

IN THE MATTER OF

SUPERMARKET DEVELOPMENT CORPORATION, ET AL.

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

Docket C-3224. Consent Order, Mar. 17, 1988--Modifying Order, Sept. 5, 1995

This order reopens a 1988 consent order (110 FTC 369) that settled allegations that the acquisition of the El Paso Division of Safeway Stores, Inc., by Supermarket Development Corporation and Furr's, Inc. would reduce supermarket competition in 12 towns in New Mexico and western Texas, and required, for ten years, prior Commission approval before acquiring supermarket assets. This order modifies the consent order by substituting for the prior-approval requirement a provision requiring Furr's Supermarket to notify the Commission at least 30 days before acquiring certain supermarkets in those areas.

ORDER REOPENING AND MODIFYING ORDER

On April 3, 1995, Furr's Supermarkets, Inc. ("FSI"), a successor to respondent Supermarket Development Corporation ("SDC") and its subsidiary Furr's, Inc. ("Furr's"), filed an Application to Modify Consent Order ("Application") in Docket No. C-3224, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. The Application requested that the Commission reopen and modify paragraph IV, the prior approval provision of the order in Docket No. C-3224, to permit FSI to acquire fee simple interests in real estate on which FSI currently operates a retail grocery store as a lessee. In its Application, FSI asserts that the public interest supports its request for reopening and modification. The Application was placed on the public record for thirty days, and no comments were received. Subsequently, on July 14 and 21, 1995, FSI filed amendments to its Application, requesting that the Commission set aside the prior approval requirement in its entirety, or in the alternative, substitute a prior notice requirement, citing the Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued on June 22, 1995, and published at 60 Fed. Reg. 39,745-47 (August 3, 1995) ("Prior Approval Policy Statement").

The Commission, in its Prior Approval Policy Statement, said, in relevant part, that "the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement." Consistent with the Commission's Prior Approval Policy Statement, the presumption is that the prior approval requirement in this order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceedings and modify the order in Docket No. C-3224 to set aside the prior approval requirement.

The Commission also stated that it would continue to fashion remedies as needed in the public interest, including ordering narrow prior notification requirements in certain limited circumstances. Accordingly, a prior notification provision may be used where there is a credible risk that a company would, but for an order, engage in an anticompetitive merger that would not be subject to the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission has determined that the record in this case evidences a credible risk that the respondent and its successors could engage in future anticompetitive acquisitions that would not be reportable under the HSR Act. The complaint in Docket No. C-3224 charged that respondent SDC's proposed acquisition of the El Paso Division of Safeway Stores, Inc. would, if consummated, violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the retail sale and distribution of food and grocery store items in supermarkets in twelve relevant geographic markets consisting of individual cities and towns in Texas and New Mexico. (Complaint, ¶¶ 13-15, 18-19). The complaint also alleged that there were nineteen cities and towns in Texas and New Mexico in which respondent SDC and Safeway both operated grocery stores (*Id.*, at ¶ 12), and paragraph IV of the order required respondent to obtain prior Commission approval before acquiring any retail grocery store or any interest in a retail grocery store in those nineteen cities and towns.

There has been no showing that the competitive conditions that gave rise to the Commission's complaint and order in Docket No. C-3224 no longer exist. Moreover, the size and localized nature of the relevant markets and the likely size and other characteristics of the market participants and relevant transactions as identified in the complaint and order indicate that future acquisitions that would currently be covered by the provisions of paragraph IV of the order would probably not be subject to the premerger notification and waiting period requirements of the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph IV of the order to substitute a prior notification requirement for the prior approval requirement.

The Commission has also determined, pursuant to the Prior Approval Policy Statement, to exclude from paragraph IV FSI's acquisitions of fee simple interests in real estate on which FSI currently operates a retail grocery store as a lessee. FSI has a contractual right to operate each of the leased stores for terms that extend beyond the remainder of the order. FSI's change in status from a leaseholder to a feeowner in any one or more of these stores would have no practical effect on competition in the relevant markets. Under the circumstances, it is unnecessary to require prior notice of these transactions.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

It is further ordered, That paragraph IV of the order in Docket No. C-3224 be, and hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten years from and after the date of service of this order, Furr's shall not, without prior notification to the Federal Trade Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six months of the date of offer to purchase the facility, or any interest in a retail grocery store or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store in the following cities or towns:

Albuquerque, New Mexico; Alamogordo, New Mexico; Artesia, New Mexico; Carlsbad, New Mexico; Clovis, New Mexico; El Paso, Texas; Espanola, New Mexico; Fort Stockton, Texas; Hobbs, New Mexico; Las Cruces, New Mexico; Las Vegas, New Mexico; Lovington, New Mexico; Midland, Texas; Odessa, Texas; Pecos, Texas; Portales, New Mexico; Roswell, New Mexico; Santa Fe, New Mexico; and Silver City, New Mexico.

The prior notification required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Furr's and not of any other party to the transaction. Furr's shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Furr's shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Provided further that these prohibitions shall not relate to the construction of new facilities by Furr's, or the leasing of a facility by Furr's not presently a grocery store in those locations, or the acquisition by Furr's of the fee simple interest in real estate for a facility in which it currently operates a retail grocery store as the lessee.

One year from the date of service of this order and annually thereafter, Furr's shall file with the Commission a verified written report of its compliance with this paragraph.

IN THE MATTER OF

GIANT FOOD, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6459. Modified Consent Order, April 13, 1964--Set Aside Order, Sept. 7, 1995

This order reopens a 1964 consent order--which prohibited Giant from inducing its suppliers to offer, or to receive from its suppliers, compensation for promotional services or facilities on terms that Giant knew were not proportionally equal to the terms those suppliers offered other retailers--and sets aside the consent order pursuant to the Commission's 1994 Sunset Policy Statement, under which the Commission presumed that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On June 5, 1995, Giant Food, Inc. ("Giant Food") filed its Request To Reopen and Vacate Order ("Petition") in this matter. Respondent requests that the Commission set aside the 1964 order, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, respondent affirmatively states that it has complied with the terms of the order. The Petition was placed on the public record for thirty days, and no comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's cease and desist order in Docket No. 6459, issued on June 1, 1961, affirmed as modified by the United States Court of Appeals for the District of Columbia Circuit on June

¹ Sunset Policy Statement, 59 Fed. Reg. at 45,289.

14, 1962, and modified by the Commission in accordance with the direction of the court on April 13, 1964, has been in effect for over thirty-one years. Consistent with the Commission's Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 6459.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened;

It is further ordered, That the Commission's order in Docket No. 6459 be, and it hereby is, set aside, as of the effective date of this order.

IN THE MATTER OF

THE SCOTTS COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3613. Complaint, Sept. 8, 1995--Decision, Sept. 8, 1995*

This consent order requires, among other things, Scotts, an Ohio-based corporation, to divest its Peters Consumer Water Soluble Fertilizer Business and related assets to Alljack & Company or another Commission-approved buyer by no later than December 31, 1995. If the divestiture is not completed on time, the consent order permits the Commission to appoint a trustee to complete the transaction. In addition, the Commission substituted a 10-year prior-notice provision for the 10-year prior-approval provision contained in the proposed consent agreement as it was published for public comment.

Appearances

For the Commission: *Howard Morse, Robert Cook and William Baer.*

For the respondent: *Jack Schafer, Covington & Burling, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the Scotts Company ("Scotts") has entered into an agreement and plan of merger with Stern's Miracle-Gro Products, Inc. ("Miracle-Gro"), whereby Scotts will acquire all of the outstanding voting securities of Miracle-Gro in exchange for voting securities of Scotts, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. THE RESPONDENT

1. Respondent Scotts is a corporation organized and existing under the laws of Ohio, with its principal place of business at 14111 Scottslawn Road, Marysville, Ohio. Scotts is a leading producer and marketer of consumer lawn care products. Its total revenues exceeded \$600 million in its fiscal year ended October 31, 1994.

2. At all times relevant herein, the respondent has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, the respondent has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

II. THE PROPOSED MERGER

3. Miracle-Gro is a privately-held corporation organized and existing under the laws of New Jersey. Miracle-Gro is the leading marketer of water soluble fertilizer in the United States. Miracle-Gro earned profits of approximately \$30 million on sales in excess of \$100 million in 1994.

4. On or about January 26, 1995, Scotts and Miracle-Gro executed an Agreement and Plan of Merger, wherein Scotts and Miracle-Gro agreed that Scotts would acquire the voting securities of Miracle-Gro in exchange for voting securities of Scotts (the "Proposed Merger"). The transaction is valued at approximately \$200 million.

III. THE RELEVANT MARKET

5. Water soluble fertilizer for consumer use ("consumer water soluble fertilizer") is one relevant line of commerce within which to analyze the effect of the Proposed Merger on competition. Water soluble fertilizer is a crystalline powder, easily dissolved in water, which is composed principally of nitrogen, phosphorous, and potash. Water soluble fertilizer for consumer use is typically sold in packages of less than 20 pounds; the five pound package is the most popular size. Water soluble fertilizer is typically applied to houseplants, gardens, shrubs, and flowers using a watering can or a hose-end

sprayer. Water soluble fertilizer produces noticeable effects on plants within a few days but lasts only a few weeks.

6. Consumer water soluble fertilizer is highly differentiated through branding. Scotts markets consumer water soluble fertilizer under the Peters brand name. Miracle-Gro markets consumer water soluble fertilizer under the Miracle-Gro brand name.

7. Fertilizer is also sold in granular form. Granular fertilizer is typically applied by dropping it onto the soil or, in some cases, mixing it with the soil. It takes several weeks for granular fertilizer to produce noticeable effects on plants; however, granular fertilizer does not have to be reapplied for two months to a year after application.

8. Consumers are not likely to switch from water soluble fertilizer to granular fertilizer in response to price changes because of differences between the two types of product in terms of convenience, method of application, and performance characteristics. Meaningful price comparisons between the various types of fertilizer are difficult to make.

9. Specialty fertilizers (such as liquid fertilizers, plant spikes, and organic fertilizers) also differ in characteristics and uses from water soluble fertilizer. Consumers are not likely to switch from water soluble fertilizer to those products in response to a price increase.

10. Water soluble fertilizers sold for agricultural and commercial use are sold in substantially larger packages than consumer water soluble fertilizer and are not alternatives for consumers.

11. The United States is one relevant geographic area within which to analyze the likely effect of the Proposed Merger on competition. The ability of domestic marketers of consumer water soluble fertilizer to engage in anticompetitive behavior is not significantly affected by the possible diversion of product produced overseas into the United States.

IV. CONCENTRATION

12. Miracle-Gro is by far the best selling consumer water soluble fertilizer in the United States. Scotts' Peters product is the third best selling consumer water soluble fertilizer in the United States. Miracle-Gro accounts for more than 70 percent and Scotts' Peters brand accounts for approximately six to seven percent of consumer water soluble fertilizer sales in the United States.

13. The United States consumer water soluble fertilizer market is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The Proposed Merger would increase the HHI by approximately 900 points, from approximately 5,500 to approximately 6,400.

14. Even if the relevant market is expanded to include other types of consumer garden fertilizer, or even consumer fertilizers generally, the market is highly concentrated with Scotts and Miracle-Gro having a combined market share of more than 35 percent of sales.

V. ENTRY CONDITIONS

15. Entry into the United States consumer water soluble fertilizer market would not be timely, likely, or sufficient to deter or offset the possible adverse effects of the Proposed Merger on competition.

16. Consumers typically purchase water soluble fertilizer on the basis of brand name and do so, in part, because the misapplication or overapplication of fertilizer can destroy the plants that the fertilizer is to benefit. The brand name is a signal that the product will consistently perform as it is expected to perform.

17. Consumers who purchase water soluble fertilizer on the basis of brand name are reluctant to try an unknown brand, even in response to a price change. That reluctance is, in part, based on the possibility of killing plants if the fertilizer does not perform as it is expected to perform. The price of the fertilizer is small relative to the replacement cost of the plants to which it is applied.

18. To achieve sufficient scale to affect competition in the United States consumer water soluble fertilizer market, and to do so in a timely manner, an entrant would have to employ a "pull" marketing strategy. A pull marketing strategy uses advertising to create a brand reputation to generate a high level of consumer demand to pull the product through retail distribution.

19. A pull marketing strategy involves a substantial sunk investment in advertising. In addition, a pull marketing strategy also involves a high degree of risk, because there is no guarantee that the marketing effort will succeed. The high sunk cost and high degree of risk would discourage the use of a pull marketing strategy by potential entrants or potential fringe expanders. Miracle-Gro spends approximately \$25 million annually on national advertising. The cost

of entry to new entrants or fringe expanders is likely to be even greater than the cost of entry originally borne by existing competitors.

20. Entry using a "push" marketing strategy involves the use of point of purchase promotions to attract customers in the store, as well as the use of retailer incentives to encourage retailers to recommend the product to customers in the store. Entry using a push marketing strategy would not involve the high sunk cost or high degree of risk that is associated with a pull marketing strategy. However, entry using a push marketing strategy would require many years to achieve sufficient sales to significantly impact competition.

21. Even entry using a pull marketing strategy may require considerable time. Lawn and garden retailing, including fertilizer retailing, is a highly seasonal business in which most sales are made to consumers during the spring growing season. Products to be sold during the spring growing season typically must be presented to retailers during the preceding summer; orders for such products typically are taken during the fall; and delivery of such products typically is made during early winter. An entrant or fringe expander that fails to make significant sales during one year must wait until the next year to gain sales.

VI. EFFECT OF THE PROPOSED MERGER ON COMPETITION

22. Miracle-Gro already exercises market power in the consumer water soluble fertilizer market. Miracle-Gro refuses to negotiate its prices with retailers and earns substantial profits.

23. Miracle-Gro is the closest substitute for Scotts' Peters brand in the United States consumer water soluble fertilizer market. Consumers who purchase Scotts' Peters brand are more likely to switch to Miracle-Gro than to any other brand.

24. Scotts' marketing strategy for Peters included competing more aggressively with Miracle-Gro during 1995. That strategy included technical improvements to the Peters product, a reduction of the price of the Peters product, and the production of television commercials directly comparing Peters to Miracle-Gro.

25. The merger of Scotts and Miracle-Gro may substantially lessen competition or tend to create a monopoly in the United States consumer water soluble fertilizer market, because, among other things:

- a. It will increase concentration substantially in a highly concentrated market;
- b. It will eliminate actual, direct, substantial, and potentially increased competition between Scotts' Peters brand and Miracle-Gro;
- c. It will facilitate coordinated interaction among sellers of water soluble fertilizer for United States consumer use;
- d. It will facilitate the unilateral exercise of market power by the merged firm;
- e. It will eliminate competition between the two closest substitutes among differentiated products in the consumer water soluble fertilizer market;
- f. It will likely result in increased prices for consumer water soluble fertilizer; and
- g. It will allow the merged firm to reduce innovation by delaying or reducing product development.

VII. VIOLATIONS CHARGED

26. The Agreement and Plan of Merger between Scotts and Miracle-Gro, described in paragraph three, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

27. The Proposed Merger would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by proposed respondent, the Scotts Company ("Scotts") of Stern's Miracle-Gro Products, Inc. ("Miracle-Gro"), and having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The proposed respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the

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

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

1. Respondent Scotts 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 14111 Scottslawn Road, Marysville, Ohio.

ORDER

I.

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

A. "*Respondent*" or "*Scotts*" means the Scotts Company, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by the Scotts Company, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "*Miracle-Gro*" means Stern's Miracle-Gro Products, Inc., its predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by Stern's Miracle-Gro Products, Inc.

C. "*Alljack*" means Alljack & Company and Celex Corporation, their predecessors, successors and assigns, subsidiaries, divisions, groups, and affiliates.

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

E. The term "*water soluble fertilizer*" means fertilizer that is sold as a powder, composed principally of nitrogen, phosphorous and potash, to be dissolved in water prior to application for use principally on houseplants, gardens, shrubs and flowers.

F. The term "*consumer water soluble fertilizer*" means water soluble fertilizer packaged for sale in containers of less than 20 pounds.

G. The term "*Peters Consumer Water Soluble Fertilizer*" means consumer water soluble fertilizer sold under the Peters brand name.

H. The term "*Peters Consumer Water Soluble Fertilizer Business*" means all assets, properties, business and goodwill, tangible and intangible, relating to the manufacture or sale of Peters Consumer Water Soluble Fertilizer in the United States, including, without limitation, the following:

1. All Peters trademarks;
2. Inventory;
3. The right to use the same packaging and trade dress that Peters has used for consumer water soluble fertilizer, provided that the right to use the Scotts trademark is limited to the right to sell existing inventory;
4. All customer lists, distribution agreements, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to manufacturing know-how), specifications, designs, drawings, processes, quality control data, and formulas;
5. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
6. All rights under warranties and guarantees, express or implied;
7. All books, records, and files; and
8. All items of prepaid expense.

The term "Peters Consumer Water Soluble Fertilizer Business" does not include accounts receivable, the Peters production facilities located at Allentown, Pennsylvania, the use of intangible assets (including the use of the Peters trademarks on water soluble fertilizer in containers of 20 pounds or more) for the production or sale of agricultural or commercial products, or the use of the Peters trademarks on potting soil, perlite, or vermiculite.

I. The term "*Peters Business*" means all assets, properties, business and goodwill, tangible and intangible, relating to the manufacture or sale of all products that Scotts has sold under the Peters trademarks during the five (5) years preceding the date on which this agreement is accepted by the Commission, including, without limitation, the Allentown, Pennsylvania plant where Peters products are manufactured and including, without limitation, the following:

1. The Peters Consumer Water Soluble Fertilizer Business;
2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;
3. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes, quality control data, and assets relating to research and development;
4. Inventory and storage capacity;
5. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;
6. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
7. All rights under warranties and guarantees, express or implied;
8. All books, records, and files; and
9. All items of prepaid expense.

II.

It is further ordered, That:

A. Scotts shall divest, through sale or exclusive perpetual license, absolutely and in good faith, no later than December 31, 1995, the Peters Consumer Water Soluble Fertilizer Business as an ongoing business and shall also, at the time of such divestiture, divest such additional ancillary assets and ancillary businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Peters Consumer Water Soluble Fertilizer Business.

B. The divestiture shall be made either

1. No later than ten (10) days from the date this order becomes final, to Alljack, pursuant to the agreements between Scotts and Alljack, which are Confidential Appendices II and III, or

2. To an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

The purpose of the divestiture of the Peters Consumer Water Soluble Fertilizer Business is to ensure that the Peters Consumer Water Soluble Fertilizer Business continues to operate as an ongoing business in the same business in which it is engaged at the time this Agreement is accepted by the Commission and to remedy the lessening of competition resulting from the acquisition, as alleged in the Commission's complaint.

C. Pending divestiture of the Peters Consumer Water Soluble Fertilizer Business, respondent shall take such actions as are necessary to maintain the viability and marketability of the Peters Consumer Water Soluble Fertilizer Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any part of the Peters Consumer Water Soluble Fertilizer Business.

D. Unless the acquirer has its own source of supply, the divestiture shall include an agreement by Scotts (the "Supply Agreement") to supply water soluble fertilizer for a period of two (2) years from the date of the divestiture required by this paragraph II. The water soluble fertilizer supplied pursuant to the Supply Agreement shall, at the option of the acquirer, be of the same

chemical composition as, and of a quality equal to or greater than, the water soluble fertilizer marketed by the Peters Consumer Water Soluble Fertilizer Business at the time this agreement is accepted by the Commission for comment. The Supply Agreement shall obligate Scotts to supply such water soluble fertilizer at a price equal to direct cash cost of raw materials, packaging, and labor (based on expenses during the previous fiscal year), plus ten (10) percent. The Supply Agreement shall obligate Scotts to supply annually, at a minimum, at the option of the acquirer, an amount of water soluble fertilizer, in containers ready for sale or in bulk, equal to the greatest unit amount of Peters Consumer Water Soluble Fertilizer produced by or on behalf of the Peters Consumer Water Soluble Fertilizer Business during

1. The twelve (12) months prior to the divestiture required by this paragraph II, and
2. Each of the five (5) calendar years preceding the divestiture required by this paragraph II.

E. The divestiture shall include a non-exclusive perpetual license, with no continuing royalty, to manufacture Peters Consumer Water Soluble Fertilizer for sale in the United States as it has been manufactured at any time during the twelve (12) months preceding the date on which this agreement containing consent order is accepted by the Commission for public comment, as well as a royalty-free license for all improvements to Peters' Water Soluble Fertilizer technology that have been made up to the time of the divestiture required by this paragraph II. Such license shall give the acquirer the right to make any improvements to the licensed technology; provided, however, that such license need not give the acquirer rights in Scotts intellectual property that Scotts has not used in connection with Peters Consumer Water Soluble Fertilizer.

F. Respondent shall not offer consumer water soluble fertilizer (including, but not limited to, consumer water soluble fertilizer bearing the Miracle-Gro trademark) for sale using the Scotts trademark for a period of two (2) years following the divestiture required by this paragraph II; provided, however, during that two (2) year period, Scotts may continue to sell the following products using the Scotts trademark:

1. Scotts Water-Soluble Plant Food Powder, All Purpose Formula (8 ounce and 16 ounce sizes);
2. Scotts Water-Soluble Plant Food Powder, Houseplant/Foliage Formula (8 ounce and 16 ounce sizes); and
3. Scotts Water-Soluble Plant Food Powder, African Violet/Flowering Formula (8 ounce size).

G. At the time of the execution of a divestiture agreement between Scotts and a proposed acquirer of the Peters Consumer Water Soluble Fertilizer Business, Scotts shall provide the acquirer with a complete list of all Scotts employees who have spent the majority of their time on the development, distribution, marketing, or sale of Peters Consumer Water Soluble Fertilizer during the twelve (12) months prior to the date on which this agreement is accepted by the Commission. Such list shall state each such individual's name, position, address, telephone number, and a description of the duties of and work performed by the individual in connection with the Peters Consumer Water Soluble Fertilizer Business.

H. Scotts shall provide the individuals identified pursuant to paragraph II.G. of this order with financial incentives to continue in their employment positions during the period covered by the Hold Separate Agreement, hereto attached, and to accept employment with the Commission-approved acquirer, if such employment is offered, at the time of the divestiture. Such incentives shall include:

1. Continuation of all employee benefits offered by Scotts until the date of the divestiture; and
2. A bonus equal to 25 percent of the total annual compensation of any employee who agrees to employment with the Commission-approved acquirer, payable upon the beginning of such employee's employment by the Commission-approved acquirer.

I. The divestiture agreement may protect Scott's interest in the Scotts trademark on inventory acquired by the acquirer of the Peters Consumer Water Soluble Fertilizer Business and may provide for the continued use by Scotts of the Peters trademarks for agricultural and commercial products and consumer soil products.

J. Respondent shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect

until such time as respondent has made the divestiture required by this order.

III.

It is further ordered, That:

A. If Scotts has not divested, absolutely and in good faith and with the Commission's prior approval, the Peters Consumer Water Soluble Fertilizer Business by December 31, 1995, the Commission may appoint a trustee to divest the Peters Consumer Water Soluble Fertilizer Business. If the trustee has not divested the Peters Consumer Water Soluble Fertilizer Business within six (6) months after the trustee's appointment, then the trustee may divest either the Peters Consumer Water Soluble Fertilizer Business or the Peters Business. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Scotts shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

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

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business required by this order.

4. The trustee shall have six (6) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture of the Peters Consumer Water Soluble Fertilizer Business, which shall be subject to the prior approval of the Commission. If no acquirer of the Peters Consumer Water Soluble Fertilizer Business is approved by the Commission by the end of the six (6) month period (or at the end of any extensions to that period pursuant to this paragraph III.B.4.), then the trustee shall have twelve (12) additional months to accomplish the divestiture of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Peters Consumer Water Soluble Fertilizer Business or the Peters Business, or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by the respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission, or, in the case of a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is

submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a Commission arrangement (based on sales price) contingent on the trustee's divesting the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

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

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

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee

issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

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

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Scotts shall not, without prior notification to the Commission, directly or indirectly:

A. Acquire any stock, share capital, equity, or other interest in any person engaged in the sale of consumer water soluble fertilizer in the United States within the year preceding such acquisition; provided, however, that an acquisition of securities will be exempt from the requirements of this paragraph if, after such acquisition of securities, Scotts will hold cumulatively no more than two (2) percent of the outstanding shares of any class of securities of such person; or

B. Enter into any agreement or other arrangement to transfer direct or indirect ownership, management, or control of any assets used for or previously used for (and still suitable for use for) the sale of consumer water soluble fertilizer in the United States; provided, however, that prior notice shall not be necessary for the acquisition of assets used to manufacture consumer water soluble fertilizer, the acquisition of assets in the ordinary course of business, or the acquisition of assets valued at less than \$100,000 from the same person within any twelve (12) month period.

The prior notifications required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification,

notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Scotts and not of any other party to the transaction. Scotts shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Scotts shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

V.

It is further ordered, That within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the divestiture provisions of paragraphs II and III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture; provided, however, that respondent is not obligated to produce copies of documents subject to any legally recognized privilege.

VI.

It is further ordered, That one (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs II and IV of this order.

VII.

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

VIII.

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

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

B. Upon five (5) days notice to respondent, with respondent's counsel present, and without restraint or interference, to interview officers, employees, or agents of respondent.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between the Scotts Company ("Scotts"), a corporation organized, existing, and doing business under and by virtue of the laws of Ohio, with its office and principal place of business at 14111 Scottslawn Road, Marysville, Ohio and the Federal Trade Commission ("the Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively the "Parties").

PREMISES

Whereas, on January 26, 1995, Scotts entered into an Agreement and Plan of Merger with Stern's Miracle-Gro Products, Inc. ("Miracle-Gro") to acquire all of the voting securities of Miracle-Gro in exchange for voting securities of Scotts (hereinafter the "Acquisition");

Whereas, Scotts is a leading producer and marketer of consumer lawn care products, including consumer water soluble fertilizer under the Peters brand name;

Whereas, Miracle-Gro, with its principal office and place of business located at 800 Port Washington Blvd., Port Washington, New York is the leading marketer of water soluble fertilizer in the United States;

Whereas, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission;

Whereas, if the Commission accepts the Agreement Containing Consent Order ("consent order"), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules;

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Peters Consumer Water Soluble Fertilizer Business (as defined in paragraph I of the consent order) and Miracle-Gro during the period prior to the final acceptance of the consent order by the Commission (after the 60-day

public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy;

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro and the Commission's right to have the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, and Miracle-Gro continue as viable competitors;

Whereas, the Commission is concerned that the exchange of competitively sensitive information between persons operating and managing Miracle-Gro, the Peters Business, and the Peters Consumer Water Soluble Fertilizer Business may lessen the competitive viability of any divestiture if the Commission accepts the proposed consent order and makes it final;

Whereas, the purposes of the Hold Separate and the consent order are:

1. To preserve the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, and Miracle-Gro as viable, independent businesses pending the Commission's final approval of the consent order and the divestiture of a viable and ongoing enterprise,
2. To remedy any anticompetitive effects of the Acquisition,
3. To preserve the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, and Miracle-Gro as, ongoing and competitive entities engaged in the same business in which they are presently employed until the Commission gives final approval to the consent order and the divestiture is achieved, and
4. To protect the competitive viability of Miracle-Gro, the Peters Business, and the Peters Consumer Water Soluble Fertilizer Business by preventing the exchange of competitively sensitive information among persons managing or operating those businesses;

Whereas, Scotts' entering into this Hold Separate shall in no way be construed as an admission by Scotts that the Acquisition is illegal;

Whereas, Scotts understands that no act or transaction contemplated by this Hold Separate shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade

Commission Act by reason of anything contained in this Hold Separate:

Now, therefore, the parties agree, upon the understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that it will not seek further relief from Scotts with respect to the Acquisition if the consent order is made final, except that the Commission may exercise any and all rights to enforce this Hold Separate, the consent order to which it is annexed and made a part thereof and the order, once it becomes final and in the event that the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business pursuant to the consent order, as follows:

1. Scotts agrees to execute and be bound by the consent order.
2. To ensure the complete independence and viability of the Peters Consumer Water Soluble Fertilizer Business, the Peters Business and Miracle-Gro and to assure that no competitive information is exchanged between Miracle-Gro and either the Peters Consumer Water Soluble Fertilizer Business or the Peters Business, Scotts shall hold Miracle-Gro separate and apart as it is presently constituted, from the date this Hold Separate is accepted until the earlier of the completion of the divestiture obligations required by the consent order or three (3) days after the Commission withdraws its acceptance of the consent order pursuant to Section 2.34 of the Commission's Rules, on the following terms and conditions:

- a. Except as required by law, and except to the extent that necessary information is exchanged in defending investigations or litigation, obtaining legal advice, or complying with this Hold Separate or the consent order, Scotts (including, but not limited to, any officer, director, employee, or agent of Scotts) shall not receive or have access to, or the use of, any material confidential information of Miracle-Gro or the activities of the board of directors of Miracle-Gro (the "Miracle-Gro Board") not in the public domain that relates to water soluble fertilizer, nor shall Miracle-Gro (including, but not limited to any officer, director, employee or agent of Miracle-Gro) receive or have access to, or the use of, any material confidential information of Scotts or the activities of the board of directors of Scotts (the "Scotts Board") not in the public domain that relates to

water soluble fertilizer; provided, however, after the consent order is made final, Scotts and Miracle-Gro may exchange information concerning water soluble fertilizer sold outside the United States. Scotts may receive on a regular basis from Miracle-Gro aggregate financial and other information necessary to allow Scotts to file financial reports, tax returns, personnel reports, and reports with the Securities and Exchange Commission. Any such information that is obtained pursuant to this subparagraph shall be used only for the purpose set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Scotts from sources other than Miracle-Gro or the Miracle-Gro Board and includes but is not limited to customer lists, price lists, prices, marketing methods, advertising plans, patents, technologies, processes, or other trade secrets.)

b. Except as expressly provided in this Hold Separate, all manufacturing, sales, licensing, and other business relationships relating to water soluble fertilizer between Scotts and Miracle-Gro shall be conducted at arm's length and on commercial terms available to other persons. Furthermore, Scotts and Miracle-Gro may not integrate or coordinate the marketing of the products of Scotts and Miracle-Gro.

c. Scotts shall circulate a notice of this Hold Separate and consent order, in the form attached hereto as Attachment A, to the management employees (including, but not limited to, officers) of Scotts and Miracle-Gro (including, but not limited to, members of the board of directors of Scotts (the "Scotts Board") and members of board of directors of Miracle-Gro (the "Miracle-Gro Board")), as well as to any employees or agents of Scotts or Miracle-Gro who participate directly or indirectly in managing or operating any business affected by this Hold Separate or the consent order. Scotts shall also appropriately display a notice of this Hold Separate and consent order in the form attached hereto as Attachment A.

d. Scotts shall report in writing to the Commission every sixty (60) days concerning Scott's efforts to accomplish the purposes of this Hold Separate.

e. Scotts shall maintain the marketability, viability, and competitiveness of the Peters Consumer Water Soluble Fertilizer Business and the Peters Business, and shall not cause or permit the destruction removal, wasting, deterioration, or impairment of any

assets or business it may have to divest except in the ordinary course of business and except for ordinary wear and tear, and Scotts shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

f. Scotts shall continue to provide to the Peters Business and the Peters Consumer Water Soluble Fertilizer Business such support services as it provided during the twelve (12) months and the calendar year prior to the acceptance of the consent order by the Commission. The Peters Business and the Peters Consumer Water Soluble Fertilizer Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Peters Business and the Peters Consumer Water Soluble Fertilizer Business, which employees shall be the employees of the Peters Business or the Peters Consumer Water Soluble Fertilizer Business that have managed and operated the Peters Business and the Peters Consumer Water Soluble Fertilizer Business during the twelve (12) months prior to the Commission's acceptance of consent order by the Commission and may also be hired from sources other than the Peters Business or the Peters Consumer Water Soluble Fertilizer Business. The compensation of the management employees of the Peters Business and the Peters Consumer Water Soluble Fertilizer Business shall be based in significant part on the sales of the Peters Business or the Peters Consumer Water Soluble Fertilizer Business, as applicable. Scotts shall facilitate the efforts of the Peters Business and the Peters Consumer Water Soluble Fertilizer Business to promote Peters products (including, but not limited to Peters Consumer Water Soluble Fertilizer products) to retailers, both at trade shows and otherwise, pending the divestiture required by the consent order. Scotts' obligation to facilitate those efforts shall include, without limitation, permitting the Peters Business and the Peters Consumer Water Soluble Fertilizer Business to participate either with Scotts or independently in all industry trade shows. Scotts shall provide the Peters Business and the Peters Consumer Water Soluble Fertilizer Business with any funds to accomplish the foregoing.

g. Scotts shall cause the Peters Consumer Water Soluble Fertilizer Business to expend in 1995 at an annual rate at least equal to the funds expended for 1993 or 1994 (whichever is greater) for advertising and promotion of Peters Consumer Water Soluble

Fertilizer during 1995 and shall cause the Peters Consumer Water Soluble Fertilizer Business to increase such spending as reasonably necessary in light of competitive conditions. If the Peters Consumer Water Soluble Fertilizer Business is not divested by December 31, 1995, then Scotts shall thereafter cause the Peters Consumer Water Soluble Fertilizer Business to expend for advertising and promotion of Peters Consumer Water Soluble Fertilizer at an annual rate of no less than 200 percent of the amount expended for 1995 for that purpose until such time as divestiture has been accomplished.

h. The Peters Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Peters Business, which employees shall be the employees of the Peters Business that have managed and operated the Peters Business during the twelve (12) months prior to the Commission's acceptance of Agreement by the Commission and may also be hired from sources other than the Peters Business. Each Peters Business management employee shall execute a confidentiality agreement prohibiting the disclosure of any confidential information of the Peters Business.

3. Scotts agrees that it will comply with the provisions of this paragraph three of this Hold Separate, in addition to the terms and conditions in paragraph two, from the date this Hold Separate is accepted until the earlier of the Commission's final approval of the consent order or three (3) days after the Commission withdraws its acceptance of the consent order pursuant to Section 2.34 of the Commission's Rules:

a. All earnings and profits of Miracle-Gro shall be retained separately by Miracle-Gro. Miracle-Gro shall be held separate and apart and shall be operated independently of Scotts except to the extent that Scotts must exercise direction and control over Miracle-Gro to assure compliance with this Agreement or the consent order. Except as expressly provided in this Hold Separate, all manufacturing, sales, licensing, and other business relationships between Scotts and Miracle-Gro shall be conducted at arm's length and on commercial terms available to other persons.

b. Except as required by law, and except to the extent that necessary information is exchanged in defending investigations or litigation, obtaining legal advice, or complying with this Hold Separate or the consent order, Scotts (including, but not limited to,

any officer, director, employee, or agent of Scotts) shall not receive or have access to, or the use of, any material confidential information of Miracle-Gro or the activities of the Miracle-Gro Board not in the public domain, nor shall Miracle-Gro (including, but not limited to, any officer, director, employee or agent of Miracle-Gro) receive or have access to, or the use of, any material confidential information about the Peters Consumer Water Soluble Fertilizer Business or the Peters Business not in the public domain. Scotts may receive on a regular basis from Miracle-Gro aggregate financial and other information necessary to allow Scotts to file financial reports, tax returns, personnel reports, and reports with the Securities and Exchange Commission. Any such information that is obtained pursuant to this subparagraph shall be used only for the purpose set forth in this subparagraph.

c. Scotts shall not change the composition of the Miracle-Gro Board and, except as expressly provided in this Hold Separate, Scotts shall not change the composition of the management of Miracle-Gro (except that the Miracle-Gro Board shall have the power to remove management employees for cause) and members of the Miracle-Gro Board shall not serve as officers, directors, employees, or agents of Scotts. Scotts shall not exercise direction or control over, or influence directly or indirectly, Miracle-Gro or the Miracle-Gro Board; provided, however, Scotts may exercise only such direction and control as is necessary to assure compliance with this Hold Separate the order and with all applicable laws. Meetings of the Scotts Board and meetings of the Miracle-Gro Board shall be audio recorded and the recording retained for two (2) years after the termination of the Hold Separate. Notwithstanding, in order to maintain Miracle-Gro's value, Scotts may direct the management of Miracle-Gro with regard to the following matters: investment decisions relating to Miracle-Gro's cash, decisions relating to the handling of claims and litigation, proposed acquisitions and divestitures outside of the ordinary course of business, and changes in Miracle-Gro's corporate structure.

d. The Chairman of the Miracle-Gro Board shall have the power to remove members of the Miracle-Gro Board for cause and to require Scotts to appoint replacement members to the Miracle-Gro Board who are not officers, directors, employees, or agents of Scotts. If the Chairman of the Miracle-Gro Board ceases to act or fails to act

diligently, a substitute chairman shall be appointed from among the members of the Miracle-Gro Board.

e. If necessary, Scotts shall provide Miracle-Gro with sufficient working capital to maintain the same level of sales as during the twelve (12) months preceding the date of the Hold Separate.

f. All material transactions of Miracle-Gro, out of the ordinary course of business and not precluded by this Hold Separate, shall be subject to a majority vote of the Miracle-Gro Board. The Miracle-Gro Board shall serve at the cost and expense of Scotts. Scotts shall indemnify the Miracle-Gro Board against any losses or claims of any kind that might arise out of its involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Miracle-Gro Board directors.

g. Scotts shall take all reasonable steps, consistent with the other provisions of this Hold Separate, to maintain the marketability, viability, and competitiveness of Miracle-Gro, and not to cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or business it may have to divest except in the ordinary course of business and except for ordinary wear and tear, and Scotts shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of Miracle-Gro.

4. Should the Federal Trade Commission seek in any proceeding to compel Scotts to divest itself of the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, Miracle-Gro, or any additional assets, or to seek any other equitable relief, Scotts shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Scotts also shall waive all rights to contest the validity of this Hold Separate.

5. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request with reasonable notice to Scotts made to its General Counsel, Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business and Miracle-Gro shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro relating to compliance with this Hold Separate;

b. Upon five (5) days notice to Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro and without restraint or interference from it, to interview officers or employees of Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro, which officers or employees may have counsel present, regarding any such matters.

6. This Hold Separate shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

The Scotts Company ("Scotts") has entered into an Agreement Containing Consent Order ("consent order") and an Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business. Until after the Commission's order becomes final and the Peters Consumer Water Soluble Fertilizer Business or the Peters Business is divested, Stern's Miracle-Gro Products, Inc. ("Miracle-Gro") must be managed and maintained as a separate, ongoing business, independent of all other Scotts businesses. All competitive information relating to Miracle-Gro must be retained and maintained on a confidential basis by the persons involved in Miracle-Gro, and such persons are prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Scotts business, including the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

Any violation of the Agreement Containing Consent Order or the Agreement to Hold Separate, incorporated by reference as part of the

Concurring Statement

120 F.T.C.

Agreement Containing Consent Order, may subject Scotts to civil penalties and other relief as provided by law.

APPENDIX II

[CONFIDENTIAL]

APPENDIX III

[CONFIDENTIAL]

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission has adopted a policy not to include prior approval requirements in its orders in merger cases. *See* Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, 60 Fed. Reg. 39,745 (Aug. 3, 1995), Commissioner Azcuenaga dissenting (60 Fed. Reg. at 39,476). This is the first new order to be issued since the policy was adopted. Although I dissented from the decision of the Commission to change its policy, the order is consistent with the new policy, and I have voted to issue it.

IN THE MATTER OF

FOOD SERVICE EQUIPMENT INDUSTRY INC., ET AL.

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

Docket 4433. Consent Order, Oct. 15, 1941--Set Aside Order, Sept. 21, 1995.

This order reopens a 1941 consent order--which prohibited the Food Service from selling certain equipment through anyone other than recognized dealers, and from selling equipment directly to buyers--and sets aside the consent order, as to respondent Food Service Equipment Distributors Association, pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On June 30, 1995, the Foodservice Equipment Distributors Association, formerly known as Food Service Equipment Industry, Inc. ("FEDA") filed its Petition To Reopen and Set Aside Consent Order ("Petition") in this matter. FEDA requests that the Commission set aside the 1941 order pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued July 22, 1994, published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, FEDA affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on August 18, 1995. No comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's order in Docket No. 4433 was issued on October 15, 1941, and has been in

¹ See Sunset Policy Statement, 59 Fed. Reg. at 45, 289.

effect for approximately 54 years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 4433 as to respondent Foodservice Equipment Distributors Association.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened;

It is further ordered, That the Commission's order in Docket No. 4433 be, and it hereby is, set aside as to respondent Foodservice Equipment Distributors Association, as of the effective date of this order.

IN THE MATTER OF

ALPINE INDUSTRIES, INC., ET AL.

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

Docket C-3614. Complaint, Sept. 22, 1995--Decision, Sept. 22, 1995

This consent order prohibits, among other things, two Minnesota-based sister companies and their principal officer from making unsubstantiated claims about the ability of any air cleaning product to eliminate, remove, clear or clean any indoor air pollutant -- or any quantity of indoor air pollutants -- from a user's environment.

Appearances

For the Commission *Kerry O'Brien, Linda Badger, Jeffrey Klurfeld and Joan Bernstein.*

For the respondents: *William Erhart, Marvin & Erhart, Anoka, MN.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Alpine Industries, Inc., a corporation, Living Air Corp., a corporation, and William J. Converse, individually and as an officer of Alpine Industries, Inc. and Living Air Corp. ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Alpine Industries, Inc. is a Tennessee corporation, with its principal office or place of business at 9199 Central Avenue N.E., Blaine, Minnesota.

Respondent Living Air Corp. is a Tennessee corporation, with its principal office or place of business at 11673 Tulip Street, Coon Rapids, Minnesota.

Respondent William J. Converse is an officer of Alpine Industries, Inc. and Living Air Corp. Individually or in concert with others, he formulates, directs and controls the acts and practices of

Alpine Industries, Inc. and Living Air Corp., including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Living Air Corp.

PAR. 2. Respondents have advertised, labelled, offered for sale, sold, and distributed ozone generators, including the "Living Air Model XL15," as air cleaning products for use in homes, offices, and other commercial establishments.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for their Living Air Model XL15 ozone generator, including but not necessarily limited to the attached Exhibits A-B. These advertisements contain the following statements:

- A. WHAT IS INDOOR AIR POLLUTION? . . . WHAT CAN BE DONE ABOUT IT? . . . Air filters are only partially effective.

...

HOW DOES LIVING AIR WORK? . . . Ozone breaks down or oxidizes impurities in the air. It destroys mold, mildew, fungi and bacteria. Ozone rids the air of harmful smoke and odors created by cigarettes, cooking, pets and disease. Living Air purifiers recreate outdoor air inside of your home or business. . . .

Each Living Air unit is equipped with a purifier control knob to regulate the amount of ozone being produced. Simply set the control for the number of square feet being serviced YOU CONTROL THE AMOUNT OF OZONE. . . .

OZONE • WHAT IT IS AND HOW IT WORKS . . . All that's left behind is the safe, pure, breathable oxygen necessary to life. . . . •NO HARSH AND HAZARDOUS CHEMICALS •NO HEAVY PERFUME ODORS •NO CLEANING PRODUCT ODORS •NO POLLUTANTS •NO MOLDS •NO FUNGI •NO BACTERIA. . . . (Exhibit A: promotional material)

- B. Government Agencies rate INDOOR AIR POLLUTION as the nation's biggest pollution problem

Styrene, benzene, allergens, trichlorethylene, sulphur dioxide, dust mites, bacteria, carbon tetrachloride, chloroform, pollens, dust, hydrocarbons, formaldehyde, ammonia, mold spores. . . .

Indoor Air Pollutants

DUST . . . Causes eye irritation, allergies, eye-ear-nose-throat infections, asthma attacks, fatigue and depression.

BACTERIA . . . Causes colds, flu, respiratory infections, eye infections. . .

MOLD SPORES . . . Causes allergies, sinus headaches, irritability, fatigue and depression. . . .

How does indoor air pollution affect your body?

...

EYE AND NASAL IRRITANTS

Sulfur dioxide (lethal poison), ammonia, acrolein (in tobacco smoke, a carcinogen), benzene (carcinogen), formaldehyde, pollen, mold spores, dust, dust mites, bacteria. . .

BRONCHIAL CONSTRICTORS

Sulphur dioxide (lethal poison), ammonia, allergens, bacteria. . .

PULMONARY IRRITANTS

Chloroform (lethal poison, suspected carcinogen), nitrogen dioxide (lethal poison), carbon tetrachloride (suspected carcinogen), formaldehyde, small particulates, bacteria. . .

POISONS

Cyanide (from tobacco smoke), hydrocarbons (tobacco smoke and other combustions), nitrogen dioxide, sulphur dioxide.

CARCINOGENS

Acrolein, benzene, chloroform, carbon tetrachloride.

ASPHYXIANT

Hydrocarbons. . . .

Inefficient Air Filtration Systems

. . . AIR FILTRATION SYSTEMS ARE NOT THAT EFFICIENT. . . Much of the air is unaffected, and remains polluted!

Media Filters and Electronic Air Cleaners

. . .

BOTH TYPES HAVE THE SAME MAJOR DRAWBACKS:

1. Air filtration systems only affect the air that passes through them. Much of the air in your building does not get to the filter on a regular basis.
2. Filters have to be CLEANED or REPLACED regularly. They get clogged, reduce airflow, lose efficiency and make the blower motor work harder.

AIR PURIFICATION - The Natural Way

. . .

Together, activated oxygen and negative ions both clean and purify the air naturally. . . .

LIVING AIR PURIFICATION - How Does It Work?

. . .

•NO HARSH AND HAZARDOUS CHEMICALS •NO HEAVY PERFUME ODORS •NO CLEANING PRODUCT ODORS •NO POLLUTANTS •NO MILDEW •NO MOLDS •NO FUNGI •NO BACTERIA. . . .

A QUIZ . . . How would you answer?

Does anyone in your family suffer from allergies?

Would you like to relieve their suffering?

Do you worry about bacteria in the air?

Would you feel more comfortable knowing that bacteria in the air was being killed by nature?

Does the thought of breathing in dust and the accompanying dust mites bother you?

Would you be more comfortable if you didn't have to worry about them?

. . . .

Does tobacco smoke bother or irritate anyone?

Would you like to reduce or eliminate that irritation? (Exhibit B: promotional material)

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

A. When used as directed, the Living Air Model XL15 eliminates, removes, clears, or cleans formaldehyde, sulfur dioxide, ammonia, trichlorethylene, benzene, chloroform, carbon tetrachloride, odors, nitrogen dioxide, mold, mildew, bacteria, dust, cigarette smoke, pollen, and hydrocarbons from a user's environment.

B. The use of ozone is more effective in cleaning or purifying indoor air than air cleaning products that use filters.

C. The Living Air Model XL15 does not create harmful by-products.

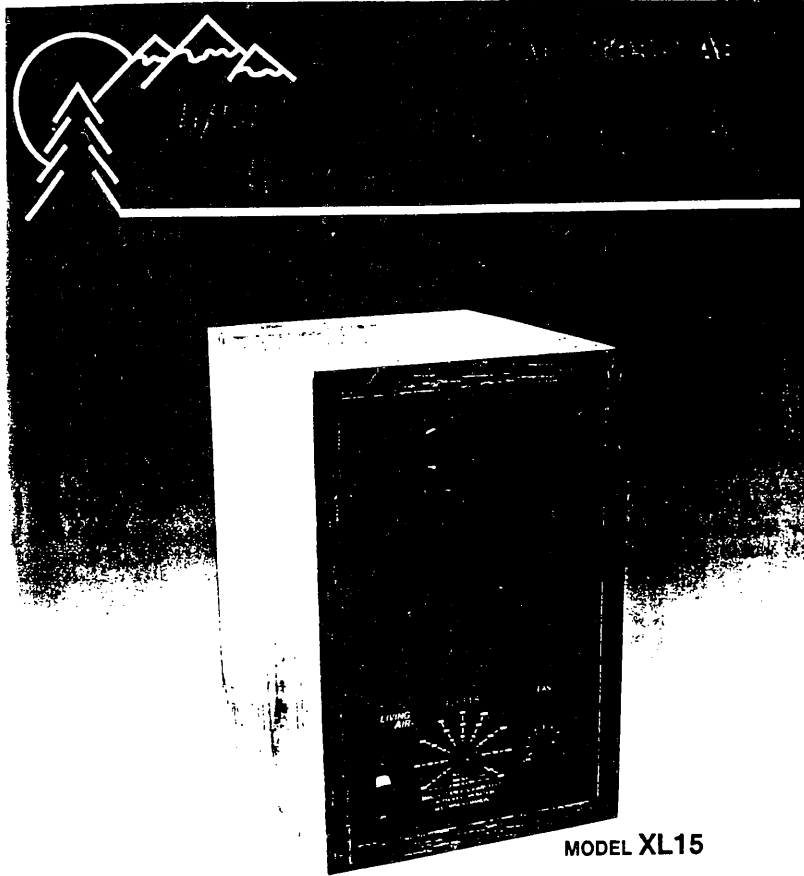
D. When used as directed, the Living Air Model XL15 prevents or provides relief from colds, flu, allergies, asthma, sinus headaches, and ear, eye, nose and throat infections.

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

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

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

EXHIBIT A



Living Air Purification Systems

■■■ BREATHE EASY

EXHIBIT A

Complaint

120 F.T.C.

EXHIBIT A

**WHAT IS INDOOR AIR POLLUTION?**

Smoke, mold, mildew, odors and dust are some of the indoor pollutants easy to see and smell. Others like gases, bacteria and pollen are more difficult to detect. Recently, many people have found themselves to be allergic to various chemicals found in their work place. These pollutants can enter the air from synthetic material like carpeting, upholstery and various wall paneling.

Static electricity, although not technically defined as a pollutant, is a common problem in various indoor environments.

WHY IS IT SUCH A PROBLEM?

During the energy crisis of the 1970s we began to insulate and seal our buildings more tightly. This saved energy, but it also caused pollutants to be trapped indoors.

WHAT CAN BE DONE ABOUT IT?

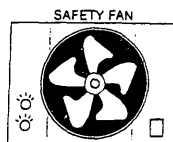
Many different devices have been used in unsuccessful attempts to clean indoor air. Spray and wick products, basically perfumes, are pollutants themselves. Air filters are only partially effective. Early ionizers removed particles from the air but also darkened the walls.

HOW DOES LIVING AIR WORK?

Living Air engineering has created the new generation of air purifiers by combining an all new ionizer with an ozone generator. Airborne particles such as dust, pollen and bacteria are electrically charged (ionized) to remove them from the breathable air.

Ozone breaks down or oxidizes impurities in the air. It destroys mold, mildew, fungi and bacteria. Ozone rids the air of harmful smoke and odors created by cigarettes, cooking, pets and disease.

Living Air purifiers recreate outdoor air inside of your home or business.

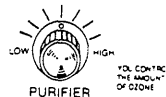


The machines are mechanically safe. The safety fan stops immediately if anything is inserted between the blades, even a

tender finger. This feature works even if the front grill is removed.

Each Living Air unit is equipped with a purifier control knob to regulate the amount of ozone being produced. Simply set the control for the number of square feet being serviced.

CONTROL KNOB



PURIFIER

FOR CONTROLLING THE AMOUNT OF OZONE

WHEN WILL I SEE RESULTS?

Almost immediately! If unusual pollutants are introduced—a visiting cigar smoker or other unusual odor—you can raise the ozone level for a short time and quickly clean up the air.

Result times can often vary: if pollutant concentration is severe it will take longer for the machine to have its full effect.

IS IT EXPENSIVE?

No, not at all. The machines are quite affordable. There are no costly filters that need to be replaced over and over again. Maintenance is simple: ozone plates and lint screens can be removed and gently hand washed. Low operating cost is another big plus. The machines will add only a few pennies a day to the average utility bill.

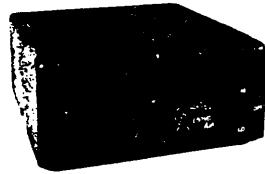
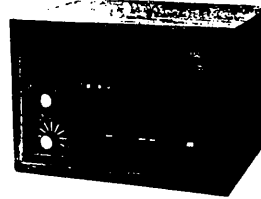
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Complaint

EXHIBIT A

MODEL 150

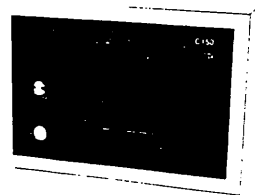
The MODEL 150 is a very versatile machine. A self-contained portable air purification unit, it removes annoying odors and pollutants from almost every home, small office or shop. Eliminates tobacco smoke, odors, mold, mildew, fungi and bacteria. The 150 works best where forced-air heating/cooling systems are operating on a continuous air circulation basis.

**MODEL PEAK**

This powerful little unit is designed to knock out air pollution associated with heavy automobile traffic. Plug the PEAK into your car's cigarette lighter and say goodbye to smog, gas and exhaust fumes. The PEAK, with its standard adaptor, can also be plugged into any standard wall socket. As quick as that, it can begin to clean and revitalize the air in your office, motel room or other small, confined space.

MODEL C150

The Model C150 was created for general purpose applications where space is confined and the problems are severe. Ideal for offices and shops having unusually persistent odors, continuous sources of pollution, or high humidity. High ozone output boosts the overall air purification efficiency that is often necessary to clean up trouble spots.

**MODEL XL15**

The XL15 is perfect for areas as small as ten square feet or as large as 2,500 square feet. The large 350 CFM fan is very powerful yet extremely quiet. That makes it perfect for air cleaning applications where unnecessary noise may be a concern. Beauty salon operators love this model, even the ones who do acrylic nails. Greater fan speed and higher ozone output capabilities makes the XL15 perfect for air cleaning jobs whether big and small. Other possible applications: medical or dental labs, law offices, fur storage rooms, paint stores, public rest rooms, employee break rooms, pet shops, photography labs and graphic design studios.



EXHIBIT A

OZONE • WHAT IT IS AND HOW IT WORKS

The air we breathe is made up of two joined oxygen atoms (O₂). If we take three O₂ molecules and recombine them so that there are two units with three oxygen atoms each, we now have ozone (O₃). These ozone molecules travel through the air. When they encounter a pollutant one oxygen atom will break away and attach itself to the pollutant thereby oxidizing it. All that's left behind is the safe, pure, breathable oxygen necessary to life.

IONS • INDOOR SPACE TRAVELERS

Living Air's pulsating negative ion field generator reestablishes the ratio of negative to positive ions found in the outdoors. Ionized (charged) particles are removed from the air by attraction to solid surfaces.

•NO HARSH AND HAZARDOUS CHEMICALS •NO HEAVY PERFUME ODORS •NO CLEANING PRODUCT ODORS
•NO POLLUTANTS •NO MOLDS •NO FUNGI •NO BACTERIA

- Dust
- Pollen
- Smoke
- Odors
- Mold
- Mildew
- Static Electricity

FEATURES

Model	Height	Width	Depth	Weight	Power Usage
XL 15	11 3/4"	8"	9 3/4"	16 LB.	30 Watts
150	8"	11 3/4"	9 3/4"	16 LB.	30 Watts
C150	8"	11 3/4"	9 3/4"	17 LB.	30 Watts
PEAK	3"	6 1/2"	6 1/2"	4 LB.	15 Watts

DIMENSIONS & ELECTRICAL SPECIFICATIONS

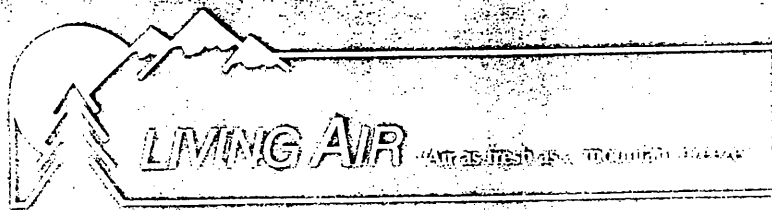
Model	Ozone Output Control	Fan Control	Washable Lint Screen	Ozone Plates	Activated Charcoal Filter	Fan	Ozone Output MG/HR Max
XL 15	1	1	1	2*	0	350 CFM	312
150	1	1	1	1	0	75 CFM	134
C150	1	1	1	2	0	75 CFM	312
PEAK	Combined	Feature	1	1	1	17 CFM	15

*Plus one 1/4 plate

DISTRIBUTED BY:



EXHIBIT B



The FACTS Concerning
INDOOR AIR
POLLUTION

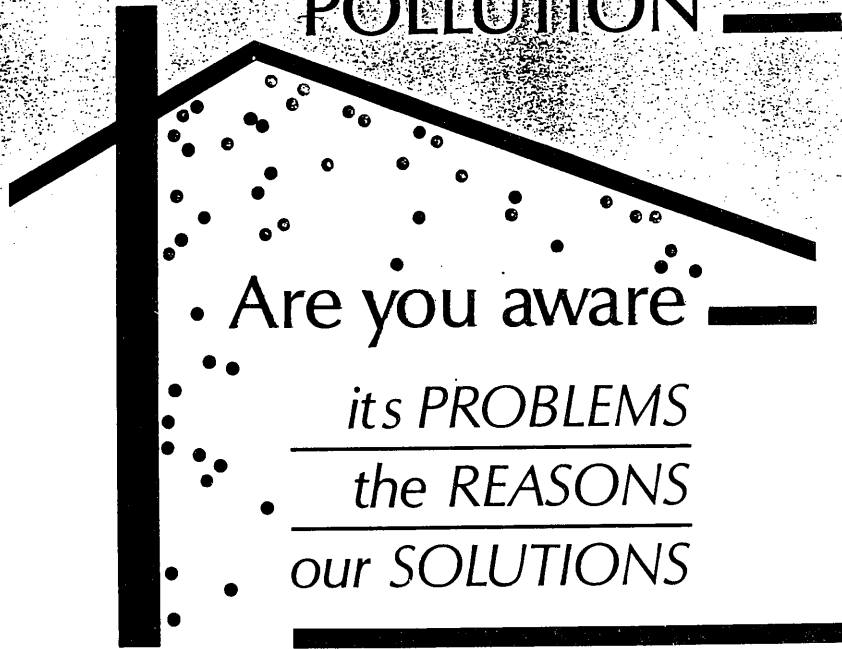


EXHIBIT B

The average person spends

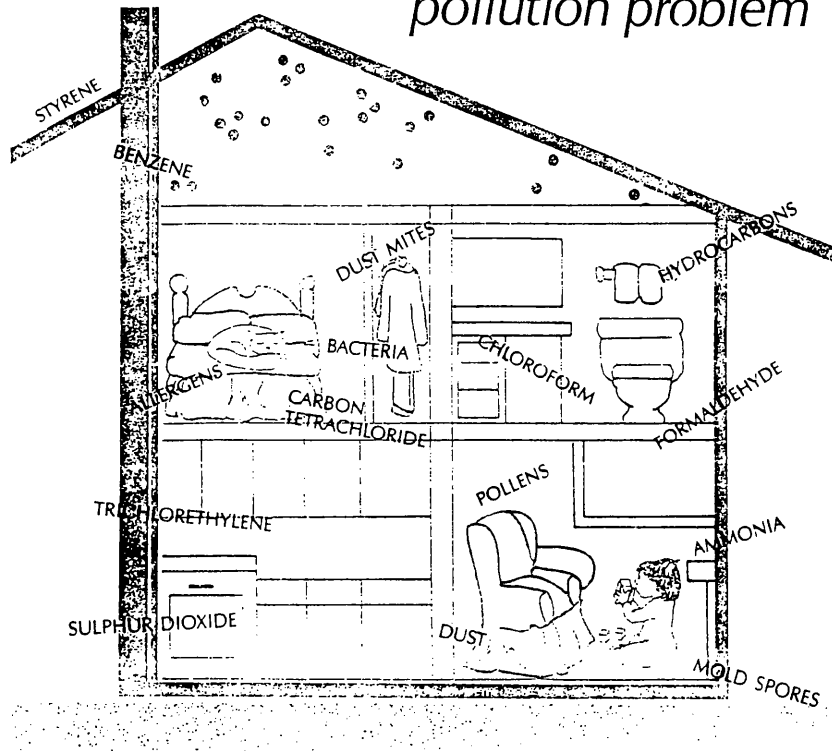
90% of their time indoors

During the energy crisis in the 1970s building construction practices changed—Homes, offices, schools and all types of buildings are now insulated and sealed more tightly. This saves energy, but also causes pollutants to be trapped indoors.

EXHIBIT B

Government Agencies rate INDOOR AIR POLLUTION

*as the nation's biggest
pollution problem*



Complaint

120 F.T.C.

EXHIBIT B

Tightly Constructed Buildings Don't Breathe . . .

- ☒ Little or no AIR EXCHANGE.
- ☒ Indoor air is RE-CIRCULATED.
- ☒ INDOOR AIR POLLUTION is trapped indoors!

Clothing-

Pollens, oils (from smoke), gases, other allergens and odors, attach themselves to the fabric. Once indoors, clothing releases allergens, gases and odors into the air. . .

Furnishings-

New carpeting, drapes, furniture and upholstery emit chemical fumes, noxious gases and odors. . .

Construction Materials-

Paint, plywood, particle board (from cabinets, furniture, paneling) emit chemical fumes, noxious gases and odors. . .

Stoves, Furnaces, Water Heaters-

Escaping unvented fumes contain carbon monoxide and nitrogen dioxide. . .

Heating/Cooling Systems

Ductwork gathers dust and moisture, creating mold and mold spores, and hosting bacteria and dust mites, and circulates dust, mold spores, bacteria and dust mites throughout the building. . .

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Complaint

EXHIBIT B

Indoor Air Pollutants

DUST

Did you know? 42,000 dust mites can live in only one ounce of dust! Forty pounds of dust generated per year per 1,500 square feet of space, hosting 15 species of dust mites!

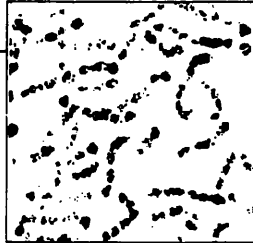
Causes eye irritation, allergies, eye-ear-nose-throat infections, asthma attacks, fatigue and depression.



BACTERIA

Did you know? Bacteria are found in your heating and cooling system, house pets, garbage, bathrooms—everywhere in your home!

Causes colds, flu, respiratory infections, eye infections...



MOLD SPORES

Did you know? Mold spores are found in your heating and cooling system, in damp clothing, cleaning materials and the moisture in your ceilings, walls, carpets, drapes...

Causes allergies, sinus headaches, irritability, fatigue and depression.



Complaint

120 F.T.C.

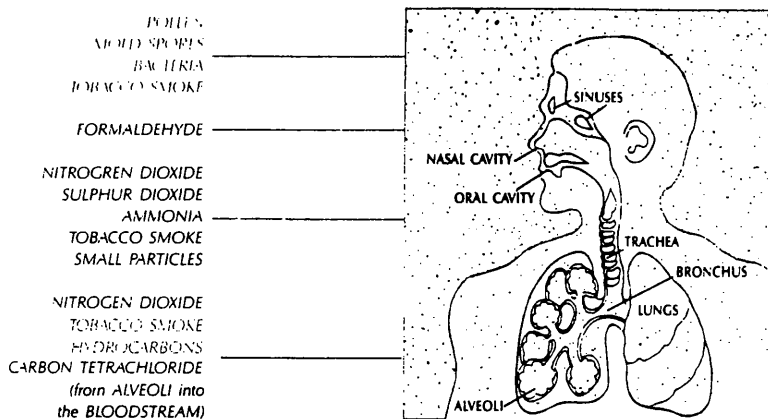
EXHIBIT B

Some Pollutants, Their Sources & Symptoms

BENZENE	Paint, new carpets, new drapes, upholstery	Headaches, eye/skin irritation, fatigue, cancer
AMMONIA	Tobacco smoke, cleaning supplies	Eye/skin irritation, headaches, nose-bleeds, sinus problems
CHLOROFORM	Paint, new drapes, upholster, new carpeting	Headaches, asthma attacks, dizziness, eye irritation, skin irritation
FORMALDEHYDE	Tobacco smoke, plywood, cabinets, furniture, particle board, office dividers, new carpets, new drapes, wallpaper, panelling	Headaches, eye/skin irritation, drowsiness, fatigue, respiratory problems, memory loss, depression, gynecological problems, cancer
SULPHUR DIOXIDE	Tobacco smoke	Asthma attacks, eye/skin irritation, sinus problems, lung cancer
HYDROCARBONS	Tobacco smoke, gas burners, furnaces	Headaches, fatigue, nausea, dizziness, breathing difficulty
TRICHLORETHYLENE	Paints, glues, furniture, wallpaper	Headaches, eye/skin irritation, respiratory irritation
CARBON TETRACHLORIDE	Paint, new drapes, new carpets, cleaning supplies	Headaches, dizziness, fatigue

EXHIBIT B

How does indoor air pollution affect your body?



EYE AND NASAL IRRITANTS

Sulphur dioxide (lethal poison), ammonia, acrolein (in tobacco smoke, a carcinogen), benzene (carcinogen), formaldehyde, pollen, mold spores, dust, dust mites, bacteria...

BRONCHIAL CONSTRICTORS

Sulphur dioxide (lethal poison), ammonia, allergens, bacteria...

PULMONARY IRRITANTS

Chloroform (lethal poison, suspected carcinogen), nitrogen dioxide (lethal poison), carbon tetrachloride (suspected carcinogen), formaldehyde, small particles of dust, bacteria

POISONS

Cyanide (from tobacco smoke), hydrocarbons (tobacco smoke and other combustions), nitrogen dioxide, sulphur dioxide.

CARCINOGENS

Acrolein, benzene, chloroform, carbon tetrachloride.

ASPHYXIANT

Hydrocarbons.

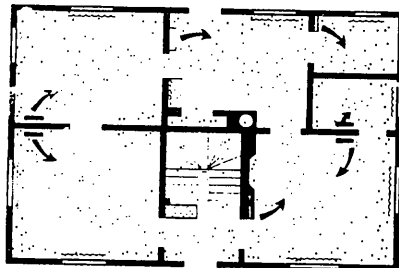
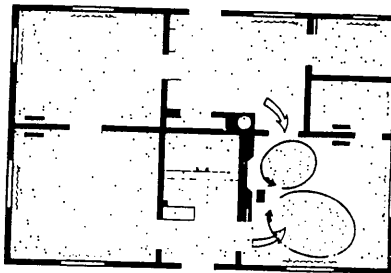
EXHIBIT B

Inefficient Air Filtration Systems

LOCALIZED AREA UNITS (Media Filter)

Only the air caught in the air stream goes through the filter.

Air trapped behind drapes, under furniture, in fabric (upholstery, clothing, carpeting, drapes, etc.) does not get filtered nearly as often, and sometimes not at all.



WHOLE BUILDING UNITS (Media Filter, or Electronic Air Cleaner)

The only air that gets "filtered" is the air which is actually drawn through the unit. "Dirty" air constantly invades the space.

Recirculates the same air—does not get behind drapes or under furniture.

*AIR FILTRATION SYSTEMS ARE NOT THAT EFFICIENT...
Much of the air is unaffected, and remains polluted!*

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Complaint

EXHIBIT B

Media Filters and Electronic Air Cleaners

TYPICAL GLASS FIBER FILTER

Traps larger particulates with better efficiency than small matter. To permit air-flow, it must permit some pollutants to pass through. Fiber Filters typically only stop about HALF of the smoke, dust and bacteria in the air. (HEPA filters boast over 90% efficiency, and still leave about 1/5 of the smoke and dust particulates in the air that goes through it.)



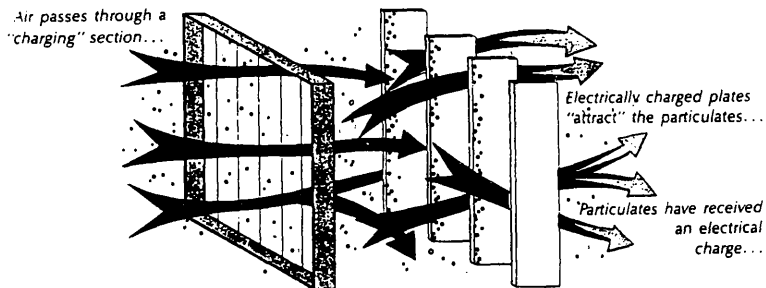
ACTIVATED CARBON FILTER

Designed to trap smaller particulates and some gasses—the higher density the filter, the slower the air-flow, manufacturers compromise on filtering efficiency. Many gasses and odors, and 1/3 to 1/2 of the smoke and dust particulates still get through.



Both types of filters get clogged, reduce efficiency and air flow, and must be replaced often.

ELECTRONIC AIR CLEANERS

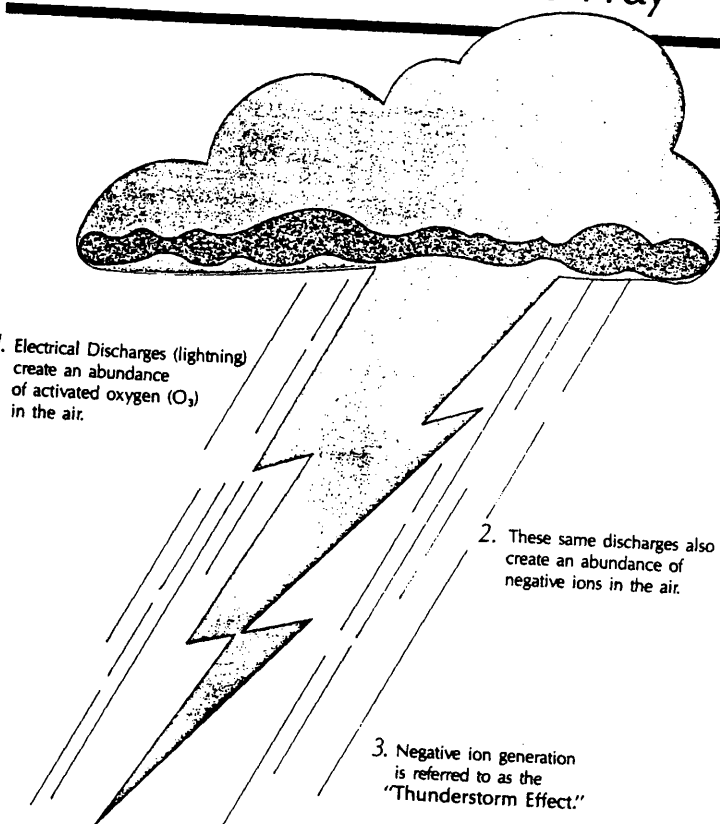


BOTH TYPES HAVE THE SAME MAJOR DRAWBACKS.

1. Air filtration systems only affect the air that passes through them. Much of the air in your building does not get to the filter on a regular basis.
2. Filters have to be CLEANED or REPLACED regularly. They get clogged, reduce air-flow, lose efficiency and make the blower motor work harder.

EXHIBIT B

AIR PURIFICATION— The Natural Way



1. Electrical Discharges (lightning) create an abundance of activated oxygen (O₃) in the air.

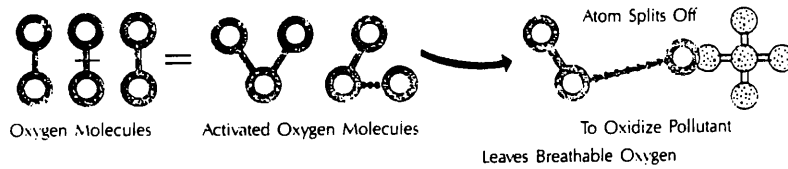
2. These same discharges also create an abundance of negative ions in the air.

3. Negative ion generation is referred to as the "Thunderstorm Effect."

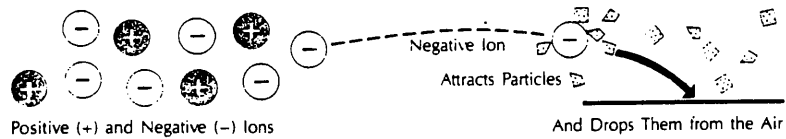
*Together, activated oxygen and negative ions
both clean and purify the air—naturally!*

LIVING AIR PURIFICATION— How Does It Work?

What is Activated Oxygen—How it Works



Negative Ions—Indoor Space Traveler



NO HARSH AND HAZARDOUS CHEMICALS
 NO HEAVY PERFUME ODORS • NO CLEANING
 PRODUCT ODORS • NO POLLUTANTS • NO MILDEW
 NO MOLDS • NO FUNGI • NO BACTERIA

EXHIBIT B

A QUIZ . . .

How would you answer?



	YES	NO
Does anyone in your family suffer from allergies?	<input type="checkbox"/>	<input type="checkbox"/>
Would you like to relieve their suffering?	<input type="checkbox"/>	<input type="checkbox"/>
Do you worry about bacteria in the air?	<input type="checkbox"/>	<input type="checkbox"/>
Would you feel more comfortable knowing that bacteria in the air was being killed by nature?	<input type="checkbox"/>	<input type="checkbox"/>
Does the thought of breathing in dust and the accompanying dust mites bother you?	<input type="checkbox"/>	<input type="checkbox"/>
Would you be more comfortable if you didn't have to worry about them?	<input type="checkbox"/>	<input type="checkbox"/>
Do you find yourself spraying "air fresheners" or "air deodorizer" around the house before company arrives?	<input type="checkbox"/>	<input type="checkbox"/>
Would it be nice not to worry about it?	<input type="checkbox"/>	<input type="checkbox"/>
Does tobacco smoke bother or irritate anyone?	<input type="checkbox"/>	<input type="checkbox"/>
Would you like to reduce or eliminate that irritation?	<input type="checkbox"/>	<input type="checkbox"/>
Are there ever cooking odors which linger?	<input type="checkbox"/>	<input type="checkbox"/>
Would you like to be able to control them?	<input type="checkbox"/>	<input type="checkbox"/>
Do animal odors ever build up?	<input type="checkbox"/>	<input type="checkbox"/>
Would you like it if that didn't happen?	<input type="checkbox"/>	<input type="checkbox"/>
Would you like to try the LIVING AIR PURIFIER in your home for a couple of days at no cost or obligation?	<input type="checkbox"/>	<input type="checkbox"/>
After you have tried it, if the LIVING AIR PURIFIER has significantly improved your indoor air quality, would it be worth between \$ _____ and \$ _____ (plus tax and shipping) to keep it in your home forever?	<input type="checkbox"/>	<input type="checkbox"/>

Complaint

EXHIBIT B

TO OUR CUSTOMERS

You can help. News of our products is spread by word-of-mouth, and by referrals. Please help by referring me to some people you know who would enjoy the benefits of a LIVING AIR PURIFICATION SYSTEM in their home or place of business.

Think of: Friends, relatives, business associates, neighbors, merchants—and others you know well.

And, who do you know out of town? In other parts of the country?

NAME _____ ADDRESS _____

ADDRESS _____ RES. PHONE _____

CITY _____ STATE _____ ZIP _____ WORK PHONE _____

WORK _____ OCCUPATION _____ HOW LONG _____

CHILDREN _____ AGES _____ AT HOME _____ PETS _____

NEEDS _____

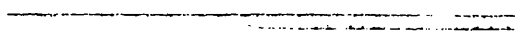
NOTES _____

EXHIBIT B



LIVING AIR

*Building a stronger America using the
old fashioned work ethic and the latest
technology helping each other to benefit—
Just the way it should be!*



DECISION AND ORDER

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

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

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

1. Respondent Alpine Industries, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located in the City of Blaine, State of Minnesota.

Respondent Living Air Corp. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located in the City of Coon Rapids, State of Minnesota.

Respondent William J. Converse is an officer of said corporations. He formulates, directs, and controls the policies, acts

and practices of said corporations, and his principal office and place of business is located at Living Air Corp.'s 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 purposes of this order, the following definitions shall apply:

A. The term "*air cleaning product*" shall mean any product, equipment, or appliance designed or advertised to remove, treat, or reduce the level of any pollutant(s) in the air.

B. The terms "*indoor air pollutant(s)*" or "*pollutant(s)*" shall mean one or more of the following: formaldehyde, sulfur dioxide, ammonia, trichlorethylene, benzene, chloroform, carbon tetrachloride, odors, nitrogen dioxide, mold, mildew, bacteria, dust, cigarette smoke, pollen, and hydrocarbons, or any other gaseous or particulate matter found in indoor air.

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

I.

It is ordered, That respondents Alpine Industries, Inc. and Living Air Corp., corporations, their successors and assigns, and their officers; William J. Converse, individually and as an officer of Alpine Industries, Inc. and Living Air Corp.; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication,

A. Such product's ability to eliminate, remove, clear, or clean any indoor air pollutant from a user's environment; or

B. Such product's ability to eliminate, remove, clear, or clean any quantity of indoor air pollutants from a user's environment;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents Alpine Industries, Inc. and Living Air Corp., corporations, their successors and assigns, and their officers; William J. Converse, individually and as an officer of Alpine Industries, Inc. and Living Air Corp.; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. The use of ozone is more effective in cleaning or purifying indoor air than other air cleaning methods;

B. The product does not create harmful by-products; or

C. When used as directed, the product prevents or provides relief from any medical or health-related condition;

unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents Alpine Industries, Inc. and Living Air Corp., corporations, their successors and assigns, and their officers; William J. Converse, individually and as an officer of Alpine Industries, Inc. and Living Air Corp.; and respondents' agents,

representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, the efficacy, performance, or health-related benefit of any such product, unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

IV.

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

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

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

V.

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

VI.

It is further ordered, That the individual respondent shall, for a period of five (5) years after the date of service of this order upon him, promptly notify the Commission, in writing, of his discontinuance of his present business or employment and of his affiliation with a new business or employment. For each such new affiliation, the notice shall include the name and address of the new business or employment, a statement of the nature of the new business or employment, and a description of respondent's duties and responsibilities in connection with the new business or employment.

VII.

It is further ordered, That the corporate respondents shall, within ten (10) days from the date of service of this order upon them, distribute a copy of this order to each of their officers, agents, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, or who is in communication with customers or prospective customers, or who has any responsibilities with respect to the subject matter of this order; and for a period of three (3) years, from the date of issuance of this order, distribute a copy of this order to all of respondents' future such officers, agents, representatives, independent contractors, and employees.

VIII.

It is further ordered, That the corporate respondents shall, within ten (10) days from the date of service of this order upon them, deliver by first class mail or in person a copy of this order or Attachment A to each of their present distributors or retailers of their ozone generators.

IX.

This order will terminate on September 22, 2015, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying

consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

X.

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

ATTACHMENT A

[To Be Printed on company letterhead]

[date]

Dear [distributor]:

Alpine Industries, Inc. and Living Air Corp. recently settled a civil dispute with the Federal Trade Commission ("FTC") regarding certain claims for our product, the Living Air Model XL15 ozone generator. As a part of the settlement, we are required to make sure that our distributors and wholesalers stop using or distributing advertisements or promotional materials containing those claims.

We have entered into this agreement to resolve a dispute with the FTC on certain claims it contends are not substantiated. The agreement entered into is not an admission that we have violated the law. However, as part of the agreement, we will not be making certain claims unless they are supported by competent and reliable scientific evidence.

Your assistance will be greatly appreciated in fulfilling the terms of the agreement. We have agreed not to make the following claims unless we have competent and reliable scientific evidence: 1) that the product eliminates or clears indoor air pollutants; 2) that the product creates no harmful by-products; 3) that the product provides relief from specific medical or health-related conditions; and 4) that the use of ozone is more effective in cleaning or purifying indoor air than other air cleaning products such as filters.

We ask each of our dealers, distributors, and sales managers to cooperate with us to ensure that no current advertising or promotional material makes these claims. Again, your assistance in this regard will be greatly appreciated.

Sincerely,

William J. Converse
President
Alpine Industries, Inc., and
Living Air Corp.

Complaint

120 F.T.C.

IN THE MATTER OF

QUANTUM ELECTRONICS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3615. Complaint, Sept. 22, 1995--Decision, Sept. 22, 1995*

This consent order prohibits, among other things, the Rhode Island-based company and its principal officers from making unsubstantiated claim about the ability of any air cleaning product to eliminate, remove, clear or clean any indoor air pollutant -- or any quantity of indoor air pollutants -- from a user's environment.

Appearances

For the Commission: *Kerry O'Brien, Linda Badger, Jeffrey Klurfeld and Joan Bernstein.*

For the respondents: *Kevin Brill, Corrente, Brill & Kusnitz, Ltd., Providence, R.I.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Quantum Electronics Corporation, a corporation, and Albert O. Coates, Maurice Lepenven, and Jacqueline J. Maynard, individually and as officers of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Quantum Electronics Corporation is a Rhode Island corporation, with its principal office or place of business at 110 Jefferson Blvd., Warwick, Rhode Island.

Respondent Albert O. Coates is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

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

Respondent Jacqueline J. Maynard is an officer of the corporate respondent. Individually or in concert with others, she formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have advertised, labelled, offered for sale, sold, and distributed ozone generators, including the "Panda 200," as air cleaning products for use in homes, offices, other commercial establishments, and boats.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for their Panda 200 ozone generator, including but not necessarily limited to the attached Exhibits A-F. These advertisements contain the following statements:

A. Odors, Bacteria [sic] and gasses are all molecular in size. Because of this, no filtration device can remove them from your home. However, they are effectively eliminated when in contact with an ozone molecule, such as those generated by the Panda unit....The cleansing action of ozone is the result of oxidation, i.e., the breaking down of the molecular structure of noxious and toxic gases as well as bacterial and organic matter, the source of mold, mildew and most odors. The process is one of elimination, NOT filtration or scenting. While the effects are permanent, when fostering conditions persist, periodic treatment will prevent future growth.

Why Use the QUANTUM AIR PURIFIER?: ... No Harmful By-Products....

Your home can have a cleaner, healthier environment, free of pollutants. The following is a list of specific contaminants generally found in the home. [formaldehyde, nitrogen dioxide, sulfur dioxide, carbon dioxide, ammonia, volatile organic compounds, dust, molds, mildew, hydrogen sulfide, methane, trichlorethylene, chlorine]....

"It has really helped to relieve Kristie's (daughter) allergic reaction to dust mites." We run it 24 hours a day." Linda A. Brown/Huntington, MD....

"I have recommended it to my patients with allergy and breathing problems and they have used it with great alleviation of their symptoms. I think this is a

wonderful product and I feel everyone should own one." Dr. William F. Welles/San Diego, CA

"The effectiveness of ozone as a bactericide is well documented and it is a comforting aid in maintaining sterile conditions in my surgeries." Nomate T. Kpea, D.O., M.P.H./Medical Director

The LaserDermatology Centers of Rhode Island

"After using a Quantum ozone generator for three months, PRACTICAL SAILOR is convinced that the machine completely eliminates odors, and kills mildew." PRACTICAL SAILOR MAGAZINE, December 1990.

(Exhibit A: promotional material)

B. Quantum ozone generators are self-contained portable air purification devices for the purpose of neutralizing a variety of annoying odors and pollutants from room atmosphere and contents. These devices clean and purify by oxidizing, (breaking down) the molecular structure of noxious or toxic gases. Quantum ozone generators are proven effective against mold and mildew, viruses, fungi and bacteria, both airborne and settled....

PANDA SERIES 200: ... This is the smallest unit, designed for home use. Can be regulated downward for totally safe and quiet use in small bedrooms or upward for whole-house purification.... Eliminates all odors, mold and mildew problems and generally enhances indoor air quality. (Exhibit B: promotional material)

C. As we move further into the 90's, there will no doubt be more and more companys [sic] entering the air filtration business, taking advantage of the growing health consciousness of the American population, making health claims in an effort to solicit interest in their products. In February, 1989, Consumer Reports conducted a test of 27 air filtration devices then on the market.... "No clear evidence exists to establish the usefulness of purifiers in preventing or treating allergic respiratory disease." Why did all 27 of the models tested fail? Because all they did was filter airborne particles.... Because it did nothing about filtering the harmful gasses in the air. The noxious and toxic gasses -- the molecules -- passed right on through. There was nothing in those units to stop the mold and mildew, the viruses and fungi and the bacteria in the air There are about 600,000,000 molecules in .1 microns and the air filtration devices missed every one of them. For a moment, think of a micron as being the size of a barn. Now think of .1 microns as being the size of that barn door. A Quantum ozone generator will eliminate the fly that wants to go through that barn door! ...

Let's say the family pet makes a bad mistake on the living room carpet.... Now, place a little 7 1/2 pound Panda ozone generator in the same room for about 4 hours.... You will have neutralized it all safely, inexpensively and, most importantly, permanently.

(Exhibit C: promotional material)

D. Another group of three patients noted marked improvement in extrinsic asthma/reactive airway disease triggered by mold incitants.... Dramatic improvement was noted after several weeks of diligent use of the Quantum Panda to the point where they had minimal symptoms and required almost no bronchodilator medication. (Exhibit D: promotional material)

E. We wanted to let you know that we absolutely love our Quantum air machine.... best of all, my asthma has improved 100%. (Exhibit E: promotional material)

F. Before you provided me with an Air Purification Unit for my home, my three children: ... had major problems with asthma on a recurring basis I am so happy to tell you that not one of my children have required the first bit of medical attention for respiratory problems since your Unit arrived. (Exhibit F: promotional material)

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

A. When used as directed, the Panda 200 eliminates, removes, clears, or cleans formaldehyde, sulfur dioxide, ammonia, trichlorethylene, carbon dioxide, hydrogen sulfide, methane, odors, nitrogen dioxide, mold, mildew, bacteria, dust, chlorine, fungi, volatile organic compounds, viruses, and noxious or toxic gases from a user's environment.

B. The use of ozone is more effective in cleaning or purifying indoor air than air cleaning products that use filters.

C. The Panda 200 does not create harmful by-products.

D. When used as directed, the Panda 200 prevents or provides relief from allergies, asthma, and viruses.

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

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

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

EXHIBIT A

7/92 - Present



Panda AIR PURIFIER

EXHIBIT A



QUANTUM ELECTRONICS CORPORATION
31 GRAYSTONE ST. WARWICK RI 02886 401-732-6770 • FAX 401-732-6772



For each "PANDA" purchased a donation is made to:



Quotes and Comments

"It has really helped to relieve Krisite's (daughter) allergic reaction to dust mites." We run it 24 hours a day."
Linda A. Brown / Huntington, MD

"Since I purchased the Quantum unit I can breathe easily all year round. The unit is wonderful."
Dina Difore / R. I. Teen Institute

"I have recommended it to my patients with allergy and breathing problems and they have used it with great alleviation of their symptoms. I think this is a wonderful product and I feel everyone should own one."
Dr. William F. Welles / San Diego, CA

"The effectiveness of ozone as a bactericide is well documented and it is a comforting aid in maintaining sterile conditions in my surgeries."
Norma I. Kpao, D.O., M.P.H. / Medical Director
The LaserDermatology Centers of Rhode Island

"After using a Quantum ozone generator for three months, PRACTICAL SAILOR is convinced that the machine completely eliminates odors, and kills mold."
PRACTICAL SAILOR MAGAZINE, December 1990

678

Complaint

EXHIBIT A

Your home can have a cleaner, healthier environment, free of pollutants.

The following is a list of specific contaminants generally found in the home.

- Formaldehyde 0.1ppm
(some materials are acceptable below 0.1)
Sources: Wood cabinets, carpeting, drapes, insulation, pressed board
- Nitrogen dioxide 0.05ppm
Sources: Gas stoves, space heaters, other combustion sources
- Sulfur dioxide 0.05ppm
Sources: (same as nitrogen dioxide)
- Carbon dioxide 700ppm
Sources: Occupant exhalation, combustion sources
- Ammonia 10ppm
Sources: Cleaning materials, bathrooms, toilet dispensers
- Volatile organic compounds (variable)
Sources: Plastics, water, dry cleaned clothes
- Dust (variable)
Sources: Nonspecific
- Mold, Mildew (variable)
Sources: Inadequate ventilation, humidity, water seepage
- Hydrogen Sulfide (no acceptable level)
Sources: Septic gases
- Methane (no acceptable level)
Sources: Septic gases
- Trichloroethylene 20ppm
Sources: Cleaning solvents, printers
- Chlorine 10ppm
Sources: Bleaches, cleaning materials

*Compiled by the state of Rhode Island Department of Health

Why Use the QUANTUM AIR PURIFIER?

- Energy Efficient
- User Friendly
- Portable
- Lightweight
- Self Cleaning
- Totally Maintenance Free
- No Harmful By-Products



All QUANTUM AIR PURIFIERS come with a 30-day, money-back guarantee as well as a one-year warranty against defects and malfunction.

What is a QUANTUM AIR PURIFIER?

IT IS AN OZONE GENERATOR

Odors, Bacteria and gasses are all molecular in size. Because of this, no filtration device can remove them from your home. However, they are effectively eliminated when in contact with an ozone molecule, such as those generated by the Panda unit.

How Does Ozone Work?

Ozone, sometimes called triatomic oxygen, is a normal trace element in the earth's atmosphere. It is nature's second most powerful sterilant (fluorine is the most powerful) and the fastest oxidizing agent. The cleansing action of ozone is the result of oxidation, i.e. the breaking down of the molecular structure of noxious and toxic gases as well as bacterial and organic matter, the source of mold, mildew and most odors. The process is one of elimination, NOT filtration or scenting. While the effects are permanent, when fostering conditions persist, periodic treatment will prevent future growth.

Complaint

120 F.T.C.

EXHIBIT B

7/92 - 7/22/86.

SPECIFICATIONS

QUANTUM LINE OF OZONE GENERATORS		
<p>Quantum ozone generators are self-contained portable air purification devices for the purpose of neutralizing a variety of annoying odors and pollutants from room atmosphere and contents. These devices clean and purify by oxidizing, (breaking down) the molecular structure of noxious or toxic gases. Quantum ozone generators are proven effective against mold and mildew, viruses, fungi and bacteria, both airborne and settled. ALL QUANTUM DEVICES CONFORM TO UL STANDARD 867</p>		
PANDA SERIES	EFFECTIVE RANGE*	DESCRIPTION
200	7,200 Cubic Feet	This is the smallest unit, designed for home use. Can be regulated downward for totally safe and quiet use in small bedrooms or upward for whole-house purification. Good for small offices, conference rooms and employee lounges. Eliminates all odors, mold and mildew problems and generally enhances indoor air quality.
300	12,000 Cubic Feet	This is designed for slightly larger and more contaminated areas, severe mold and mildew problems, larger office areas with some smokers or stuffy conditions.
400	16,800 Cubic Feet	The smallest commercial strength generator for pet shops, beauty shops, garages, restaurants and some chemically saturated areas.
600	26,000 Cubic Feet	Most powerful commercial production model. Good in bars and lounges, highly saturated chemical areas, fish markets, meat, fish and produce sections of super-markets, or large areas such as dining halls. Excellent for smoke damage restoration and rapid purification when time is a factor.
DIMENSIONS: 11 3/16" x 5 3/4" x 9 1/2"		FAN: Adjustable fan output, low of 30 CFM @ 23 dB to high of 112 CFM @ 41 dB.
WEIGHT: 9 - 12 lbs.		
CABINET: High impact-resistant ABS cover. UL rated 94 MB, designer "haircell" finish. Black. Carrying handle. Aluminum base.		ELECTRICAL: 120 Volts - 60 Hz Maximum consumption: 30 watts Minimum Consumption: 16 watts
FACE PANEL: Separate fan speed and ozone output controls. Directional air-flow grid. Operational mode indicator lights.		
<p>* The ideal operating range for ozone is between .03 to .05 parts per million which is the world-wide outdoor ambient average. A minimum of .03 ppm can be achieved in the effective range as indicated. Consult the owner's manual for a complete breakdown of ozone in ppm/Area in cubic feet ratio.</p>		

EXHIBIT B

EXHIBIT C

AS WE MOVE FURTHER INTO THE 90'S, THERE WILL BE MORE AND MORE COMPANIES ENTERING THE AIR FILTRATION BUSINESS, TAKING ADVANTAGE OF THE GROWING HEALTH CONSCIOUSNESS OF THE AMERICAN POPULATION, MAKING HEALTH CLAIMS IN AN EFFORT TO SOLICIT INTEREST IN THEIR PRODUCTS.

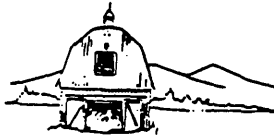
IN FEBRUARY, 1989, CONSUMER REPORTS CONDUCTED A TEST OF 27 AIR FILTRATION DEVICES THEN ON THE MARKET. SOME OF THE UNITS TESTED HAD HEPA FILTERS (HIGH EFFICIENCY PARTICULATE ARRESTING), SOME WERE OF THE ELECTROSTATIC PRECIPITATOR VARIETY, SOME ION GENERATORS, AND OTHERS EVEN LESS SOPHISTICATED THAN THESE.

THE MODELS TESTED EACH REMOVED PARTICULATE MATTER (AIRBORNE PARTICLES) TO VARYING DEGREES BUT, AS TO THE OVERALL HEALTH BENEFITS OF ALL 27 UNITS TESTED:

"NO CLEAR EVIDENCE EXISTS TO ESTABLISH THE USEFULNESS OF PURIFIERS IN PREVENTING OR TREATING ALLERGIC RESPIRATORY DISEASE."

WHY DID ALL 27 OF THE MODELS TESTED FAIL?

BECAUSE ALL THEY DID WAS FILTER AIRBORNE PARTICLES.



THE BEST OF THE UNITS TESTED FILTERED PARTICLES IN THE AIR AS SMALL AS .1 MICRONS, BUT WHAT DOES THAT MEAN? HOW SMALL IS A MICRON?

A MICRON IS ABOUT 39 MILLIONTHS OF AN INCH. THE PERIOD AT THE END OF THIS SENTENCE IS APPROXIMATELY 1000 MICRONS WIDE. A HUMAN HAIR IS 100 MICRONS WIDE. THE BEST TESTED MODEL MENTIONED ABOVE FILTERED .1 MICRONS WHICH IS 1/1000 THE THICKNESS OF A HUMAN HAIR.

SO WHY DID IT FAIL?

BECAUSE IT DID NOTHING ABOUT FILTERING THE HARMFUL GASSES IN THE AIR. THE NOXIOUS AND TOXIC GASSES -- THE MOLECULES -- PASSED RIGHT ON THROUGH. THERE WAS NOTHING IN THOSE UNITS TO STOP THE MOLD AND MILDEW, THE VIRUSES AND FUNGI, AND THE BACTERIA IN THE AIR. TO SAY NOTHING ABOUT THE BACTERIA THAT WAS NOT IN THE AIR, THAT HAD ALREADY SETTLED ON THE FURNITURE, AND ON THE CARPET, AND ON YOU!

QUANTUM ELECTRONICS CORPORATION MAKES ABSOLUTELY NO HEALTH CLAIMS IN REGARD TO OUR OZONE GENERATORS BUT, AS FOR CLEANING THE AIR, WE ASK YOU TO CONSIDER THIS...

THERE ARE ABOUT 600,000,000 MOLECULES IN .1 MICRONS AND THE AIR FILTRATION DEVICES MISSED EVERY ONE OF THEM.

FOR A MOMENT, THINK OF A MICRON AS BEING THE SIZE OF A BARN. NOW THINK OF .1 MICRONS AS BEING THE SIZE OF THAT BARN DOOR.

A QUANTUM OZONE GENERATOR WILL ELIMINATE THE FLY THAT WANTS TO GO THROUGH THAT BARN DOOR:

WE INVITE YOU TO PUT ONE OF OUR UNITS TO THE TEST.

LET'S SAY THE FAMILY PET MAKES A BAD MISTAKE ON THE LIVING ROOM CARPET. TAKE ANY ONE OF THE 100 OR MORE AIR FILTRATION DEVICES PRESENTLY ON THE MARKET. PUT IT IN THE LIVING ROOM AND LET IT RUN FOR 24 HOURS BEFORE REMOVING IT. THEN, WHEN YOU RETURN TO THE ROOM, WHAT DO YOU THINK YOU WILL SMELL?



NOW, PLACE A LITTLE 7 1/2 POUND PARMA OZONE GENERATOR IN THE SAME ROOM FOR ABOUT 4 HOURS. WHEN YOU RETURN, THE ODOR WILL BE GONE, THE BACTERIA CAUSING THE ODOR WILL BE DESTROYED AND FIDO WILL BE ONCE AGAIN OUT OF THE DOGHOUSE.

YOU WILL NOT HAVE FILTERED OUT THE ODORS AND THE BACTERIA. NOR WILL YOU HAVE COVERED THEM OVER WITH A SMELLY PERFUME WHICH IN ITSELF MAY BE HARMFUL TO YOUR HEALTH.

YOU WILL HAVE NEUTRALIZED IT ALL SAFELY, INEXPENSIVELY AND, MOST IMPORTANTLY, PERMANENTLY.

WE GUARANTEE IT.

EXHIBIT C

Complaint

120 F.T.C.

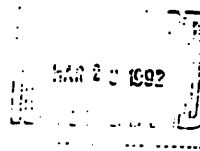
EXHIBIT D

JEFFRY L. ANDERSON, M.D.
45 San Clemente Dr., Suite B-100, B-110
Corte Madera, CA 94925
(415) 927-7140

3/42 - Pres.

March 4, 1992

Moe Lepenven
Quantum Electronics Corp.
31 Graystone Street
Warwick, RI 02886



Dear Moe:

I am writing concerning the Quantum Panda ozone generator. I have been using Quantum Panda in my clinical work for the last year and have found it be extremely valuable in treating specific clinical conditions related to indoor air contamination. It has been particularly valuable in addressing mold allergy-hypersensitivity problems, especially in the category of patients that exhibit a very toxic type of hypersensitivity responses to mold inhalants. There is an increasingly recognized neurotoxic aspect to mold hypersensitivity and I have a number of patients who exhibit major neurological dysfunction varying between vascular type headaches and vestibular labyrinthine disorders to frank partial complex seizures as well as multiple other neuropsychological syndromes.

Inflammatory immune complex connective tissue disease is also a very common feature of this type of mold hypersensitivity and what is often misdiagnosed as a fibromyalgia syndrome by other physicians is really immune complex connective tissue disease triggered by chronic mold exposure. I have at least four patients with this condition who live in the Bay Area in residential structures which were structurally contaminated with molds to the point where the patient either continued to experience disabling and progressive dysfunction if they remained there, or would have to relocate. In these four cases, the proper and ongoing use of the Quantum Panda ozone generator produced dramatic improvements in their clinical conditions allowing them to remain in their current residence and avoid the stress and expense of relocating. Two of the patients clearly rated the Quantum Panda as having "changed their lives."

Another group of three patients noted marked improvement in extrinsic asthma/reactive airway disease triggered by mold incitants. Their pattern was classic nocturnal and early morning bronchospasm related to indoor mold. Dramatic improvement was noted after several weeks of diligent use of the Quantum Panda to the point where they had minimal symptoms and required almost no bronchodilator medication.

At least one patient has had improvements in symptomatology related to chemical hypersensitivity. This is a woman who had major neurological, particularly cognitive dysfunction, respiratory distress and other problems due to reactivity to particle board cabinets with sealers and lacquer newly installed

EXHIBIT D

678

Complaint

EXHIBIT D

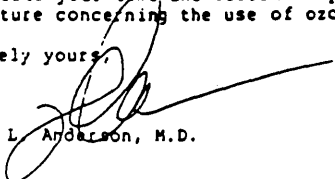
March 4, 1992
Page Two

in her kitchen. She got to the point where she had to basically isolate herself to her bedroom as any other rooms close to the kitchen let alone the kitchen itself would produce disabling symptoms. After the use of the Quantum Panda ozone generator for about a week she began experiencing diminishing symptomatology, increased intolerance to the ambient air in rooms adjacent to the kitchen and eventually could tolerate brief periods in the kitchen itself. It is clear that the ozone did activate enough of the outgassing VOCs and formaldehyde from the cabinets to markedly alleviate her reactivity.

In summary, I have found the Quantum Panda to be very valuable tool in treating environmental-related illnesses, particularly mold allergy-hypersensitivity and to some degree chemical hypersensitivity. Combining the Quantum Panda with a state-of-the-art air filtration/purification system with either HEPA or other mechanical as well as carbon block filter has added even more benefit. I have found that at the lowest setting most patients can tolerate the ambient ozone levels on a 24-hour per day basis. However, I am recommending that people avoid exposure to ambient air in rooms where the ozone generator runs above 3; above this setting some respiratory irritation can occur with relatively brief exposures to higher levels. I simply require them to close up and isolate the specific room being treated for six to eight hours while the generator is running on high, then to open doors and windows and let the room outgas for 30 to 45 minutes before returning to the room for any significant length of time. This has avoided any irritant effects as far as I can see.

I intend to use the Quantum Panda increasingly in my medical practice and anticipate ongoing benefits to my patients. I appreciate your time and effort in providing clinical data and literature concerning the use of ozone in environmental control.

Sincerely yours,


Jeffrey L. Anderson, M.D.

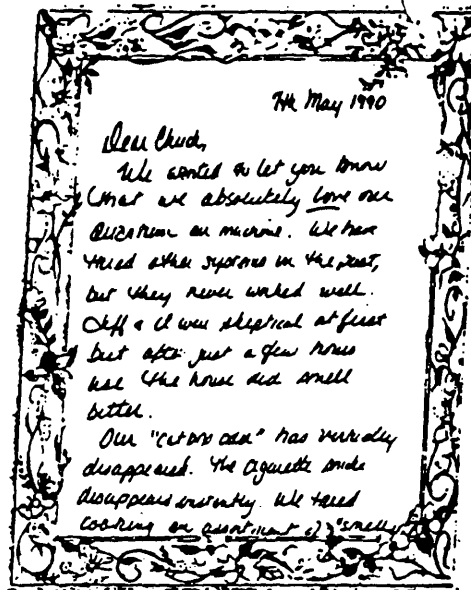
JLA:MJ

EXHIBIT D-1

Complaint

120 F.T.C.

EXHIBIT E



foods - broccoli, cauliflower, onion and onion sauce, garlic spaghetti sauce, you name it. You could smell the food cooking but after dinner, the odor was gone!!

Best, best of all, my asthma has improved 80%. I've been off bronchodilators and steroids for one whole month. I don't wake up in the middle of the night feeling as if I'm suffocating. Never late night trips to the E.R. Before the Quorum machine, I had to take 150 mg of prednisone twice a day and use my inhaler every 2 hours. That's a lot of medication just to be able to breathe with a wheeze + chest pain.

I'd saved \$500 on medications, doctor visits and emergency room fees in 1 month.

I finally feel like a human being rather than a walking dry stone. Not getting me sleep now that I'm not waking him up because I'm turning blue.

T.C. The Yabby cat thinks it's his personal breeze machine. After he spends an hour running around the house, he sits on front of the machine for a few minutes + purrs. It takes a lot to make T.C. purr, he doesn't like many things, but he loves his ozone!

This is a new new item for anyone with pets, asthma or wood burning stoves!

Thanks again!!

Debbie Jeff Okland

EXHIBIT E

678

Complaint

EXHIBIT F

June 20, 1991

441-Perms.

Mrs. Judy Carter
3430 Malvera Drive
Norfolk, VA 23518

Mr. Paul Smoot
Descal-A-Matic Corporation
4855 Brookside Court, Suite A
Norfolk, VA 23502

Dear Mr. Smoot:

Before you provided me with an Air Purification Unit for my home, my three children: Christian-16, Ryan-8 and Kendall-5, had major problems with asthma on a recurring basis and had to be taken to the hospital emergency room for emergency treatment and also on office visits to the doctor. Medical costs for aspirators, inhalers and other therapy was a hardship on a working, single parent. When the attacks came in the middle of the night, it meant loss of proper rest for all of us.

In past years, during the months of February, March, April and May, the medical costs for the children were very high and that does not count the time involved to and from

I put your Air Purifier in my house in February of this year and have had it on ever since. As you know, this year the pollen count reached and maintained record levels for weeks on end, still no problems!

I am so happy to tell you that not one of my children have required the first bit of medical attention for respiratory problems since your Unit arrived.

I recently reviewed the medical records of the kids and was reminded of the agony we all went through before your Air Purifier.

Please let me know if this will be of any help.

Thank you very much.

Judy Carter



DECISION AND ORDER

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

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

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

1. Respondent Quantum Electronics Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located in the City of Warwick, State of Rhode Island.

Respondents Albert O. Coates, Maurice Lepenven, and Jacqueline J. Maynard are 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 purposes of this order, the following definitions shall apply:

A. The term "*air cleaning product*" shall mean any product, equipment, or appliance designed or advertised to remove, treat, or reduce the level of any pollutant(s) in the air.

B. The terms "*indoor air pollutant(s)*" or "*pollutant(s)*" shall mean one or more of the following: odors, nitrogen dioxide, formaldehyde, sulfur dioxide, ammonia, trichlorethylene, carbon dioxide, hydrogen sulfide, methane, mold, mildew, bacteria, dust, chlorine, fungi, volatile organic compounds, viruses, or any other gaseous or particulate matter found in indoor air.

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

I.

It is ordered, That respondents Quantum Electronics Corporation, a corporation, its successors and assigns, and its officers, and Albert O. Coates, Maurice Lepenven, and Jacqueline J. Maynard, 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 manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication,

A. Such product's ability to eliminate, remove, clear, or clean any indoor air pollutant from a user's environment; or

B. Such product's ability to eliminate, remove, clear, or clean any quantity of indoor air pollutants from a user's environment;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, Quantum Electronics Corporation, a corporation, its successors and assigns, and its officers, and Albert O. Coates, Maurice Lepenven, and Jacqueline J. Maynard, 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 manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

- A. The use of ozone is more effective in cleaning or purifying indoor air than other air cleaning methods;
- B. The product does not create harmful by-products; or
- C. When used as directed, the product prevents or provides relief from allergies, asthma, and viruses;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, Quantum Electronics Corporation, a corporation, its successors and assigns, and its officers, and Albert O. Coates, Maurice Lepenven, and Jacqueline J. Maynard, 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 manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from

representing, in any manner, directly or by implication, the efficacy, performance, or health-related benefit of any such product, unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

IV.

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

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

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

V.

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

VI.

It is further ordered, That each individual respondent shall, for a period of five (5) years after the date of service of this order upon him/her, promptly notify the Commission, in writing, of his/her discontinuance of his/her present business or employment and of his/her affiliation with a new business or employment. For each such new affiliation, the notice shall include the name and address of the

new business or employment, a statement of the nature of the new business or employment, and a description of respondent's duties and responsibilities in connection with the new business or employment.

VII.

It is further ordered, That the corporate respondent shall, within ten (10) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, or who is in communication with customers or prospective customers, or who has any responsibilities with respect to the subject matter of this order; and for a period of three (3) years, from the date of issuance of this order, distribute a copy of this order to all of respondent's future such officers, agents, representatives, independent contractors, and employees.

VIII.

It is further ordered, That the corporate respondent shall, within ten (10) days from the date of service of this order upon it, deliver by first class mail or in person a copy of this order to each of its present distributors or retailers of its ozone generators.

IX.

This order will terminate on September 22, 2015, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any paragraph in this order that terminates in less than twenty years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

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

X.

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

Complaint

120 F.T.C.

IN THE MATTER OF

ARIZONA INSTITUTE OF REPRODUCTIVE MEDICINE, LTD.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3616. Complaint, Sept. 25, 1995--Decision, Sept. 25, 1995*

This consent order prohibits, among other things, an Arizona institute and its president from misrepresenting the success rate of their in vitro fertilization program or any other infertility treatment services. In addition, the consent order stipulates that any comparison with other success rates be based upon the same calculating methodology. Finally, the order requires the respondents to possess competent and reliable scientific evidence for any future comparative success-rate claims for fertility services.

Appearances

For the Commission: *Matthew Daynard, Michael Katz, Richard Kelly and Joan Bernstein.*

For the respondents: *Thomas R. Lofy, Scottsdale, AZ.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Arizona Institute of Reproductive Medicine, Ltd., a limited corporation, and Robert H. Tamis, individually and as president of Arizona Institute of Reproductive Medicine, Ltd., ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Arizona Institute of Reproductive Medicine, Ltd. is a limited corporation formed under the laws of the state of Arizona, with its principal place of business located at 2850 North 24th Street, Phoenix, Arizona.

Respondent Robert H. Tamis, M.D. is president of the corporate respondent. Individually, or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint.

His principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents are engaged in offering for sale and the sale of services in connection with the treatment of infertility in the human reproductive system.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated promotional materials, including but not necessarily limited to the attached Exhibit A. Exhibit A contains the following statements:

"The success rate of most IVF programs are [sic] quoted as the percentage of embryo transfer procedures that result in clinical pregnancies....However, this figure may not accurately reflect the success rate that most patients are interested in (ie; the percentage of couples entering the IVF program who achieve a "take home baby":). Because IVF success rates can be calculated in a variety of ways, one must exercise caution when comparing success rates of different programs. To avoid confusion, the best way to express the success of IVF programs is to list the percent success of each step of the IVF procedure during the most recent 6-12 month period. The chart below compares the success rate of the Arizona Institute of Reproductive Medicine to the average success rate of other IVF programs in the United States.

IVF PROGRAM	Nat'l Av. %		AIRM Av %	
	1991	1992	1991	1992
Couples entering IVF program	100	100%	92%	
Successful ovarian stimulation	72	100%	93%	
Successful egg capture	---	100%	99%	
CLINICAL PREGNANCIES/EMBRYO TRANSFER	16	15%	20%	
Chemical Pregnancies/embryo transfer	--	20%	8%	
DELIVERY RATE/EMBRYO TRANSFER	14	17%	16%	
				(1-92 to 6-92)"

(Exhibit A)

PAR. 5. Through the use of the statements contained in the promotional materials referred to in paragraph four, including but not necessarily limited to the promotional material attached as Exhibit A, respondents have represented, directly or by implication, that during each of the time periods specified in the promotional material set forth in paragraph four, patients in respondents' in vitro fertilization program achieved live births (delivery rate) per embryo transfer at

rates higher than the national average for in vitro fertilization programs.

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

PAR. 7. In truth and in fact, at the time they made the representation set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such a representation. Respondents calculated the success statistics in their promotional materials counting multiple births (*i.e.*, twins, triplets, etc.) as multiple deliveries. The national percentages were based on data published by The Society for Assisted Reproductive Technology (SART), a national organization whose members, including respondents, are providers of assisted reproductive technologies. SART publishes annually national averages for live births achieved through its members' services. National averages for live births are based on a protocol which requires members to report multiple births as single deliveries. The published report counts a multiple birth as a single delivery. According to SART data for the year 1991, the national average for live births per embryo transfer was approximately 17 percent rather than respondents' cited 14 percent. Had respondents likewise counted multiple births as a single delivery, respondents' success statistics for deliveries would have been lower than both the actual national average or the national average cited in Exhibit A. Therefore, the representation set forth in paragraph six was, and is, misleading.

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

EXHIBIT A

SUCCESS RATES

There is an enormous variation in the success rates of IVF (and GIFT) programs in the United States. About 90% of all IVF pregnancies are achieved by only 15% of IVF programs, and one half of all IVF programs started will close down within one or two years because no pregnancies are achieved.

The Arizona Institute of Reproductive Medicine has one of the most successful IVF programs in the country. Over 111 pregnancies have been achieved with IVF, with 75 babies delivered to date, including 17 sets of twins and 3 sets of triplets since the IVF program was begun in 1984. Since 1988, over 60 pregnancies have been achieved with the Frozen Embryo program, with 42 deliveries to date, including 7 sets of twins. Part of the reason for the success of the Arizona Institute of Reproductive Medicine program is tight quality control and a commitment to medical research related to IVF.

The success rate of most IVF programs are quoted as the percentage of embryo laboratory procedure efficiencies. However, this figure may not accurately reflect the success rate that most patients are interested in (ie; the percentage of couples entering the IVF program who achieve a "take home baby");. Because IVF success rates can be calculated in a variety of ways, one must exercise caution when comparing success rates of different programs. To avoid confusion, the best way to express the success of IVF programs is to list the percent success of each step of the IVF procedure during the most recent 6-12 month period. The chart below compares the success rate of the Arizona Institute of Reproductive Medicine program to the average success rate of the other IVF programs in the United States.

IVF PROGRAM	Nat'l Av. %		AIRM Av %
	1991	1992	
Couples entering IVF program	100	100%	92%
Successful ovarian stimulation	72	100%	93%
Successful egg capture	---	100%	99%
CLINICAL PREGNANCIES/EMBRYO TRANSFER	16	15%	20%
Chemical Pregnancies/embryo transfer	--	20%	8%
DELIVERY RATE/EMBRYO TRANSFER	14	17%	16%

(1-92 to 6-92)

The above success rates of the Arizona Institute of Reproductive Medicine's IVF program are updated every three months and reflect the statistics from the most recent twelve month period. The "success rate" quoted by most other programs (clinical pregnancies per embryo transfer) is highlighted in the chart for comparison.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such an 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 Institute of Reproductive Medicine, Ltd., is a limited corporation 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 2850 North 24th Street, Suite 500-A, Phoenix, Arizona.

Respondent Robert H. Tamis, M.D., is president of respondent Arizona Institute of Reproductive Medicine. His principal office or place of business is the same as that of the corporate respondent. Dr. Tamis formulates, directs and controls the acts and practices of said corporation.

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

ORDER

DEFINITIONS

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

I.

It is ordered, That respondents Arizona Institute of Reproductive Medicine, Ltd., a limited corporation, and Robert H. Tamis, M.D., individually and as president of said corporation, their successors and assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, sale or offering for sale of services relating to the treatment of infertility, do forthwith cease and desist from representing, directly or by implication, that respondents' success rates in terms of achieving deliveries is higher than or compares favorably with the success rates of any single provider or group of providers of these services, unless at the time of making such a representation, respondents possess and rely upon competent and reliable scientific evidence for making such a comparison which shall, at a minimum, consist of results for its own patients that are based upon the same criteria for determining the calculation of delivery rates that were used to produce the results with which the comparison is made, or otherwise misrepresenting the past or present success of respondents in achieving live births or pregnancies or the past or present success of any single provider or group of providers of these services in achieving live births or pregnancies.

II.

It is further ordered, That respondents, shall forthwith distribute a copy of this order to each of their officers, agents, representatives, and employees, who are engaged in the preparation and placement of

advertisements or promotional materials, who communicated with patients or prospective patients, or who have any responsibilities with respect to the subject matter of this order; and for a period of ten (10) years from the date of entry of this order, distribute same to all of respondents' future officers, agents, representatives, and employees having said responsibilities.

III.

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

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

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

IV.

It is further ordered, That:

(1) Respondent Arizona Institute of Reproductive Medicine, Ltd. shall notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in respondent which may affect compliance obligations arising out of this order; and

(2) Respondent Robert H. Tamis, M.D. shall promptly notify the Commission of the discontinuance of his present business or of his affiliation with the corporate respondent. In addition, for a period of three (3) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment that involves an infertility program. Each such notice shall include the respondent's new business address and

a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

V.

It is further ordered, That this order will terminate on September 25, 2015, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

VI.

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