again without worrying about raising our cholesterol.
New Eggland's Best eggs are fresh, real eggs that won't increase serum cholesterol . . . even though they contain about as much cholesterol as other eggs. In recent clinical tests, as part of a low-fat diet, people ate as many as twelve Eggland's Best eggs a week . . . and didn't increase their serum cholesterol.
Eggland's Best eggs come from very specially fed hens, you see.
Hens that eat no animal fat. Just healthy grains, extra Vitamin E and a special all-natural supplement that's rich in minerals. Plus canola oil, the oil lowest in saturated fat. So now there's a delicious, honest-to-goodness fresh egg that we can enjoy without worrying about cholesterol.
Now we can eat real eggs again!
[Exhibit C (Radio: "Hattie," Rev. 3)]

D. If you love eggs, but cholesterol has put you on a lowfat diet, here's a way to turn that diet sunny side up.
Introducing Eggland's Best, eggs from specially fed hens.
Like ordinary eggs, they contain cholesterol. Yet in clinical tests, people ate twelve Eggland's Best eggs a week as part of a low-fat diet and showed no increase in their serum cholesterol.
Try Eggland's Best. Your cholesterol-conscious diet can now have a sunny side. [Exhibit D (TV: "Put Back On," 93 Rev.)]

E. **It's simple. When the hens eat better, you eat better, too.**
Introducing Eggland's Best. Premium eggs from hens fed a premium diet.

Unlike ordinary eggs, Eggland's Best are laid by hens that eat no animal fat. Just lots of healthy grains, extra Vitamin E and a little canola oil -- the oil lowest in saturated fat.
[Exhibit E (Print: "It's Simple")]

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

A. Eating Eggland's Best eggs will not increase serum cholesterol.
B. Eating Eggland's Best eggs will not increase serum cholesterol as much as eating ordinary eggs.

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

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

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondent has represented, directly or by implication, that clinical studies have proven that adding twelve Eggland's Best eggs per week to a low-fat diet does not increase serum cholesterol.

PAR. 9. In truth and in fact, clinical studies have not proven that adding twelve Eggland's Best eggs per week to a low-fat diet does not increase serum cholesterol. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits C and E, respondent has represented, directly or by implication, that:

A. Eggland's Best eggs are low in saturated fat.
B. Eggland's Best eggs are lower in saturated fat than ordinary eggs.

PAR. 11. In truth and in fact:

A. Eggland's Best eggs are not low in saturated fat.
B. Eggland's Best eggs are not lower in saturated fat than ordinary eggs.

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

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

Commissioner Owen dissenting.

EXHIBIT A

Egg-land's Best. Eggs that won't increase your serum cholesterol.

Imagine! Fresh, delicious, 100% real eggs that won't increase your serum cholesterol.

You read it right.

In recent clinical tests as part of a low-fat diet, even a dozen Egg-land's Best eggs a week caused no increase in serum cholesterol even though they contain about as much cholesterol as other eggs.

Know what that means? Now you can eat real eggs again. So go ahead, enjoy! Cut out the coupon below and save 35¢ on real eggs that won't increase your serum cholesterol.

Egg-land's Best. Now you can eat real eggs again.

EXHIBIT B

Ayer

NW Ayer Incorporated
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7498
212-474-5000
Fax: 212-474-5400

EXHIBIT B

CLIENT	EGGLAND'S BEST	PROGRAM	
PRODUCT	Eggs	FACILITIES	TV
TITLE	"Egg Dishes Vers. 3"	DATE	7/27/92
NUMBER	ZAYA 2021 ***AS PRODUCED***	LENGTH	:30

VIDEO	AUDIO
	(MUSIC THROUGHOUT)
OPEN ON CU OF MAN TALKING TO HIMSELF	MAN OC: "Two eggs over easy."
CUT TO CU L/R PAN OF TWO EGGS IN PAN	AVO: You can eat eggs again.
CUT TO QUICK PAN OF MAN TALKING	MAN OC: "No wait...poached!"
CUT TO CU OF POACHED EGG BEING LIFTED OUT OF BOILING WATER	AVO: and not increase your serum cholesterol.
CUT TO L/R PAN OF EGGLAND CARTON	Introducing Eggland's Best.
CUT TO CU OF WHOLE EGGS FALLING INTO BOILING WATER	They're fresh,
CUT TO ECU OF HARD-BOILED EGG BEING PEELED	real eggs.
CUT TO PLATE OF EGGS AND POTATOES	And in
CUT TO HARD-BOILED EGG BEING SLICED	clinical tests in a
CUT TO L/R PAN OF FULL EGG CARTON	lowfat diet even twelve a week
CUT TO CU OF SCRAMBLED EGGS BEING PUT ON MUFFIN	caused no increase in serum cholesterol.
CUT TO CU OF MAN TALKING	MAN OC: "An omelet."
CUT TO RAW EGGS BEING MIXED IN BOWL	AVO: They're special eggs
CUT TO MUSHROOMS BEING PUT IN OMELET	from specially
CUT TO CU OF MAN	fed hens. MAN OC "Sunnyside...that's it!"
CUT TO ECU OF EGGLAND LOGO ON EGGS	Eggland's Best.
CUT TO SHOT OF EGGLAND'S BEST CARTON. SUPER: NOW YOU CAN EAT REAL EGGS AGAIN.	Now, you can eat real eggs again

EXHIBIT B

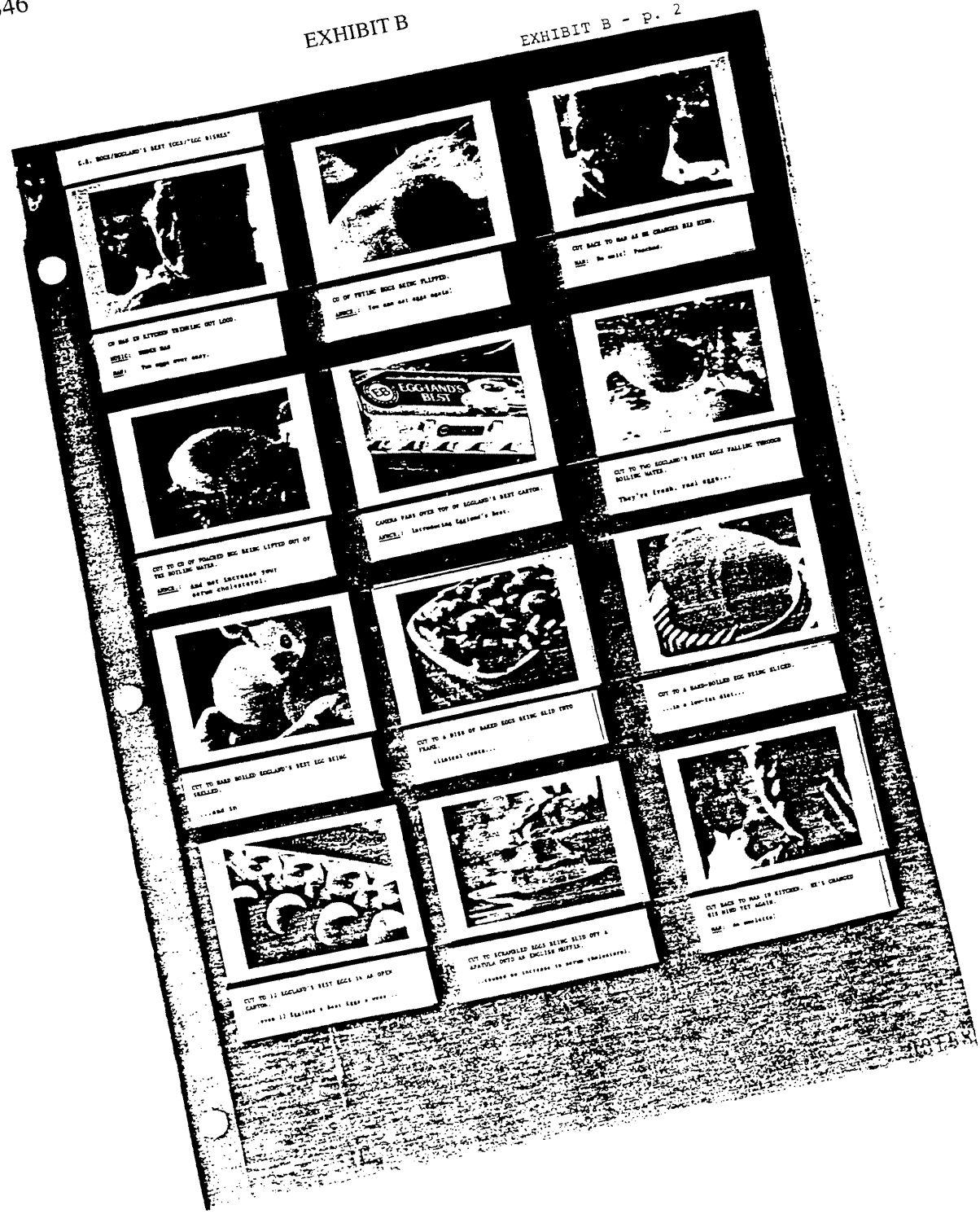

EXHIBIT B

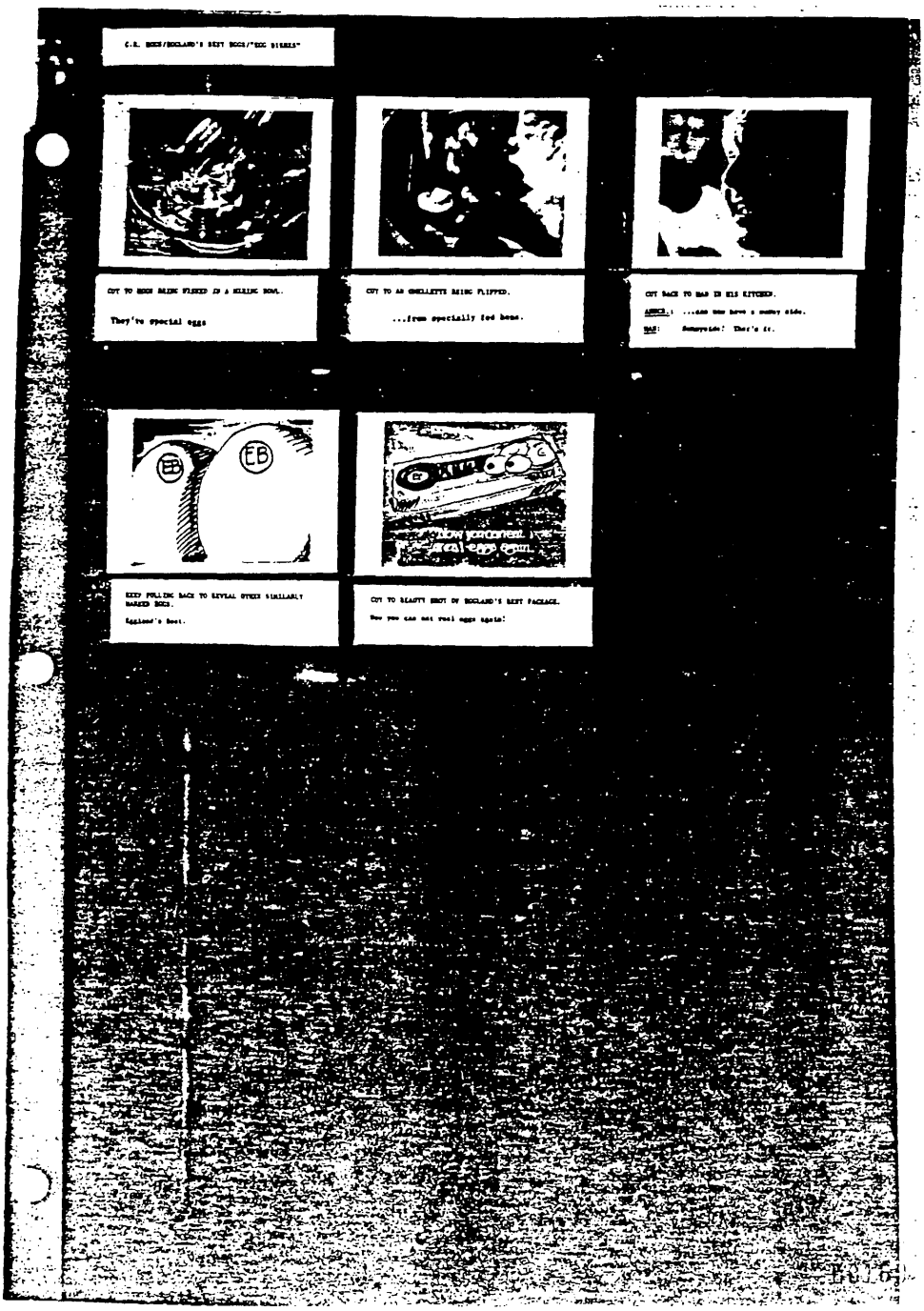

EXHIBIT C

EXHIBIT C

STRACHAN·McGUIRE
COMMUNICATIONS GROUP

WORLDWIDE PLAZA
[illegible]
NEW YORK, N.Y. [illegible]
[illegible] 212/474-[illegible]
FAX 212/474-[illegible]

CLIENT EGGLAND BEST EGGS
PRODUCT SAME
TITLE HATTIE
NUMBER 08-0792 AS PRODUCED

PROGRAM
FACILITIES RADIO
DATE August 24, 1992
LENGTH :60
Track #7

HATTIE: Hi, this is Hattie Winston. Do you remember eating eggs every day? Then there was all this cholesterol business. Well, now we can eat eggs again without worrying about raising our cholesterol.

New **Eggland's Best** eggs are fresh, real eggs that won't increase serum cholesterol...even though they contain about as much cholesterol as other eggs. In recent clinical tests, as part of a low-fat diet, people ate as many as twelve **Eggland's Best** eggs a week...and didn't increase their serum cholesterol.

Eggland's Best eggs come from very specially fed hens, you see.

Hens that eat no animal fat. Just healthy grains, extra vitamin E and a special all-natural supplement that's rich in minerals. Plus canola oil, the oil lowest in saturated fat. So now there's a delicious, honest-to-goodness fresh egg that we can enjoy without worrying about cholesterol.

Now we can eat real eggs again!

ANNCR: Look for the initials "EB" on every **Eggland's Best** egg.

APPROVED

340 Complaint

EXHIBIT D

EGGLAND'S BEST
:30 TV
"PUT BACK ON"
1/15/93
AS PRODUCED

EXHIBIT D

Pulp White ZAYA 3004

MUSIC: **UNDER THROUGHOUT**

V.O.: If you love eggs, but
cholesterol has put you on a low-fat diet...
here's a way to turn that diet sunny side up.

Introducing Eggland's Best, eggs from
specially fed hens.

Like ordinary eggs, they contain cholesterol.
Yet, in clinical tests, people ate 12 Eggland's
Best eggs a week as part of a low-fat diet
and showed no increase in their serum
cholesterol.

Try Eggland's Best.
Your cholesterol-conscious diet can now have a
sunny side.

EXHIBIT D

EXHIBIT D - p. 2

EXHIBIT D

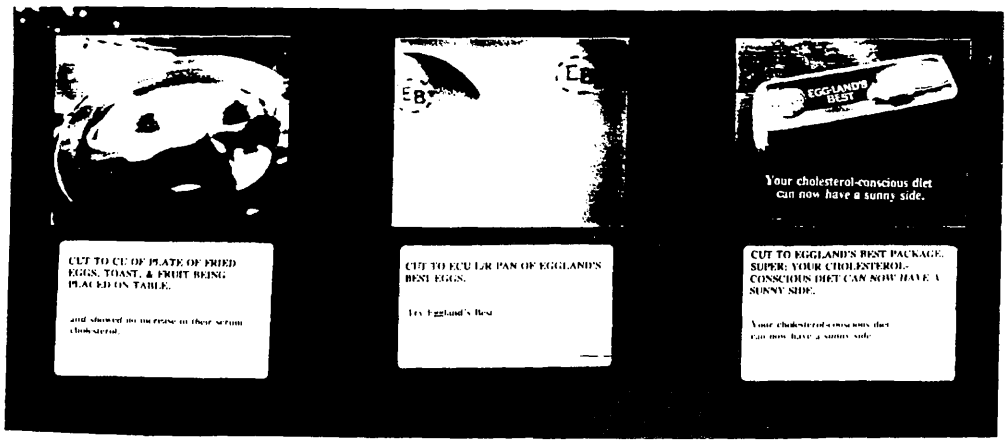
CUT TO CU OF PLATE OF FRIED EGGS, TOAST, & FRUIT BEING PLACED ON TABLE.
CUT TO ECU LR PAN OF EGGLAND'S BEST EGGS.
EGG-LAND'S BEST
Your cholesterol-conscious diet can now have a sunny side.
CUT TO EGGLAND'S BEST PACKAGE. SUPER: YOUR CHOLESTEROL-CONSCIOUS DIET CAN NOW HAVE A SUNNY SIDE.

EXHIBIT E

EXHIBIT E

It's simple. When the hens eat better, you eat better, too.

Introducing Egg-land's Best.® Premium eggs from hens fed a premium diet.

Unlike ordinary eggs, Egg-land's Best are laid by hens that eat no animal fat. Just lots of healthy grains, extra Vitamin E and a little canola oil–the oil lowest in saturated fat.

Ask for them at one of the fine restaurants listed in this book. And find out just how good an egg can be.

Introducing Egg-land's Best.

UTAH MENU GUIDE AD -- RAN JULY 1992

CR-NAT-P20005
8" x 5"
Utah Menu Directory—July 1992

DECISION AND ORDER

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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, 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 Eggland's Best, Inc. is a corporation organized, existing and doing business under and by the virtue of the laws of the State of Pennsylvania, with its offices and principal place of business located at 842 First Street, King of Prussia, Pennsylvania.

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

DEFINITION

For purposes of this order, the phrase "food containing egg yolk" shall not include "medical foods" as defined by 21 U.S.C. 360ee (b)(3) as currently in effect as of the date of this order.

I.

It is ordered, That respondent Eggland's Best, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the absolute or comparative amount of cholesterol, total fat, saturated fat or any other nutrient or ingredient in such food.

II.

It is further ordered, That respondent Eggland's Best, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the absolute or comparative effect of such food on serum cholesterol, whether or not such food is consumed as part of an unrestricted diet or as part of any specific dietary regimen, unless at the time of making the representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating such representation; provided, however, that any such representation that is specifically permitted in labeling for such food by regulations promulgated by the Food and

Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to be substantiated as required by this paragraph. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondent Eggland's Best, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the absolute or comparative health benefits of such food, including but not limited to its effect on heart disease, unless at the time of making the representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating such representation; provided, however, that any such representation that is specifically permitted in labeling for such food by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to be substantiated as required by this paragraph.

IV.

It is further ordered, That respondent Eggland's Best, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any food in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the

existence, contents, validity, results, conclusions or interpretations of any test or study.

V.

It is further ordered, That respondent Eggland's Best, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to disclose clearly and prominently in any advertisement or promotional material that refers, directly or by implication, to the absolute or comparative amount of cholesterol, fat or saturated fat in such food, the average cholesterol content of such food expressed in the following terms:

1. The number of milligrams; and
2. The percentage of "Maximum Daily Value."

The statements required by subparagraphs A.1 and A.2 of this Part shall appear in close proximity. For purposes of this Part, the term "Maximum Daily Value" shall mean: (1) the daily reference value or other daily intake limit for cholesterol established in an effective final regulation of the Food and Drug Administration; or (2) in the absence of such a regulation, the daily intake limit of cholesterol advised by any one of the following three organizations: the National Academy of Sciences, the Surgeon General of the Public Health Service, or the American Heart Association. In the event that the Food and Drug Administration does not have a final effective regulation and none of the three named organizations advises that daily cholesterol intake be limited to a specific maximum amount, subparagraph A.2 of this Part shall not apply. Provided, however, that this Part will not be deemed to apply to any representation that is specifically permitted in labeling for such food product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

B. For a time period of one year, beginning no later than forty-five (45) days from the date this order becomes final, offering for sale, selling, or distributing eggs unless the package label for such eggs clearly and prominently states, in the exact language that follows, that:"There are no studies showing that these eggs are different from other eggs in their effect on serum cholesterol." Provided, however, that this requirement shall apply only in those geographic areas where respondent has disseminated or caused to be disseminated advertising or promotional materials containing any representation, directly or by implication, about the effect of Eggland's Best eggs or other eggs on serum cholesterol over a period of 12 weeks or more, or at any time between January 1, 1993 and the date of the acceptance of this order by the Commission for public comment, including but not limited to those geographic areas listed in Attachment A to this order.

For purposes of this order, "clearly and prominently" shall mean as follows:

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

2. In a print advertisement, the disclosure shall be in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears, shall be located in close proximity to the statement or other reference requiring the disclosure and shall be of a color or shade that readily contrasts with the background of the advertisement;

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

4. On a package label, the disclosure shall be in a conspicuous and prominent place on the package, in a conspicuous format, and in conspicuous and legible type in contrast by typography, layout, or color with all other printed material on the package. Provided, however, that if the disclosure is displayed on the top or front panel of a standard twelve-egg carton or on the top, front or side panel of

a standard six-egg carton, is in at least ten (10) point type and is either on a separate label or enclosed within a border, and both the type and the border are of a color or shade that readily contrasts with the background of the carton, the disclosure shall be deemed to have been made clearly and prominently for purposes of this order.

VI.

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

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

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

VII.

It is further ordered, That respondent Eggland's Best, Inc. shall, within thirty (30) days after service upon it of this order, distribute a copy of the order to each of its operating divisions, to each of its franchisees, to each of its managerial employees, and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertising or other materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

VIII.

It is further ordered, That respondent Eggland's Best, Inc. shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure, including but not limited to dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or

affiliates, or any other corporate change that may affect compliance obligations arising out of this order.

IX.

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

Commissioner Owen dissenting.

ATTACHMENT A

GEOGRAPHIC AREAS WITH CHOLESTEROL-RELATED ADVERTISING OR PROMOTION PURSUANT TO PARAGRAPH V.B. OF AGREEMENT CONTAINING CONSENT ORDER

1. Iowa
2. Maine
3. Rhode Island
4. Western and Central Pennsylvania
5. Virginia
6. Maryland
7. Washington, D.C.
8. Georgia
9. South Carolina
10. Alabama
11. Mississippi
12. Louisiana
13. Arkansas
14. California
15. Nevada
16. Idaho
17. Michigan
18. Colorado
19. South Dakota
20. Washington
21. Montana
22. Alaska
23. Wyoming
24. Missouri
25. Oklahoma
26. Salt Lake City, Utah
27. Raleigh-Durham, North Carolina
28. Southern Illinois (St. Louis Market)

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

The Commission today issues a final consent order settling complaint allegations that Eggland's Best, Inc., made deceptive advertising claims about its eggs. I join the Commission in finding reason to believe that Eggland's claims are deceptive and join in approving the order except for paragraph V.B. I do not agree that the corrective notice provision contained in paragraph V.B. is warranted, and I dissent from the order to that extent.

In imposing a corrective notice remedy, the Commission must consider whether an advertisement has played a substantial role in creating in the public's mind a false belief about a product that will linger on after the false advertisement ceases. *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). A corrective notice provision is intended to dissipate the lingering effects of a deceptive advertisement so that future advertisements do not become part of a continuing deception of the public. *Id.* at 769.

Here, there is no direct evidence, such as the consumer surveys and expert testimony in Warner Lambert Co., that Eggland's Best's advertisements created a lingering false impression about the effects on serum cholesterol of its eggs. It is unlikely that such an impression was created. Eggland's Best's advertisements ran for a relatively short period of time, and the claims are contrary to general information about the relationship between the consumption of eggs and serum cholesterol that is available to consumers in significant quantity from a variety of other sources. Without a stronger showing of the need for corrective advertising under the Warner-Lambert test, I cannot support the corrective notice provision in the order.

During the period for comment on the order, the issue was raised whether the required corrective notice is unduly broad and in itself could be misleading. Although this appears to be a reasonable question, given the available evidence, I do not reach this issue, because I would not impose a corrective notice requirement at all.

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

I concur in the Commission's decision to issue a complaint, and to accept a consent agreement in this matter, except as to Section V.B. of the order. With respect to that Section, which requires corrective advertising, I dissent.

The seminal case on corrective advertising is the Listerine case, *Warner-Lambert Company,* 86 FTC 1398 (1975), where the Commission opined:

> [I]f a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be avoided by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.

86 FTC at 1499-1500.

As the complaint alleges, Eggland's ads, in my judgment, certainly create an impression that its eggs will not increase serum cholesterol, or, comparatively, increase cholesterol as much as ordinary eggs. However, we must also find that the beliefs created by the challenged ads are likely to linger after the advertising ceases. As to that likelihood, it seems to me important to compare and contrast the facts in Warner-Lambert to the situation here.

In Warner-Lambert, decided in 1975, the Commission noted that the challenged advertising claims had been made directly to the consuming public since 1921, and involved expenditures of large sums in print and television media. 86 FTC at 1501. The Commission cited to the ALJ's Findings of Fact, which noted that Listerine had made the contested representations since the product went on the market almost a century before; that cold and sore throat claims had been made continuously on its labeling since prior to 1938; and that over the ten years preceding the decision, Listerine had spent several million dollars on its colds advertising, the vast majority occurring on network and spot television, covering all parts of the day and evening and particularly in network prime time. *Id.* at 1468 (IDFF 219-220); *see also id.* at 1407-1408 (IDFF 5-8). The Commission pointed to record testimony indicating the high

percentage of consumers taking such claims that would remain as long as five years after the ads ended. It concluded: "The record demonstrates that long after Listerine cold efficacy advertising ceased, a substantial proportion of the public would continue to believe in Listerine's efficacy for the treatment and prevention of colds and sore throats." *Id.* at 1503 (emphasis supplied).

If we contrast the length in time, and the magnitude of Listerine's advertising to the instant case, Eggland's advertising would hardly appear to rise to even a two-digit percentage thereof. We have no evidence that Eggland's campaign was so similarly saturated and extended that long after it ceases, a substantial portion of the public will continue to believe the challenged claims in the absence of the corrective advertising that the Commission has accepted.

One significant factor is in evidence here that was not present in the Listerine case: the barrage of contrary information to which the public is exposed. While the public received little, if any, information from sources other than the advertiser about the true effect of Listerine on colds and sore throats, the vast majority of information available to consumers challenges the Eggland claims, and links egg consumption with increased serum cholesterol. Articles in the popular press, television and radio programs, and many cookbooks recommend that consumers lower their consumption of eggs. Doctors and the American Heart Association advise people to limit their egg consumption for health reasons. The general ambient information and perception is that eggs are unhealthy, and this climate is highly relevant in determining whether the false beliefs created by Eggland's Best advertisements will likely linger. Eggland's Best advertisements attempted to counteract the common wisdom, but ran for only a short time. Because the information that eating eggs is likely to increase serum cholesterol will continue to be widely disseminated to consumers through media sources, it is unlikely that the beliefs regarding the effects of Eggland's Best eggs on serum cholesterol, or their comparative benefits to other eggs, will be maintained. In sum, the half-life of Eggland's advertising campaign is probably very short.

During the public comment period, eighteen comments were received. Two of these comments supported the Commission's position with respect to the corrective labeling notice, and the remaining sixteen comments either disagreed with the Commission's position or were silent on this issue. Comments from the American

Advertising Federation and the American Association of Advertising Agencies focused on the lack of a factual record indicating that Eggland's advertising has caused the type of injury that needs to be redressed by corrective advertising, and stressed the quantum difference in factual record between Egglands and Warner-Lambert. Members of the egg industry and academics were also critical of the corrective labeling provision. In addition to echoing the concerns regarding evidence of lingering harm, these commentators believe that the incentive to innovate will be reduced, and that the required language of the corrective label is itself misleading.

In contrast, both the Massachusetts Office of the Attorney General and the Center for Science in the Public Interest (CSPI) believe that corrective advertising is appropriate in this case. Further, both request that the Commission expand the scope of the requirement. The Massachusetts AG's Office recommends including Massachusetts in the area where corrective labeling is required, and the CSPI urges the Commission to require that the corrective statement be made in advertising as well as on the carton label. The Commission has chosen to refrain from altering the scope of the corrective advertising based on these comments, and I believe that the weight of the public comment reinforces my earlier opinion in opposition to corrective advertising.[1]

My dissent on the use of corrective advertising in this case is not to suggest, however, that corrective advertising is only appropriate where the ad campaign is decades-old and swamps the public. A classic opportunity for appropriately imposing the remedy was the Sun Company case two years ago. File No. 902-3268. There, the Commission challenged claims linking octane and automobile engine performance made by a company that was previously under a Commission order for earlier false performance and uniqueness claims for its gasoline. *Sun Oil Co.*, 84 FTC 247 (1974). Nonetheless, the Commission agreed to merely a cease-and-desist order, despite the fact that the challenged claims took advantage of, and further contributed to, widespread consumer misperception about the relationship between octane and performance. The contrast between the Commission's decision there, and here, suggests that the Commission's current posture on corrective advertising may be more

[1] Moreover, it should be noted that nothing in the Commission's action precludes Massachusetts from seeking its own relief and, indeed, Massachusetts has filed a law suit against Eggland's Best.

a function of respondents' willingness to agree to the remedy, rather than of a well defined and implemented policy.

Finally, a comment on the remedy itself. The corrective advertising is ordered to be placed on Eggland's Best carton label. Due to other legal limitations, Eggland's Best has not made serum cholesterol or heart health claims on the carton. Thus, while the attempt to limit the breadth of the remedy may be well-intentioned, I find it highly ironic that corrective advertising has been mandated in a medium where the original deceptive claims were never made.

STATEMENT OF ROSCOE B. STAREK, III

I support the corrective advertising provision in this order. Under the appeals court decision in Warner-Lambert Co., corrective advertising may be ordered if the challenged ads substantially contributed to the development and maintenance of a false and material belief, and a substantial portion of consumers will continue to hold the false belief.[1] The Warner-Lambert court suggested that the purpose of advertising is to create enduring beliefs in consumers' minds, such that the FTC might well presume in some cases that the standard for imposing corrective advertising had been met.[2] The Warner-Lambert decision accords the Commission substantial discretion in applying a corrective advertising remedy. The Commission must take care, however, to exercise such broad discretion judiciously. The question I had to answer in this case was whether corrective advertising is appropriate in the absence of an extended period of deceptive advertising or extrinsic evidence demonstrating that the false impressions will persist in consumers' minds after the ads cease.[3]

I have determined that a limited corrective advertising requirement is an appropriate remedy here. First, I have reason to believe that the Eggland's ads have created in consumers, minds enduring

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[1] *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *modifying and enforcing* 86 FTC 1398 (1975), *cert. denied*, 435 U.S. 950 (1978).

[2] The court stated that it need not rely upon such a presumption in its case, however, because the record contained evidence that the Listerine ads in question had created, in the minds of consumers exposed to the advertising, false beliefs that would persist after the ads ended. *Id.*, 562 F.2d at 762-63; *see* 86 FTC at 1471 n.23 (data relied upon was a survey of "consumers who have seen or heard a lot of advertising for Listerine").

[3] It is certainly unrealistic to think that we will have this data when the respondents enter into a consent agreement before a complaint is filed.

false impressions about these eggs. Because Eggland's is able to charge for its eggs about 200% of the typical price per dozen, we have strong evidence that the company's ads have been successful in creating in the minds of its consumers a belief that its eggs are meaningfully superior to other eggs. Second, the superiority touted by Eggland's ads -- including ads disseminated during the public comment period -- pertains to their effect on serum cholesterol. Common sense tells me that this belief, which relates to the principal attribute purportedly distinguishing Eggland's eggs from other eggs is not going to disappear overnight, simply because advertising making that claim ceases. Third, consumers who continued to believe that Eggland's had a demonstrated superiority over typical eggs would suffer an identifiable injury, again due to the price differential. Further, if the ads lead consumers to increase their egg consumption significantly, some consumers may increase their serum cholesterol levels and thus potentially harm their health. A corrective notice placed on the egg package would enable consumers to avoid further injury.

Finally, I am persuaded by the careful crafting of the corrective remedy. The instant notice is designed to reach consumers likely to have been misled by Eggland's ads (those who are preparing to purchase the product), rather than the population at large. It has a limited dissemination schedule and will not be unreasonably costly. Moreover, the notice itself is a statement of fact that is neither derogatory of Eggland's eggs nor implies criticism of other companies' products.

Thus, although I think corrective advertising is a remedy that should be used sparingly, I support its inclusion in this order.

STATEMENT OF COMMISSIONER DENNIS A. YAO

I voted to accept the consent agreement in this matter. Although I support the terms of the consent agreement, I would have preferred that the complaint include an implied heart disease allegation.

The Commission alleges in its complaint that, among other things, Eggland's Best falsely represented that it had a reasonable basis for claims that eating its eggs will not increase serum cholesterol in an absolute sense and that eating its eggs will not increase serum cholesterol as much as eating ordinary eggs. I believe that reasonable consumers would interpret the express claim that

Eggland's eggs will not increase serum cholesterol to imply that those eggs would therefore not increase the risk of heart disease -- especially when the express claim was made for eggs, a product notoriously well known for its negative impact on heart health. Although the order does include a requirement that health claims, including claims about heart disease, be substantiated by competent and reliable scientific evidence, I believe that industry and the public would best be served if the Commission communicated its belief that an implied health claim has been made here.[1]

[1] I would note that the complaint also alleges that Eggland's Best falsely represented that its eggs are low in saturated fat in an absolute sense, and are lower in saturated fat than ordinary eggs. Although I agree that the implied saturated fat claims challenged in the complaint were made, in my view this claim is further down the spectrum of implied claims towards those needing extrinsic evidence than the implied heart disease claim I discuss here. I thus can discern no reason for excluding the implied heart disease claim from the complaint while including the saturated fat claims.

IN THE MATTER OF

TCH CORPORATION, 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-3519. Complaint, Aug. 16, 1994--Decision, Aug. 16, 1994

This consent order requires, among other things, two California-based corporations to divest, within one year, to a Commission-approved buyer, the pharmacy business in either the PayLess or the Thrifty or Bi-Mart stores in six designated areas, requires the respondents to ensure that the assets to be divested remain viable and marketable, and for ten years requires that the respondents obtain Commission approval prior to acquiring any stock or other interest in any entity engaged in the business of selling prescription drugs at retail stores in the six areas designated.

Appearances

For the Commission: *Laura Wilkinson, Ann B. Malester, Claudia R. Higgins, Melissa K. Heydenreich, Meribeth Petrizzi* and *Jacqueline K. Mendal.*

For the respondents: *Harvey I. Saferstein, George S. Cary, Aimee H. Goldstein* and *Stephanie Kaufman, Irell & Mannella,* Newport Beach, CA.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, TCH Corporation ("TCH"), a Delaware corporation, and Green Equity Investors, L.P. ("GEI"), a Delaware investment limited partnership (collectively, "respondents"), subject to the jurisdiction of the Federal Trade Commission, have agreed to acquire certain assets of Kmart Corporation, a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. "*TCH*" or "*Thrifty*" means TCH Corporation, a corporation organized, existing, and doing business under and by the virtue of the laws of Delaware, its directors, officers, agents and representatives, its domestic and foreign parents, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, agents and representatives of its domestic and foreign successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words "subsidiary," "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations or partnerships.

2. "*GEI*" means Green Equity Investors, L.P., an investment limited partnership organized, existing, and doing business under and by the virtue of the laws of Delaware, its general partners, directors, officers, agents and representatives, its domestic and foreign parents, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, agents and representatives of its domestic and foreign successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words "subsidiary," "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations or partnerships.

3. "*Kmart*" means Kmart Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Michigan, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures.

II. RESPONDENTS

4. Respondent TCH is a corporation organized and existing under the laws of Delaware, with its principal place of business at 3424 Wilshire Boulevard, Los Angeles, CA.

5. Respondent GEI is an investment limited partnership organized and existing under the laws of Delaware, with its principal place of business at 333 South Grand Avenue, Suite 5400, Los Angeles, CA. GEI controls TCH.

6. For purposes of this proceeding, respondents are, and at all times relevant herein have been, engaged in commerce as commerce is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are either corporations, or partnerships 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.

III. ACQUIRED COMPANY

7. Kmart is a corporation organized and existing under the laws of the State of Michigan, with its headquarters at 3100 West Big Beaver Road, Troy, Michigan.

8. Kmart is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

9. On or about December 1, 1993, TCH and Kmart agreed to enter into an agreement whereby GEI, through TCH, will acquire from Kmart Corporation all of the stock of PayLess Drug Stores Northwest, Inc., a wholly-owned subsidiary of Kmart, for consideration totaling approximately $1.162 billion ("Acquisition").

V. THE RELEVANT MARKETS

10. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the sale of prescription drugs in retail stores.

11. For purposes of this complaint, the relevant sections of the country in which to analyze the effects of the Acquisition are: Bishop, California; Fort Bragg/Mendocino, California; Mt. Shasta, California; Taft, California; Florence, Oregon; and Ellensburg, Washington.

12. The relevant markets set forth in paragraphs ten and eleven are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

13. Entry into the relevant markets is difficult or unlikely.

14. TCH and Kmart are actual competitors in the relevant markets.

VI. EFFECTS OF THE ACQUISITION

15. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between TCH and Kmart;
b. By increasing the likelihood that TCH will unilaterally exercise market power; or
c. By increasing the likelihood of collusion in the relevant markets.

16. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

VII. VIOLATIONS CHARGED

17. The acquisition agreement described in paragraph nine constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondents' proposed acquisition of certain voting securities and

assets of PayLess Drug Stores Northwest, Inc., a wholly-owned subsidiary of Kmart Corporation, and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34, 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 TCH Corporation ("TCH" or "Thrifty") is a corporation organized and existing under the laws of Delaware with its office and principal place of business at 3424 Wilshire Boulevard, Los Angeles, CA.

2. Respondent Green Equity Investors, L.P. ("GEI") is a Delaware investment limited partnership organized and existing under the laws of Delaware with its office and principal place of business at 333 South Grand Avenue, Suite 5400, Los Angeles, CA.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*TCH*" or "*Thrifty*" means TCH Corporation, a corporation organized, existing, and doing business under and by the virtue of the laws of Delaware, its subsidiaries, divisions, and groups controlled by TCH, and their respective directors, officers, agents, representatives, and their respective successors and assigns.

B. "*GEI*" means Green Equity Investors, L.P., an investment limited partnership organized, existing, and doing business under and by the virtue of the laws of Delaware, its general partners, subsidiaries, divisions, and groups controlled by GEI, and their respective directors, officers, agents, representatives, and their respective successors and assigns.

C. "*Respondents*" means TCH and GEI.

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

E. "*Acquisition*" means the acquisition of the voting stock of PayLess Drug Stores Northwest, Inc., a wholly-owned subsidiary of Kmart Corporation, by respondents TCH and GEI.

F. "*Acquirer*" means the party or parties to whom respondents TCH and GEI divest the assets herein ordered to be divested.

G. "*Prescription drugs*" means ethical drugs available at retail only by prescription.

H. "*PayLess Pharmacy Business*" means PayLess's business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order, but does not include PayLess's business of selling other products in those retail stores.

I. "*PayLess Pharmacy Assets*" means all assets constituting the PayLess Pharmacy Business, excluding those assets pertaining to the PayLess trade name, trade dress, trade marks and service marks, and including but not limited to:

1. Leases and properties, at the acquirer's option;
2. Zoning approvals and registrations, at the acquirer's option;
3. Books, records, reports, dockets and lists relating to the PayLess Pharmacy Business;

4. Lists of stock keeping units ("SKUs"), *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;

5. Lists of all customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;

6. All names of prescription drug manufacturers and distributors under contract with PayLess;

7. All price lists for prescription drugs, operating manuals, and advertising and promotional materials, at the acquirer's option, but only if the divestiture is to an acquirer that does not already operate a pharmacy in any location; and

8. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

J. "*Thrifty and Bi-Mart Pharmacy Business*" means Thrifty's business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order, but does not include Thrifty's business of selling other products in those retail stores.

K. "*Thrifty and Bi-Mart Pharmacy Assets*" means all assets constituting the Thrifty and Bi-Mart Pharmacy Business, excluding those assets pertaining to the Thrifty and Bi-Mart trade names, trade dress, trade marks and service marks, and including but not limited to:

1. Leases and properties, at the acquirer's option;

2. Zoning approvals and registrations, at the acquirer's option;

3. Books, records, manuals, dockets and lists, relating to the Thrifty and Bi-Mart Pharmacy Business;

4. Lists of SKUs, *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;

5. Lists of all customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;

6. All names of prescription drug manufacturers and distributors under contract with Thrifty;

7. All price lists for prescription drugs, operating manuals, and advertising and promotional materials, at the acquirer's option, but only if the divestiture is to an acquirer that does not already operate a pharmacy in any location; and

8. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

L. "*Assets To Be Divested*" means either the PayLess Pharmacy Assets or the Thrifty and Bi-Mart Pharmacy Assets located in the following cities or towns:

1. Bishop, California;
2. Fort Bragg/Mendocino, California;
3. Mt. Shasta, California;
4. Taft, California;
5. Florence, Oregon; and
6. Ellensburg, Washington.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, within one (1) year of the date this order becomes final, the Assets To Be Divested.

B. Divestiture of the Assets To Be Divested by respondents shall be made only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Assets To Be Divested is to ensure the continuation of the Assets To Be Divested as ongoing viable pharmacies engaged in the same businesses in which the Assets To Be Divested are presently employed and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. Pending final divestiture of the Assets To Be Divested, respondents shall take such action as is necessary to maintain the viability and marketability of the Assets To Be Divested and shall not cause or permit the destruction, removal wasting, deterioration, or impairment of any Assets To Be Divested except in the ordinary course of business and except for ordinary wear and tear.

D. If a divestiture includes a lease of physical space, and if pursuant to that lease a respondent through default of the lease or otherwise regains possession of the space, respondents must notify the Commission of such repossession within thirty (30) days and must redivest such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within one (1) year of the date this order becomes final, respondents shall consent to the appointment by the Commission of a trustee to divest the Assets To Be Divested. Provided, however, that if the Commission has not approved or disapproved a proposed divestiture within 120 days of the date the application for such divestiture has been put on the public record, the running of the divestiture period shall be tolled until the Commission approves or disapproves the divestiture. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the

identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest the Assets To Be Divested.

3. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.8. of this order to accomplish the divestiture. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the twelve-month divestiture period may be extended by the Commission, or in the case of a court appointed trustee by the court; provided, however, the Commission may extend the twelve (12) month divestiture period only two (2) times.

4. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested, or to any other relevant information, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under paragraph III.B.3. in an amount equal to the delay, as determined by the Commission or for a court-appointed trustee, by the court.

5. Subject to respondents' absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II.B., 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. The divestiture shall be made in the manner set out in paragraph II of this order. Provided, however, if the trustee receives bona fide offers from more than one acquirer, and if the Commission determines to approve more than one such acquirer, the trustee shall divest to the acquirer selected by respondents from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment

bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

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

8. Within ten (10) 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, respondents shall 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.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

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

IV.

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 complied with the provisions of paragraphs II. and III. 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, and have complied with those provisions. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph II. and III. of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

It is further ordered, That, for a ten (10) year period commencing on the date this order becomes final, respondents shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise: (A) Acquire any stock, share capital, equity, leasehold or other interest in any concern, corporate or non-corporate, engaged in the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order or previously engaged in the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order within the six-month period prior to such acquisition; or (B) Acquire any assets used for, or previously used for (and still suitable for use for), the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order. Provided, however, that these prohibitions shall not relate to the construction of new facilities or the acquisition or lease of facilities that have not operated as pharmacies within six months of the date of the offer to acquire or lease. Provided further, that the requirement of prior Commission approval set out in this paragraph shall not apply to a respondent contemplating an acquisition otherwise subject to prior Commission

approval if, at the time of such acquisition, that respondent does not own, directly or indirectly, any interest in the whole or any part of the stock or share capital of, any company that is engaged in the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order or any asset used or previously used within the previous six-months in (and still suitable for use in) the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order. Provided, however, that for any such acquisition exempted from the requirements of this paragraph, each acquiring respondent shall provide written notice to the Commission of such acquisition at least ten (10) days prior to such acquisition. Notwithstanding the foregoing, respondent GEI may acquire, for investment purposes only, an interest of not more than five (5) percent of the stock or share capital of any concern. One year from the date this order becomes final, annually thereafter for the next nine (9) years on the anniversary of the date this order became final, and at such other times as the Commission may require, respondents shall file with the Commission a verified written report setting forth in detail the manner and form in which they have complied and are complying with paragraph V. of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents, respondents shall permit any duly authorized representatives of the Commission:

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

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

VII.

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

Commissioner Owen dissenting.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN

I find reason to believe that the proposed acquisition of certain assets of Kmart Corporation by TCH Corporation and Green Equity Investors, L.P. may violate Section 5 of the FTC Act by substantially lessening competition with respect to acute care prescription drugs sold to cash customers in three California markets: Bishop, Mt. Shasta, and Fort Bragg/Mendocino.[1] In the absence of further investigation, I cannot find reason to believe that the Act has been violated with respect to the remaining geographic markets alleged in the Commission's complaint.[2] I therefore dissent with respect to those allegations, and with respect to any provisions in the order that are unnecessary to remedy the alleged anticompetitive effects in the product and geographic markets that I have supported.

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[1] I define acute care prescription drugs as those drugs which are prescribed to fill an immediate need and are rarely refilled, such as antibiotics. Maintenance drugs, by contrast, are those prescribed on an on-going basis and are regularly refilled, such as blood pressure medicine. The latter are more susceptible to competition from mail-order firms. I define cash customers to mean persons whose prescription drug purchases are not covered by managed care or other third-party payors. Such customers are less able to resist a price increase.

[2] The rationale underlying my unwillingness to support a complaint and consent agreement where, due to insufficient investigation, the record does not establish reason to believe that the law has been violated, is detailed in my dissenting statement in the matter of QVC Network, Inc./Paramount Communications, Inc. (File No. 941- 0008).

IN THE MATTER OF

DOMINICAN SANTA CRUZ HOSPITAL, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket C-3521. Complaint, Aug. 18, 1994--Decision, Aug. 18, 1994

This consent order prohibits, among other things, the California non-profit corporations from acquiring, for ten years, without prior Commission approval, all or any significant part of a general acute care hospital in Santa Cruz County, CA. The consent order also prohibits, for ten years, the respondents from selling or transferring any hospital in the county to a non-respondent prior to the acquirer agreeing to be bound by the Commission's order.

Appearances

For the Commission: *Jeffrey A. Klurfeld, David M. Newman* and *John P. Wiegand.*

For the respondents: *Toby Singer* and *Philip Proger, Jones, Day, Reavis & Pogue,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Catholic Healthcare West and Dominican Santa Cruz Hospital have acquired AMI-Community Hospital in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C.18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to the provisions of Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, stating its charges as follows:

I. DEFINITIONS

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

(a) "*General acute care hospital*," herein referred to as "*hospital*," means a health facility, other than a federally owned facility, having a duly organized governing body with overall

administrative and professional responsibility, and an organized medical staff, that provides or is licensed to provide 24-hour inpatient care, as well as outpatient services, and having as a function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities; "hospital" does not include any skilled nursing facility, mental health or psychiatric facility, rehabilitation facility, chemical dependency facility or other chronic care facility.

(b) To "*operate a hospital*" means to own, lease, manage, or otherwise control or direct the operations of a hospital, directly or indirectly.

II. THE RESPONDENTS

2. Respondent Catholic Healthcare West ("CHW") is a non-profit religious corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business and mailing address at 1700 Montgomery Street, Suite 300, San Francisco, California. CHW is a person subject to the jurisdiction of the Commission pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21.

3. CHW is primarily engaged in the establishment, management, and maintenance of acute care hospitals in the western United States. It and its affiliated corporations own and operate hospitals in California, Nevada, and Arizona.

4. Respondent Dominican Santa Cruz Hospital ("Dominican") is a non-profit religious corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, principal place of business and mailing address at 1555 Soquel Drive, Santa Cruz, California. Dominican operates a hospital facility also called Dominican Santa Cruz Hospital ("DSCH"). Dominican is a person subject to the jurisdiction of the Commission pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21.

5. CHW is the sole corporate member of Dominican. Through this affiliation, CHW controls Dominican.

6. At all times relevant herein, respondents have been and are now engaging in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. CHW does

business in a number of states. CHW and Dominican, through their hospitals, among other things, have:

(a) Purchased substantial amounts of supplies, equipment and medicines from sources outside of the State of California;
(b) Received substantial revenues from private and governmental insurers located outside of the State of California; and
(c) Treated some patients who travel from or reside outside of the State of California.

7. Until the acquisition described in Section III below, respondents owned or operated one general acute care hospital, DSCH, in Santa Cruz County, California.

III. THE ACQUISITION

8. AMI-Community is a wholly-owned subsidiary of American Medical International ("AMI"), a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its executive offices in Beverly Hills, California. The sole shareholder of AMI-Community is AMI. Until the acquisition described below, AMI-Community owned and operated a general acute care hospital in Santa Cruz County, California, the AMI-Community Hospital of Santa Cruz (hereinafter "Community Hospital"). At the time of the acquisition, AMI owned and operated over 49 acute care hospitals in 14 states, including Community Hospital.

9. At all times relevant herein, AMI and AMI-Community have been engaging in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. AMI does business in a number of states. AMI and AMI-Community, through their hospitals, among other things, have:

(a) Purchased substantial amounts of supplies, equipment and medicines from sources outside of the State of California;
(b) Received substantial revenues from private and governmental insurers located outside of the State of California; and
(c) Treated some patients who travel from or reside outside of the State of California.

10. On or about March 8, 1990, Dominican entered into an agreement with AMI for Dominican to purchase substantially all of the assets of AMI-Community, including Community Hospital and associated real property, inventories, tangible personal property, and all transferable licenses. In consideration thereof, the agreement provided that Dominican would pay AMI approximately $11.25 million.

11. On or about March 8, 1990, Dominican and CHW, through its control of, and affiliation with, Dominican, acquired Community Hospital pursuant to the agreement described in paragraph ten, above.

IV. TRADE AND COMMERCE

12. For purposes of this complaint, the relevant line of commerce is general acute care hospital services.

13. For purposes of this complaint, the relevant sections of the country are Santa Cruz County, California, and/or portions of Santa Cruz County.

14. Prior to the acquisition described above, the relevant markets were highly concentrated, with no more than three firms doing business in the markets. The only hospital in Santa Cruz County, other than DSCH and Community Hospital, was Watsonville Community Hospital in Watsonville, California. In 1989, DSCH had a market share, measured by patient-days, of 62% or more, and, measured by available beds, of 50% or more; Community Hospital had a market share, measured by patient-days, of 14% or more, and measured by available beds, of 23% or more.

15. Entry into the relevant markets is difficult, due to the following factors, among others:

(a) Substantial lead times required to establish a new hospital, including but not limited to lead times for obtaining regulatory clearance for construction of hospital facilities; and
(b) Sunk costs that are large relative to the total cost for *de novo* entry.

V. THE EFFECTS OF THE ACQUISITION

16. The acquisition of Community Hospital by CHW and Dominican increased the market share of CHW and Dominican, the

largest provider of acute care hospital services in the Santa Cruz County area, from approximately 62% to approximately 76%, measured by patient-days, and from approximately 50% to approximately 73% measured by available beds, and increased the two-firm concentration ratio from approximately 86%, measured by patient-days, and 77%, measured by available beds, to approximately 100%. As a result of the acquisition, the Herfindahl-Hirschmann Index increased by over 1700 points, from approximately 4620 points to approximately 6350 points, measured by patient-days, and increased by over 2300 points, from approximately 3770 points to approximately 6090, measured by available beds.

17. Through their acquisition of Community Hospital, CHW and Dominican acquired a direct and actual competitor in the relevant markets.

18. The effect of the acquisition of Community Hospital by CHW and Dominican may be substantially to lessen competition or tend to create a monopoly in the relevant markets in the following ways, among others:

(a) Actual and potential competition in the relevant markets has been substantially reduced;
(b) CHW and Dominican have obtained a dominant position in the relevant markets;
(c) The likelihood of collusion in the relevant markets has been substantially increased; and
(d) Patients, physicians, and purchasers of health care coverage may be denied the benefits of free and open competition based on price, quality, and service.

VI. VIOLATION CHARGED

19. The acquisition of Community Hospital and other assets from AMI-Community by CHW and Dominican violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Commissioner Azcuenaga and Commissioner Yao dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation into the acquisition of substantially all of the assets of AMI-Community Hospital of Santa Cruz by Dominican Santa Cruz Hospital ("Dominican") and Catholic Healthcare West ("CHW") (hereinafter collectively known as "respondents"), and the respondents having been furnished with a copy of a draft of complaint which the San Francisco 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 Clayton Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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, makes the following jurisdictional findings and enters the following order:

1. Respondent Dominican is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, principal place of business and mailing address at 1555 Soquel Avenue, Santa Cruz, California.

Respondent CHW is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, principal place of business and mailing address at 1700 Montgomery Street, San Francisco, California.

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

ORDER

I.

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

A. "*Dominican*" means Dominican Santa Cruz Hospital (a California corporation), its directors, trustees, officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors and assigns.

B. "*CHW*" means Catholic Healthcare West (a California corporation), its directors, trustees, officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors and assigns.

C. "*General acute care hospital,*" herein referred to as "*hospital,*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides or is licensed to provide 24-hour inpatient care, as well as outpatient services, and having as a function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities; "hospital" does not include any skilled nursing facility, mental health or psychiatric facility, rehabilitation facility, chemical dependency facility or other chronic care facility.

D. To "*acquire a hospital*" means to directly or indirectly acquire the whole or any part of the stock, share capital, equity or other interest in or any assets of any hospital, or enter into any arrangement to obtain direct or indirect ownership, management or control of any hospital or any part thereof, including but not limited to the lease of or management contract for a hospital, or the acquisition of the right to designate directly or indirectly the directors or trustees of a hospital. To "acquire a hospital" excludes entering into any arrangement to construct a new hospital if a construction permit for such hospital has not been issued by the California Office

of Statewide Health Planning and Development at the time such an arrangement is entered into.

E. "*Affiliate*" means any entity whose management and policies are controlled or directed in any way, directly or indirectly, by the entity of which it is an affiliate.

II.

It is ordered, That, for a period of ten (10) years from the date this order becomes final, neither Dominican nor CHW shall, without the prior approval of the Federal Trade Commission, acquire any hospital in Santa Cruz County, California; and

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, neither Dominican nor CHW shall permit all or any substantial part of any hospital owned or operated by either Dominican or CHW in Santa Cruz County, California, to be acquired by any other person unless the acquiring person files with the Federal Trade Commission, a written agreement to be bound by the provisions of this order, which agreement shall be a condition precedent to the acquisition;

Provided, however, that no acquisition shall be subject to this paragraph II of this order if the fair market value of (or, in the case of a purchase acquisition, the consideration to be paid for) the hospital or part thereof to be acquired does not exceed two million dollars ($2,000,000).

III.

It is further ordered, That respondents, Dominican and CHW, upon written request of the staff of the Federal Trade Commission, made to Dominican or CHW, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission:

A. Reasonable access during Dominican's or CHW's office hours, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in Dominican's or CHW's possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to Dominican's and CHW's reasonable convenience, to interview officers or employees of Dominican or CHW, who may have counsel present, regarding such matters; and

It is further ordered, That annually beginning on the first anniversary of the date this order becomes final and continuing for nine (9) years thereafter, Dominican shall submit a verified report demonstrating the manner in which it has complied and is complying with this order.

IV.

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

STATEMENT OF CHAIRMAN JANET D. STEIGER
IN SUPPORT OF FINAL ISSUANCE OF CONSENT ORDER

Respondent Dominican Santa Cruz Hospital acquired the assets of its principal competitor, AMI-Community Hospital, in March, 1990, in what I have reason to believe was a violation of Section 7 of the Clayton Act. The Commission has voted to resolve this matter by issuing a consent order that requires Dominican and its parent, Catholic Healthcare West, to seek prior approval of any further hospital acquisitions in the Santa Cruz County, California, market.

The facts of this case provide sufficient reason to believe that this acquisition violates Section 7 of the Clayton Act. Ordinarily, such facts would lead the Commission to seek a preliminary injunction in federal district court. However, the acquisition was not reportable under the Hart-Scott-Rodino Act, and was consummated before Commission staff was able to open an investigation to explore the competitive effects of the acquisition consequently, the Commission never had the opportunity to consider seeking a preliminary injunction under Section 13(b) of the FTC Act to prevent the acquisition from being consummated.

Under these circumstances, the Commission is left with less effective or more costly remedial options.[1] Divestiture of the acquired hospital is not an appealing remedy. The acquired hospital has been converted to a skilled nursing/rehabilitative care facility -- it no longer operates as a hospital -- and the costs of conversion back to a hospital would, even under the best of circumstances, be substantial, with no guarantee of success. In addition, subsequent to the acquisition, Sutter Health, a major Northern California hospital chain, announced plans to construct an acute care hospital in Santa Cruz, which would restore a third hospital competitor in the market.[2] The very real prospect that Sutter will enter this market, before a divestiture decree could be obtained through litigation and a willing buyer found, is an additional factor weighing against pursuit of a divestiture order.[3] Thus, although divestiture may be an appropriate remedy in many cases where the Commission is unable to obtain a pre-consummation injunction, the facts of this case suggest that the Commission's resources would not be well spent on pursuing divestiture here.

Respondents have agreed to accept an order that requires them to seek prior approval of hospital acquisitions in the Santa Cruz County market. The order includes within the definition of "hospital" any facility for which the State of California's Office of Statewide Healthcare Planning and Development has issued a building permit, even if the hospital has not been completed. Thus, it will prevent respondents from acquiring Sutter's interest in its proposed site once Sutter has obtained permission from the State of California to begin construction.

As a practical matter, this very unusual case presents the Commission with three choices: to close a case in which there is

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[1] These, of course, are the circumstances that Congress sought to obviate through the Hart-Scott-Rodino Act.

[2] Sutter's planned 30-bed hospital, while smaller than AMI-Community, is expected to be a state-of-the-art facility that may pose a competitive check on a unilateral exercise of market power by Dominican or on the possibility of coordination between Dominican and Watsonville Community Hospital, which currently is Dominican's only competitor in the relevant market.

[3] While Sutter's plans are not so far advanced that its entry is inevitable, several factors suggest that Sutter is likely to enter. First, it has committed substantial funds by acquiring a site for its proposed hospital. Second, Sutter has obtained all necessary land use and zoning approvals from the City and County of Santa Cruz. Third, Sutter's experience as a hospital company in Northern California enhances the likelihood that it will be able to enter the market successfully.

reason to believe that the law has been violated; to issue an administrative complaint under Part III of the Commission's Rules; or to issue the negotiated consent order. The first choice, ignoring an apparent violation of law, clearly is unacceptable. The second choice, issuing a complaint, does not appear to be in the public interest under the specific circumstances of this case. Because divestiture is problematic here, it is entirely possible that the Commission would obtain nothing more than the relief contained in this consent order after expending scarce enforcement resources in protracted litigation. The third choice, issuing the consent order, makes the clear statement that the Commission will not ignore what it has reason to believe are violations of law, and imposes a reasonable remedy given the specific circumstances presented.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I have reason to believe that Dominican Santa Cruz Hospital's acquisition of AMI-Community Hospital was anticompetitive, and I would have supported an action under Section 7 of the Clayton Act to enjoin the transaction before it was consummated in March 1990. In light of the competitive situation in this market, I share Commissioner Yao's concern that the consent order does not provide an adequate remedy, and on that ground I dissent.

DISSENTING STATEMENT OF COMMISSIONER DENNIS A. YAO

I agree with the majority that Dominican Santa Cruz Hospital's acquisition of AMI-Community Hospital is likely to be anti-competitive. I do not believe that this anticompetitive problem can be solved with the relief the Commission is today giving final approval to, and I have reason to believe that issuance of an administrative complaint would be appropriate in this matter. Because I believe that something more than a requirement that Dominican obtain prior approval of future acquisitions is needed here, I dissent from the Commission's decision.

This merger, consummated in March 1990, combines two major acute care hospitals in Santa Cruz County, California, and leaves Dominican as the dominant hospital, with more than 70% of a clearly defined geographic market (bounded by mountains and ocean). Only one competitor remains in the market, Watsonville Hospital, located

in a more rural area approximately 14 miles south of Santa Cruz. There is considerable evidence that suggests that this merger may be anticompetitive. Dominican has argued for efficiencies from converting Community into a skilled nursing/rehabilitative care facility. However, neither hospital's physical plant was so small as to raise concerns that either was operating pre-merger below minimum efficient scale and, in my view, the asserted efficiencies are clearly insufficient to offset the likely anticompetitive effects.

Other activities detailed in comments received since the Commission's acceptance of the proposed consent raise concerns of possible collusion. Santa Cruz Medical Clinic's comment presents evidence which it suggests shows that Dominican and Watsonville may have colluded with respect to the provision of home health services through a joint venture-like relationship.

An argument supporting possible restoration of competition in Santa Cruz County is based on the publicly announced plans of Sutter Health Systems to open a 30-bed hospital specializing in baby deliveries and non-acute surgeries by 1995. However, the limited scope of procedures that Sutter plans to perform at the center may make its presence in the market, should it ever actually enter,[1] insufficient to defeat a collusive price increase by Dominican and Watsonville in acute care services.

Admittedly complicating the possibility of obtaining greater relief here is that Dominican, shortly after the merger, converted Community into a skilled nursing/rehabilitative care facility. That conversion is now largely complete and presents the Commission with a problem. At the time the proposed consent was accepted for public comment, I had suggested that a stronger consent order, short of a full divestiture order, could be crafted that might reduce the prospects that the merger will be anticompetitive. For example, I suggested that prior approval or prior notification requirements could be placed on potentially anticompetitive joint ventures.[2] Also, restrictions could be placed on conduct by Dominican that might make entry of Sutter more difficult *(e.g.*, if Dominican sought to bar doctors at its hospitals from attending patients at Sutter), without

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[1] Although Sutter has apparently finally obtained all local permits, Sutter has not cleared all necessary regulatory hurdles in order to commence construction.

[2] In University Health, Inc., Docket No. 9246 (Sept. 9, 1992) (final consent order), the Commission required that the respondent give the Commission prior notification of certain joint ventures.

impinging on activity that would be protected under the Noerr-Pennington immunity doctrine. Unfortunately, a majority of the Commission is not prepared at this time to seek to obtain stronger relief.

In sum, because I believe that something more than a prior approval requirement for future acquisitions is needed here, I respectfully dissent.

IN THE MATTER OF

AMERICAN INSTITUTE OF HABIT CONTROL, INC., ET AL.

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

Docket C-3522. Complaint, Aug. 23, 1994--Decision, Aug. 23, 1994

This consent order prohibits, among other things, a Florida-based company and its president from making any representation about the relative or absolute performance or efficacy of any smoking cessation or weight loss program, unless they possess and rely upon competent and reliable scientific evidence to substantiate the representation, and from representing that the Surgeon General's 1989 report states that the hypnosis method used by the respondents is one of the most effective ways to stop smoking.

Appearances

For the Commission: *Matthew Daynard.*

For the respondents: *David A. Clanton, Baker & McKenzie,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Institute of Habit Control, Inc., a corporation, and Steven Present, 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 American Institute of Habit Control, Inc., is a Florida corporation, with its principal office or place of business at 9655 South Dixie Highway, Miami, Florida.

Respondent Steven Present is the sole officer, director and shareholder of the corporate respondent. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have advertised, offered for sale, and sold The Present Seminar for smoking cessation and weight loss, and other stop-smoking and weight-loss seminars to consumers. The Present Seminar is a single, group hypnosis session, two-and-one-half hours in length, provided to consumers by respondent Steven Present at various hotel locales in various cities.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for The Present Seminar for smoking cessation, including but not necessarily limited to the attached Exhibits A-C. These advertisements contain the following statements:

A. "STOP SMOKING IN 2-1/2 HOURS! . . . 97% proven success rate. ATTEND STEVEN PRESENT'S GROUP HYPNOSIS SEMINAR AND STOP SMOKING-QUICKLY, EASILY AND PERMANENTLY! At last, a major breakthrough now makes it much easier to stop smoking. Steven Present's stop smoking methods, perfected over the past 10 years, were TOP RATED IN THE 1989 U.S. SURGEON GENERAL'S SMOKING REPORT . . . YOU WILL BECOME A NON-SMOKER IN JUST ONE NIGHT! . . . Is it hard to believe that after years of smoking, after trying to quit so many times before, that the answer is just a few days away?. . .Even smokers with 30, 40, and 50 year habits will crush their cigarettes and throw them away - FOR GOOD! 97% of those who attend, that's right, 97% WILL COMPLETELY STOP SMOKING BEFORE THE SEMINAR'S OVER! NOW YOU TOO WILL BREAK FREE FROM CIGARETTES!. . .LOSE WEIGHT FREE!. . .With Steven Present's hypnosis, you can lose weight without dieting, by eliminating your desire for fattening foods and sweets. After just one session of Steven Present's hypnosis, you can eat less and still feel full! That's how you can lose weight and finally keep it off!" (Exhibit A).

B. "THE PRESENT SEMINAR - FIRST IN RESULTS! STOP SMOKING IN 2-1/2 HOURS-GUARANTEED!. . .DON'T MISS THIS CHANCE TO STOP SMOKING FOREVER. ATTEND STEVEN PRESENT'S GROUP HYPNOSIS SEMINAR. Steven Present, M.S., Dir., is nationally known for his success in changing hard core smokers into ex-smokers. After his seminar, 97% of his clients lose their desire to smoke, throw away their cigarettes, and stop smoking. Now you can too. . .During Steven Present's Seminar, his proven system will completely break the control that nicotine and cigarettes have over you. If you are like the thousands throughout the country who attend his seminar, you too will stop smoking without withdrawal, stress, or weight gain. In JUST ONE NIGHT! If this sounds too good to be true, here's the proof. The 1989 U.S. SURGEON GENERAL'S SMOKING REPORT STATED THAT GROUP HYPNOSIS IS ONE OF THE MOST EFFECTIVE WAYS TO STOP SMOKING." (Exhibit B)

C. "STOP SMOKING IN 2-1/2 HOURS! 97% PROVEN SUCCESS RATE! Even if you've tried other methods. . .no matter how long you've been smoking or

how many packs a day you smoke. . .with Steven Present's unique method of hypnosis, you will stop smoking. . .in just 2-1/2 hours-Guaranteed. Without withdrawal, anxiety, or weight gain. . .YOU WON'T CRAVE CIGARETTES. . .Steven Present's method is different from other systems because it doesn't depend on willpower. Instead, it uses the power of hypnosis to eliminate your craving for cigarettes in every situation. . .45 specific hypnotic suggestions eliminate your craving for cigarettes at all times, including: Driving your car. . .after a meal. . .drinking coffee. . .talking on the phone. . .while having a drink. . .waking up in the morning, and when around others who are smoking. It happens automatically, effortlessly . . .97% of those who attend will throw away their cigarettes and completely stop smoking before the seminar is over. . .LOSE WEIGHT - FREE. . .With Steven Present's hypnosis, you can lose weight without dieting, by eliminating your desire for fattening foods and sweets. After just one session of Steven Present's hypnosis, you can eat less and still feel full! That's how you can lose weight and finally keep it off!" (Exhibit C)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondents have represented, directly or by implication, that:

A. Ninety-seven percent of the participants in respondents' smoking cessation seminars permanently abstain from smoking after attending those seminars.

B. The U.S. Surgeon General, in the 1989 U.S. Surgeon General's Report on Smoking, Reducing the Health Consequences of Smoking: 25 Years of Progress, states that the group hypnosis method used by respondents is one of the most effective ways to stop smoking.

PAR. 6. In truth and in fact:

A. Ninety-seven percent of the participants who attend respondents' smoking cessation seminars do not permanently abstain from smoking after those seminars.

B. The U.S. Surgeon General, in the 1989 U.S. Surgeon General's Report on Smoking, Reducing the Health Consequences of Smoking: 25 Years of Progress, does not state that the group hypnosis method used by respondents is one of the most effective ways to stop smoking.

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

PAR. 7. Through the use of the statements in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondents have represented, directly or by implication, that:

A. Participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction and permanently abstain from smoking cigarettes.

B. Respondents' single-session, group hypnosis seminar is more efficacious for smoking cessation than other smoking cessation methods.

C. Participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction without experiencing withdrawal, stress or weight gain.

D. Participants who attend respondents' single-session group hypnosis seminar achieve and maintain weight loss.

PAR. 8. Through the use of the statements in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five and seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

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

Commissioner Owen recused and Commissioner Yao not participating.

EXHIBIT A

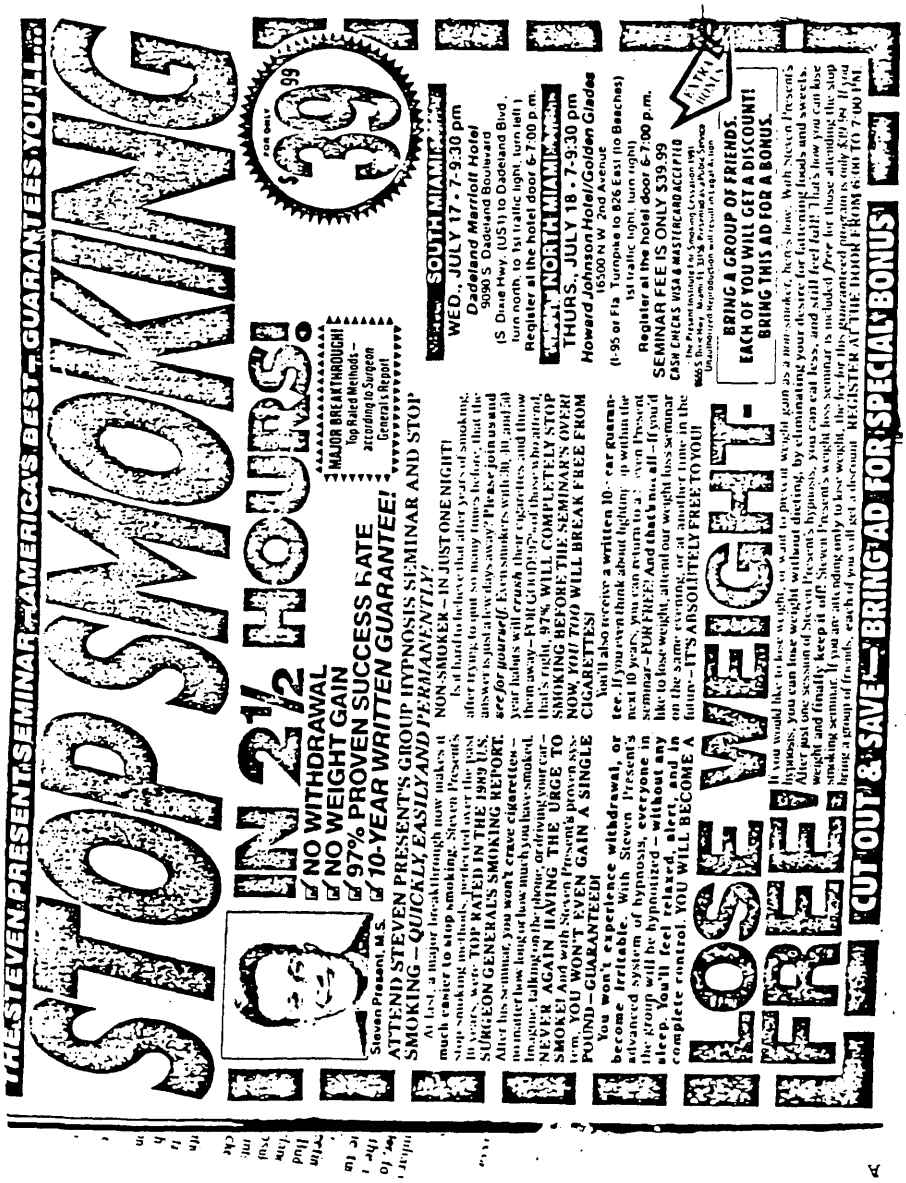

THE STEVEN PRESENTS SEMINAR – AMERICA'S BEST – GUARANTEES YOU'LL...
STOP SMOKING
IN 2½ HOURS!
NO WITHDRAWAL
NO WEIGHT GAIN
97% PROVEN SUCCESS RATE
10-YEAR WRITTEN GUARANTEE!
MAJOR BREAKTHROUGH! Top Rated Methods – according to Surgeon General's Report
ATTEND STEVEN PRESENT'S GROUP HYPNOSIS SEMINAR AND STOP SMOKING – QUICKLY, EASILY AND PERMANENTLY!
NON-SMOKER – IN JUST ONE NIGHT!
SOUTH MIAMI
WED., JULY 17 • 7-9:30 pm
Dadeland Marriott Hotel
9090 S. Dadeland Boulevard
(S. Dixie Hwy. (US1) to Dadeland Blvd., turn north to 1st traffic light, turn left.)
Register at the hotel door 6-7:00 p.m.
NORTH MIAMI
THURS., JULY 18 • 7-9:30 pm
Howard Johnson Hotel/Golden Glades
16500 N.W. 2nd Avenue
(I-95 or Fla. Turnpike to 826 East (to Beaches))
Register at the hotel door 6-7:00 p.m.
SEMINAR FEE IS ONLY $39.99
CASH CHECKS VISA & MASTERCARD ACCEPTED
$39.99
LOSE WEIGHT
FREE
BRING A GROUP OF FRIENDS.
EACH OF YOU WILL GET A DISCOUNT!
BRING THIS AD FOR A BONUS.
CUT OUT & SAVE – BRING AD FOR SPECIAL BONUS!

EXHIBIT B

THE PRESENT SEMINAR — FIRST IN RESULTS!

STOP SMOKING

IN 2½ HOURS - GUARANTEED!

OR DOUBLE YOUR MONEY BACK!

• NO WITHDRAWAL
• NO STRESS
• NO WEIGHT GAIN

$299 COMPLETE

Steven Present, M.S., Dir.

DON'T MISS THIS CHANCE TO STOP SMOKING FOREVER. ATTEND STEVEN PRESENT'S GROUP HYPNOSIS SEMINAR.

GROUP HYPNOSIS IS ONE OF THE MOST EFFECTIVE WAYS TO STOP SMOKING. And with Steven Present's hypnosis, you will not be asleep. You won't lose control. You will walk out feeling alert, clear and refreshed. MOST IMPORTANT, YOU WILL WALK OUT A NON-SMOKER!

When you attend this seminar, you will receive Steven Present's double guarantee. If you are not completely satisfied, he will refund double your money during the session, on the spot. But that's not all - You also receive a lifetime guarantee. If you ever want extra help, you can repeat the seminar - FOR FREE!

Stop wasting over $500 a year on cigarettes. For about the price of 2 weeks worth of cigarettes, you will be smoke free, at last. All it takes is 2½ hours. Make a decision you and your family can live with. ATTEND THIS SEMINAR! YOU'LL BE GLAD YOU DID!

If this sounds almost too good to be true, here's the proof. The 1988 U.S. SURGEON GENERAL'S SMOKING REPORT STATED THAT

During Steven Present's seminar, his proven system will completely break the control that nicotine and cigarettes have over you. If you are like the thousands throughout the country who attend his seminar, you too will stop smoking without withdrawal, stress, or weight gain, IN JUST ONE NIGHT!

SOUTH MIAMI

WED., JAN. 30 • 7-9:30 pm

Dadeland Marriott Hotel

9090 S. Dadeland Boulevard

Register at the hotel door 6-7:00 p.m.

NORTH MIAMI

THURS., JAN. 31 • 7-9:30 pm

Howard Johnsons/Golden Glades

16500 N.W. 2nd Avenue

Register at the hotel door 6-7:00 p.m.

SEMINAR FEE IS ONLY $29.99

Cash, Checks and Credit Cards Accepted

BRING AS MANY FRIENDS AS POSSIBLE! EACH OF YOU WILL GET A DISCOUNT

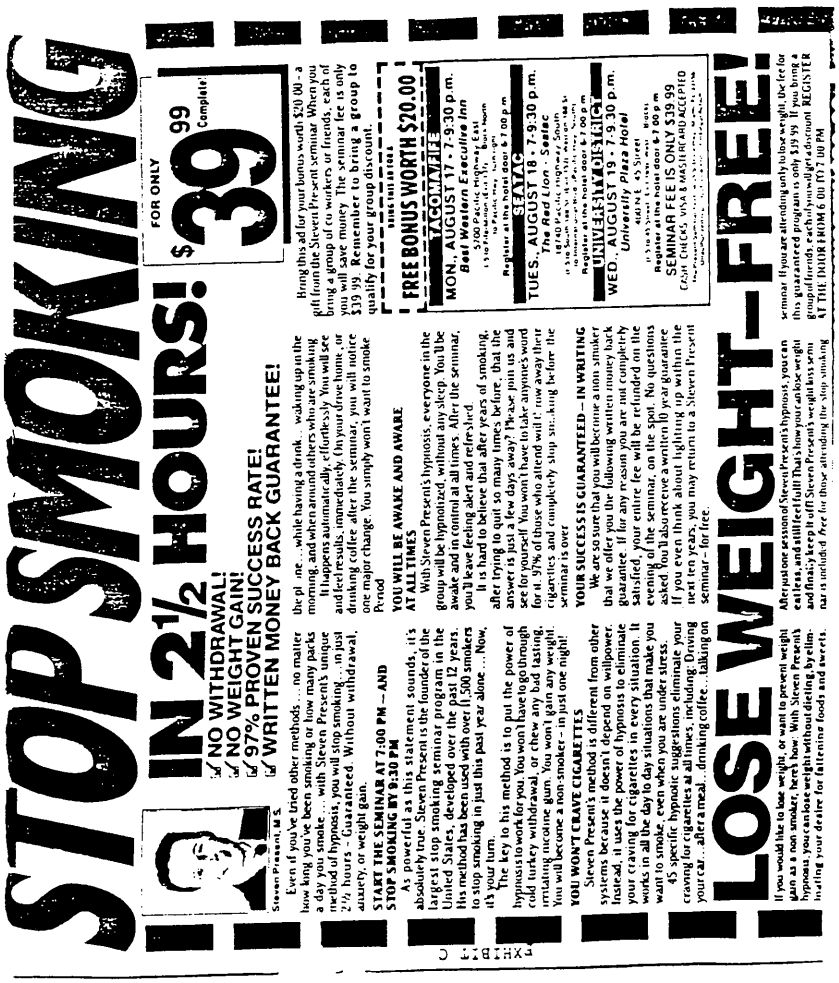
BRING THIS AD FOR A BONUS

The Present Seminar

WEIGHT LOSS/STRESS REDUCTION INCLUDED FREE!!

CUT OUT & SAVE! BRING THIS AD FOR A BONUS

EXHIBIT C



STOP SMOKING

IN 2½ HOURS!

FOR ONLY $39.99 Complete

- NO WITHDRAWAL!
- NO WEIGHT GAIN!
- 97% PROVEN SUCCESS RATE!
- WRITTEN MONEY BACK GUARANTEE!

Even if you've tried other methods.... no matter the pl one... while having a drink... waking up in the morning, and when around others who are smoking

How long you've been smoking or how many packs a day you smoke... with Steven Present's unique method of hypnosis, you will stop smoking... in just 2½ hours – Guaranteed. Without withdrawal, anxiety, or weight gain.

START THE SEMINAR AT 7:00 PM – AND STOP SMOKING BY 9:30 PM

As powerful as this statement sounds, it's absolutely true. Steven Present is the founder of the largest stop smoking seminar program in the United States, developed over the past 12 years. His method has been used with over 11,500 smokers to stop smoking in just this past year alone.... Now, it's your turn.

The key to his method is to put the power of hypnosis to work for you. You won't have to go through cold turkey withdrawal, or chew any bad tasting, irritating nicotine gum. You won't gain any weight. You will become a non-smoker – in just one night!

YOU WON'T CRAVE CIGARETTES

Steven Present's method is different from other systems because it doesn't depend on willpower. Instead, it uses the power of hypnosis to eliminate your craving for cigarettes in every situation. It works in all the day to day situations that make you want to smoke, even when you are under stress.

45 specific hypnotic suggestions eliminate your craving for cigarettes at all times, including: Driving your car... after a meal... drinking coffee... talking on the phone... while having a drink... waking up in the morning, and when around others who are smoking

It happens automatically, effortlessly. You will see and feel results, immediately. On your drive home, or drinking coffee after the seminar, you will notice one major change. You simply won't want to smoke

Period

YOU WILL BE AWAKE AND AWARE AT ALL TIMES

With Steven Present's hypnosis, everyone in the group will be hypnotized, without any sleep. You'll be awake and in control at all times. After the seminar, you'll leave feeling alert and refreshed.

It is hard to believe that after years of smoking, after trying to quit so many times before, that the answer is just a few days away? Please join us and see for yourself. You won't have to take anyone's word for it. 97% of those who attend will walk away their cigarettes and completely stop smoking before the seminar is over

YOUR SUCCESS IS GUARANTEED – IN WRITING

We are so sure that you will become a non smoker that we offer you the following written money back guarantee. If for any reason you are not completely satisfied, your entire fee will be refunded on the evening of the seminar, on the spot. No questions asked. You'll also receive a written 10 year guarantee

If you even think about lighting up within the next ten years, you may return to a Steven Present seminar - for free.

Bring this ad for your bonus worth $20.00 - a gift from the Steven Present seminar When you bring a group of co workers or friends, each of you will save money The seminar fee is only $39.99. Remember to bring a group to qualify for your group discount.

FREE BONUS WORTH $20.00

TACOMA

MON., AUGUST 17 - 7-9:30 p.m.
Best Western Executive Inn
5700 Pacific Highway East
Register at the hotel door 6-7:00 p.m.

SEATAC

TUES., AUGUST 18 - 7-9:30 p.m.
The Red Lion - Seatac
18740 Pacific Highway South
Register at the hotel door 6-7:00 p.m.

UNIVERSITY

WED., AUGUST 19 - 7-9:30 p.m.
University Plaza Hotel
400 N.E. 45 Street
Register at the hotel door 6-7:00 p.m.

SEMINAR FEE IS ONLY $39.99
CASH, CHECKS, VISA & MASTERCARD ACCEPTED

AT THE DOOR FROM 6:00 TO 7:00 PM

LOSE WEIGHT–FREE!

If you would like to lose weight, or want to prevent weight gain as a non smoker, here's how Steven Present's hypnosis you can lose weight without dieting, by eliminating your desire for fattening foods and sweets.

After just one session of Steven Present's hypnosis, you can eat less, and still feel full! That's how you can lose weight and finally keep it off! Steven Present's weight loss seminar is included *Free* for those attending the stop smoking seminar. If you are attending only to lose weight, the fee for this guaranteed program is only $39.99. You may bring a group for a group discount. REGISTER

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such an 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 American Institute of Habit Control, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Florida, with its offices and principal place of business at 9655 South Dixie Highway, Miami, Florida.

Respondent Steven Present is the sole officer, director and shareholder of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, and his principal office and place of business is the same as that of the corporate respondent.

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

ORDER

DEFINITION

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

I.

It is ordered, That respondents American Institute of Habit Control, Inc., a corporation, its successors and assigns, and its officers, and Steven Present, individually and as an officer and director of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any smoking cessation program or weight loss program, including any such program that uses hypnosis, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that the U.S. Surgeon General, in the 1989 U.S. Surgeon General's Report on Smoking, Reducing the Health Consequences of Smoking: 25 Years of Progress, states that the group hypnosis method used by respondents is one of the most effective ways to stop smoking.

B. Representing, directly or by implication, that ninety-seven percent of the participants who attend respondents' stop smoking seminars permanently abstain from smoking after those seminars, unless such is the case.

C. Making any representation, directly or by implication, about the relative or absolute performance or efficacy of any smoking

cessation program or weight loss program, unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

D. Misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, survey or report.

E. Misrepresenting, directly or by implication, the performance or efficacy of any smoking cessation program or weight loss program.

II.

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

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

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

III.

It is further ordered, That respondents shall 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(s), the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

IV.

It is further ordered, That the individual respondent named herein shall promptly notify the Commission of the discontinuance of his

present business or of his affiliation with the corporate respondent. In addition, for a period of three (3) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment that involves a smoking cessation program or a weight loss program. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

V.

It is further ordered, That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors and employees who are involved in the preparation and placement of advertisements or promotional materials; and, for a period of three (3) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

VI.

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

Commissioner Owen recused and Commissioner Yao not participating.

IN THE MATTER OF

KIWI BRANDS INC., ET AL.

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

Docket C-3523. Complaint, Aug. 24, 1994--Decision, Aug. 24, 1994

This consent order requires, among other things, Kiwi Brands Inc., a subsidiary of Sara Lee Corporation, to divest its Esquire and Griffin brands of shoe care products and related assets: to Hickory Industries, within one month of the date the order becomes final; or to a Commission approved acquirer, within twelve months of the date the order becomes final. If the sale is not accomplished within the specified time, the Commission would be entitled to appoint a trustee to sell the assets to a Commission approved acquirer in a manner approved by the Commission. In addition, for a period of ten years, the respondents are required to obtain prior Commission approval before acquiring any stocks or assets of any entity engaged in chemical shoe care products.

Appearances

For the Commission: *Howard Morse* and *Naomi Licker.*

For the respondents: *Louis Keilor* and *Gary Senner, Sonnenschein, Math & Rosenthal,* Chicago, IL.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Kiwi Brands Inc., a subsidiary of respondent Sara Lee Corporation, and Sara Lee Corporation have acquired assets of Knomark, Inc., a wholly-owned subsidiary of Papercraft Corporation, and assets of Reckitt & Colman plc in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

ALLEGATIONS OF FACT

I. THE RESPONDENTS

1. Respondent Kiwi Brands Inc., a subsidiary of Sara Lee Corporation, is a Delaware corporation with its office and principal place of business at 447 Old Swede Road, Douglassville, Pennsylvania,

2. Respondent Sara Lee Corporation is a Maryland corporation with its office and principal place of business at 3 First National Plaza, Chicago, Illinois.

3. Respondent Sara Lee Corporation, through respondent Kiwi Brands Inc., manufactures, distributes, and sells chemical shoe care products through grocery stores, drug stores, and mass merchandisers.

4. Respondents Sara Lee Corporation and Kiwi Brands Inc. (hereinafter collectively "Sara Lee") at all times relevant herein have been and are now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. THE ACQUISITIONS

5. On or about November 27, 1987, Sara Lee entered into agreements with Knomark, Inc. ("Knomark"), a wholly-owned subsidiary of Papercraft Corporation, and Papercraft Corporation, pursuant to which Sara Lee agreed to acquire and did acquire certain assets of Knomark (hereinafter referred to as the "Knomark acquisition"). As a result of the Knomark acquisition, Sara Lee acquired the "Esquire" brand of chemical shoe care products.

6. On or about October 4, 1991, Sara Lee entered into an agreement with Reckitt & Colman plc ("Reckitt & Colman"), pursuant to which Sara Lee agreed to acquire and did acquire certain assets of Reckitt & Colman (hereinafter referred to as the "Reckitt & Colman acquisition"). As a result of the Reckitt & Colman acquisition, Sara Lee acquired the "Griffin" brand of chemical shoe care products.

7. Sara Lee did not report either the Knomark acquisition or the Reckitt & Colman acquisition to the Federal Trade Commission or

the Department of Justice pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

III. THE RELEVANT MARKET

8. The relevant line of commerce in which to analyze the effects of the Knomark acquisition and of the Reckitt & Colman acquisition is the sale of chemical shoe care products used in the maintenance, cleaning, and protection of shoes, including but not limited to aerosol, liquid, wax, and cream products, through grocery stores, drug stores, and mass merchandisers, sometimes referred to as the mass market channel. The relevant line of commerce does not include sales of chemical shoe care products through shoe repair shops, independent and chain retailers, sporting goods retailers, and department stores, sometimes referred to as the specialty channel.

9. The relevant section of the country or geographic area in which to analyze the effects of the Knomark acquisition and of the Reckitt & Colman acquisition is the United States.

IV. MARKET STRUCTURE

10. Prior to the Knomark acquisition, Sara Lee produced, distributed, and sold chemical shoe care products through the mass market channel under the "Kiwi" brand that competed with those produced, distributed, and sold by Knomark under the "Esquire" brand.

11. Prior to the Reckitt & Colman acquisition, Sara Lee produced, distributed, and sold chemical shoe care products through the mass market channel under the "Kiwi" and "Esquire" brands that competed with those produced, distributed, and sold by Reckitt & Colman under the "Griffin" brand.

12. The relevant market alleged in paragraphs eight and nine was, prior to the Knomark acquisition and prior to the Reckitt & Colman acquisition, and is very highly concentrated, measured by the Herfindahl-Hirschmann Index. Prior to the Knomark acquisition, Sara Lee's share of sales in the relevant market was approximately 90%. At the time of the Knomark acquisition, Knomark's share of sales in the relevant market was about 2.5%. At the time of the Reckitt & Colman acquisition, Reckitt & Colman's share of sales in the relevant market was about 2%.

13. Sara Lee possesses unilateral market power, or has a dangerous probability of obtaining such market power, in the relevant market alleged in paragraphs eight and nine.

V. ENTRY CONDITIONS

14. Entry into the relevant market alleged in paragraphs eight and nine is difficult, unlikely, and would not be timely, because of the need to develop a brand name and the time and sunk costs involved in obtaining access to shelf space.

VI. EFFECTS OF THE ACQUISITIONS

15. The effect of the Knomark acquisition and of the Reckitt & Colman acquisition has been and may be substantially to lessen competition and to tend to create a monopoly in the relevant market alleged in paragraphs eight and nine in the following ways, among others:

a. By eliminating actual competition between Sara Lee and Knomark and between Sara Lee and Reckitt & Colman;

b. By significantly enhancing the likelihood that Sara Lee will unilaterally exercise market power;

c. By significantly enhancing the likelihood that Sara Lee will exercise market power in coordination with other competitors; and

d. By increasing barriers to entry into the relevant market.

16. Sara Lee undertook the Knomark acquisition and the Reckitt & Colman acquisition with the willful intention and effect of restraining, lessening, or eliminating competition, or acquiring or maintaining market power in the relevant market alleged in paragraphs eight and nine.

VIOLATIONS CHARGED

17. The Knomark acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

18. The Reckitt & Colman acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

19. Sara Lee, in making the Knomark acquisition and the Reckitt & Colman acquisition, monopolized or attempted to monopolize the relevant market alleged in paragraphs eight and nine 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 ("the Commission") having initiated an investigation of the acquisition by Kiwi Brands Inc. ("Kiwi"), a wholly-owned subsidiary of Sara Lee Corporation ("Sara Lee"), of certain assets of Knomark, Inc., at the time of the acquisition a wholly-owned subsidiary of Papercraft Corporation, and of certain assets of Reckitt and Colman plc, 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 the respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) 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 Kiwi is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of

Delaware, with its office and principal place of business located at 447 Old Swede Road, Douglassville, Pennsylvania.

2. Respondent Sara Lee is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 3 First National Plaza, Chicago, Illinois.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Kiwi*" means Kiwi Brands Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Kiwi, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns.

B. "*Sara Lee*" means Sara Lee Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Sara Lee, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns.

C. "*Respondents*" means Kiwi Brands Inc. and Sara Lee Corporation.

D. "*Chemical shoe care products*" means all chemical products used in the maintenance, cleaning, and protection of shoes, including, but not limited to, aerosol, liquid, wax, and cream products.

E. "*Sales through the mass market*" means all sales through grocery stores, drug stores, and mass merchandisers.

F. "*Knomark acquisition*" means the 1987 acquisition in which Sara Lee acquired the "Esquire" brand of chemical shoe care products, among other assets, from Knomark, Inc., a wholly-owned subsidiary of Papercraft Corporation.

G. "*Reckitt and Colman acquisition*" means the 1991 acquisition in which Sara Lee acquired the "Griffin" brand of chemical shoe care products, among other assets, from Reckitt and Colman plc.

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

I. "*Griffin and Esquire assets*" means all assets, tangible or intangible, acquired by Sara Lee in the Knomark acquisition and owned by Sara Lee as of January 1, 1994, relating to the production or sale of chemical shoe care products in North and South America, and all assets, tangible or intangible, acquired by Sara Lee in the Reckitt & Colman acquisition and owned by Sara Lee as of January 1, 1994, relating to the production or sale of chemical shoe care products in North and South America under the "Griffin" brand name; provided, however, that "Griffin and Esquire assets" exclude equipment and formulas used in the production of chemical shoe care products under the "Kiwi" brand. The Griffin and Esquire assets include, but are not limited to, registered and unregistered trademarks; formulas and other trade secrets; raw materials, finished goods, packaging materials, and other inventories (excluding inventories of raw materials and packaging materials for any products to be manufactured by Kiwi for Hickory Industries, Inc., after the divestiture); customer lists; and business and financial records, relating to the "Griffin" or "Esquire" brands.

II.

It is further ordered, That respondents shall divest, absolutely and in good faith, the Griffin and Esquire assets. The Griffin and Esquire assets shall be divested either:

(1) Within one (1) month of the date this order becomes final, to Hickory Industries, Inc. ("Hickory"), pursuant to the November 30, 1993, Asset Purchase Agreement between Kiwi and Hickory, as amended by Amendment One to November 30, 1993, Asset Purchase Agreement, dated March 8, 1994, attached hereto as a Confidential Appendix; or

(2) Within twelve (12) months of the date the order becomes final, to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

The purpose of the divestiture is to assure the continuing use of the Griffin and Esquire assets in an ongoing, independent, viable operation engaged in the sale of chemical shoe care products in the United States, and to remedy the lessening of competition resulting

from the Knomark acquisition and the Reckitt and Colman acquisition as alleged in the Commission's complaint. Provided, however, that if respondents divest pursuant to paragraph II (1) of this order, in no event shall respondents' enforcement of any security interest contained in the Asset Purchase Agreement referred to in paragraph II (1) of this order be construed to not require the Commission's prior approval, pursuant to paragraph V of this order, if such approval would otherwise be required.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Griffin and Esquire assets within twelve months of the date this order becomes final, the Commission may appoint a trustee to divest the Griffin and Esquire assets. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Griffin and Esquire assets.

3. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III B. 8. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court.

4. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Griffin and Esquire assets, or to any other relevant information, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

5. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived

from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Griffin and Esquire assets.

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

8. Within ten (10) 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, respondents shall 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.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III A. of this order.

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

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

IV.

It is further ordered, That pending divestiture of the Griffin and Esquire assets, respondents shall maintain the viability and marketability of the Griffin and Esquire assets and shall not cause or permit the destruction, removal, wasting, deterioration or impairment of the Griffin and Esquire assets.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, presently engaged in or within the two years preceding such acquisition engaged in the manufacture of chemical shoe care products in the United States, or the distribution or sale of chemical shoe care products through the mass market in the United States; provided, however, that an acquisition will be exempt from the requirements of this paragraph if it is solely for the purpose of investment and respondents will hold no more than one percent of the shares of any class of security traded on a national securities exchange or authorized to be quoted in an interdealer quotation system of a national securities association registered with the United States Securities and Exchange Commission; or

B. Acquire any assets used for, or previously used for (and still suitable for use for) the manufacture of chemical shoe care products in the United States, or the distribution or sale of chemical shoe care products through the mass market in the United States (including, but not limited to, brand or trade names), except in the ordinary course of business, from any concern, corporate or non-corporate, presently engaged in, or within the two years preceding such acquisition engaged in the manufacture of chemical shoe care products in the United States, or the distribution or sale of chemical shoe care products through the mass market in the United States; provided, however, that an acquisition of assets will be exempt from the requirements of this paragraph if the purchase price of the assets-to-be-acquired is less than $100,000, and the purchase price of all assets used for, or previously used for (and still suitable for use for) the manufacture of chemical shoe care products in the United States, or the distribution or sale of chemical shoe care products through the mass market in the United States that respondents have acquired from the same person (as that term is defined in the premerger notification rules, 16 CFR 801.1(a)(1)) in the twelve-month period preceding the

proposed acquisition, when aggregated with the purchase price of the to-be-acquired assets, does not exceed $100,000.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless respondents are required to seek prior approval from the Commission pursuant to paragraph V, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, presently engaged in, or within the two years preceding such acquisition engaged in the manufacture, distribution, or sale of chemical shoe care products in the United States; provided, however, that an acquisition will be exempt from the requirements of this paragraph if it is solely for the purpose of investment and respondents will hold no more than one percent of the shares of any class of security traded on a national securities exchange or authorized to be quoted in an interdealer quotation system of a national securities association registered with the United States Securities and Exchange Commission; or

B. Acquire any assets used or previously used (and still suitable for use) in the manufacture, distribution, or sale of chemical shoe care products, except in the ordinary course of business, from any concern, corporate or non-corporate, presently engaged in, or within the two years preceding such acquisition engaged in the manufacture, distribution, or sale of chemical shoe care products in the United States.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"). Respondents shall provide to the Commission at least thirty days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"), both the Notification and supplemental information either in respondents' possession or reasonably available to respondents. Such supplemental information shall include a copy of the proposed acquisition agreement; the names of

the principal representatives of each respondent and of the firm respondents desire to acquire who negotiated the acquisition agreement; and any management or strategic plans discussing the proposed acquisition. If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the acquisition until twenty days after submitting such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraph II or III 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, and have complied with paragraphs II and III of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture. Provided, however, that if, prior to the date the first report required by this paragraph is due, respondents have consummated the acquisition described in paragraph II (1) of this order, respondents shall, in lieu of the report or reports and documentary attachments required by this paragraph, submit to the Commission, within thirty (30) days of consummation of the acquisition, a verified statement that respondents have complied with paragraph II of this order, including the date of consummation.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order

becomes final, and at such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs V and VI of this order.

VIII.

It is further ordered, That each of the respondents shall notify the Commission at least thirty days prior to any proposed change in such 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 such respondent that may affect compliance obligations arising out of this order.

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request, each of the respondents shall permit any duly authorized representative of the Commission:

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

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

IN THE MATTER OF

GENERAL RAILWAY SIGNAL CO.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 2(a) OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-837. Consent Order, Sept. 24, 1964--Modifying Order, Aug. 29, 1994

This order reopens the proceeding and modifies the Commission's 1964 order (66 FTC 882) by terminating the order consistent with the Commission's new policy that the public interest requires setting aside orders in effect for more than twenty years.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER

On April 29, 1994, Union Switch & Signal, Inc. ("Union"), filed a Request To Reopen Proceedings and Modify Order ("Request") in this matter, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. Union modified its request by letter dated June 22, 1994. The Request was placed on the public record and elicited no comments.

On July 22, 1994, the Commission issued its Statement of Policy with Respect to Duration of Competition Orders and Statement of Intention To Solicit Public Comment with Respect to Duration of Consumer Protection Orders. In its Statement of Policy, the Commission said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years." Statement of Policy at 8.

The Commission order in Docket C-837 was issued on September 24, 1964,[1] and has been in effect for almost thirty years. Consistent with the Commission's July 22, 1994, Statement of Policy, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented,

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[1] *General Railway Signal Co.*, 66 FTC 882 (1964), *modified*, 108 FTC 181 (1986) (petition of American Standard, successor to Westinghouse Air Brake Co.); 110 FTC 143 (1987) (petition of General Railway Signal). Petitioner Union is a successor to Westinghouse Air Brake Co., one of the two original respondents.

It is ordered, That the proceeding be, and it hereby is, reopened for the purpose of modifying the order entered therein;

It is further ordered, That the Commission's order in Docket C-837 be, and it hereby is, modified to state that from the date hereof, the order in Docket C-837 shall have expired; and

It is further ordered, That notice hereof shall be provided to the petitioner and to other respondents under the order in Docket C-837.

Commissioner Yao not participating.*

* Prior to leaving the Commission, former Commissioner Deborah K. Owen registered her vote in the affirmative for the order in this matter.

IN THE MATTER OF

THE AMERICAN ASSOCIATION OF LANGUAGE SPECIALISTS

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

Docket C-3524. Complaint, Aug. 31, 1994--Decision, Aug. 31, 1994

This consent order prohibits, among other things, the professional association of interpreters, based in Washington, D.C., from fixing or otherwise interfering with any form of price or fee competition among language specialists in the future; from maintaining any agreement or plan to limit or restrict the specialists working time or condition; for ten years, from making statements at an association meeting concerning fees; and, for three years, from compiling and distributing aggregate information concerning fees already charged.

Appearances

For the Commission: *Michael McNeely* and *Kent Cox.*

For the respondent: *Charles D. Ossola, Lowe, Price, LeBlanc & Becker,* Alexandria, VA.

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 respondent The American Association of Language Specialists, a corporation, 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 The American Association of Language Specialists (hereafter "TAALS") is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal place of business located at 1000 Connecticut Avenue, N.W., Washington, D.C. TAALS is a voluntary professional association of individuals engaged in confer-

ence interpreting, translating, précis writing, and other language services.

PAR. 2. Conference interpreting is the practice of expressing, in spoken form, ideas in a language different from an original spoken statement made at conferences or other high level business, scientific, humanitarian, cultural, governmental, or intergovernmental meetings.

PAR. 3. Translating is the practice of expressing, in written form, ideas in a language different from an original writing. Précis writing is the practice of expressing, in written form, summaries, minutes, or highlights of conferences or other high level business, scientific, humanitarian, cultural, governmental, or intergovernmental meetings.

PAR. 4. Except to the extent that TAALS has restrained competition as described herein, TAALS members have been and are in competition among themselves and with other interpreters, translators, précis writers, and other language specialists.

PAR. 5. TAALS engages in substantial activities that further its members' pecuniary interests including, among other things:

A. Advising members on operating translation and interpretation businesses;
B. Promoting members' interpretation and translation businesses by distributing an annual directory of member translators and interpreters to members and consumers;
C. Providing referrals of members to consumers seeking language services;
D. Promulgating work rules and fee schedules; and
E. Vouching for the qualifications of its members by maintaining rigorous membership requirements including sponsorship by current members.

PAR. 6. By virtue of its purposes and activities, TAALS is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 7. TAALS' acts and practices, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. The TAALS General Assembly is TAALS' supreme decision making body. It consists of all TAALS members and meets

annually. The General Assembly makes decisions by vote of members at meetings, with absent members voting by proxy.

PAR. 9. TAALS maintains a set of Work Rules contained in the "TAALS Professional Code for Language Specialists," the "Appendix to the Professional Code for Language Specialists," the "Working Conditions for Interpreters," "Working Conditions for Translators," and "Working Conditions for Précis Writers." The TAALS Work Rules are binding on members everywhere and require TAALS members to refuse to work under conditions not in accordance with those laid down by the association. Members sign a pledge to abide by the Work Rules when they join TAALS.

PAR. 10. The TAALS Work Rules were drawn up and adopted by TAALS members at General Assembly meetings.

PAR. 11. TAALS members are required to obtain a waiver from TAALS before deviating from the Work Rules. TAALS members can be expelled from the association for violating the Work Rules absent a waiver.

PAR. 12. TAALS enforces member compliance with the Work Rules through the TAALS "Committee to Ensure Respect for the Code," which investigates alleged infractions of the Work Rules and recommends penalties, including expulsion from TAALS, for such infractions. The General Assembly imposes penalties based on the recommendation of the Committee to Ensure Respect for the Code.

COUNT I

PAR. 13. Each of the allegations in paragraphs one through twelve herein are incorporated in this Count I as though set forth in full.

PAR. 14. Since at least 1973, TAALS has periodically created and distributed fee schedules entitled "Reports of Fees Currently Being Paid in the Americas" (hereafter "Fee Reports"). The TAALS Fee Reports list minimum fees for interpretation and translation services sold to private sector purchasers.

PAR. 15. The private sector interpretation fees listed in the Fee Reports were adopted by vote of the TAALS general membership at General Assembly meetings. TAALS requires its members to refrain from accepting private sector fees below those specified in the Fee Reports.

PAR. 16. The TAALS Work Rules prescribe identical compensation for interpreters working on the same interpretation team and performing the same function regardless of differences in interpreters' experience, skill, or other characteristics.

PAR. 17. The TAALS Work Rules deter members from providing services free of charge by requiring that in such cases members must pay their own travel and subsistence expenses.

PAR. 18. The TAALS Work Rules require members to calculate conference interpretation fees on an indivisible full-day basis, regardless of the duration of the actual assignment during the day.

PAR. 19. The TAALS Work Rules require members to charge an additional fee when they lead an interpretation team.

PAR. 20. The TAALS Work Rules require members to charge 160 percent of the minimum fee when interpreting alone.

PAR. 21. The TAALS Work Rules prescribe mandatory minimum standards for:

A. Transportation to and from conferences at which members work, including class of air travel and excess baggage allowance for air travel;
B. The quality of lodging at conferences at which members work;
C. The amount and type of subsistence expense allowances for conferences at which members work;
D. The rate of compensation for travel time, briefing time, and other time not worked; and
E. The amount and applicability of cancellation fees.

The Work Rules prohibit members from accepting engagements on terms inferior to those prescribed.

PAR. 22. TAALS promulgates the Fee Reports and the Work Rules for the purpose and with the intended effect of raising and sustaining the general level of fees and other compensation paid to interpreters, translators, précis writers, and other language specialists in the United States so that interpreters, translators, précis writers, and other language specialists can earn more money and greater profits.

PAR. 23. TAALS members and other interpreters, translators, and précis writers use the Fee Reports and Work Rules when setting their own fees and other compensation.

PAR. 24. Respondent TAALS has been and is acting as a combination of its members or in conspiracy with its members and others, to restrain price competition, to fix or stabilize fees, and to prevent discounting of fees in the provision of interpretation, translation, précis writing, and other language services.

PAR. 25. The combination or conspiracy and TAALS' acts or practices described above constitute price fixing, whose purpose and effects have been and are to restrain competition unreasonably and to injure consumers by, among other ways, depriving consumers of the benefits of competition on fees among interpreters, translators, précis writers, and other language specialists in the provision of interpretation, translation, précis writing, and other language services.

PAR. 26. The acts and practices herein alleged were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 27. Each of the allegations in paragraphs one through twelve herein are incorporated in this Count II as though set forth in full.

PAR. 28. The TAALS Work Rules require members to declare a single professional domicile and prohibit members from changing professional domiciles more than twice per year. The TAALS Work Rules also require that travel expenses to a job be charged based on a member's professional domicile, regardless of the member's actual location and even if no travel was actually involved. The Work Rules further require all members to notify TAALS of all professional domicile changes at least sixty days in advance. These domicile restrictions, in conjunction with the minimum standards for travel reimbursement alleged in paragraph twenty-one, reduce price competition on travel charges and deprive consumers of the benefits of reduced charges based on a translator's actual geographic proximity to a job.

PAR. 29. The TAALS Work Rules prescribe mandatory standards for:

A. The maximum hours worked per day and per shift by interpreters, translators, and précis writers;
B. The composition of interpreting teams, including the minimum number of interpreters per language spoken at a conference and the designation of a team leader; and
C. The minimum number of précis writers per conference team.

The Work Rules prohibit members from accepting engagements on terms inferior to those prescribed.

PAR. 30. The TAALS Work Rules prohibit members from engaging in all forms of personal publicity, including advertising.

PAR. 31. TAALS has established rules limiting its members' use of portable electronic simultaneous interpretation equipment.

PAR. 32. By enacting and enforcing the Work Rules, respondent TAALS has been and is acting as a combination of its members or in conspiracy with its members and others, to restrain competition by attempting to control the output and marketing of interpretation, translation, précis writing, and other language services.

PAR. 33. The combination or conspiracy and TAALS' acts or practices described above have had and continue to have the purpose and effect of restraining competition unreasonably and injuring consumers by, among other ways, depriving consumers of the benefits of competition among interpreters, translators, précis writers, and other language specialists in the provision of interpretation, translation, précis writing, and other language services.

PAR. 34. The acts and practices herein alleged were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

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 a 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 considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments 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 TAALS is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its offices and principal place of business located at 1000 Connecticut Avenue, N.W., Washington, D.C.

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:

"*Respondent*" or "*TAALS*" mean The American Association of Language Specialists, its directors, trustees, general assemblies, councils, committees, working groups, boards, divisions, chapters, officers, representatives, delegates, agents, employees, successors, and assigns.

"*Fees*" means any cash or non-cash charges, rates, prices, benefits or other compensation received or intended to be received for the rendering of interpretation, translation, or other language services, including but not limited to, salaries, wages, transportation, lodging, meals, allowances (including subsistence and travel allowances), reimbursements for expenses, cancellation fees, compensation for time not worked, compensation for travel time and preparation or study time, cancellation fees, and payments in kind.

"*Cancellation fee*" means any fee intended to compensate for the termination, cancellation or revocation of an understanding, contract, agreement, offer, pledge, assurance, opportunity, or expectation of a job.

"*Interpretation*" means the act of expressing, in oral form, ideas in a language different from the language used in an original spoken statement.

"*Translation*" means the act of expressing, in written form, ideas in a language different from the language used in an original writing.

"*Other language service*" means any service that has as an element the conversion of any form of expression from one language into another or any service incident to or related to interpretation or translation, including briefing or conference preparation, equipment rental, conference organizing, teleconferencing, précis writing, supervision or coordination of interpreters, reviewing or revising translations, or providing recordings of interpretations.

"*Interpreter*" means one who practices interpretation.

"*Translator*" means one who practices translation.

"*Language specialist*" means one who practices interpretation, translation, or any other language service.

"*Unbiased*" means lacking any systematic errors that would result from the selection or encouragement of one outcome or answer over others.

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

II.

It is further ordered, That respondent, directly or indirectly, or through any person, corporation, or other device, in or in connection

with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. Creating, formulating, compiling, distributing, publishing, recommending, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees for interpretation, translation, or any other language service, including but not limited to fee guidelines, suggested fees, proposed fees, fee sheets, standard fees, or recommended fees;

B. Entering into, adhering to, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to construct, fix, stabilize, standardize, raise, maintain, or otherwise interfere with or restrict fees for interpretation, translation, or other language services;

C. Suggesting, urging, encouraging, recommending, or attempting to persuade in any way interpreters, translators, or other language specialists to charge, pay, offer, or adhere to any existing or proposed fee, or otherwise to charge or refrain from charging any particular fee;

D. For a period of ten (10) years after the date this order becomes final, continuing a meeting of interpreters, translators, or other language specialists, after 1) any person makes a statement, addressed to or audible to the body of the meeting, concerning the fees charged or proposed to be charged for interpretation, translation, or any other language service and TAALS fails to declare such statement to be out of order, 2) any person makes two such statements and TAALS fails to eject him or her from the meeting, or 3) two people make such statements;

E. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any form of price competition, including but not limited to offering to do work for less remuneration than a specific competitor, undercutting a competitor's actual fee, offering to work for less than a customer's announced fee, advertising discounted rates, or accepting any particular lodging or travel arrangements;

F. Advising against, restricting, or prohibiting interpreters, translators, or other language specialists from accepting hourly fees, half-day fees, weekly fees, or fees calculated or payable on other than a full-day basis;

G. Advising against, restricting, or prohibiting interpreters, translators, or other language specialists from performing services free of charge or at a discount, or from paying their own travel, lodging, meals, or other expenses; and

H. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any forms of personal publicity, including but not limited to advertising by interpreters, translators, or other language specialists.

Provided, that nothing contained in this paragraph II shall prohibit respondent from:

1. Compiling or distributing accurate aggregate historical market information concerning past fees actually charged in transactions completed no earlier than three (3) years after the date this order becomes final, provided that such information is compiled and presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions;

2. Collecting or publishing accurate and otherwise publicly available fees paid by governmental and intergovernmental agencies, if such publication states the qualifications and requirements to be eligible to receive such fees;

3. Continuing a meeting following statements concerning historical, governmental, or intergovernmental fees that are made in order to undertake the activities permitted in paragraphs II.1 and II.2. of this order; or

4. Formulating, adopting, disseminating to its organizational subdivisions and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to advertising, including unsubstantiated representations, that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

III.

It is further ordered, That, respondent shall clearly and conspicuously state the following in any publication of fees made pursuant to paragraphs II.1 and II.2 of this order:

BY ORDER OF THE FEDERAL TRADE COMMISSION, TAALS IS PROHIBITED FROM RECOMMENDING, SUGGESTING, OR ENFORCING FEES APPLICABLE IN THE UNITED STATES. UNDER UNITED STATES LAW, INTERPRETERS AND OTHER LANGUAGE SPECIALISTS MUST UNILATERALLY AND INDEPENDENTLY DETERMINE THEIR OWN FEES.

IV.

It is further ordered, That respondent, directly or indirectly, or through any person, corporation, or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from entering into, adhering to, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to:

A. Limit, restrict, or mandate the length of time that interpreters, translators, or other language specialists work in a given period, or for which they are paid for preparation or study;

B. Limit, restrict, or mandate the number of interpreters, translators, or other language specialists used for a given job or type of job;

C. Limit, restrict, or mandate the reimbursement of or payment to interpreters, translators, or other language specialists for travel expenses or time spent traveling, or otherwise prevent consumers from receiving any advantages, based on interpreters', translators', or other language specialists' actual travel arrangements or geographic location, by restricting, requiring declarations of, or regulating the number or duration of residences or domiciles of members or by other means; or

D. Limit, restrict, or mandate the equipment used in performing interpretation, translation, or other language services.

Provided, that nothing contained in paragraph IV of this order shall prohibit respondent from providing information or its nonbinding and noncoercive views concerning interpretation equipment, the hours of work or preparation, or the number of language specialists used for types of jobs.

V.

It is further ordered, That respondent shall, within thirty (30) days after the date this order becomes final, amend its Professional Code For Language Specialists and all appendices to conform to the requirements of paragraphs II and IV of this order and amend its bylaws to require each member, chapter, or other organizational subdivision, to observe the provisions of paragraphs II and IV of this order.

VI.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute to each TAALS member, affiliate, chapter, organizational subdivision, or other entity associated directly or indirectly with TAALS, copies of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, (4) and any document that TAALS revises pursuant to this order; and

B. For a period of ten years after the date this order becomes final, distribute to all new TAALS officers, directors, and members, and any newly created affiliates, chapters, or other organizational subdivisions, within thirty days of their admission, election, appointment, or creation, a copy of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that TAALS revises pursuant to this order.

VII.

It is further ordered, That respondent shall:

A. Within ninety (90) days after the date this order becomes final, and annually for five (5) years thereafter on the anniversary of the date this order becomes final, file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order, and any instances in which respondent has taken any action within the scope of the provisos in paragraphs II.1, II.2, II.3, or II.4 of this order;

B. For a period of five (5) years after the date this order becomes final, collect, maintain and make available to the Federal Trade Commission for inspection and copying: records adequate to describe in detail any action taken in connection with the activities covered in this order; all minutes, records, reports or tape recordings of meetings of the Council, General Assembly, and all committees, subcommittees, working groups, or any other organizational subdivisions of TAALS; and all TAALS mailings to the TAALS Council or general membership;

C. For a period of five (5) years after the date this order becomes final, provide copies to the Federal Trade Commission, within thirty (30) days of its adoption, of the text of any amendment to the TAALS Bylaws, TAALS Professional Code for Language Specialists or Appendix thereto, Working Conditions for Interpreters, Working Conditions for Translators, Working Conditions for Précis-Writers, and any new rules, regulations or guidelines of respondent; and

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

By the Commission.[1]

[1] Prior to leaving the Commission, former Commissioner Owen registered her vote in the affirmative for the Complaint and the Decision and Order in this matter.

APPENDIX A

[DATE]

ANNOUNCEMENT

The American Association of Language Specialists ("TAALS") has entered into a consent agreement with the Federal Trade Commission. Pursuant to this consent agreement, the Commission issued an order on [DATE] that prohibits TAALS, including its chapters, committees, or organizational subdivisions, from:

(1) Creating, distributing, authorizing, or endorsing any list or schedule of fees or other charges for interpretation, translation, or other language services;

(2) Entering into, or maintaining any agreement, plan, or program, to construct, fix, stabilize, raise, maintain, or otherwise interfere with fees or other charges for interpretation, translation, or other language services;

(3) Suggesting, recommending, or encouraging, in any way, that interpreters, translators, or other language specialists charge, adhere to, or refrain from charging any existing or proposed fee;

(4) For a period of ten (10) years after this order becomes final, continuing a meeting after 1) any person makes any statement to the body of the meeting concerning the fees charged or proposed to be charged for interpretation, translation, or any other language service and TAALS fails to declare such statement to be out of order, 2) any person makes two such statements and TAALS fails to eject him or her from the meeting, or 3) two people make such statements;

(5) Prohibiting, restricting, regulating, or advising against any form of price competition among its members or other interpreters, translators, or other language specialists, including undercutting a competitor's actual fee or a customer's announced fee, advertising discounted rates, or accepting any particular lodging or travel arrangements;

(6) Advising against, restricting, or prohibiting interpreters, translators, or other language specialists from accepting hourly fees, weekly fees, or fees calculated or payable on other than a full-day basis;

(7) Advising against, restricting, or prohibiting interpreters, translators, or other language specialists from performing services free of charge or from paying their own travel, lodging, meals, or other expenses; or

(8) Prohibiting, restricting, impeding, declaring unethical, or advising against any forms of personal publicity, including but not limited to advertising by interpreters, translators, or other language specialists.

In addition, the order prohibits TAALS from maintaining any agreement, understanding, plan or program to:

(1) Limit, restrict, or mandate the length of time that interpreters, translators, or other language specialists work in a given period, or for which they are paid for preparation or study;

(2) Limit, restrict, or mandate the number of interpreters, translators, or other language specialists used for a job or type of job;

(3) Limit, restrict, or mandate the payment or reimbursement for travel or the travel time of interpreters, translators, or other language specialists, or otherwise prevent consumers from receiving any advantages, based on travel arrangements or geographic location, by regulating domiciles of members or by other means; or

(4) Limit, restrict, or mandate the equipment used in performing interpretation, translation, or other language services.

Under the order, "fees" are defined to include all cash or non-cash charges, rates, benefits, or other compensation for interpretation, translation or other language services, including but not limited to, lodging, meals, subsistence and travel allowances, reimbursements for expenses, cancellation fees, and compensation for time not worked, travel time or briefing time. "Language specialist" means one who performs "other language services," which are defined to refer to any services that involve the conversion of any form of expression from one language into another or any services incident to or related to interpretation and translation. Consequently, when the order mentions "language specialists," it includes anyone who rents equipment, organizes conferences, performs teleconferencing or précis writing, supervises or coordinates interpreters, reviews or revises translations, or provides recordings of interpretations.

Further, under the order, TAALS must amend its professional code to conform to the requirements of paragraphs II and IV of the attached order, which are summarized above. TAALS must also amend its bylaws to require each member, chapter, and organizational subdivision to observe the requirements of the order. In addition, the order requires TAALS to provide to the Federal Trade Commission the text of each amendment to the TAALS Bylaws, Professional Code or Working Conditions, and the text of any new rules, regulations or guidelines.

We note, however, that the order does not prevent TAALS from adopting and enforcing reasonable ethical guidelines prohibiting advertising that would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act. In addition, TAALS will be permitted to compile and distribute accurate aggregate historical market information concerning past fees that were actually charged no earlier than three years after this order becomes final, if presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions underlying such reports. Similarly, the order does not prohibit TAALS from collecting and publishing accurate, publicly available information on fees paid by governmental and intergovernmental agencies if such publication states the qualifications and requirements for such fees. With any publication of fees permitted by the order, TAALS must include a statement that it is prohibited from recommending fees applicable in the United States and that interpreters must independently determine their own fees. In addition, the order states that it does not prohibit TAALS from providing information or its nonbinding and noncoercive views concerning interpretation equipment, the hours of work or preparation, or the number of language specialists used for a type of job.

For more specific information, members should refer to the order itself, which is enclosed.

Counsel
American Association of Language Specialists

IN THE MATTER OF

AMERICAN SOCIETY OF INTERPRETERS

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

Docket C-3525. Complaint, Aug. 31, 1994--Decision, Aug. 31, 1994

This consent order prohibits, among other things, the professional association of interpreters, based in Washington, D.C., from fixing or otherwise interfering with any form of price or fee competition among language specialists in the future; from maintaining any agreement or plan to limit or restrict the specialists working time or condition; for ten years, from making statements at an association meeting concerning fees; and, for three years, from compiling and distributing aggregate information concerning fees already charged.

Appearances

For the Commission: *Michael McNeely* and *Kent Cox.*

For the respondent: *Mario L. Herman, Purvin & Herman,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent American Society of Interpreters ("ASI"), a corporation, 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 American Society of Interpreters is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal place of business located in Washington, D.C. ASI is a voluntary professional association of individuals engaged in the business of conference interpreting.

PAR. 2. Conference interpreting is the practice of expressing, in spoken form, ideas in a language different from an original spoken

statement made at conferences or other high level business, scientific, governmental, or intergovernmental meetings.

PAR. 3. Except to the extent that ASI has restrained competition as described herein, ASI members have been and are in competition among themselves and with other interpreters.

PAR. 4. ASI engages in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, ASI is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 5. ASI's acts and practices, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. ASI decisions are made by the Assembly and the Board of Directors ("ASI Board"). The Assembly consists of all ASI members and meets annually. Assembly decisions are reached by consensus. The ASI Board acts for the Assembly in the interim and makes recommendations to the Assembly, including recommendations on fees. The ASI Board consists of seven ASI members elected at the annual Assembly.

PAR. 7. ASI maintains a set of work rules ("ASI Work Rules") approved by the ASI Board and disseminated to all ASI members. The ASI Work Rules are embodied in the "Code of Professional Standards," the "Professional Guidelines," and on the last page of the annual yearbook.

PAR. 8. The ASI Work Rules are binding on members and forbid members from accepting fees and staffing arrangements inferior to those recommended by ASI. ASI imposes penalties, including expulsion from ASI, on its members for deviating from the ASI Work Rules.

PAR. 9. The ASI Work Rules are a collection of minimum working conditions to be demanded by those providing interpretation services. ASI members have been required to advise the ASI Board before deviating from ASI Work Rules. ASI has encouraged its members to report instances of members and nonmembers undercutting the ASI Work Rules and fees.

PAR. 10. Until 1991, the ASI Yearbook Guidelines included each year's minimum daily fee for conference interpretation services charged to purchasers in the private sector ("Minimum Daily Fee"). ASI members could be expelled from the association for charging

less than the Minimum Daily Fee for conference interpretation services.

COUNT I

PAR. 11. Each of the allegations in paragraphs one through ten herein are incorporated in this Count I as though set forth in full.

PAR. 12. From as early as 1967, ASI annually created and distributed a list of Minimum Daily Fees. ASI has required its members to refrain from accepting fees in the private sector below the specified Minimum Daily Fees. ASI has encouraged its members to report instances of members and nonmembers undercutting the ASI Minimum Daily Fee.

PAR. 13. ASI Work Rules require that members charge at least the ASI Minimum Daily Fee for conference interpretation services. The Minimum Daily Fees were adopted by consensus of the ASI general membership at annual Assembly meetings.

PAR. 14. The ASI Work Rules require identical compensation for members working on the same interpretation team and performing the same function regardless of differences in interpreters' experience, skill, or other characteristics.

PAR. 15. The ASI Work Rules deter members from performing services free of charge except in welfare cases or cases of national or international emergencies.

PAR. 16. The ASI Work Rules require members to calculate conference interpretation fees on an indivisible full-day basis, regardless of the duration of the actual assignment during the day.

PAR. 17. The ASI Work Rules require members to charge 150 percent of the Minimum Daily Fee when interpreting alone.

PAR. 18. The ASI Work Rules prescribe mandatory minimum standards for the: rate of compensation for interpreting legal proceedings in an attorney's office; amount, type, and time of payment of subsistence expense allowances for conferences at which members work; rate of compensation for travel time, briefing time, and other time not worked, such as intervening weekends and holidays; rate of compensation for chief interpreters who coordinate and supervise conference interpretation services; and amount and applicability of cancellation fees. The ASI Work Rules prohibit members from accepting engagements on terms inferior to those prescribed.

PAR. 19. The ASI Board has promulgated a minimum daily rate for members to charge clients for the rental of portable interpretation equipment.

PAR. 20. ASI promulgated the above ASI Work Rules and the Minimum Daily Fees for the purpose and with the intended effect of raising and sustaining the general level of fees and other compensation paid to interpreters in the United States so that interpreters could earn more money and greater profits.

PAR. 21. ASI members have used the ASI Work Rules and the Minimum Daily Fees when setting their own fees and working conditions.

PAR. 22. Respondent ASI has been and is acting as a combination of its members or in conspiracy with some of its members and others, to restrain price competition in the sale of interpretation services, to fix or stabilize fees and other terms, and to prevent discounting of fees in the provision of interpretation services.

PAR. 23. The combination or conspiracy and ASI's acts or practices described above constitute price fixing, whose purpose and effects have been and are to restrain competition unreasonably and to injure consumers by, among other ways, depriving consumers of the benefits of price competition on fees and other terms among interpreters in the provision of interpretation services.

PAR. 24. The acts and practices herein alleged were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 25. Each of the allegations in paragraphs one through ten are incorporated in this Count II as though set forth in full.

PAR. 26. The ASI Work Rules prescribe mandatory standards for:

A. Hours worked per day and per shift by interpreters; and
B. The number of interpreters per language spoken at a conference.

The ASI Work Rules prohibit members from accepting engagements on terms inferior to those prescribed.

PAR. 27. ASI promulgated the ASI Work Rules alleged in paragraph twenty-six for the purpose and with the intended effect of restraining competition by attempting to control the output and marketing of interpretation services in the United States so that interpreters could earn more money and greater profits.

PAR. 28. By enacting and enforcing the Work Rules, respondent ASI has been and is acting as a combination of its members or in conspiracy with some of its members and others, to restrain competition by attempting to control the output and marketing of interpretation services.

PAR. 29. The combination or conspiracy and ASI's acts or practices described above have had and continue to have the purpose and effects of restraining competition unreasonably and injuring consumers by, among other ways, depriving consumers of the benefits of competition among interpreters in the provision of interpretation services.

PAR. 30. The acts and practices herein alleged were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

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 a 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 considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments 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 ASI is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its offices and principal place of business located at P.O. Box 9603, Washington, D.C.

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:

"*Respondent*" or "*ASI*" mean American Society of Interpreters, its directors, trustees, general assemblies, councils, committees, working groups, boards, divisions, chapters, officers, representatives, delegates, agents, employees, successors, and assigns.

"*Fees*" means any cash or non-cash charges, rates, prices, benefits or other compensation received or intended to be received for the rendering of interpretation, translation, or other language services, including but not limited to, salaries, wages, transportation, lodging, meals, allowances, reimbursements for expenses, compensation for time not worked, compensation for travel time and preparation and study time, cancellation fees, and payments in kind.

"*Interpretation*" means the act of expressing, in oral form, ideas in a language different from an original spoken statement.

"*Translation*" means the act of expressing, in written form, ideas in a language different from an original writing.

"*Other language service*" means any service that has as an element the conversion of any form of expression from one language into another or any service incident to or related to interpretation and translation including briefing or conference preparation, equipment rental, conference organizing, teleconferencing, précis writing, supervision or coordination of interpreters, reviewing or revising translations, or providing recordings of interpretations.

"*Interpreter*" means one who practices interpretation.

"*Translator*" means one who practices translation.

"*Language specialist*" means one who practices interpretation, translation, or any other language service.

"*Unbiased*" means lacking any systematic errors that would result from the selection or encouragement of one outcome or answer over others.

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

II.

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

A. Creating, formulating, compiling, distributing, publishing, recommending, suggesting, encouraging adherence to, endorsing, publishing letters or articles supporting, or authorizing any list or schedule of fees for interpretation, translation, or any other language service, including but not limited to fee reports, fee guidelines, suggested fees, proposed fees, fee sheets, standard fees, or recommended fees;

B. Entering into, adhering to, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to construct, fix, stabilize, raise, maintain, or otherwise interfere with

or restrict the fees for interpretation, translation, or other language services;

C. Suggesting, urging, encouraging, recommending, or attempting to persuade in any way interpreters, translators, or other language specialists to charge, pay, file, or adhere to any existing or proposed fee, or otherwise to charge or refrain from charging any particular fee;

D. For a period of ten (10) years after the date this order becomes final, continuing a meeting of interpreters, translators, or other language specialists, after 1) any person makes a statement, addressed to or audible to the body of the meeting, concerning the fees charged or proposed to be charged for interpretation, translation, or any other language service and ASI fails to declare such statement to be out of order, 2) any person makes two such statements and ASI fails to eject him or her from the meeting, or 3) two people make such statements;

E. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any form of price competition, including but not limited to offering to do work for less remuneration than a specific competitor, undercutting a competitor's actual fee, offering to work for less than a customer's announced fee, advertising discounted rates, or accepting any particular lodging or travel arrangements;

F. Discouraging, restricting, or prohibiting interpreters, translators, or other language specialists from accepting hourly fees, half-day fees, weekly fees, or fees calculated on other than a full-day basis; and

G. Discouraging, restricting, or prohibiting interpreters, translators, or other language specialists from performing services free of charge or at a discount, or from paying their own travel, lodging, meals, or other expenses.

Provided, that nothing contained in this paragraph II shall prohibit respondent from:

1. Compiling or distributing accurate aggregate historical market information concerning past fees actually charged in transactions completed no earlier than three (3) years after the date this order becomes final, provided that such information is compiled and

presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions;

2. Collecting or publishing accurate and otherwise publicly available fees paid by governmental and intergovernmental agencies, if such publication states the qualifications and requirements to be eligible to receive such fees; or

3. Continuing a meeting following statements concerning historical, governmental, or intergovernmental fees that are made in order to undertake the activities permitted in paragraphs II.1 and II.2. of this order.

III.

It is further ordered, That respondent shall clearly and conspicuously state the following in any publication of fees made pursuant to paragraphs II.1 and II.2 of this order:

BY ORDER OF THE FEDERAL TRADE COMMISSION, ASI IS PROHIBITED FROM RECOMMENDING, SUGGESTING, OR ENFORCING FEES. UNDER UNITED STATES LAW, INTERPRETERS AND OTHER LANGUAGE SPECIALISTS MUST UNILATERALLY AND INDEPENDENTLY DETERMINE THEIR OWN FEES.

IV.

It is further ordered, That respondent, directly or indirectly, or through any person, corporation, or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from entering into, adhering to, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to:

A. Limit, restrict, or mandate the length of time that interpreters, translators, or other language specialists work in a given period, or for which they are paid for preparation or study; or

B. Limit, restrict, or mandate the number of interpreters, translators, or other language specialists used for a given job or type of job.

Provided, that nothing contained in paragraph IV of this order shall prohibit respondent from providing information or its nonbinding and non-coercive views concerning the hours of work or preparation or the number of language specialists used for types of jobs.

V.

It is further ordered, That respondent shall, within thirty (30) days after the date this order becomes final, amend its Code of Professional Standards and all Professional Guidelines, including those found in the annual Membership List of ASI, and all appendices to conform to the requirements of paragraphs II and IV of this order and amend its bylaws to require each member, chapter, or other subdivision, to observe the provisions of paragraphs II and IV of this order.

VI.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute to each ASI member, affiliate, chapter, organizational subdivision, or other entity associated directly or indirectly with ASI, copies of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, (4) and any document that ASI revises pursuant to this order, with the exception of the annual Membership List; and

B. Within one-hundred eighty (180) days after the date this order becomes final, distribute copies of the annual Membership List as revised pursuant to this order; and

C. For a period of five (5) years after the date this order becomes final, distribute to all new ASI officers, directors, and members, and any newly created affiliates, chapters, or other organizational subdivisions, within thirty days of their admission, election, appointment, or creation, a copy of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that ASI revises pursuant to this order.

VII.

It is further ordered, That respondent shall:

A. Within ninety (90) days after the date this order becomes final, and annually for three (3) years thereafter on the anniversary of the date this order becomes final, file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order, and any instances in which respondent has taken any action within the scope of the provisos in paragraphs II.1 or II.2 or II.3 of this order:

B. For a period of five (5) years after the date this order becomes final, notify and provide copies to the Federal Trade Commission staff, within thirty (30) days, of any fee reports, fee lists, fee schedules, fee guidelines or similar materials produced by or for any association that come into respondent's possession;

C. For a period of five (5) years after the date this order becomes final, collect, maintain and make available to the Federal Trade Commission staff for inspection and copying: records adequate to describe in detail any action taken in connection with the activities covered in this order; all minutes, records, reports or tape recordings of meetings of the Board General Assembly, and all chapters, committees, subcommittees, working groups, or any other organizational subdivisions of ASI; and all ASI mailings to the ASI Board or general membership;

D. For a period of three (3) years after the date this order becomes final, provide copies to the Federal Trade Commission, within thirty (30) days of its adoption, of the text of any amendment to the ASI Bylaws, ASI Professional Guidelines, ASI Code of Professional Standards, ASI Yearbook Professional Guidelines, and any new rules, regulations or guidelines of respondent; and

E. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution or reorganization of itself or any chapter, division, or of any proposed change resulting in the emergence of a successor corporation or

association, or any other change in the corporation or association that may affect compliance obligations arising out of this order.

By the Commission.[1]

APPENDIX A

[DATE]

ANNOUNCEMENT

The American Society of Interpreters ("ASI") has entered into a consent agreement with the Federal Trade Commission. Pursuant to this consent agreement, the Commission issued an order on [DATE] that prohibits ASI, including its chapters, committees, or organizational subdivisions, from:

(1) Creating, distributing, authorizing, or endorsing any list or schedule of fees or other charges for interpretation, translation, or other language services;

(2) Entering into, or maintaining any agreement, plan, or program, to construct, fix, stabilize, raise, maintain, or otherwise interfere with the fees or other charges for interpretation, translation, or other language services;

(3) Suggesting, recommending, or encouraging, in any way, interpreters, translators, or other language specialists that charge, adhere to, or refrain from charging any existing or proposed fee;

(4) For a period of ten (10) years after the date this order becomes final, continuing a meeting after a) any person makes a statement to the body of the meeting, concerning the fees charged or proposed to be charged for interpretation, translation, or any other language service and ASI fails to declare such statement to be out of order, b) any person makes two such statements and ASI fails to eject him or her from the meeting, or c) two people make such statements;

(5) Prohibiting, restricting, regulating, or advising against any form of price competition among its members or other interpreters, translators, or other language specialists, including undercutting a

[1] Prior to leaving the Commission, former Commissioner Owen registered her vote in the affirmative for the Complaint and the Decision and Order in this matter.

competitor's actual fee or a customer's announced fee, advertising discounted rates or accepting any particular lodging or travel arrangements;

(6) Discouraging, restricting, or prohibiting interpreters, translators, or other language specialists from accepting hourly fees, weekly fees, or fees calculated on other than a full-day basis; and

(7) Discouraging, restricting, or prohibiting interpreters, translators, or other language specialists from performing services free of charge or from paying their own travel, lodging, meals, or other expenses.

In addition, the order prohibits ASI from maintaining any agreement, understanding, plan or program to:

(1) Limit, restrict, or mandate the length of time that interpreters, translators, or other language specialists work in a given period, or for which they are paid for preparation or study; or

(2) Limit, restrict, or mandate the number of interpreters, translators, or other language specialists hired for a job or type of job.

Under the order, "fees" are defined to include all cash or non-cash charges, rates, benefits, or other compensation for interpretation, translation or other language services, including but not limited to, lodging, meals, subsistence and travel allowances, reimbursements for expenses, cancellation fees, and compensation for time not worked, travel time or briefing time. "Language specialist" means one who performs "other language services," which are defined to refer to any services that involve the conversion of any form of expression from one language into another or any services incident to or related to interpretation and translation. Consequently, when the order mentions "language specialists," it includes anyone who rents equipment, organizes conferences, performs teleconferencing or précis writing, supervises or coordinates interpreters, reviews or revises translations, or provides recordings of interpretations.

Further, under the order, ASI must amend its Code of Professional Standards, Professional Guidelines, and Yearbook Professional Guidelines to conform to the requirements of paragraphs II and IV of the attached order, which are summarized above. ASI must also amend its bylaws to require each member, chapter, and organizational subdivision to observe the requirements of the order.

In addition, the order requires ASI to provide to its members and affiliates and to the Federal Trade Commission the text of each amendment to the ASI Bylaws, the ASI Code of Professional Standards, and all ASI Professional Guidelines, including those found in the ASI Membership Lists, and the texts of any new rules, regulations or guidelines. The order also requires that, within thirty days after obtaining them, ASI must provide to the Federal Trade Commission copies of all lists of fees that have been produced by any associations and come into ASI's possession.

We note, however, that ASI will be permitted to compile and distribute accurate aggregate historical market information concerning past fees that were actually charged no earlier than three years after this order becomes final, if presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions underlying such reports. Similarly, the order does not prohibit ASI from collecting and publishing accurate publicly available information on fees paid by governmental and intergovernmental agencies if such publication states the qualifications and requirements for such fees. With any publication of fees permitted by the order, ASI must include a statement that it is prohibited from recommending fees and that interpreters must independently determine their own fees. In addition, the order states that it does not prohibit ASI from providing information or its nonbinding and noncoercive views concerning the hours of work or preparation or the number of language specialists used for a type of job.

For more specific information, members should refer to the FTC order itself, which is enclosed.

Counsel
American Society of Interpreters