IN THE MATTER OF

JOCKEY INTERNATIONAL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3494. Complaint, May 10, 1994--Decision, May 10, 1994

This consent order requires, among other things, a Wisconsin-based manufacturer of underwear, hosiery, and sportswear to disclose the country where its clothing is made and to use the correct generic fiber name for clothing. The consent order also requires the respondent to distribute copies of the order to each of its employees, agents, licensees and other representatives who are selling or advertising any of its textile products through mail order catalogs and promotional materials.

Appearances

For the Commission: *Robert E. Easton.*

For the respondent: *Charlotte Shapiro*, in-house counsel, Kenosha, WI.

COMPLAINT

The Federal Trade Commission, having reason to believe that Jockey International, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of the Federal Trade Commission Act and of the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby alleges:

PARAGRAPH 1. Respondent Jockey International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its office and principal place of business located at 2300 60th Street, Kenosha, Wisconsin.

PAR. 2. Respondent is now, and for some time past has been, engaged, directly or through licensees, by means of mail order catalogs, in the advertising, offering for sale, sale and distribution of a variety of products in or affecting commerce, including textile

wearing apparel and other textile fiber products as "textile fiber product" and "commerce" are defined in the Textile Fiber Products Identification Act (15 U.S.C. 70) (hereafter referred to as the Textile Act). The allegations in this complaint relate to mail order catalogs published prior to June 1993.

PAR. 3. In September 1984 Congress amended the Textile Act to require that catalogs and other mail order promotional material disclose whether textile fiber products offered for sale are imported or domestically produced or both. The amendment states:

Misbranding and False Advertising of Textile Fiber Products

(i) For the purposes of this Act, a textile fiber product shall be considered to be falsely or deceptively advertised in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of such textile fiber product, unless such textile fiber product description states in a clear and conspicuous manner that such textile fiber product is processed or manufactured in the United States of America, or imported, or both. (15 U.S.C. 70b(i))

PAR. 4. The Commission, pursuant to authority under the Textile Act to make such rules and regulations as may be necessary and proper for the enforcement of the Textile Act (15 U.S.C. 70e), promulgated a rule effective April 17, 1985 relating to country of origin in mail order advertising. Rule 34 states:

When a textile fiber product is advertised in any mail order catalog or mail order promotional material, the description of such product shall contain a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. Other words or phrases with the same meaning may be used. The statement of origin required by this section shall not be inconsistent with the origin labeling of the product being advertised. (16 CFR 303.34)

PAR. 5. Section 4(b) of the Textile Act requires that a label attached to an imported or domestic textile product disclose the identity of the constituent fibers by their generic names. Section 4(c) of the Textile Act states that if fiber content is mentioned or implied in a written advertisement, then the proper generic names as required under Section 4(b) of the Textile Act must be disclosed. Section 4(b) of the Textile Act reads, in part, as follows:

. . . a textile fiber product shall be misbranded if a stamp, tag, label, or other means of identification, or substitute therefore authorized by section 5, is not on or affixed to the product showing in words and figures plainly legible, the following:

(1) The constituent fiber or combination of fibers in the textile fiber product, designating with equal prominence each natural or manufactured fiber in the textile fiber product by its generic name . . . (15 U.S.C. 70b(b))

Section 4(c) of the Textile Act reads:

(c) For the purpose of this Act, a textile fiber product shall be considered to be falsely or deceptively advertised if any disclosure or implication of fiber content is made in any written advertisement which is used to aid, promote, or assist directly or indirectly in the sale or offering for sale of such textile fiber product, unless the same information as that required to be shown on the stamp, tag, label, or other identification under section 4(b) (1) and (2) is contained in the heading, body, or other part of such written advertisement, except that the percentages of the fiber present in the textile fiber product need not be stated. (15 U.S.C. 70b(c))

PAR. 6. The Commission, pursuant to authority under the Textile Act to make such rules and regulations as may be necessary and proper for the enforcement of the Textile Act (15 U.S.C. 70e), promulgated Rules 40, 41 and 42 relating to fiber content disclosures in advertising. Rules 40, 41 and 42, in relevant part, read:

Rule 40 - Use of Terms in Written Advertisements Which Imply Presence of a Fiber.

The use of terms in written advertisements which are descriptive of a method of manufacture, construction, or weave, and which by custom and usage are also indicative of a textile fiber or fibers, or the use of terms in such advertisements which constitute or connote the name or presence of a fiber or fibers, shall be deemed to be an implication of fiber content under section 4(c) of the Act, except that the provisions of this section shall not be applicable to nondeceptive shelf or display signs in retail stores indicating the location of textile fiber products and not intended as advertisements.

Rule 41 - Use of Fiber Trademarks and Generic Names in Advertising.

(a) In advertising textile fiber products, the use of a fiber trademark shall require a full disclosure of the fiber content information required by the Act and regulations in at least one instance in the advertisement.

(b) Where a fiber trademark is used in advertising textile fiber products containing more than one fiber, other than permissible ornamentation, such fiber

trademark and the generic name of the fiber must appear in the required fiber content information in immediate proximity and conjunction with each other in plainly legible type or lettering of equal size and conspicuousness.

(c) Where a fiber trademark is used in advertising textile fiber products containing only one fiber, other than permissive ornamentation, such fiber trademark and the generic name of the fiber must appear in immediate proximity and conjunction with each other in plainly legible and conspicuous type or lettering at least once in the advertisement.

Rule 42 - Arrangement of Information in Advertising Textile Fiber Products.

(a) Where a textile fiber product is advertised in such manner as to require disclosure of the information required by the Act and regulations, all parts of the required information shall be stated in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence. In making the required disclosure of the fiber content of the product, the generic names of fibers present in an amount 5 per centum or more of the total fiber weight of the product together with any fibers disclosed in accordance with paragraph (b) of Section 303.3 of this part (Rule 3) shall appear in order of predominance by weight, to be followed by the designation "other fiber" or "other fibers" if a fiber or fibers required to be so designated be present. (16 CFR 303.40-42)

PAR. 7. Pursuant to Section 3 of the Textile Act, 15 U.S.C. 70a, violation of that Act and the Federal Trade Commission rules issued thereunder is an unfair method of competition and an unfair and deceptive act or practice under the Federal Trade Commission Act.

PAR. 8. Respondent advertised or offered for sale textile fiber products in mail order catalogs or mail order promotional material without a clear and conspicuous statement that the products were processed or manufactured in the United States of America, or imported, or both.

PAR. 9. Respondent advertised or offered for sale textile fiber products in mail order catalogs or mail order promotional materials in which fiber content was mentioned or implied in written advertisements, but the generic names were not disclosed.

PAR. 10. Respondent's sale, offering for sale and advertising of textile fiber products in or affecting commerce were in violation of the Textile Act and the Federal Trade Commission rules and regulations promulgated thereunder, and constituted unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation 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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification 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 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 respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Jockey International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its office and principal place of business presently located at 2300 60th Street, Kenosha, Wisconsin.

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

ORDER

I.

It is ordered, That respondent Jockey International, Inc., a corporation, its successors and assigns, trading under its own name or under any other name or names, and its officers, agents, licensees, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, selling or advertising of any textile fiber product in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of such textile fiber product, in commerce, as the terms "textile fiber product" and "commerce" are defined in the Textile Fiber Products Identification Act (15 U.S.C. 70) ("Textile Act"), do forthwith cease and desist from:

1. Failing to state in the description of such textile fiber product in a clear and conspicuous manner that such textile fiber product is processed or manufactured in the United States of America, or imported, or both; and
2. Mentioning or implying fiber content without using the generic fiber names in a manner consistent with the Textile Act and the rules and regulations thereunder.

II.

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

III.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its employees, agents, licensees and representatives acting in connection with the offering for sale, selling or advertising of any textile fiber product in any mail order catalog or mail order promotional material which is used in the direct sale or

direct offering for sale of such textile fiber product, in commerce, as the terms "textile fiber product" and "commerce" are defined in the Textile Fiber Products Identification Act (15 U.S.C. 70) ("Textile Act").

IV.

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

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL

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

Docket 9071. Consent Order, Oct. 12, 1976--Modifying Order, May 12, 1994

This order reopens the proceeding and modifies the Commission's 1976 consent order by deleting the administrative provisions that required the respondent to distribute a copy of the 1976 order to its funeral homes and affected employees; provide prior notice to the Commission of certain changes in its corporate organization; and periodically notify the Commission regarding the acquisition or sale of any funeral homes. The Commission concluded that these provisions were no longer warranted or were essentially duplicative of requirements in provisions in more recent Commission orders against the respondent and therefore, warranted reopening and modifying the order.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On January 12, 1994, Service Corporation International ("SCI") filed a petition to reopen the proceeding in Docket No. 9071, *Service Corp. Int'l.*, 88 FTC 530 (1976), pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, to modify the order by deleting Parts III, VI, and VII.

On October 12, 1976, a final order was issued as a result of a consent agreement between SCI and the Commission, to resolve allegations that SCI violated Section 5 of the FTC Act in connection with the marketing of funeral services and merchandise. Part I of the order prohibits certain misrepresentations and practices in connection with the marketing of funeral services and merchandise. Part II provided for consumer redress. Part III requires SCI to transmit copies of the order to all of its funeral homes and to notify all affected employees of the order's requirements. Part IV required SCI to file a compliance report. Part V required SCI to maintain records adequate to disclose its compliance with the order and to furnish such records to the Commission upon request after reasonable notice. The record retention requirements in Part V lasted three years. Part VI

requires SCI to notify the Commission at least thirty days prior to any proposed change in SCI such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in corporate organization which may affect compliance obligations arising out of this order. Part VII requires SCI to notify the Commission by the 10th day of each month as to the acquisition or sale of any funeral homes, occurring in the immediately preceding month. Under Part VIII of the order, paragraphs A(4), B, and E of Part I were automatically deleted from the order seven years after its effective date and paragraphs A(l)-(3), C, and D of Part I were automatically amended to conform to the parallel provisions of the Commission's Funeral Rule on the date the Rule became effective.

The petition was placed on the public record on February 3, 1994. The comment period ended on March 4, 1994. The Commission did not receive any comments regarding the petition. For the reasons stated below, the Commission has determined to grant the petition and modify the order by deleting Parts III, VI, and VII.

I. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the FTC Act, 15 U.S.C. 45(b) provides that the Commission shall reopen an order to consider whether it should be modified or vacated if a respondent files a petition that makes a satisfactory showing that changed conditions of law or fact require the order to be modified or vacated. A satisfactory showing sufficient to require reopening pursuant to Section 5(b) is made when a petition to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order, or make continued application of the order inequitable or harmful to competition. Tarra Hall Clothes, Inc., Docket No. C-2797 (October 27, 1992) at 4.

In addition, Section 2.51 of the Commission's Rules invites petitioners to demonstrate in their petitions how the public interest warrants the requested reopening and modification or vacation. In considering whether modification or vacation of an order is warranted on public interest grounds, the Commission balances the reasons favoring the requested modification against any reasons not to make the modification. For example, the Commission has vacated

orders where the reasons for doing so outweighed the reasons for retaining them. *Albertson's, Inc.*, 110 FTC 1, 2 (1987); *see also Redman Industries, Inc.*, 110 FTC 636, 640 (1988) (four orders vacated on public interest grounds because they contained remedies contemplated and rejected as not beneficial to consumers in connection with a proposed rulemaking).

Regardless of whether the modification or vacation is sought because of changed conditions of law or fact or because the public interest warrants it, the burden is on the petitioner to make a satisfactory showing for the Commission to reopen the order. *See* S. Rep. No. 96-500, 96th Cong., lst Sess. 9-10 (1979). This burden is a heavy one in view of the public interest in repose and finality of Commission orders. *Federated Dep't. Stores, Inc. v. Moitie,* 452 U.S. 394 (1981).

II. THE COMMISSION'S DISPOSITION OF SCI'S ARGUMENTS

SCI argues that changed conditions of law and fact, and the public interest, warrant modification of the order through the deletion of Parts III, VI, and VII of the order. SCI points out that Part I of the order does not impose any conduct prohibitions on SCI different from those imposed by the Funeral Rule. SCI argues that the only order provisions that continue to impose obligations different from those imposed by the Funeral Rule are administrative provisions designed to ensure order compliance (*i.e.*, distribution of the order, notification of corporate status changes, and monthly reports of SCI's funeral home acquisitions and sales). In addition, SCI notes that it is subject to three antitrust orders that require it to report funeral home acquisitions on an annual basis for the next ten years and to notify the Commission of corporate status changes.[1]

In its petition, SCI appears to argue that the promulgation of the Funeral Rule is a change of law or fact warranting modification of the order. In support, it relies upon *Kroger Co.*, 113 FTC 772 (1990), a case in which the Commission modified an order to eliminate costly

[1] *See* Service Corp. Int'l., Docket No. C-3440 (June 15, 1993); Service Corp. Int'l., Docket No. C-3372 (February 25, 1992); Sentinel Group, Inc., Docket No. C-3348 (October 23, 1991) (SCI agreed to be bound by the provisions of this order in the consent agreement arising from SCI's acquisition of Sentinel).

compliance procedures where an amendment to a trade regulation rule imposed less onerous compliance requirements than those contained in the order. SCI's reliance on Kroger is misplaced. In Kroger, the Commission modified the order because the amendments to the Retail Food Store Advertising and Marketing Practices Rule ("Unavailability Rule"), which Kroger could not have foreseen when it agreed to the order, brought the terms of the order into conflict with the Unavailability Rule and deprived Kroger of defenses that its competitors could invoke. *Id.* at 775-76.

The Commission's promulgation of the Funeral Rule was anticipated at the time the Commission issued the SCI order. Indeed, pursuant to its own terms, the order was automatically modified as a result of the Funeral Rule's promulgation. As a result, there is no conflict between the SCI order and the Funeral Rule and hence no change in law or fact warranting modification of the SCI order.

SCI further argues that the costs of Parts III, VI, and VII of the order outweigh their benefits and that for this reason modification of the order would serve the public interest. SCI cites KKR Associates, L.P., Docket No. C-3253 (May 13, 1993), in support of this proposition. SCI argues that while the three provisions it seeks to delete were intended to impose compliance obligations on SCI funeral homes that were not imposed on other funeral homes, these additional obligations are no longer warranted. SCI submits that Part III originally served a useful purpose because the Commission had an interest in having each SCI funeral home advised of the unique obligations imposed by the order. Similarly, SCI recognizes that Part VII served a useful purpose because the Commission had an interest in being apprised of changes in SCI's ownership of funeral homes so that Commission staff knew which homes were subject to the unique obligations imposed by the order. SCI further acknowledges that the Commission had an interest in being notified of extraordinary changes in SCI's corporate structure to ensure that such changes did not operate to relieve SCI funeral homes of the order's unique requirements. SCI contends, however, that these three administrative provisions no longer serve a useful purpose because the order's conduct prohibitions no longer impose any obligations different from those imposed by the Funeral Rule.

Part III provides that SCI shall "transmit copies of this order to all of respondent's funeral homes and notify, orally and in writing, all

affected employees of the requirements of this order." The order's conduct prohibitions were automatically amended to conform to the parallel provisions of the Commission's Funeral Rule on the date the Rule became effective. As a result, the order cannot be understood standing alone, for it is not possible to determine what conduct the order prohibits without consulting the parallel provisions of the Funeral Rule. Accordingly, Part III of the order is no longer warranted.

Part VI provides: "That respondent notify the Federal Trade Commission at least thirty days prior to any proposed change in Service Corporation International such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in corporate organization which may affect compliance obligations arising out of this order." This provision is perpetual and nearly identical to parallel, perpetual provisions set forth in three other Commission orders to which SCI is subject.[2] Therefore, it is no longer warranted.

Part VII of the order provides: "That respondent notify the Federal Trade Commission by the 10th day of each month as to the acquisition or sale of any funeral homes, occurring in the immediately preceding month." This provision imposes on SCI a perpetual obligation to submit monthly reports of its funeral home acquisitions and sales. SCI estimates that its compliance with this requirement entails an annual cost to its legal department of about $840, in addition to the corporate development time involved in assisting the legal department. The Commission notes that SCI's total cost of complying with this requirement in perpetuity clearly exceeds the cost of complying with it for a limited number of years. This requirement also imposes costs to the extent that it exposes SCI to civil penalty liability if it fails to file the required monthly reports in a timely fashion.

The Commission is unaware of any other administrative order requiring monthly reports of asset acquisitions and sales. Moreover, SCI is already obliged to submit annual reports of its funeral home acquisitions until the years 2001-2003 pursuant to three antitrust consent orders, all of which require annual reports of all funeral home

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[2] Service Corp. Int'l., Docket No. C-3440, Part XII at 9; Service Corp. Int'l., Docket No. C-3372, Part XI at 9; Sentinel Group, Inc., Docket No. C-3348, Part X at 7.

acquisitions for ten years.[3] The Commission recognizes that respondent's obligation to report all acquisitions in accordance with the three outstanding antitrust orders essentially makes the reporting requirement contained in Part VII duplicative. As the Commission's needs are adequately served by receiving acquisition reports until the year 2003, Part VII is no longer warranted.[4]

III. CONCLUSION

The Commission concludes, in the public interest, that the petition should be granted to modify the order by deleting Parts III, VI, and VII.

It is therefore ordered, That the proceeding is hereby reopened and the order issued on October 12, 1976, is hereby modified to read as follows:

ORDER

DEFINITIONS

The term "*alternative container*" means, with respect to each of respondent's funeral homes owned on May 26, 1976, any receptacle or enclosure, made of any material, which is of sufficient strength and retentiveness to hold and transport human remains, and which is made available to customers at a price that does not exceed 60 percent of the retail price charged for the lowest line casket regularly offered by that funeral home as of May 26, 1976; provided, that commencing July 1, 1977, and thereafter annually, the maximum prices for alternative containers that are initially established pursuant to this order shall be adjusted to reflect changes in the Bureau of Labor Statistics' Consumer Price Index subsequent to April 1976; provided further, that with respect to each of respondent's funeral homes that is acquired after May 26, 1976, (1) respondent shall

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[3] Service Corp. Int'l., Docket No. C-3440, Part X at 8; Service Corp. Int'l., Docket No. C-3372, Part IX at 8; Sentinel Group, Inc., Docket No. C-3348, Part VIII at 6.

[4] The Commission recognizes that there is not a complete overlap between Part VII of the order and the reporting requirements of the antitrust orders, in that the latter pertain only to acquisitions, while Part VII covers both sales and acquisitions. We note that the sections of the antitrust consent orders, referenced in footnote two, herein, require respondent to report certain corporate sales. We find this sufficient to meet the Commission's needs.

establish a maximum price for alternative containers at a price not exceeding the mean maximum price for alternative containers chargeable in respondent's funeral homes as of the date of acquisition, and (2) a maximum price established pursuant to (1) shall be adjusted to reflect changes in the Consumer Price Index subsequent to the date of acquisition as provided above.

The term "*casket*" means a rigid container which is designated for the encasement and burial of human remains and which is usually constructed of wood or metal, ornamented, and lined with fabric.

The term "*customer*" means the person making arrangements for the care and disposition of the body of a deceased person.

The term "*discount*" means, with regard to the sale of a particular item, a price adjustment, commission or allowance which is openly and regularly made available by third parties to respondent's funeral homes and to other similarly situated funeral homes and which would not regularly be made available to customers who sought to order that item directly from such third parties; provided, that a price adjustment, commission or allowance made available on the basis of prompt payment shall be considered a "discount" even if such an adjustment, commission or allowance would regularly be made available to customers.

The term "*effective date of this order*" means the date on which this order becomes a final order.

The term "*funeral home*" means an establishment primarily engaged in preparing the dead for final disposition and conducting funeral services.

The term "*funeral services*" means funerals in which the funeral home provides the customary services, necessary facilities and equipment, a casket and other selected merchandise.

The term "*immediate cremation service*" means the removal and disposition by cremation of the remains without embalming, viewing (except for purposes of identification) or visitation and without any pre-cremation service with the body present, which service is arranged by the funeral home.

The term "*item*" refers to both merchandise and services.

The term "*mark-up*" means the excess of the amount charged by respondent to a customer of one of respondent's funeral homes for crematory or cemetery services, pallbearers, public transportation, clergy honoraria, musicians or singers, nurses, gratuities, flowers, or

obituary notices over the net amount actually advanced, paid or owed by respondent to the third party, when such items were furnished by the third party, and when the charges for such items were listed or described as "cash advances," "accommodations," or words of similar import on the contract, final bill, or other written evidence of agreement or obligation submitted to the customer by the funeral home; provided, that it shall not be considered a mark-up when one of respondent's funeral homes charges a customer an amount for an item which exceeds the total amount of the additional or marginal costs to respondent and its subsidiaries for such items when the amount charged to the customer is a fixed and consistent amount for the entire item not exceeding $20 and when the item consists of services rendered in whole or in part by employees of respondent or any of its subsidiaries while on duty and thereby earning other compensation from respondent or any of its subsidiaries that is not included in the additional or marginal cost described above; provided further, that any excess attributable to a discount shall not be considered a mark-up.

The term "*prescribed time period*" means the five-year period immediately preceding the effective date of this order or, with respect to any funeral home acquired by respondent or any subsidiary thereof during that five-year period, the period beginning with the date of acquisition of such funeral home and ending on the effective date of this order.

The term "*public transportation*" means nonlimousine (including as "limousines" hearses, flower cars and other funeral vehicles) transportation by common carriers for hire which is regulated by Federal or State regulatory agencies.

The term "*respondent's funeral homes*" refers to funeral homes owned or hereafter acquired and owned by respondent or a subsidiary thereof and located in the United States.

I.

It is ordered, That Service Corporation International, a corporation, and its officers, representatives, agents and employees, its successors and assigns, directly or through any corporation, subsidiary, or other device in connection with the sale or offering for sale of funeral services and funeral merchandise by and through its

funeral homes, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. When one of respondent's funeral homes arranges with a third party (including one of respondent's subsidiaries) on behalf of a customer for items to be furnished by such third party and not by the funeral home itself:

1. Charging of the customer by the funeral home for items listed or described as "cash advances," "accommodation" or words of similar import on the contract, final bill or other written evidence of agreement or obligation submitted to the customer by the funeral home, more than the amount actually advanced, paid or owed by the funeral home to such third party on behalf of the customer for such items;

2. Misrepresenting to the customer in any other respect the actual amount advanced, paid, or owed by the funeral home to such third party on behalf of the customer for items represented by the funeral home as having been furnished to the customer by such third party;

3. Listing or describing items to be furnished by the funeral home itself (or any of its employees while on duty) as "cash advances," "accommodations" or words of similar import on the contract, final bill or other written evidence of agreement or obligation submitted to the customer by the funeral home;

4. Charging of the customer by the funeral home for the following items, when furnished by such third party and not by the funeral home itself, more than the amount advanced, paid or owed by the funeral home to such third party for such items:

a. Cemetery or crematory charges
b. Pallbearers
c. Public Transportation
d. Clergy Honoraria
e. Musicians or singers
f. Nurses
g. Gratuities
h. Flowers
i. Obituary notices

Provided, that paragraphs A(l)-(4) shall not require any of respondent's funeral homes to pass on to a customer any discount received by the funeral home if the fact that the funeral home does or may receive such discounts is disclosed to the customer in writing before the customer becomes legally obligated to pay for the funeral arrangements.

B. (1) Requiring customers of respondent's funeral homes who express interest in an immediate cremation service to purchase a casket for such a service, and failing to make available to such customers an alternative container; and (2) failing to affirmatively disclose, at the time the arrangements are made and before agreement, the availability and price of an immediate cremation service and of an alternative container to customers who (i) express interest in an immediate cremation service, (ii) inquire as to the least expensive means of disposition available at the funeral home, or (iii) inquire as to the full range of options respecting disposition of the deceased unless such customer affirmatively expresses an interest in any merchandise or service inconsistent with an immediate cremation service or with the use of an alternative container either at the time of making the inquiry or after the alternative of cremation is presented. Provided, that where one of respondent's funeral homes complies with the foregoing requirements, any of respondent's funeral homes located within two miles of such complying funeral home need not comply with the foregoing requirements if it (i) informs each customer who expresses an interest in an immediate cremation service of the availability and price of such a service at the complying funeral home, and (ii) if it has already received the body of the deceased, offers to arrange for the transfer of the remains to the complying funeral home at no extra charge to the customer for the transfer.

C. Suggesting to customers, directly or by implication, that purchase of a casket for cremation is required by State law or by crematory rule, if such is not the case.

D. Misrepresenting, by statements or suggestions, directly or by implication, the extent to which any casket, including a sealer casket, will be airtight or watertight or will prevent natural processes of decomposition or provide long-term preservation of human remains; provided, that this paragraph shall not prevent respondent's funeral homes from accurately describing, displaying or otherwise making

available to customers the written warranty or claims of the manufacturer or supplier of such casket, to the extent that such may be required for compliance with Federal Trade Commission regulations or other applicable laws.

E. Furnishing embalming or other services or merchandise in connection with readying deceased bodies for burial without obtaining prior written or oral authorization therefor; provided, that furnishing embalming or other services or merchandise to avoid irreparable deterioration of the remains or offensive odor (after having made a good faith effort to obtain permission) or to satisfy the requirements of applicable laws and regulations shall not be regarded as a violation of this order.

II.

It is further ordered,

A. That respondent shall obtain from its funeral home managers or such other persons as would reasonably be expected to be most knowledgeable of the billing practices of respondent's funeral homes a separate statement for each such funeral home which shall indicate whether during the prescribed time period the funeral home had any policy or practice of charging a mark-up, and if so, the time period during which any such policy was in effect or any such practice was utilized and the type(s) of items which were the subject of such policies or practices. For purposes of Part II of this order, a mark-up that is determined (based upon a consideration of other comparable transactions) to be attributable to an estimation error (including discrepancies attributable solely to a consistent practice of rounding off) shall not be considered to be the result of a policy or practice of charging a mark-up.

B. That respondent shall cause a firm of independent certified public accountants to perform a statistical evaluation of the accuracy of the information compiled pursuant to paragraph II(A), which evaluation shall be based on sufficient sampling(s) of respondent's documentation (including but not limited to customer contracts and funeral bills, invoices of cash advance vendors, regular and special checks paid to such vendors, "add-on and delete" forms, computer summaries of income from or expenses for individual cash advance

items, if available, and computer summaries of amounts paid to specific vendors of cash advance items, if available) for funerals contracted for during the prescribed time period to permit said accountants to conclude, with a 98 percent confidence factor, that the information compiled pursuant to paragraph II(A) and the information obtained as a result of the sampling(s) made by said accountants in performing the statistical evaluation have identified not less than 98 percent of all funerals contracted for during the prescribed time period which involved the purchase of an item which was in fact the subject of a policy or practice of charging a mark-up.

C. That respondent shall thereafter examine its files and thereby identify each customer of its funeral homes who contracted for a funeral during the prescribed time period and purchased an item which was the subject of a policy or practice of charging a mark-up; provided, that respondent shall not be required to examine its files for any funeral home for which the information compiled pursuant to paragraphs II(A) and II(B) does not disclose a policy or practice of charging any mark-ups; provided further, that with respect to each of respondent's funeral homes for which the information compiled pursuant to paragraphs II(A) and II(B) discloses a policy or practice of charging a mark-up, respondent shall be required to examine only the documentation relating to the type(s) of items disclosed in said information as having been the subject of such a policy or practice, and, for each such type(s) of item, shall be required to examine such documentation only for the time period during which said information discloses that such type of item was the subject of such a policy or practice.

D. That respondent shall cause a letter to be sent within four (4) months of the effective date of this order, by first class mail, to each customer identified pursuant to paragraph II(C), which customer as of that date has paid or caused to be paid a bill or bills in which total mark-ups in excess of $10 were included; said letter shall advise the customer of his right to a refund as set forth below, the approximate date when such a refund will be made, and the need to inform respondent of any future change of residence or address where such refund can be delivered; provided, that with respect to customers entitled to a refund under this part of this order whose letters are returned to respondent undelivered, respondent's obligation to make

refunds to such customers shall terminate six (6) months after the effective date of this order.

E. That respondent cause a revised bill to be sent within four (4) months of the effective date of this order, by first class mail, to each customer identified in paragraph II(C), which customer as of that date has not yet paid or caused to be paid the bill or bills in which a mark-up was included, deducting the amount of the mark-up from the amount owed respondent by the customer.

F. That six (6) months after the effective date of this order, respondent prepare a list of all the customers to whom letters were sent pursuant to paragraph II(D) who have paid or caused to be paid a bill or bills in which total mark-ups in excess of $10 were included and whose letters have not at that time been returned to respondent undelivered. The amount of refund due each such customer shall be the total of:

(1) The amount of the mark-ups paid or caused to be paid by the customer; plus

(2) A fractional share of the total amount of mark-ups paid or caused to be paid by customers whose letters sent pursuant to paragraph II(D) were returned to respondent undelivered, and a fractional share of the total amount of mark-ups of $10 or less paid or caused to be paid by the customers identified pursuant to paragraph II(C); the numerator of each such fractional share to equal the mark-ups paid or caused to be paid by the customer, and the denominator to equal the total amount of mark-ups paid by the customers whose letters were not returned to respondent undelivered.

G. That within ten (10) days following the completion of the list described in paragraph II(F), respondent shall cause to be mailed to each customer on that list a check in an amount computed in accordance with paragraph II(F). Such payments shall complete respondent's obligations with respect to restitution under this order.

III.

It is further ordered, That respondent shall, within 60 days after the service upon it of this order, file with the Commission a report in

writing setting forth in detail the manner in which respondent is complying and intends to comply with this order.

IV.

It is further ordered, That for a period of not less than three (3) years after the effective date of this order, respondent maintain records which are adequate to disclose respondent's compliance with this order, such records to be furnished by respondent to the Federal Trade Commission upon request after reasonable notice.

V.

It is further ordered, That in the event the Federal Trade Commission promulgates a trade regulation rule regarding funeral industry practices:

A. Each provision of paragraphs A(4), B and E of Part I of this order that deals with a practice with respect to which there is no requirement or prohibition in the rule shall be automatically deleted from this order on the date the rule is promulgated, and after the rule is promulgated, each court order or Commission amendment that deletes from the rule a requirement or prohibition with respect to a practice dealt with in paragraphs A(4), B and E of Part I of this order shall, on the date such order or amendment becomes effective, cause to be automatically deleted from this order the provision dealing with the practice with respect to which there is no requirement or prohibition in the rule;

B. Each provision of Part I of this order that deals with a practice for which there are differing requirements or prohibitions in the rule shall be automatically superseded and replaced by such differing requirements or prohibitions on the date the rule becomes effective, and after the rule becomes effective, each amendment to a requirement or prohibition of the rule dealing with a practice dealt with in Part I of this order shall, on the date the amendment becomes effective, cause an identical amendment to be made to Part I of this order; provided, that if the trade regulation rule proceeding regarding funeral industry practices that was commenced on August 28, 1975 is concluded by the Federal Trade Commission without the adoption of the rule in any form, or if said proceeding is not concluded but the

rule is not promulgated in any form within five (5) years after the effective date of this order, or if the rule is promulgated in some form but for any reason does not become effective within seven (7) years after the effective date of this order, the provisions of paragraphs A(4), B and E of Part I shall, on the date the rule proceeding is concluded or at the close of the applicable time period, be automatically deleted from this order; provided further, that no exception or limitation to respondent's obligation to comply with any trade regulation rule hereafter made effective shall be implied from this order.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today grants the petition of Service Corporation International ("SCI") to reopen the order issued against it on October 12, 1976, and to modify it by setting aside paragraphs III, VI and VII. I dissent.

Today's order fails to apply the correct legal standard under which the Commission addresses petitions to reopen and modify its orders. That standard, which is partially summarized in the order is, perhaps, best articulated in Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 4, 1986) (unpublished). *Accord, Bulova Watch Co.*, Docket No. C-1887, Letter to Mr. Codraro, 111 FTC 766 (Jan. 19, 1989); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to Messrs. Carlsen and Arthur, 111 FTC 771 (Mar. 9, 1989); Tarra Hall Clothes Inc., Docket No. C-2797, Letter to Mr. Lawrence M. Garten (Nov. 26, 1987) (unpublished) (denying petition to reopen and modify), and Letter to Mr. Garten (Oct. 27, 1992) (unpublished) (granting petition to reopen and modify); *Albertsons, Inc.*, Docket No. C-3064, 110 FTC 1 (July 1, 1987) (order granting petition to reopen and modify in public interest).

As stated in these and numerous other cases, Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified or vacated if a respondent makes a satisfactory showing that changed conditions of law or fact require the order to be modified or set aside. A petition to reopen makes such a satisfactory showing if it identifies significant changes in circumstance and shows that the changes eliminate the need for the order or make continued application of the order

inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *see Phillips Petroleum Co.,* Docket No. C-1088, 78 FTC 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); Pay Less Drugstores Northwest, Inc., Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 1119 (1932) ("clear showing" of changes that have eliminated reasons for order or such that the order causes unanticipated hardship).

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (Mar. 24, 1983), at 2 (hereafter "Damon Letter") (unpublished). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. 2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2; *see, e.g., Chevron Corp.*, Docket No. C-3147, 3 Trade Reg. Rep. (CCH) paragraph 22,239 (Mar. 13, 1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for order). The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make "a satisfactory showing" of changed conditions to obtain reopening of the order. *See also, Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (petitioner must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the petitioner has the burden of showing, by means other than

conclusory statements, why an order should be modified.[1] If the Commission concludes that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC,* 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying Bowman Transportation standard to FTC order).

The respondent here does not make the requisite "satisfactory showing" set forth in Section 5(b) of the FTC Act, 15 U.S.C. 45(b), that "changed conditions of law or fact require [the] order to be altered, modified, or set aside, in whole or in part." Even assuming for the sake of argument that the respondent makes a sufficient showing to require reopening and consideration, it does not present changed conditions of fact or law that justify the requested modification.

The order issued today virtually ignores the standard of "affirmative need" ordinarily applied to petitions to reopen in the public interest and articulated in matters such as Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esquire (Mar. 29, 1983), and Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart, (June 5, 1986). In addition, unlike the majority, I do not believe the respondent demonstrates that the public interest in the requested modification outweighs the public interest in repose and finality of commission orders. *See Federated Department Stores v. Moitie,* 425

[1] The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979) states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient.... The Commission, to reemphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

U.S. 394 (1981) (strong public interest considerations support repose and finality).

The petition implies that the order should be reopened and modified because of changed conditions of law or fact, quoting Rule 2.51(b) of the Commission's Rules of Practice, and suggesting in its concluding paragraph that "[a]s set forth above, the proposed modification is warranted by changed circumstances . . ." I agree with the majority that nothing in the petition describes a changed condition of law or fact that rises to the level contemplated by the Commission's standard for reopening orders.

The majority also concludes, however, that reopening and modification are justified in the public interest. In this I cannot agree. The majority first accepts the respondent's argument that the promulgation of the Commission's Trade Regulation Rule governing Funeral Industry Practices, 16 CFR Part 453 (1993) ("Funeral Rule"), has resulted in the modification of the substantive terms of the order to conform to the applicable portions of the Rule. On this basis, the majority concludes that paragraph III of "the order cannot be understood standing alone, for it is not possible to determine what conduct the order prohibits without consulting the parallel provisions of the Funeral Rule."

Although it is true that the Funeral Rule has superseded all of the substantive requirements of the 1976 order, it does not necessarily follow from this alone that the remainder of the order, or even paragraph III, is, or should be made, defunct. Only the first clause of paragraph III is affected by the issuance of the Funeral Rule. That clause requires that the respondent distribute copies of the order to its employees; the second clause, however, requires that the respondent "notify, orally and in writing, all affected employees of the requirements of this order." The issuance of the Funeral Rule may reduce the effectiveness of distribution of the order, but it has no effect on the respondent's duty to notify its employees of the requirements of the order. A petition to reopen and modify the order to delete the distribution requirement might have met the Commission's standard.

The administrative requirements in the order currently provide a means to assess the respondent's compliance with the relevant portions of the Rule rather than the former substantive provisions of the order. They also furnish the Commission with an alternative means of enforcing the law against a respondent that the Commission has alleged violated Section 5 of the FTC Act by engaging in conduct

that, if proven, also would have violated the Funeral Rule had it been in effect. Although the Commission now might well choose to seek enforcement of the Rule rather than the order given the identical penalties available, this does not relieve the respondent of its duty to make a satisfactory showing of affirmative need for the modification sought. The present petition makes no such showing.

The Commission, in 1976, could have issued an order that would have been vacated automatically on promulgation of the Funeral Rule, but it chose not to do so. We should not simply assume, therefore, that issuance of the Rule divested the order of all purpose. Nor, on such an assumption, should we tinker with an order issued by a previous Commission without concluding, based on changed conditions or public interest considerations not presented here, that the need to modify this order outweighs the public interest in finality and repose of Commission orders in general. The question in addressing a petition to reopen and modify a Commission order is not whether today's Commission, by virtue of hindsight or greater experience, or for any other reason, has the ability, or thinks it has the ability, to write a better order than the Commission as it was composed when the order was issued. The question before the Commission is not which order would be better if we were writing on a clean slate. Rather, in assessing whether a petition states adequate grounds for granting the relief sought, the Commission must balance the alleged support for the relief against the strong public interest in finality and repose of its orders. To treat this interest lightly, diminishes the significance of our current law enforcement initiatives.

The majority concludes that "SCI's total cost of complying with [paragraph VII] in perpetuity clearly exceeds the cost of complying with it for a limited number of years" and that paragraph VII "also imposes costs to the extent that it exposes SCI to civil penalty liability if it fails to file the required monthly reports in a timely fashion." Order at 5. Nowhere does the petition or any of its attachments identify costs either to the company or to competition, let alone costs that were not contemplated or foreseeable when the respondent consented to the order in 1976.

Only at the request of the staff (at my behest), two days before the statutory deadline for issuing a decision on the petition, did the respondent offer any estimate of the costs of any of the three provisions it seeks to have set aside. Even accepting at face value the

estimate provided for compliance with paragraph VII of the order -- $840.00 per year[2] -- this estimate, without more, does not appear to constitute the kind of significant and unforeseeable harm required under the Commission's standard for reopening and modifying final orders, particularly in the context of a company that, according to public sources, posted net income for the first half of 1993 of almost $52 million and revenues for the same period of about $441million.[3] This estimate is more than the complete absence of a showing in the respondent's petition, but it is a fragile twig, indeed, on which to hang the decision to reopen and modify a Commission order.

As the finale to its discussion of the costs of the order, the commission asserts that the reporting requirement "also imposes costs to the extent that it exposes SCI to civil penalty liability . . . ." Order at 5. It has long been my impression, in considering a petition to reopen, that the costs of complying with the order were the costs of complying with the order, not the costs of failing to comply. If the specter of the costs of an order violation are to be used to alleviate the terms of that order, I must confess to some confusion about how we will write future orders.

As I understand it, the majority is suggesting that potential liability for violating a final order can be a basis for reopening and setting aside that order. If so, given Section 5(l) of the FTC Act, then the basis for reopening and modification arises the day the order issues. This does not compute. It should go without saying that the potential costs of violating an order, no less than the costs of complying with an order, are foreseeable and contemplated and cannot be the basis for reopening.

If the majority, instead, is focusing on the relative significance of the reporting requirement, in the context of the potential for civil penalties, the point is no less bewildering. Every order contains reporting requirements, such as periodic compliance reports and corporate change-of-form reports, that are essential to enable the Commission to monitor and enforce compliance. Respondents to such orders risk civil penalties for failure to comply with these reporting requirements as well as the conduct provisions of the order.

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[2] Affidavit of James M. Shelger, Senior Vice President and General Counsel of SCI, May 9, 1994, at paragraph 3, submitted subject to a request for confidential treatment that was waived on behalf of the company by letter of May 12, 1994, to Robert Frisby, Esq., Federal Trade Commission, from Michael H. Byowitz, Attorney for SCI.

[3] Standard & Poors, Standard Corporation Descriptions 6301 (Sept. 1993).

Never before, to my knowledge, has the Commission treated the potential civil liability for non-compliance as a basis for reopening a final order. If, in a particular case, the Commission should decide to seek penalties for a reporting failure, presumably it would consider that enforcement action sufficiently important to override the potential cost to the respondent of the penalties being sought. To cite these costs as a basis for reopening and setting aside the reporting requirements suggests that the Commission does not trust itself not to bring a frivolous civil penalty suit. Surely that is not the case.

Finally, the Commission concludes that paragraph VI "is perpetual and nearly identical to parallel, perpetual provisions set forth in three other Commission orders to which SCI is subject, and "[t]herefore, it is no longer warranted."[4] I agree that if the petition had met the standard for reopening, and had justified the requested setting aside of paragraph III, setting aside the remaining provisions might be considered in the nature of "housekeeping" and, therefore, might have been warranted in the public interest. Because I would not have reopened this order to begin with, I do not reach the question of harmless redundancy. For the same reason, to the extent that paragraph VII is not entirely duplicative of the pending antitrust orders, I do not address whether its setting aside would be appropriate.

The majority's order also reflects concern over the permanence of the "fencing-in" relief in the underlying order. This concern, although valid, raises the broader issue of when and how it may be appropriate to limit the duration of Commission orders or portions thereof. I often have expressed my interest in changing our policy to "sunset" Commission orders.[5] Sunsetting of orders, however, is not an issue that should be approached or resolved on an *ad hoc* basis. Rather, the duration of Commission orders, which, over the years, has been the subject of considerable research and contemplation both by the staff and by the Commission, should be addressed formally and deliberately by the agency in a context that will enable it to examine and weigh various approaches. Only in this manner are we likely to reach a conclusion that promotes overall fairness without undermin-

[4] Service Corp. Int'l, Docket No. C-3440 (June 15, 1993); Service Corp. Int'l, Docket No. C-3372 (Feb. 25, 1992); and Sentinel Group, Inc., Docket No. C-3348 (Oct. 23, 1991).

[5] *E.g.*, Testimony before the Senate Subcommittee on the Consumer, Committee on Commerce, Science and Transportation, July 28, 1992 at 36-37. *See also* Letter from the Federal Trade Commission to the Honorable Jack Brooks, Chairman, House Committee on the Judiciary, Jan. 12, 1993.

ing the force and deterrent effect of Commission orders -- past, present and future.

Therefore, whatever the merits of revising the order because its fencing-in provisions have continued for a period that to the majority intuitively seems long enough, there is no justification for deciding that issue in the context of a petition to modify an existing order without insisting that the petitioner show affirmative need for relief. The Commission does so here at its peril.

The order issued today suggests to others subject to "fencing-in" provisions that do not expire by their terms that the Commission now will be more lenient than before in granting relief from those provisions. To the extent that the order conveys this suggestion, it may be expected to generate more petitions seeking to have the Commission vacate or limit similar provisions whether or not those petitioners meet the Damon standard of affirmative need.

The majority all but ignores the Commission's longstanding criteria in issuing its order in this matter. By failing to apply the traditional affirmative need standard in order to reach the public interest question and engaging, instead, in a more arbitrary analysis, today's order may convey another unfortunate message: that changes in the make-up of the Commission automatically open final orders for renegotiation aimed at having those orders vacated or rewritten on little or no empirical basis. The challenge for an enforcement agency with members appointed for staggered terms is to be flexible enough to reflect changing times, yet still to maintain a consistent and coherent legal standard for reopening and modification. The Commission today fails to meet that challenge.

I dissent.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I write separately to express my view that the Commission has followed a wholly defensible and appropriate approach to the disposition of Service Corporation International's ("SCI's") petition to reopen and modify the order in Docket No. 9071. The straightforward and unencumbered analysis contained in today's Commission order hardly stems from some mere change in Commission membership and scarcely heralds the abandonment of a demonstrably superior method of evaluating petitions to modify orders. Rather, it represents a marked improvement over the labored reasoning that from time to time has plagued the Commission's decisions regarding

the "public interest" element of 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.

I recognize that the Commission has on occasion expressed the requirement that a petitioner seeking an order modification in the public interest demonstrate, "[a]s a threshold matter . . . some affirmative need to modify the original order."[1] According to this formulation, only after the petitioner has cleared the affirmative need hurdle must the Commission proceed to balance "the reasons favoring the modification" requested against any reasons not to make that modification."[2] But it is precisely this creation of a separate "affirmative need" component -- not required by any statute, rule of Commission practice, or judicial precedent, and not even articulated with consistency across the spectrum of Commission rulings[3] -- that has produced some of the strained decisions in this area. Those decisions have involved a tendency -- to which I have admittedly succumbed -- to find the affirmative need requirement satisfied on the basis of a very marginal showing by the petitioner. It does the Commission no credit to establish a "threshold" and then, in case after case, find that threshold crossed on the flimsiest evidence.

Today's ruling concerning SCI's petition represents an advance. Rather than declare a separate "affirmative need" requirement and then find it satisfied by the most tenuous of showings, the Commission simply balances the costs of retaining Parts III, VI, and VII of the 1976 order against the costs of deleting those provisions. Although our ruling does not expressly dwell on considerations of SCI's affirmative need for the requested order revisions, the decision

[1] Damon Corp., Docket No. C-2916, letter to Joel E. Hoffman, Esquire (March 29, 1983) at 2 ("Damon letter") (italics added); *see also* Louisiana-Pacific Corp., Docket No. C-2956, letter to John C. Hart (June 5, 1986) at 5.

[2] Damon letter at 2.

[3] Whereas many Commission decisions reopening and modifying orders under a public interest standard have held petitioners to the requirement to demonstrate affirmative need, *see., e.g.*, Institut Merieux, S.A., Docket No. C-3301 (Order, April 22, 1994), numerous other Commission rulings have made no mention at all of such a requirement. *See, e.g.,.* Tarra Hall Clothes, Inc. and Abraham Cohen, Docket No. C-2797 (Order, October 27, 1992). In fact, the Commission's denial of a petition in *Reader's Digest Association, Inc.*, 111 FTC 758 (letter to Ms. Farquhar and Ms. Blatch, January 6, 1989), constitutes the only instance in recent years in which the Commission has even mentioned Damon in responding to a petition to modify a consumer protection order. Moreover, even the letter issued in Reader's Digest made no mention of affirmative need, but simply cited Damon for the proposition that "the Commission may determine that the public interest warrants reopening of an order if respondent demonstrates that the order impedes competition." *Id.* at 759.

integrates affirmative need -- and the interest in the repose and finality of Commission orders -- into the array of costs and benefits that we must consider under the "public interest" rubric of Section 2.51. I cannot help but conclude that this handling of affirmative need portends a clearer, more consistent treatment of petitions to reopen and modify on public interest grounds.

IN THE MATTER OF

SYNCHRONAL CORPORATION, ET AL.

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

Docket 9251. Amended Complaint, Oct. 6, 1993--Decision, May 13, 1994*

This consent order prohibits, among other things, Thomas L. Fenton, a former officer of Synchronal Corporation, from disseminating a purported baldness cure infomercial, for a product called Omexin; from misrepresenting that any commercial is an independent program; and from making unsubstantiated claims for any food, drug or device in the future.

Appearances

For the Commission: *Lisa B. Kopchik, Richard L. Cleland, Lesley A. Fair* and *Brian A. Dahl.*

For the respondents: *Jeffrey D. Knowles* and *Edward F. Glynn, Venable, Baetjer, Howard & Civiletti*, Washington, D.C.

AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; and Ana Blau a/k/a Anushka, and Steven Victor, M.D., individually, hereinafter sometimes referred to as 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:

* Complaint issued October 28, 1991, published at 116 FTC 989 (1993).

PARAGRAPH 1. Respondent Synchronal Corporation is a Delaware corporation, with its offices and principal place of business at 1035 Camphill Road, Fort Washington, Pennsylvania. Synchronal produces, distributes, and provides various services for numerous program-length television advertisements, or "infomercials," on its own behalf or for third-party sellers of products and services. These infomercials include "Cellulite Free: Straight Talk with Erin Gray" for the Anushka Bio-Response Body Contouring Program ("the Anushka products"), a purported cellulite treatment; and "Can You Beat Baldness?" for Omexin, a purported treatment for hair loss. Synchronal has also sold various products through telephone solicitations, including Chae Basics, a purported skin treatment. Synchronal Corporation is a wholly-owned subsidiary of Regal Group, Inc.

Respondent Synchronal Group, Inc. ("Synchronal Group"), is a Delaware corporation, with its offices and principal place of business at 1035 Camphill Road, Fort Washington, Pennsylvania. Synchronal Group is now known as Regal Group, Inc.

Respondent Smoothline Corporation is a Delaware corporation, with its offices and principal place of business at 1035 Camphill Road, Fort Washington, Pennsylvania. It has advertised, offered for sale, and sold the Anushka products.

Respondent Omexin Corporation is a Delaware corporation, with its offices and principal place of business at 1035 Camphill Road, Fort Washington, Pennsylvania. It has advertised, offered for sale, and sold Omexin.

Respondent Ira Smolev ("Smolev") is or was at relevant times herein an officer and director of Synchronal Corporation and Synchronal Group. Individually or in concert with others, he has formulated, directed, and controlled the acts and practices of Synchronal Corporation and Synchronal Group. His home address is 120 Meadow Lane, Southampton, New York.

Respondent Richard E. Kaylor ("Kaylor") is or was at relevant times herein an officer and director of Synchronal Corporation, Synchronal Group, Smoothline Corporation, and Omexin Corporation. Individually or in concert with others, he has formulated, directed, and controlled the acts and practices of Synchronal Corporation, Synchronal Group, Smoothline Corporation, and Omexin Corporation. His home address is 2 Woodside Lane, Rye, New York.

Respondent Thomas L. Fenton ("Fenton") is or was at relevant times herein an officer and director of Synchronal Corporation and Synchronal Group. Individually or in concert with others, he has formulated, directed, and controlled the acts and practices of Synchronal Corporation and Synchronal Group. His home address is 160 East 38th Street, New York, New York.

Respondent Ana Blau a/k/a Anushka ("Blau") is or was at relevant times herein the founder and co-owner of the Anushka Institute. Blau's business address is 241 East 60th Street, New York, New York. Blau aided in the promotion of the Anushka products by providing an expert endorsement of the product on the "Cellulite Free: Straight Talk with Erin Gray" infomercial. In return for her role in marketing the Anushka products, Blau has received remuneration from the manufacturer and/or distributor of the product.

Respondent Steven Victor, M.D. ("Victor") is or was at relevant times herein a medical doctor licensed to practice by the State of New York, with a specialty in dermatology. Victor's business address is 30 East 76th Street, New York, New York. Victor aided in the promotion of Omexin by providing an expert endorsement of the product on the "Can You Beat Baldness?" infomercial. In return for his role in marketing Omexin, Victor has received remuneration from the manufacturer and/or distributor of the product.

The aforementioned respondents cooperated and acted together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold, and distributed the Anushka Products, Omexin, and Chae Basics. These products are foods, cosmetics, and/or drugs, as the terms "food," "cosmetic" and "drug" are defined in Sections 5, 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 45, 52 and 55.

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, 15 U.S.C. 44.

The Anushka Products

PAR. 4. Respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have disseminated or have caused to be disseminated advertisements and promotional materials for the Anushka products, including but not necessarily limited to the attached Exhibit A, a transcription of the infomercial entitled "Cellulite Free: Straight Talk with Erin Gray." The aforesaid advertisement contains the following statements:

1. Narrator: "The skin is massaged with our body contouring gel which has ingredients like our specially processed French seaweed formula with its unique beneficial properties that really penetrates the skin into the cellulite layer. You can actually feel the gel working as it penetrates into the cellulite. And in days our clients are on their way to being cellulite-free, even after years of living with cellulite." [Exhibit A, p. 8]

2. Vicki: "After the first treatment I was hooked. I really saw a difference immediately. So I did exactly what Anushka told me to do and the cellulite came off rapidly. Each week my hips and thighs looked better. Within six weeks it was all gone. . . You know, I should also mention that I lost nine pounds and a couple of inches off my hips and thighs." [Exhibit A, p. 10]

3. Gray: "Many doctors and others in the medical profession are enthusiastic about the Anushka program. . . ." [Exhibit A, p. 13]

4. Woman: "Within four weeks I lost inches off my thighs and my thighs looked smoother and firmer. Within six weeks the cellulite was gone." [Exhibit A, p. 30]

5. Woman:"Well, within three months I had not only lost all of my cellulite but I also lost about four inches from my hips and thighs. I lost fifteen pounds and a full dress size." [Exhibit A, p. 29]

6. Announcer: "Now, here's how you can order the really proven way to get rid of cellulite. Just pick up your phone, dial this number and order Anushka's five-and-a-half-minute bio-response body contouring program right now. Imagine opening your package from Anushka and realizing you are on your way to ridding your body of ugly cellulite. In only minutes a day a few days a week.... After the first treatment you'll begin to see a difference. You'll be well on your way to a cellulite-free body." [Exhibit A, pp. 18-19, 30-31]

Announcer: "Step one, you massage the unique body contour and seaweed gel which penetrates the open pores of the skin to start attacking those ugly cellulite pockets from the very first treatment. In minutes you'll feel the seaweed at work. The second step is to take cellulean enzymes to help your body metabolize carbohydrates and help you with your body contouring program. The third step is to apply your Anushka body firming lotion to firm the skin with its deep penetrating action. . . . Call now so you can start the Anushka body contouring program working for you. Get rid of those ugly cellulite pockets once and for all." [Exhibit A, pp. 19-20, 31-32]

7. Marie: "I was very impressed by Anushka's clients because they verified the claims. Also the extensive client charts that showed the proof with numbers, with statistics. And the experts, medical and otherwise that backed up what she was saying. And one thing that is very surprising and I was very, very impressed by, it is that one of the key ingredients in her treatment is something as simple as seaweed."

Gray: "Well, tell us, Anushka, is this ordinary seaweed?"

Anushka: "Absolutely not. We use a very special seaweed. And one of the people we turned to for this seaweed is a leading researcher in marine biology. And he is here with us today to help explain how seaweed works to help get rid of cellulite. . . .

Gray: "Now tell us, how is it that seaweed effects cellulite?"

Fryda: "Well, I think this diagram will help make it clear. These are cellulite cells with their trapped toxins surrounded by tough connective tissue. Now with cellulite cells the hardened connective tissue won't let these nutrients get to the cells so the trapped toxins cannot be neutralized and taken away. . . . There are other effective ingredients in Anushka's anti-cellulite gel. But seaweed is a key to its success. It's one reason why it's the most powerful anti-cellulite program ever developed." [Exhibit A, pp. 25-27]

8. Anushka: "Well, let me tell you that in the course of my research I finally found the combination which worked to make my cellulite disappear. And I was the happiest woman on earth. Needless to say. So that is what made me decide to start with the Anushka Institute so other women could benefit from our discovery." [Exhibit A, p. 6]

9. Anushka: "Many of our clients wanted to share the treatments with friends who lived outside New York . . . They urged us to develop a program that could be used at home. We insisted it be both easy to use and at the same time completely effective so their friends could get the same results." [Exhibit A, p. 9]

10. Anushka: "I am so certain that my anti-cellulite program will work for you as well as it has for thousands of my clients that I will return to you every penny you spend for the program if you're not completely satisfied." [Exhibit A, pp. 21, 32-33]

11. Anushka: "And remember you did not do anything to make cellulite appear, but now you can make it disappear make it disappear." [Exhibit A, p. 21]

PAR. 5. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have represented, directly or by implication, that:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets contain

ingredients that substantially reduce or eliminate cellulite from the body.

B. Users of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will achieve a visible reduction in cellulite after a single or a few treatments.

C. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will cause a substantial reduction in the size of the hips and thighs.

D. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will cause the loss of a substantial amount of weight.

E. For thousands of women, the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have substantially reduced or eliminated cellulite from the body.

PAR. 6. In truth and in fact:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets do not contain ingredients that substantially reduce or eliminate cellulite from the body.

B. Users of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will not achieve a visible reduction in cellulite after a single or a few treatments.

C. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will not cause a substantial reduction in the size of the hips and thighs.

D. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will not cause the loss of a substantial amount of weight.

E. For thousands of women, Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have not substantially reduced or eliminated cellulite from the body.

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

PAR. 7. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, they possessed and relied upon a reasonable basis for such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor did not possess and rely upon a reasonable basis for such representations. Therefore, respondents' representation as set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Respondent Blau has made statements as an expert endorser in advertisements and promotional materials for the Anushka products, including but not necessarily limited to the attached Exhibit A. These statements include the following:

1. Anushka: "Well, let me tell you that in the course of my research I finally found the combination which worked to make my cellulite disappear. And I was the happiest woman on earth. Needless to say. So that is what made me decide to start with the Anushka Institute so other women could benefit from our discovery." [Exhibit A, p. 6]

2. Anushka: "Many of our clients wanted to share the treatments with friends who lived outside New York . . .They urged us to develop a program that could be used at home. We insisted it be both easy to use and at the same time completely effective so their friends could get the same results." [Exhibit A, p. 9]

3. Anushka: "I am so certain that my anti-cellulite program will work for you as well as it has for thousands of my clients that I will return to you every penny you spend for the program if you're not completely satisfied." [Exhibit A, pp. 21, 32-33]

4. Anushka: "And remember you did not do anything to make cellulite appear, but now you can make it disappear." [Exhibit A, P. 21]

5. Anushka: "We use a very special seaweed. And one of the people we turned to for this seaweed is a leading researcher in marine biology. And he is here with us today to help explain how seaweed works to help get rid of cellulite." [Exhibit A, p. 26]

6. Anushka: "Remember, it's not your fault you have cellulite. Just say to yourself, I don't have to put up with it anymore because now I know what to do. I did it. You can do it too." [Exhibit A, p. 34]

PAR. 10. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph nine, including but not necessarily limited to the advertisement attached as Exhibit A, respondent Blau has represented, directly or by implication, that:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets contain ingredients that substantially reduce or eliminate cellulite from the body.

B. For thousands of women, the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have substantially reduced or eliminated cellulite from the body.

PAR. 11. In truth and in fact:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets do not contain ingredients that substantially reduce or eliminate cellulite from the body.

B. For thousands of women, the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have not substantially reduced or eliminated cellulite from the body.

Therefore, the representations set forth in paragraph ten were, and are, false and misleading, and respondent Blau knew or should have known that said representations were, and are, false and misleading.

PAR. 12. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph nine, including but not necessarily limited to the advertisement attached as Exhibit A, respondent Blau has represented, directly or by implication, that at the time she made the representations set forth in paragraph ten, she possessed and relied upon a reasonable basis for such representations, consisting of an actual exercise of her represented expertise in cellulite reduction, in the form of an examination or testing of the Anushka products at least as extensive as an expert in that field would normally conduct in order to support the conclusions presented in the endorsement.

PAR. 13. In truth and in fact, at the time she made the representations set forth in paragraph ten, respondent Blau did not possess and rely upon a reasonable basis for such representations. Therefore, respondent Blau's representation as set forth in paragraph twelve was, and is, false and misleading.

Omexin

PAR. 14. Respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have disseminated or have caused to be disseminated advertisements and promotional materials for Omexin, including but not necessarily limited to the attached Exhibit B, a transcription of the infomercial entitled "Can You Beat Baldness?". The aforesaid advertisement contains the following statements and depictions:

1. Announcer: "The following program will give you news of a product unlike anything else available anywhere for stopping hair loss and actually reversing balding by growing new hair." [Exhibit B, p. 2]

2. John Hylan: "Well, our research is still going on, but, it has gone far enough to show that Omexin works. We know that Omexin really does stop hair loss and does grow hair back." [Exhibit B, p. 7]

3. Announcer: "Omexin has been scrupulously tested by dermatologists, and clinicians, and by thousands of grateful individuals. The test results and the personal stories speak for themselves." [Exhibit B, p. 14]

4. Announcer: "The answer couldn't have been simpler. The Omexin System is based on the Omexin Active Treatment, a fine white cream which you simply massage into the affected areas daily." [Exhibit B, p. 15]

5. Announcer: "Omexin works for the vast majority of people." [Exhibit B, p. 16]

6. Campanella: "It reportedly has stopped the balding process in a high percentage of test subjects and even re-grown healthy new hair for a large number of men and women of all ages." [Exhibit B, p. 17]

7. Campanella: "What are your initial impressions of Omexin ?

Dr. Victor: "[In] Omexin, we have for men and women a new safe product that they can apply that will stop the hair from falling out, and in a fair number of patients, probably up to 70%, will start growing some new hair." [Exhibit B, p. 9]

8. Campanella: "Dr. Wexler, what about your research?"

Dr. Wexler: "We have patients in both a double-blind study and using what we consider to be a very active ingredient, and what we've seen is that patients are ceasing to lose their hair very quickly within starting Omexin and then within a short time after, they start seeing new hair appear. It's not just a fuzz, we're seeing actual pigmented terminal hair, which is very exciting for the patient as well as the doctor." [Exhibit B, p. 10]

9. Hylan: "Now, we don't know if that's the reason Omexin grows hair, but we sure do know that it does."

Campanella: "And can you prove that?"

Hylan: "Absolutely! To prove that Omexin works, we've done thorough, extensive testing using medically sound methods and applying the highest scientific standards." [Exhibit B, p. 7]

PAR. 15. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have represented, directly or by implication, that:

A. Omexin contains an ingredient that curtails hair loss for a large majority of balding men and women.

B. Omexin contains an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

C. Omexin contains an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.

D. Omexin contains an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

E. Omexin has successfully curtailed hair loss and promoted new hair growth for thousands of balding men and women.

PAR. 16. In truth and in fact:

A. Omexin does not contain an ingredient that curtails hair loss for a large majority of balding men and women.

B. Omexin does not contain an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

C. Omexin does not contain an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.

D. Omexin does not contain an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost.

E. Omexin has not successfully curtailed hair loss and promoted new hair growth for thousands of balding men and women.

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

PAR. 17. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have represented directly or by implication, that at the time they made the representations set forth in paragraph fifteen, they possessed and relied upon a reasonable basis for such representations.

PAR. 18. In truth and in fact, at the time they made the representations set forth in paragraph fifteen, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton did not possess and rely upon a reasonable basis for such representations. Therefore, respondents' representation as set forth in paragraph seventeen was, and is, false and misleading.

PAR. 19. Respondent Victor has made statements as an expert endorser in advertisements and promotional materials for Omexin, including but not necessarily limited to the attached Exhibit B. These statements include the following:

1. Dr. Victor: "Then, on the other side of the coin, we have very controlled scientific studies. We have 2 groups. We actually take the men who are bald. We tattoo their scalp and we have them apply the Omexin in the balding area every day, twice a day. Now, every month they come back and we count the number of hairs that grow in the area where we tattooed their scalp . . . So far the studies have shown that these men are growing new hair." [Exhibit B, pp. 8-9]

2. Dr. Victor:. . . basically, the majority of patients get a good result within 3 weeks." [Exhibit B, p. 11]

3. Dr. Victor: "Now, Omexin is a product that can stop hair loss and grow hair for a vast majority of people." [Exhibit B, p. 19]

4. Dr. Victor: "What is particularly good about Omexin , for a man or a woman in their 30's or 20's, with just beginning to thin. If they start using the product religiously, they can stop the hair from falling out. And they ran retain the hair they have and remains that way for the rest of their lives." [Exhibit B, p. 20]

5. Dr. Victor: "I think in Omexin, we have for men and women, a new safe product they can apply that will stop the hair from falling out, and in a fair number of patients, probably up to 70%, will start growing some new hair." [Exhibit B, p. 20]

PAR. 20. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph nineteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondent Victor has represented, directly or by implication, that:

A. Omexin contains an ingredient that curtails hair loss for a large majority of balding men and women.
B. Omexin contains an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.
C. Omexin contains an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.
D. Omexin contains an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost in a large majority of balding men and women.

PAR. 21. In truth and in fact:

A. Omexin does not contain an ingredient that curtails hair loss for a large majority of balding men and women.
B. Omexin does not contain an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.
C. Omexin does not contain an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.
D. Omexin does not contain an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

Therefore, the representations set forth in paragraph twenty were, and are, false and misleading, and respondent Victor knew or should have known that said representations were, and are, false and misleading.

PAR. 22. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph nineteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondent Victor has represented, directly or by implication, that at the time he made the representations set forth in paragraph twenty, he possessed and relied upon a reasonable basis for such representations, consisting of an actual exercise of his represented expertise in the treatment of hair loss, in the form of an examination or testing of Omexin at least as extensive as an expert in that field would normally conduct in order to support the conclusions presented in the endorsement.

PAR. 23. In truth and in fact, at the time he made the representations set forth in paragraph twenty, respondent Victor did not possess and rely upon a reasonable basis for such representations. Therefore, respondent Victor's representation as set forth in paragraph twenty two was, and is, false and misleading.

Deceptive Format

PAR. 24. Through the advertising and dissemination of "Cellulite Free: Straight Talk with Erin Gray," respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have represented, directly or by implication, that "Cellulite Free: Straight Talk with Erin Gray" is an independent television program and is not paid commercial advertising.

PAR. 25. In truth and in fact, "Cellulite Free: Straight Talk with Erin Gray" is not an independent television program and is paid commercial advertising. Therefore, the representation set forth in paragraph twenty four was, and is, false and misleading.

PAR. 26. Through the advertising and dissemination of "Can You Beat Baldness?" respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have represented, directly or by implication, that "Can You Beat Baldness?" is an independent television program and is not paid commercial advertising.

PAR. 27. In truth and in fact, "Can You Beat Baldness?" is not an independent television program and is paid commercial advertis-

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

Consumer Testimonials

PAR. 28. Through the advertising and dissemination of "Cellulite Free: Straight Talk with Erin Gray," respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor, in numerous instances have represented, directly or by implication, that testimonials from consumers appearing in advertisements for the Anushka products reflect the typical or ordinary experience of members of the public who have used the products.

PAR. 29. In truth and in fact, in numerous instances, testimonials from consumers appearing in advertisements for the Anushka products do not reflect the typical or ordinary experience of members of the public who have used the products. Therefore, the representation set forth in paragraph twenty eight was, and is, false and misleading.

PAR. 30. Through the advertising and dissemination of "Can You Beat Baldness?" respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton, in numerous instances have represented, directly or by implication, that testimonials from consumers appearing in advertisements for Omexin reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 31. In truth and in fact, in numerous instances, testimonials from consumers appearing in advertisements for Omexin do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph thirty was, and is, false and misleading.

Automatic Shipment and Unordered Merchandise

PAR. 32. In the advertising and sale of the Anushka products, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have in numerous instances shipped without consumers' express consent additional supplies of these products to consumers who ordered an initial supply, and have billed consumers' credit card accounts for these additional shipments without the consumers' knowledge and authorization. Respondents

Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor did not adequately disclose to those consumers prior to their initial purchase that additional products would be shipped to them and that the consumers would be billed for them. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts and practices.

PAR. 33. By and through the acts and practices alleged in paragraph thirty two, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have mailed or caused to be mailed supplies of the Anushka products to consumers without the expressed request or consent of the recipient without having attached to the products a clear and conspicuous statement that the recipient may treat the products as a gift and has the right to retain, use, discard, or dispose of them in any manner the recipient sees fit without any obligation to the respondent. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

PAR. 34. In the advertising and sale of Omexin, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, and Kaylor have in numerous instances shipped without consumers' express consent additional supplies of these products to consumers who ordered an initial supply, and have billed consumers' credit card accounts for these additional shipments without the consumers' knowledge and authorization. Respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, and Kaylor did not adequately disclose to those consumers prior to their initial purchase that additional products would be shipped to them and that the consumers would be billed for them. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts and practices.

PAR. 35. By and through the acts and practices alleged in paragraph thirty four, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, and Kaylor have mailed or caused to be mailed supplies of Omexin to consumers

without the expressed request or consent of the recipient without having attached to the products a clear and conspicuous statement that the recipient may treat the products as a gift and has the right to retain, use, discard, or dispose of them in any manner the recipient sees fit without any obligation to the respondent. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

PAR. 36. Respondents Synchronal Corporation, Synchronal Group, Smolev, and Kaylor have promoted, offered for sale, and sold Chae Basics through telephone solicitations of consumers identified from their purchases of other products sold through advertisements produced or disseminated by Synchronal Corporation or Synchronal Group. In numerous instances in the course of these telephone solicitations, respondents' agents have represented, directly or by implication, that consumers would be sent a free supply of Chae Basics.

PAR. 37. In truth and in fact, in numerous instances the supply of Chae Basics sent to consumers as described in paragraph thirty six was not free, in that consumers, credit card accounts were billed a charge for the product. Therefore, the representations set forth in paragraph thirty six were, and are, false and misleading.

PAR. 38. In the solicitation of orders by telephone of Chae Basics, respondents Synchronal Corporation, Synchronal Group, Smolev, and Kaylor have in numerous instances billed the credit card accounts of consumers who agreed to the receipt of a supply of the product that was represented as free, have automatically shipped additional supplies of the product to consumers without their express consent, and have automatically billed consumers, credit card accounts for these latter shipments without the consumers' express knowledge and authorization. Respondents Synchronal Corporation, Synchronal Group, Smolev, and Kaylor did not adequately disclose to those consumers prior to their initial purchase that additional products would be shipped to them and that the consumers would be billed for them. The practices of respondents Synchronal Corporation, Synchronal Group, Smolev, and Kaylor as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not

reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

PAR. 39. By and through the acts and practices alleged in paragraph thirty eight, respondents Synchronal Corporation, Synchronal Group, Smolev, and Kaylor have mailed or caused to be mailed supplies of Chae Basics to consumers without the expressed request or consent of the recipient without having attached to the products a clear and conspicuous statement that the recipient may treat the products as a gift and has the right to retain, use, discard, or dispose of them in any manner the recipient sees fit without any obligation to the respondent. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

PAR. 40. By and through the acts and practices alleged in this complaint, respondents have violated Sections 5(a) and 12 of the Federal Trade Commission Act and the provisions of the Postal Reorganization Act, 39 U.S.C. Section 3009, by directly or indirectly engaging in unfair or deceptive acts or practices, by disseminating false advertisements in or affecting commerce, and by acting in concert with others, or knowingly and substantially assisting others to employ the violations set forth above by providing the means and instrumentalities for the commission of such unfair or deceptive acts or practices.

DECISION AND ORDER

The Commission having heretofore issued its amended complaint charging respondents named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the Postal Reorganization Act, and respondents having been served with a copy of that amended complaint, together with a notice of contemplated relief,

Respondent Thomas L. Fenton, his attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the amended 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 amended complaint, or that the facts as alleged in such amended complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with Section 3.25(c) of its Rules with regard to respondent Thomas L. Fenton; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed said agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 3.25(f) of its Rules, the Commission enters the following order:

ORDER

For the purposes of this order:

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession to yield accurate and reliable results.
2. "*Video advertisement*" shall mean any advertisement intended for dissemination through television broadcast, cablecast, home video, or theatrical release.

I.

It is ordered, That respondent Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc., and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from selling, broadcasting or otherwise disseminating, or assisting others to sell, broadcast or otherwise disseminate, in part or in whole, the program-length television

advertisement for Omexin described and identified in the complaint as "Can You Beat Baldness?"

II.

It is further ordered, That respondent Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc., and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of Omexin or any other substantially similar hair loss treatment product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. Such product or service contains an ingredient that can or will curtail hair loss for a large majority of balding men and women;
2. Such product or service contains an ingredient that can or will promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of men and women;
3. Such product or service contains an ingredient that has been scientifically proven to curtail hair loss for a large majority of men and women;
4. Such product or service contains an ingredient that has been scientifically proven to promote the growth of new, pigmented terminal hairs where hair has previously been lost for a large majority of men and women; or
5. Such product or service has successfully curtailed hair loss and promoted new hair growth for thousands of balding men and women.

For purposes of this order a "substantially similar hair loss treatment product or service" shall be defined as any product or service that is advertised or intended for sale over-the-counter to treat, cure or curtail hair loss and which contains omentum or any extract thereof.

B. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product or service in or affecting commerce, as "commerce" is defined in The Federal Trade Commission Act, that:

1. The use of the product or service can or will prevent, cure, relieve, reverse, or reduce loss of hair;
2. The use of the product or service can or will promote the growth of hair where hair has already been lost;
3. The product or service is an effective remedy for hair loss in a substantial number of cases; or
4. Any test or study establishes that the product or service relieves, cures, prevents or reverses hair loss,

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

C. Advertising, packaging, labeling, promoting, offering for sale, selling, or distributing any product that is represented as promoting hair growth or preventing hair loss, unless the product is the subject of an approved new drug application for such purpose under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, provided that, this subpart shall not limit the requirements of Part II.A and B herein.

III.

It is further ordered, That respondent Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc., and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

IV.

It is further ordered, That respondent Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc., and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any food, drug or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

V.

It is further ordered, That respondent Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc., and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling, or disseminating:

A. Any advertisement that misrepresents, directly or by implication, that it is not a paid advertisement;

B. Any commercial or other video advertisement fifteen minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the commercial and immediately before each

presentation of ordering instructions for the product or service, the following disclosure:

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

Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein.

VI.

It is further ordered, That respondent Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc., and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product or service represents the typical or ordinary experience of members of the public who use the product or service, unless such is the fact.

VII.

It is further ordered, That respondent Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc., shall, for three (3) years after the date of the last dissemination to which they pertain, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying.

A. All materials that were relied upon by respondent in disseminating any representation covered by this order; and

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

VIII.

It is further ordered, That respondent Thomas L. Fenton shall, for a period of ten (10) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities. The expiration of the notice provision of this part VIII shall not affect any other obligation arising under this order.

IX.

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

IN THE MATTER OF

ORKIN EXTERMINATING COMPANY, INC.

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

Docket C-3495. Complaint, May 25, 1994--Decision, May 25, 1994

This consent order prohibits, among other things, a Georgia pesticides corporation from advertising or representing that its pesticides used in its lawn care service programs are as safe as some common household products or that they pose no significant risk to human health or the environment, without possessing competent and reliable scientific evidence to substantiate the claims.

Appearances

For the Commission: *Judith Wilkenfeld, Michael Dershowitz* and *Sydney Knight.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Orkin Exterminating Company, Inc., ("Orkin" or "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. Orkin is a Delaware corporation, with its offices and principal place of business located at 2170 Piedmont Road, N.E., Atlanta, Georgia.

PAR. 2. Orkin has advertised, offered for sale, and sold certain residential lawn care services ("residential lawn care services") which use pesticides or pesticide products. The pesticides or pesticide products are applied to lawns as a means to prevent, destroy, or repel pests such as weeds, rodents, and insects.

PAR. 3. Respondent disseminated or caused to be disseminated advertisements for residential lawn care services. These advertisements were disseminated by various means in or affecting commerce,

for the purpose of inducing purchases of such residential lawn care services by members of the public.

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

PAR. 5. Respondent disseminated or caused to be disseminated advertisements for its residential lawn care services, including but not necessarily limited to, the advertisements attached hereto as Exhibits A and B. The aforesaid advertisements contain the following statements:

(a) In addition, we'll keep weeds and harmful bugs out, using environmentally safe, biodegradable products that are neither harmful to you nor your soil. [Exhibit A]

(b) YOUR ORKIN LAWN CARE PROFESSIONAL PROGRAM

Safe, Timely, Effective Applications

Under the most accepted product rating scale our applications are rated "practically nontoxic"; the lowest toxicity rating and have lower toxicity rating than many common household products like suntan lotion or shaving cream.

Common sense suggests avoiding unnecessary contact with any chemical. In an effort to further promote safety please keep children and pets off sprayed areas for 1-2 hours after application or until materials dry. [Exhibit B]

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent represented, directly or by implication, that:

(a) The pesticides it uses in its residential lawn care services, when used as directed in such services, are as safe or safer than common household products such as suntan lotion and shaving cream; and

(b) The pesticides it uses in its residential lawn care services, when used as directed in such services, are practically non-toxic and do not pose any significant risk to human health and the environment.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent represented, directly or by implication, that at the time it made the representations set forth in paragraph six, respondent

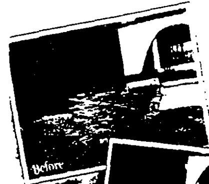
possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

KEEP YOUR LAWN LOOKING BEAUTIFUL WITH A YEAROUND GUARANTEE



We'll put the glow of health back into your yard

Imagine the luxury of letting a pro take care of your lawn. Making it beautifully thick, green and healthy. With custom-blended fertilizers. Biodegradable weed and insect control products. FREE troubleshooting calls. And a variety of seasonal treatments for specific problems.

It's true. YEAROUND lawn care is *guaranteed* to help keep your lawn looking great, month after month. In fact, if your lawn develops a problem between service calls, all you have to do is notify us. We'll be out to troubleshoot for you within 48 hours, at no extra charge!

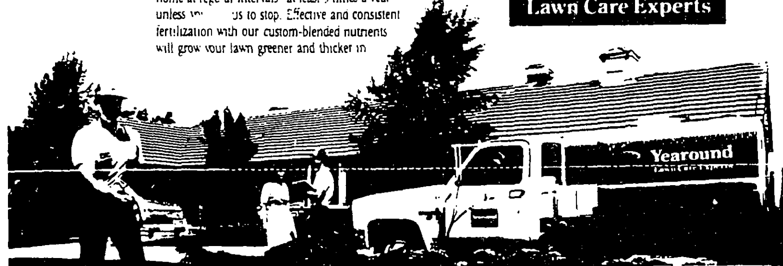
YEAROUND beauty starts with the basics

First stop: a FREE, NO OBLIGATION Lawn Analysis to determine just which nutrients your lawn needs. We examine the condition of your soil, note any insect activity and specific weeds that need to be eliminated.

Once you've decided to give us a try, we'll service your home at regular intervals – at least 5 times a year – unless you [illegible] us to stop. Effective and consistent fertilization with our custom-blended nutrients will grow your lawn greener and thicker in no time. In addition, we'll keep weeds and harmful bugs out, using environmentally safe, biodegradable products that are neither harmful to you nor your soil.

Perk up trees and shrubs

Deep root fertilization and proper insect and disease control will go a long way to improve the health and vigor of your trees and shrubs. So treat these valuable plants to YEAROUND Tree & Shrub Care and let them reward you with extra foliage, flowering and fruit.



MAIL THIS CARD TODAY FOR A FREE LAWN ANALYSIS & PRICE QUOTE

YES! I'd like a free, no-obligation lawn analysis. I'm interested in the following:

- [ ] Weed Control
- [ ] Fertilization and Insect Control
- [ ] Shrub & Tree Care
- [ ] Commercial Landscape Care

Please print clearly

Name ______

Address ______

City ______ Zip ______

Phone (home) ______ (business) ______

- [ ] If I'm not home, leave the results and price quote on the door

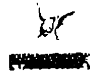


EXHIBIT A

Yearound

CALL NOW TO GET RID OF DANDELION, CLOVER & OVER 30 OTHER NASTY WEEDS.

Bothered by pesky weeds? Call the YEAROUND Green Lawn Experts. We'
only wipe out over 30 kinds of weed problems you may have lurking in
yard, but we'll also make your lawn greener, thicker and healthier than
To find out more, plus get a FREE lawn, tree &
shrub analysis, return the attached card or call 805-658-24

Yearound
Lawn Care Experts

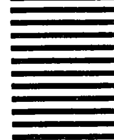
32 'A' Palma Drive
...ntura, CA 93003

...FE, EFFECTIVE &
...FORDABLE
...rtilization, Weed, Insect
Disease Control for
...wns, Trees & Shrubs
Residential • Commercial
Year Round Servicing
Guaranteed Results

Bulk Rate
U.S. Postage
PAID
Yearound

CAR RT SORT

NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES



BUSINESS REPLY MAIL

FIRST CLASS PERMIT NO 936 OXNARD, CA

POSTAGE WILL BE PAID BY ADDRESSEE

YEAROUND Lawn Care Experts
2432 A Palma Drive
Ventura CA 93003

EXHIBIT B

Your Orkin Lawn Care
Professional Program

Safe, Timely, Effective Applications

Your Orkin Lawn Care program consists of six treatments with the safest, most effective materials available. Our specialized equipment allows us to treat your lawn for its unique problems and characteristics. We recognize that every lawn is different and we can tailor our applications to fit individual needs.

Your Orkin lawn specialist has been thoroughly trained in the science of lawn care. He understands weeds, insects, and diseases. He knows what to apply and when to apply it. Every Orkin lawn specialist has passed a written exam in order to be licensed.

Orkin Lawn Care has always placed a major emphasis on the subject of proper use of lawn care materials from the perspective of our employees, our customers and the public at large.

Our six application program involves the discriminate use of pesticides. A pesticide is a material used to destroy a pest or protect your landscape from a pest. A pest is an unwanted organism [ie: weed, insect, fungus, etc.]. Pesticides are not for amateurs. To protect people and the environment, pesticide applicators must be professionally trained and licensed by their respective state [as required].

Orkin Lawn Care follows all EPA standards for pesticide handling and use. All of our pesticides are registered by the U.S. Environmental Protection Agency and the appropriate state agency. State law requires that you be given a certain label information for pesticides applied to your landscape. This information is enclosed for your review. Should you have questions, refer to your local branches. It should be understood this label information is representative of the product in its concentrated form. This would therefore, represent the product only if and when handled by your Orkin lawn specialist at the time of mixing. As an example, our standard spray mix of our round two insecticide is diluted over five hundred times. [e.g. five hundred parts water to each part insecticide.]

Under the most accepted product rating scale our applications are rated "practically nontoxic"; the lowest toxicity rating and have lower toxicity rating than many common household products like suntan lotion or shaving cream.

Common sense suggests avoiding unnecessary contact with any chemical. In an effort to further promote safety please keep children and pets off sprayed areas for 1-2 hours after application or until materials dry.

Should you ever have questions or desire additional information, feel free to contact your local branch office at your earliest convenience.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment received, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Orkin Exterminating Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its offices and principal place of business located at 2170 Piedmont Road, N.E., Atlanta, Georgia.

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

For the purposes of this order:

1. "*Pesticide*" shall mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest (as defined in 40 CFR 152.5) or intended for use as a plant regulator, defoliant, or desiccant.

2. "*Pesticide Product*" shall mean a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, delivered or applied.

I.

It is ordered, That respondent Orkin Exterminating Company, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale, distribution or use of any residential lawn care services which use any pesticide or pesticide product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing in any manner, directly or by implication, that:

1. The pesticides it uses in its residential lawn care services, when used as directed in such services, are as safe or safer than common household products such as suntan lotion and shaving cream; or

2. The pesticides it uses in its residential lawn care services, when used as directed in such services, are practically nontoxic and do not pose any significant risk to human health and the environment; or

B. Making any representation in any manner, directly or by implication, concerning the safety or degree of risk to human health or the environment of any pesticides it uses in its residential lawn care services, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable

scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

Provided however, that nothing in this order shall prohibit respondent from disseminating (1) any pesticide label approved by the United States Environmental Protection Agency, or (2) any Material Safety Data Sheets prepared pursuant to 29 CFR 1910.1200 by a source other than respondent or its agent, unless at the time of dissemination of the Material Safety Data Sheets respondent knew or should have known that the representation was deceptive.

II.

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

A. All materials that were relied upon to substantiate any representation covered by this order; and

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

III.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees engaged in the preparation and placement of advertisements or other such sales materials covered by this order.

IV.

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

V.

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

IN THE MATTER OF

W.D.I.A. CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FAIR CREDIT REPORTING ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket 9258. Complaint, May 4, 1993--Decision, May 27, 1994

This consent order prohibits, among other things, an Ohio-based information corporation and two of its officers from furnishing any consumer report for any purposes not permitted under the Fair Credit Reporting Act, and requires the respondents to take certain steps to ensure subscribers have permissible purposes for accessing consumer reports in the future. In addition, the respondents are required to maintain a toll-free telephone number available to consumers who have questions regarding the purpose for which a consumer report on them was furnished.

Appearances

For the Commission: *Ronald G. Isaac, David G. Grimes, Jr.* and *Lucy Morris.*

For the respondents: *Arthur L. Herold* and *Frank M. Northam, Webster, Chamberlain & Bean*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that W.D.I.A. Corporation, a corporation, and Mark W. Hanna and Janice L. Campanello, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, 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:

DEFINITIONS

For the purpose of this complaint, the following definitions apply:

"*Person*," "*consumer*," "*consumer report*," "*consumer reporting agency*," and "*employment purposes*" are defined as set forth in Sections 603(b), (c), (d), (f), and (h), respectively, of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681a(b), 1681a(c), 1681a(d), 1681a(f), and 1681a(h);

"*Subscriber*" means any person who is approved for or obtains a consumer report from respondents;

"*Permissible purpose*" means any of the purposes listed in section 604 of the Fair Credit Reporting Act, 15 U.S.C. 1681b, as amended, for which a consumer reporting agency may lawfully furnish a consumer report. These purposes are:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe:

(A) Intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) Intends to use the information for employment purposes; or

(C) Intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) Intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

PARAGRAPH 1. Respondent W.D.I.A. Corporation, is a corporation organized, existing, and doing business under and by

virtue of the laws of the State of Ohio, with its principal office and place of business located at 7721 Hamilton Avenue, Cincinnati, Ohio.

Respondents Mark W. Hanna and Janice L. Campanello are the President and Vice President, respectively, of the corporate respondent and its sole stockholders. They formulate, direct, and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of said corporation.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time past have been, regularly engaged in the practice of procuring and assembling information on consumers for the purpose of furnishing, for monetary fees, consumer reports to third parties. Respondents furnish these consumer reports to third parties through the means and facilities of interstate commerce. Hence, respondents are consumer reporting agencies, as defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. Respondents regularly furnish consumer reports to subscribers under circumstances in which respondents cannot reasonably conclude that the reports will be used for a permissible purpose. Typical and illustrative, but not all inclusive, of these circumstances are the following:

A. Respondents regularly furnish consumer reports to subscribers who typically have both permissible and impermissible purposes for using consumer reports. Among such subscribers are attorneys, insurance companies, and private investigators. In numerous instances, respondents provide consumer reports to these subscribers without having reason to believe that the reports have been requested for a permissible purpose.

B. Respondents regularly furnish consumer reports to new subscribers without first having made a reasonable effort to verify the purposes for which the subscribers will use the reports.

PAR. 4. By and through the acts and practices alleged in paragraph three, and others not specifically set forth herein, respondents have violated Section 604 of the Fair Credit Reporting Act by furnishing consumer reports to persons whom respondents have no

reason to believe intend to use the information for a permissible purpose under Section 604.

PAR. 5. By and through the acts and practices alleged in paragraph three, and others not specifically set forth herein, respondents have violated Section 607(a) of the Fair Credit Reporting Act by failing to maintain reasonable procedures designed to limit the furnishing of consumer reports to the purposes listed under Section 604.

PAR. 6. Respondents regularly furnish consumer reports for employment purposes that contain items of information on consumers which are matters of public record and are likely to have an adverse effect on a consumer's ability to obtain employment.

PAR. 7. At the time respondents furnish the consumer reports described in paragraph six, respondents do not notify the subject consumers that respondents are reporting public record information about them, nor do they apprise these consumers of the names and addresses of the subscribers to whom the information is being reported.

PAR. 8. Respondents do not maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date.

PAR. 9. By and through the acts and practices alleged in paragraphs six, seven, and eight, respondents have violated Section 613 of the Fair Credit Reporting Act.

PAR. 10. The acts and practices set forth in this complaint as violations of the Fair Credit Reporting Act constitute unfair or deceptive acts or practices in commerce in violation of Section 5(a) of the Federal Trade Commission Act, pursuant to Section 621(a) of the Fair Credit Reporting Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations of the Fair Credit Reporting Act and the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order,

an admission by the respondents of all the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent W.D.I.A. corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 7721 Hamilton Avenue, in the City of Cincinnati, State of Ohio.

Respondents Mark W. Hanna and Janice L. Campanello are the officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

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

ORDER

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

"*Person*," "*consumer*," "*consumer report*," "*consumer reporting agency*," and "*employment purposes*" are defined as set forth in Sections 603(b), (c), (d), (f), and (h), respectively, of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681a(b), 1681a(c), 1681a(d), 1681a(f), and 1681a(h);

"*Subscriber*" means any person who is approved for or obtains a consumer report from respondents;

"*Mixed-use subscriber*" means a subscriber who in the ordinary course of business typically has both permissible and impermissible purposes for ordering consumer reports; and

"*Permissible purpose*" means any of the purposes listed in Section 604 of the FCRA, 15 U.S.C. 1681b, or as it might be amended in the future, for which a consumer reporting agency may lawfully furnish a consumer report.

I.

It is ordered, That respondents W.D.I.A. Corporation, a corporation, its successors and assigns, and its officers, and Mark W. Hanna and Janice L. Campanello, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the furnishing of any consumer report, do forthwith cease and desist from:

1. Furnishing any consumer report under any circumstances not permitted by Section 604 of the FCRA.

2. Failing to maintain reasonable procedures designed to limit the furnishing of consumer reports to the purposes listed under Section 604 of the FCRA, as required by Section 607(a) of the FCRA. Such procedures shall include but not be limited to respondents doing or continuing to do the following:

a. With respect to prospective subscribers, before furnishing a consumer report to any such subscriber, and with respect to current mixed-use subscribers, no later than six months after the date of this order:

(i) Obtaining from each subscriber an initial written certification stating the nature of the subscriber's business and all purposes for which the subscriber plans to obtain consumer reports from respondents. Each certification under this provision must be dated and signed, must bear the printed or typed name of the person signing it, and must state that the person signing it has direct knowledge of the facts certified and supervisory responsibility for obtaining consumer reports from respondents.

(ii) Determining, based on the information in the subscriber's written certification, and any other factors of which respondents are aware or, under the circumstances, should reasonably ascertain, that each subscriber has a permissible purpose under Section 604 for the types of reports the subscriber plans to obtain. Respondents shall create and maintain a record of the basis for this determination.

(iii) Verifying (1) the business identity of the subscriber; (2) that the subscriber is engaged in the business certified and has a permissible purpose for obtaining consumer reports; and (3) with respect to prospective subscribers, that the subscriber maintains reasonable procedures designed to prevent access to consumer reports by unauthorized persons. Respondents shall conduct an on-site visual inspection of the business premises of each subscriber that respondents have not otherwise verified (*e.g.*, through a previous on-site visual inspection of the business premises or through business directories, state or local regulatory authorities, or other reliable sources) to be a legitimate business having a "permissible purpose" for the information reported.

(iv) Providing each subscriber a summary of the permissible purposes for obtaining consumer reports under Section 604 of the FCRA that is substantially identical to the summary attached to this order as Exhibit A.

(v) Informing each subscriber in writing that the FCRA imposes criminal penalties up to $5,000 and a year in prison against anyone who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses.

b. With respect to both current and prospective subscribers:

(i) Requiring, any time a subscriber requests a consumer report for employment purposes pursuant to Section 604(3)(B) of the FCRA, that the subscriber identify and certify that purpose, unless the subscriber has previously certified that purpose to respondents as the only purpose for which it requests consumer reports.

(ii) Requiring, any time a subscriber requests a consumer report for a "legitimate business need" pursuant to Section 604(3)(E) of the FCRA, that the subscriber identify and certify that business need. Such identification must be made in specific terms. Provided however, that a landlord requesting a consumer report in connection with rental of an apartment need not certify each request for a

consumer report if the landlord has previously certified that it will obtain consumer reports solely for that purpose.

(iii) Requiring each mixed-use subscriber to identify and certify the applicable purpose(s) each time it requests a consumer report. For example, to identify the specific credit purpose for requesting a report under Section 604(3)(A) of the FCRA, it would suffice for an attorney subscriber collecting a debt for a client to specify that as his or her purpose.

(iv) Disclosing the following message, or one substantially identical to it, on the computer screen each time a subscriber transmits requests by computer for consumer reports: "The federal Fair Credit Reporting Act imposes criminal penalties up to $5,000 and a year in prison against anyone who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses."

(v) Verifying that each mixed-use subscriber is using consumer reports solely for permissible purposes by sending a letter by first class mail, postage prepaid, to each consumer on whom a consumer report is furnished to a mixed-use subscriber, no later than three (3) business days after furnishing the consumer report. Respondents shall send the letter to the consumer's current address in an envelope bearing respondents' company name and its return mailing address, and stating "PLEASE FORWARD". The letter shall disclose the following information in a form substantially similar to Exhibit B:

(1) That respondents have furnished a consumer report on the consumer to the person identified by the name and address stated in the letter;

(2) The identity of the end user of the report (*i.e.*, the person on whose behalf the subscriber obtained the report) if known and if different from the person to whom respondents furnished the consumer report;

(3) The purpose identified for requesting the consumer report; and

(4) That should the consumer have questions concerning the purpose for which the consumer report was furnished, the consumer may call respondents at the toll-free ("800") telephone number stated in the letter or may write to respondents at the address stated in the letter.

(vi) Maintaining a toll-free telephone number, available for consumers to call at least six hours each business day, during times to be stated in the letter required by subparagraph I.2.b.(v). Calls to that number shall be answered by an employee of respondents or by a recording. If a recording is used, within 10 seconds after it begins, it shall clearly instruct the consumer what to do if calling about the purpose for which the consumer's consumer report was furnished. Consumers who indicate they are calling about the purpose for which their consumer report was furnished shall be promptly referred to an employee of respondents, if available. If no employee is available, the recorded message shall clearly instruct the consumer to leave a message stating the consumer's name and telephone number, and the consumer's comments or questions about the purpose for which the consumer report was furnished. The recording tape shall allow at least one minute for the consumer to record a message.

(vii) Returning promptly and in good faith all telephone calls from consumers inquiring about the purpose for which their consumer report was furnished, making at least two attempts to reach the consumer. If a consumer does not answer when called, respondents shall leave a message, if possible, including a name and telephone number for the consumer to call to speak to an individual at respondents' office. When responding to these consumers' calls, respondents shall elicit and record information from the consumers bearing on whether any subscriber may have obtained a consumer report for a purpose not permitted under Section 604 of the FCRA or for a purpose different from that identified by the subscriber at the time the report was obtained. Respondents shall train their employees to comply with the procedures set forth in this subparagraph.

(viii) Requiring each subscriber to provide on an annual basis certification updating the information previously provided on the nature of the subscriber's business and all purposes for which the subscriber plans to obtain consumer reports from respondents, and also requiring the subscriber to explain the reasons for any change in the stated purposes for obtaining consumer reports. The certification for each subscriber shall be obtained either in writing and be dated and signed and bear the printed or typed name of the person signing it, or it shall be obtained by computer. If the certification is obtained by computer, the person executing it must enter on the computer screen the information described above, and the person's name, direct dial office telephone number, and occupational title. The computer

certification request may appear in a form substantially similar to Exhibit C.

(ix) Terminating access to any consumer report as to any subscriber who:

(1) Respondents learn, through the procedures described in subparagraphs I.2.b.(v), (vi) and (vii), or otherwise, has obtained, after the effective date of this order, a consumer report for any purpose other than a permissible purpose, unless that subscriber obtained such report through inadvertent error -- *i.e.*, a mechanical, electronic, or clerical error that the subscriber demonstrates was unintentional and occurred notwithstanding the maintenance of procedures reasonably designed to avoid such errors; or

(2) Respondents have reasonable grounds to believe will not use the report solely for permissible purposes.

3. Furnishing any consumer report for employment purposes that contains public record information on a consumer that is likely to have an adverse effect upon the consumer's ability to obtain employment without notifying the consumer, at the time such report is furnished, that public record information concerning the consumer is being reported, and providing the name and address of the person to whom such report is being furnished, as provided in Section 613(1) of the FCRA. The notice may be provided to the consumer in a form substantially similar to Exhibit D. Respondents are not required to provide this notification if they have either (1) received written confirmation directly or indirectly from the consumer reporting agency that supplied the consumer report that the agency provides such notification to the consumer and they have notified that agency that the report is being provided for employment purposes, or (2) received written confirmation from the consumer reporting agency that it maintains strict procedures designed to insure that such public record information is complete and up to date, as provided in Section 613(2) of the FCRA.

II.

It is further ordered, That respondents and their successors and assigns, shall maintain for five (5) years and upon request make available to the Federal Trade Commission for inspection and

copying, documents demonstrating compliance with the requirements of this order. Such documents shall include, but are not limited to, all subscriber applications and certifications, all reports prepared in connection with on-site investigations of subscribers' businesses, all written records of respondents' determinations that its subscribers have permissible purposes for obtaining consumer reports, documents reflecting respondents' mailing of letters notifying consumers when consumer reports on them are furnished and all documents pertaining to respondents' receipt and treatment of consumers' written and oral responses to those letters, and all instructions given to employees regarding compliance with the provisions of this order.

III.

It is further ordered, That respondents, and their successors and assigns, shall deliver a copy of this order, or a synopsis thereof approved by the Federal Trade Commission, to all present and future personnel, agents, or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order.

IV.

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

V.

It is further ordered, That each individual respondent named herein promptly notify the Federal Trade Commission of the discontinuance of his or her present business or employment and of his or her affiliation with a new business or employment. In addition, for a period of ten (10) 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 whose activities include assembling or evaluating information on consumers or

furnishing consumer reports or access to consumer reports to third parties, or of his or her affiliation with a new business or employment in which his or her own duties and responsibilities involve such activities. 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 his or her 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.

VI.

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

EXHIBIT A

IMPORTANT NOTICE FOR SUBSCRIBERS

The federal Fair Credit Reporting Act permits consumer reporting agencies to provide consumer reports only for certain purposes. Any subscriber who uses false pretenses to obtain a consumer report may be the subject of criminal prosecution. It is also a law violation for us to give you a consumer report unless your purpose for obtaining it is permissible under the Act. This means that you must always tell us the true reason for requesting a consumer report. If the reason is not a permissible one under the Act, we are required by law to deny your request. Listed below are the only purposes that Section 604 of the Act permits.

(1): Pursuant to court order, or a subpoena issued by a federal grand jury.

(2): Pursuant to the written instructions of the consumer on whom the report is sought.

(3)(A): For use in connection with a credit transaction involving the consumer. Evaluating a consumer's credit application or reviewing or collecting on a credit account are all permissible purposes for obtaining a consumer report. It is not permissible for a creditor to obtain a report on a consumer unless the consumer has applied for credit or has an existing credit relationship with the creditor. Location or Litigation purposes are never permissible unless they involve collection of the consumer's credit account.

(3)(B): For use in employment decisions involving the consumer. An employer (or its agent) may obtain a consumer report in order to evaluate a consumer who has applied for employment or to evaluate a consumer for promotion, reassignment or retention.

(3)(C): For use in connection with underwriting of insurance involving the consumer. Underwriting includes issuance or renewal of insurance, and its amount and terms. Consumer reports may not be obtained for insurance claims purposes.

(3)(D): For use in connection with a consumer's eligibility for a license or benefit granted by a governmental agency that is required to consider the applicant's finances in the process.

(3)(E): For use in connection with a business transaction involving the consumer. This section provides a strictly limited basis for obtaining a consumer report. To qualify, the business transaction must involve some benefit for which the consumer has applied. A consumer's application to rent an apartment or open a checking account would qualify, as would a consumer's request to pay for goods by check. The business transaction must not involve credit, employment, or insurance -- those purposes are permissible only if they meet the standards of (3)(A) - (C).

CONSUMER REPORTS WILL BE PROVIDED ONLY FOR THESE PURPOSES

EXHIBIT B

W.D.I.A. Corporation
National Credit Information Network
Post Office Box 31221
Cincinnati, Ohio 45231-0221

Date of Report:	[Insert date report furnished]
Reference:	Consumer credit report provided to...
Company:	[Insert name, address and telephone number of subscriber who received report]

Dear Consumer:

The National Credit Information Network has provided a copy of your consumer credit report to the company listed above, at its request.
This consumer credit report is to be used for the purpose listed below: [List purpose identified by report recipient]
Should you have questions regarding the reason the above company requested a copy of your consumer credit report, feel free to contact:

National Credit Information Network
Post Office Box 31221
Cincinnati, Ohio 45231-0221

You may elect to call us at (800) 374-1400
Mon-Fri 9:00 a.m. to 12:00 Noon E.S.T.
-OR-
Mon-Fri 1:00 p.m. to 4:00 p.m. E.S.T.

[If end user is known, state the following:]
This report was requested on behalf of: [Identify end user]

Respectfully submitted
Consumer Notification Department
National Credit Information Network

EXHIBIT C

ANNUAL CERTIFICATION FOR ACCESS TO
CONSUMER CREDIT REPORTS

Please answer the following:

State the nature of your business and describe what it actually does >

Enter all purposes, separated by commas, for which you plan to obtain consumer credit reports >

Please state whether your purposes for obtaining consumer credit reports have changed from a year ago and, if so, explain the reasons for the changes >

Enter your: Name >
Official business title >
Direct dial telephone number >

Do you certify, to the best of your knowledge, that the above is true and accurate?

Yes I do -OR- No I do not

EXHIBIT D

W.D.I.A. Corporation
National Credit Information Network
Post Office Box 31221
Cincinnati, Ohio 45231-0221

Date of Report:	[Insert date report furnished]
Reference:	Consumer credit report provided to...
Company:	[Insert name, address and telephone number of subscriber who received report]

Dear Consumer:

The National Credit Information Network has provided a copy of your consumer credit report to the company listed above, at its request.

This consumer credit report is to be used for employment purposes.
The consumer credit report furnished contained public record information.
Should you have questions concerning the reason the above company requested a copy of your consumer credit report, feel free to contact:

National Credit Information Network
Post Office Box 31221
Cincinnati, Ohio 45231-0221

You may elect to call us at (800) 374-1400
Mon-Fri 9:00 a.m. to 12:00 Noon E.S.T.
-OR-
Mon-Fri 1:00 p.m. to 4:00 p.m. E.S.T.

[If end user is known, state the following:]
This report was requested on behalf of: [Identify end user]

Respectfully submitted
Consumer Notification Department
National Credit Information Network

IN THE MATTER OF

SAMICK MUSIC CORPORATION

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

Docket C-3496. Complaint, May 27, 1994--Decision, May 27, 1994

This consent order prohibits, among other things, a California subsidiary of a Korean piano manufacturer from misrepresenting the composition of any of its piano soundboards or any other piano parts in the future, and requires the respondent to pay, to the U.S. Treasury, $266,000 in disgorgement.

Appearances

For the Commission: *Darren A. Bowie, Michael C. McCarey* and *Christian S. White.*

For the respondent: *Hugh Grambau, Steptoe & Johnson*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Samick Music Corporation ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a California corporation, with its office and principal place of business located at 18521 Railroad Street, City of Industry, California.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold and distributed pianos.

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 the dissemination of promotional materials for its pianos to consumers and to distributors for use in promoting pianos to consumers.

PAR. 5. Since 1985, respondent's promotional materials have included statements alluding to the composition of the soundboards in respondent's pianos. Typical, and illustrative, are the following:

A. "Solid Spruce Soundboards" (Exhibit A).

B. "Soundboards made of the finest Sitka Spruce . . ." (Exhibit B).

C. "Samick's 'Omni-Directional' soundboards are crafted from clear, quarter-sawn white spruce from Sitka, Alaska, which is the finest soundboard material available." (Exhibit C).

D. "After two hundred years of experimentation, it has been conclusively determined that there is no material, man-made or natural, that can equal the musical properties of Alaskan Sitka spruce. That is why the ribs and soundboards of all Samick pianos are made from the costliest Alaskan spruce." (Exhibit D).

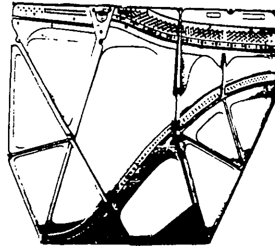
PAR. 6. By such statements and depictions contained in the materials referred to in paragraph five, above, including but not limited to the materials attached as Exhibits A-D, respondent has represented, directly or by implication, that the soundboards of its pianos are composed entirely of spruce.

PAR. 7. In truth and in fact, from 1985 until early 1990, many such soundboards were not composed entirely of spruce, but were composed of outer spruce layers with inner layers of another type or types of wood. Therefore, the representation set forth in paragraph six, above, was false and misleading.

PAR. 8. The dissemination by respondent of the aforesaid false and misleading representation as alleged in this complaint and the placement in the hands of others of the means and instrumentalities by and through which others may have disseminated said false and misleading representation constitute unfair and deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

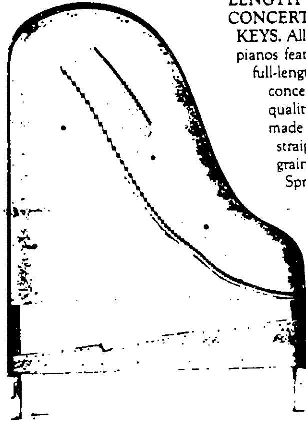
CUSTOM-CRAFTED ROYAL GEORGE FELT HAMMERS. All hammers used in Samick pianos are crafted from the finest quality 100% virgin "Royal George" high-density wool felt. All felt is tested for weight, thickness, and density to ensure proper resiliency for superior tone quality and long-lasting performance.



Vacuum Formed Plates

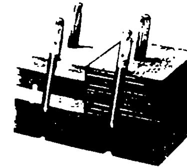
PERMA-GRIP AND PERMA-SEALED PINBLOCKS. Each Samick piano utilizes Delignit pinblocks from West Germany. Handcrafted from the finest quarter-sawn hard rock beech, these 21-ply densified beech pinblocks are superior to maple in age and wear properties. Samick pinblocks are seasoned for two years prior to final installation. The result is the ultimate in tuning stability because the pinblock is virtually impervious to atmospheric changes.

INDIVIDUALLY WEIGHTED, FULL LENGTH CONCERT KEYS. All Samick pianos feature full-length, concert-quality keys made of straight grain Sitka Spruce. Natural keys are covered with a high-quality acrylic that will never yellow, and black sharp keys are covered with a phenolic material that is pleasing from both a tactile and visual standpoint. To provide evenness of touch and a consummate control throughout the playing range, all keys are individually balanced and properly weighted.



Solid Spruce Soundboards

HAND RUBBED FINISHES. All Samick piano case components are carefully machine sanded and then hand rubbed to produce the rich lustre found on both the high polish and satin finish cabinets. The high technology polyester finish on a Samick piano is impervious to climatic changes. Advanced materials technology and hours of meticulous hand work have yielded the most beautiful and durable finishes.



Delignit Pin Blocks

Each one of these features contributes materially to the musical performance and durability of the Samick piano and makes it possible for Samick to offer the industry's most comprehensive warranty. Samick's Lifetime Limited Warranty is your assurance of a lifetime of musical enjoyment.

EXHIBIT A

EXHIBIT B

German Scale Superiority and Samick Design Engineering

The Samick Imperial Series is a masterful marriage between aesthetics and technology. They have created a brilliant collection whose tone, touch, and durability are destined to create a mystique among knowledgeable piano buyers.

IMPERIAL SERIES UNIQUE FEATURES:

- At the heart of the Imperial Series are the new scales fashioned by Mr. Klaus Fenner, unarguably the world's preeminent scale designer. Several years were spent in developing scales for every model in the Imperial Series, each of them lending distinctive voice to each model.
- Soundboards made of the finest Sitka Spruce, with all ribs extended to the outer edge.
- Samick's exclusive new vacuum plate process, which in addition to bringing a new level of accuracy to plate casting, produces plates of flawless appearance, size and weight, all contributing to superior sound.
- The new Imperial Series incorporates the most vaunted virtues of artisans from around the world:
  Roslau music strings and Delignit Beech pinblocks from Germany—Royal George felts from England—Action woods from American Rock Maple

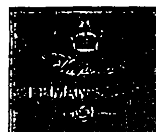
INTERNATIONAL OLYMPIC DESIGN AWARD

GRAND PRIX AWARD

Samick is proud to have recently received the coveted International Design Award commending the artisans' skills in fine piano making and the Grand Prix Award for quality.

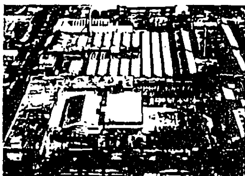
Lifetime Warranty

Imperial German Duplex Scales



The Hamburg-Steinway, Bechstein and Bluthner, recognized as the greatest pianos in the world, achieved their purer, richer and more resonant concert quality sound by incorporating German scale designs. With Imperial Scales, which are German designed, Samick has now joined this renowned group. The Imperial Scales also make Samick the only Asian piano maker to move up to this world class of sound excellence.

QUALITY BY DESIGN



Quality Production by Design

Samick boasts a complex of seven factories, each dedicated to its own product from grand pianos, vertical pianos and stringed instruments to precision metal processing, vacuum plate factory, plywood and woodworking, and an especially large sawmill. This unique complex of modern factories is one of the world's largest in the area of musical instruments and affords Samick precise quality control from start to finish.

Exceptional Sound by Design

The true test of any piano is its sound, and because of the exclusive German scale designs, the sound of every Samick piano deserves

special recognition. Its audible pleasure is the result of a complex, four-part interaction of hammers, strings, sound board and precise overall engineering. Master craftsmen create, produce, and fine tune each piano with care and pride.

Superior Performance by Design

The best techniques of age-old artisans combined with new technologies and materials make it possible for Samick to provide the world's most versatile, high performance, state-of the art pianos.

EXHIBIT B

EXHIBIT C

SOUNDBOARDS AND RIBS

SAMICK'S "Omni-Directional" soundboards are crafted from clear, quarter-sawn white spruce from Sitka, Alaska, which is the finest soundboard material available. Each soundboard has no less than 8 annual growth rings per square inch. This provides better tone direction and distribution of sound. The soundboards are tapered in thickness in accordance with scientific acoustical principals to give maximum tonal response. The spruce ribs and soundboard are corectly positioned in a book press where the ribs are "heat crowned," perpendicular to the soundboard grain to insure free vibration of the soundboard unit, and a balanced response between the bass and treble registers. The entire surface is then coated with a clear varnish for positive protection. All ribs are feathered at their ends and notched to the outer edge of the soundboard and backframe of the piano so as to deliver beautiful sounds, a smooth and equal response, and to help preserve the stability and "crown" of the soundboard.

ACOUSTA CROSS BARS

SAMICK engineers have designed special "Acousta Cross Bars" which are placed at very specific points on the soundboard, perpendicular to the ribs, to eliminate all undesirable overtones. The results are a brighter tone throughout the entire scale and longer sustain.

BACK POSTS -- BEAMS

Back posts, (or beams) the "backbone" of the piano, are a primary factor in determining how long the piano will stay in tune. The construction and placement of each are more improtant than the number of posts or beams. The SAMICK multi-laminated posts have been engineered to maintain the structural integrity of the piano and to help offset the enormous pressure, (over 20 tons), exerted by the string tension. They also contribute to tuning stabililty.

VACUUM PROCESS IRON PLATE (FRAME)

The iron plate is the metal super structure of the piano. SAMICK research and engineering has produced an exciting technological breakthrough in plate foundry techniques. An exclusive SAMICK design, the SAMICK vacuum plate is engineered to withstand the 20-plus tons of pressure exerted by the tension of the strings.

SAMICK recently completed the installation of the world's largest and fastest vacuum processing plate machine. The machine brings a new standard to the fabrication of piano plates. At optimum efficiency the machine is capable of producing a completed perfect piano plate in 77 seconds, or the equivalent of 145,000 per year! This foundry is staffed by a workforce of only 12 people. This is again proof of SAMICK'S state-of-the-art manufacturing techniques and facilities.

The SAMICK vacuum process brings a new level of accuracy and cost efficiency to plate casting. The secret lies within the method's capability of producing a clean, stable mold through the use of a plastic liner which holds the dry sand mold rigidly in place by means of a vacuum.

The accuracy, with reference to thickness ...

EXHIBIT D

Attention To Detail Yields Musical Perfection

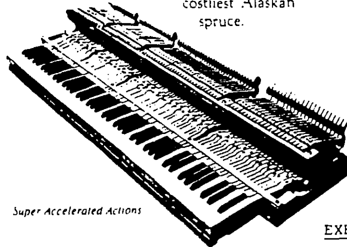
As far as the research and development team at Samick is concerned, there is no such thing as an "insignificant" element in the design and manufacture of a great musical instrument. Years of experience have taught them that the difference between a good piano and a truly superior piano can be found in a host of small, easily overlooked details. That's why even the most minute facet of the Samick piano is subjected to intense scrutiny by a team of demanding technicians.

All design and construction elements of the Samick piano are judged by two basic criteria: durability and musical performance. To achieve these two goals, Samick designers have utilized materials and design techniques from three continents. As a result, Samick pianos embody critical design and construction features found on instruments costing far more.

Listed below are some of the unique features that illustrate Samick's fanatic attention to detail. These features explain why the Samick Piano represents a long lasting investment in musical excellence.

Royal George Felt Hammers

SPRUCE SOUNDBOARDS & RIBS. After two hundred years of experimentation, it has been conclusively determined that there is no material, man-made or natural, that can equal the musical properties of Alaskan Sitka spruce. That is why the ribs and soundboards of all Samick pianos are made from the costliest Alaskan spruce.



Super Accelerated Actions

Solid Spruce Rib Construction

Spruce ribs and soundboards are correctly positioned in a book press and then the ribs are "heat crowned" perpendicular to the soundboard grain to ensure free and unencumbered vibration of the soundboard for rich, resonant tone.

VACUUM PROCESS IRON PLATES. Samick's vacuum process iron frame is the metal superstructure of the piano. Unlike conventional cast iron frames used in most lesser instruments, Samick's vacuum process plate has superior dimensional accuracy, which results in better tone quality, superior tuning stability, and longer instrument life.

SUPER ACCELERATED ACTIONS. Samick vertical pianos feature an improved version of the famous European "Schwander" direct blow action. Samick grand pianos feature an improved version of the world-famous German-made Renner action. Dubbed the "Super-Accelerated-Action," the Samick action features computer bored action and hammer rest rails to provide perfect key spacing and hammer alignment. All action parts are made of select hard rock maple, not plastic. The actions used in Samick pianos exemplify the company's meticulous attention to detail and provide the pianist with superlative control and evenness of touch.

Every action is seasoned in a climate-controlled room for six months before installation and final regulation to prevent any sticking or squeaking.

EXHIBIT D

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order;

1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located in City of Industry, California.

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

ORDER

I.

It is ordered, That respondent Samick Music 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 advertising, offering for sale, sale, or distribution of any piano in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, the composition of piano soundboards or any other piano parts.

II.

It is further ordered, That, pursuant to 15 U.S.C. 57(b), respondent, its successors and assigns, shall pay a refund of Two Hundred Sixty-Six Thousand Dollars ($266,000), which, in view of the impracticality of distributing the refund to consumers, shall be paid to the United States Treasury. Such payment shall be by two cashier's checks or certified checks made payable to the Treasurer of the United States, the first such check, in the amount of One Hundred Thirty-Two Thousand Dollars ($132,000), to be tendered to the Commission within six months of the date of service of this order, and the second such check, in the amount of One Hundred Thirty-Four Thousand Dollars ($134,000), to be tendered to the Commission within twelve months of the date of service of this order.

III.

It is further ordered, That respondent shall maintain for a period of three (3) years, and upon request make available to the Commission for inspection and copying, all promotional, advertising or other materials disseminated by respondent which make any representation concerning the composition of soundboards in pianos advertised, sold, distributed or offered for sale or distribution by respondent; all consumer complaints concerning the composition of soundboards in pianos advertised, sold, distributed or offered for sale or distribution by respondent; and accurate records of all materials relied upon by

respondent to substantiate any representation concerning the composition of soundboards in pianos advertised, sold, distributed or offered for sale or distribution by respondent.

IV.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in respondent, including but not limited to dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries, that may affect compliance obligations arising out of the order.

V.

It is further ordered, That respondent shall within thirty (30) days after service of this order, distribute this order to each of its officers, directors, managers and all personnel responsible for the preparation or review of promotional material.

VI.

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

IN THE MATTER OF

ARIZONA AUTOMOBILE DEALERS ASSOCIATION

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

Docket C-3497. Complaint, May 31, 1994--Decision, May 31, 1994

This consent order prohibits, among other things, an Arizona association consisting of approximately 199 dealers from restricting, regulating, or interfering with truthful, non-deceptive comparative or price advertising or advertising concerning financing by its members in the future. In addition, the order requires the respondent to remove from its "Standards for Advertising Motor Vehicles" any provision, policy statement or guideline that is inconsistent with the terms of the settlement, to distribute copies to each member, and to publish the revised standards in the AADA member magazine.

Appearances

For the Commission: *Ralph E. Stone, Jeffrey Klurfeld* and *Mary Lou Steptoe.*

For the respondent: *Richard Norling, Norling, Perry, Pierson & Kolsrud*, Phoenix, AZ.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Arizona Automobile Dealers Association, a corporation, hereinafter sometimes referred to as "AADA" or "respondent," 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 AADA, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its principal office and place of business at 4701 North 24th Street, Suite B-3, Phoenix, Arizona.

PAR. 2. AADA is a trade association of new automobile and truck dealers. AADA's members are generally engaged in the business of the sale of new automobiles and trucks at retail. AADA has approximately 199 members, constituting approximately 99% of the new automobile and truck dealers in the State of Arizona. Except to the extent that competition has been restrained as alleged herein, AADA's members have been and are now in competition among themselves and with other new automobile and truck dealers.

PAR. 3. AADA engages in substantial activities that further its members, pecuniary interests. By virtue of its purposes and activities, AADA is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. AADA's acts and practices, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. AADA has been and is acting as a combination of its members, or in agreement with some of its members, to restrain trade in the advertising for sale and sale of new automobiles and trucks in the State of Arizona by restricting truthful, non-deceptive advertising.

PAR. 6. In furtherance of this combination or agreement, AADA has enacted, published, and enforced certain sections of its "Standards for Advertising Motor Vehicles" that:

A. Prohibit its members "to advertise any price equaling or underselling claim, including claims that the advertiser's prices always or generally are equal to or lower than competitors, or are the lowest; that the advertiser will match or beat any price; that the advertiser will provide compensation if it cannot offer an equal or lower price; and any other claim of similar import" (Section 4);

B. Prohibit its members "to advertise statements such as 'write your own deal,' 'name your price,' 'name your own monthly payments,' and other statements of similar import" (Section 5);

C. Prohibit its members "to advertise claims such as 'everyone financed,' 'no credit rejected,' 'we finance anyone,' 'lowest payment in town,' and other similar affirmative statements" (Section 6); and

D. Prohibit its members "to advertise by making disparaging comparison with competitors' services, quality, price, products, or business methods" (Section 11) .

PAR. 7. The purposes or effects of the combination or agreement and AADA's acts or practices as described above have been and are to restrain competition unreasonably and to injure consumers in one or more of the following ways, among others:

A. By depriving consumers of truthful information concerning the prices of new automobiles and trucks;
B. By depriving consumers of truthful information concerning the financing available for new automobiles and trucks;
C. By depriving consumers of truthful information concerning the advantages of a member's products or services compared to those of a competitor's products or services; and
D. By depriving consumers of the benefits of competition among dealers in the sale of new automobiles and trucks.

PAR. 8. The acts and practices herein alleged were and are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter 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 respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Arizona Automobile Dealers Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Arizona, with its office and principal place of business located at 4701 North 24th Street, Suite B-3, Phoenix, Arizona.

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 terms "*respondent*" or "*AADA*" mean the Arizona Automobile Dealers Association, its directors, committees, officers, delegates, representatives, agents, employees, successors, and assigns.

II.

It is further ordered, That AADA, directly or indirectly, or through any person or any corporate or other device, in or in connection with its activities as a trade association, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, advising against, or discouraging: (1) truthful, non-deceptive discount or price advertising or (2) any person

or organization from otherwise engaging in truthful, non-deceptive discount or price advertising;

B. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, advising against, or discouraging truthful, non-deceptive advertising concerning the terms or availability of consumer credit;

C. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, advising against, or discouraging: (1) truthful, non-deceptive disparaging or comparative advertising or (2) any person or organization from otherwise engaging in truthful, non-deceptive disparaging or comparative advertising; and

D. Inducing, suggesting, urging, encouraging, or assisting any non-governmental person or organization to take any action that if taken by respondent would violate this order;

Provided that nothing contained in this order shall prohibit AADA from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to advertising, including unsubstantiated representations, that AADA 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 AADA shall:

A. Within thirty (30) days after the date of this order becomes final, remove from its "Standards for Advertising Motor Vehicles," and from any other existing policy statement or guideline, any provision, interpretation or policy statement that is inconsistent with the provisions of Part II of this order, including, but not limited to Sections 4, 5, 6, and 11;

B. Within thirty (30) days after the date this order becomes final, publish in Topics or in any successor publication, (a) this order, (b) the accompanying complaint, (c) any revision of the "Standards for Advertising Motor Vehicles" or any other existing policy statement or guideline of AADA made pursuant to Part III.A. of this order; and (d) a complete revised version of the "Standards for Advertising Motor Vehicles";

C. Within thirty (30) days after the date this order becomes final, distribute by first-class mail a copy of this order and the complaint to each of its members;

D. For a period of five (5) years after the date this order becomes final, provide each new member who joins AADA with a copy of the order and complaint within thirty (30) days of membership in AADA;

E Within sixty (60) days after the date this order becomes final, and annually thereafter for a period of five (5) years on the anniversary of the date this order became final, file with the Secretary of the Commission a verified written report setting forth in detail the manner and form in which AADA has complied with and is complying with this order; and

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

IV.

It is further ordered, That AADA notify the Commission at least thirty (30) days prior to any change in AADA, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

IN THE MATTER OF

COMMUNITY ASSOCIATIONS INSTITUTE

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

Docket C-3498. Complaint, June 6, 1994--Decision, June 6, 1994

This consent order prohibits, among other things, a Virginia-based association, whose members are managers of residential community associations, from interfering in any way with the truthful advertising and solicitation efforts of its members, and requires the respondent to remove from its codes of ethics any provisions inconsistent with the order's prohibition, and to make the changes known by publishing the revised code and the Commission's order in two of the respondent's publications.

Appearances

For the Commission: *Michael D. McNeely, Randall Marks* and *Jonathan D. Draluck.*

For the respondent: *Julie Carpenter* and *Anthony Epstein, Jenner & Block*, 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 Community Associations Institute, 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 as follows:

PARAGRAPH 1. Respondent Community Associations Institute ("CAI") is a corporation organized, existing, and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 1630 Duke Street, Alexandria, Virginia. CAI is a voluntary professional association of professional residential community association managers, residential community home owners associations, real estate developers,

lawyers, accountants, landscapers, and others having interests in the management of residential housing developments.

PAR. 2. CAI's members include professional residential community association managers. Except to the extent that CAI has restrained competition as described herein, CAI's professional residential community association manager members have been and are in competition among themselves and with other professional residential community association managers.

PAR. 3. CAI engages in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, CAI is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. CAI's acts and practices, including the acts and practices alleged herein, are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. CAI has conferred the designation "Professional Community Associations Manager" ("PCAM") on certain of its members who have met educational and experience qualifications and who agree to abide by its Code of Professional Ethics for Professional Community Association Managers.

PAR. 6. By promulgating and enforcing the professional courtesy provisions of its various codes of ethics, CAI has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of professional residential community association management services in the United States by restricting advertising and client solicitation.

PAR. 7. In furtherance of this combination or conspiracy, CAI:

A. Adopted and maintained (until June 22, 1993) Section B.4, "Professional Courtesy," of its Code of Professional Ethics for Professional Community Association Managers ("Code"), which states that PCAMs shall (1) exhibit professional courtesy by not interfering with contractual relationships between other professional managers and their clients and (2) give notice to other professional managers of any contacts with their clients to the extent that, such notice is useful and does not interfere with the ability to compete fully;

B. Circulated a task force report regarding guidelines for "Marketing Versus Unethical Solicitation" that declared unethical, among other things, (1) certain truthful, nondeceptive advertising and

client solicitation, including solicitations designed to attract an association away from its current manager; (2) quotations for management services given to a prospective client before being selected to bid; (3) and offering free, non-management services, such as insurance and landscaping, as marketing incentives; and

C. Enforced (until June 22, 1993) Section B.4 of the Code of Professional Ethics for Professional Community Association Managers to restrict, among other things, general mailings to condominium or homeowner associations, solicitation targeting specific condominium or homeowner associations, telephone or personal solicitation designed to attract current clients of another manager, communicating with condominium or homeowners, and quoting prices for services before being asked to do so, by conducting investigations of and issuing warning letters to managers who solicited the business of condominium or homeowner associations.

PAR. 8. At least some CAI local chapters have discouraged their members from soliciting the business of condominium or homeowner associations.

PAR. 9. The purposes and effects of the combination or conspiracy and CAI's acts or practices have been and are to restrain competition unreasonably and to injure consumers by:

A. Depriving consumers of truthful information pertinent to the availability of a professional residential community association manager; and

B. Depriving consumers of the benefits of competition among professional residential community association managers.

PAR. 10. The acts and practices herein alleged were and are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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. CAI is a corporation organized, existing and doing business under, and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 1630 Duke Street, Alexandria, Virginia.

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

ORDER

I.

It is ordered, That, for purposes of this order, the terms "respondent" or "CAI" mean the Community Associations Institute, its trustees, councils, committees, boards, divisions, officers, representatives, delegates, agents, employees, successors, and assigns.

II.

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

A. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against truthful, non-deceptive advertising and solicitation, including, but not limited to: general mailings to condominium or homeowner associations, solicitation targeting specific condominium or homeowner associations, telephone or personal solicitation designed to attract current clients of another manager, communicating with condominium or home owners, quoting prices for services before being asked to do so, and offering to provide free services; or

B. Inducing, suggesting, urging, encouraging, or assisting any non-governmental person or organization to take any action that if taken by respondent would violate this order;

Provided that nothing contained herein shall prohibit respondent from formulating, adopting, disseminating to its component societies 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:

A. Within thirty (30) days after the date this order becomes final:

1. Remove any current code of ethics provision that is inconsistent with the provisions of Part II of this order; and

2. Revoke any interpretation or policy statement, including any report regarding "Marketing Versus Unethical Solicitation," that is inconsistent with the provisions of Part II of this order.

B. Maintain Article XII, Section 12, of the CAI Bylaws as amended and adopted on June 21, 1993, and revoke, during its recertification process, the charter of any local chapter unless and until the chapter certifies that it will ensure compliance with and the integrity of said Bylaw provision.

C. Cease and desist for a period of one (1) year from maintaining or continuing respondent's affiliation with any local chapter or other organization of homeowner association managers within one hundred and twenty (120) days after respondent learns or obtains information that would lead a reasonable person to conclude that said organization has engaged, after the date this order becomes final, in any act or practice that if engaged in by CAI would be prohibited by paragraph II of this order; unless prior to the expiration of the 120 day period said organization informs respondent by verified written statement of an officer that the organization has ceased and will not resume such act or practice, and respondent has no grounds to believe otherwise.

D. Within thirty (30) days after respondent takes any action pursuant to Part III.B or III.C above, notify the Federal Trade Commission of such action and provide all documentation related thereto.

E. Within thirty (30) days after the date this order becomes final, distribute by United States mail an announcement in the form shown in Appendix A to this order (hereinafter "Appendix A") to each Professional Community Association Manager, each member of the CAI Association Management Specialist and Chief Executive Officers of Management Companies committees, and each local chapter, and use its best efforts to encourage each chapter to publish Appendix A in its newsletter.

F. Within ninety (90) days after the date this order becomes final, publish in Community Management and Common Ground, or any successor publications: (1) this order, (2) the accompanying complaint, (3) Appendix A, and (4) any Code of Ethics provision, interpretation, policy statement, or other document that CAI revises pursuant to Part III.A above.

G. Within one hundred and twenty (120) days after the date this order becomes final, and annually for five (5) years thereafter on the anniversary date of this order, 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.

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

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

APPENDIX A

Dear Member:

This letter is to inform you that, without admitting liability or any wrongdoing, we have voluntarily entered into an agreement with the Federal Trade Commission that resulted in the entry of a consent order on [enter date]. Although the consent order required that CAI take specific actions with regard to CAI's ethics provisions and by-laws, CAI had already taken some of those actions before entry of the order. In June, 1993, CAI repealed the Professional Courtesy provision of the various CAI Codes of Ethics, and amended the by-laws to provide that all ethics provisions which relate to advertising or solicitation would be limited to prohibition of false or deceptive advertising by members, and that CAI would not otherwise limit or control advertising or soliciting practices.

In accordance with the terms of the order, you are hereby notified that, among other requirements of the order, CAI may not prohibit or restrict its members from engaging in any advertising or solicitation that is truthful and nondeceptive, by any means, including through provisions in the Code of Professional Ethics for PCAMS, the AMS Code of Professional Ethics, and the CEO-MC Code of Ethics. In particular, CAI may not interfere if its members solicit or advertise truthfully and nondeceptively, including, but not limited to, engaging in any of the following activities:

1. solicitation targeting specific condominium or homeowner associations;
2. telephone or personal solicitation designed to attract clients of another manager;
3. communicating with owners;
4. quoting prices for services before being asked to do so;
5. offering to provide free services; and
6. sending general mailings to condominium or homeowner associations.

Similarly, the order bars local chapters from interfering with members' advertising and solicitation activities, including, but not limited to, the type listed above.

The order contains a proviso permitting CAI and its chapters to adopt and enforce reasonable ethical guidelines prohibiting advertising, including unsubstantiated representations, that they reasonably believe would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

The order does not bar CAI from taking action against any member that a court or state regulatory agency has found engaged in tortious interference with contract.

For more specific information, members should refer to the FTC order itself. CAI will provide any member with a copy of the order and accompanying complaint upon request.

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Counsel
Community Associations Institute