

IN THE MATTER OF  
JEROME MILTON, INC., ET AL.

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

*Docket 9187. Complaint, Sept. 24, 1984—Decision, Oct. 26, 1987*

This consent order prohibits, among other things, the Chicago, Illinois maker of Shane toothpaste from representing that Shane cures or alleviates the symptoms of canker or cold sores; reduces tooth sensitivity or plaque more effectively than any other toothpaste or oral hygiene product; or cures or alleviates gum problems unless they have reliable evidence that substantiates the representation.

*Appearances*

For the Commission: *Nancy Warder.*

For the respondents: *Maurice Raizes, Cohon, Raizes, & Regal,*  
Chicago, IL.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jerome Milton, Inc., a corporation, and Jerome Milton Schulman, individually and as an officer of Jerome Milton, Inc., hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jerome Milton, Inc., is an Illinois corporation with its office and principal place of business located at 4350 W. Ohio Street, Chicago, Illinois.

Respondent Jerome Milton Schulman is an officer of Jerome Milton, Inc. He formulates, directs and controls the acts and practices of Jerome Milton, Inc. His address is the same as that of Jerome Milton, Inc.

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

PAR. 2. Respondents are engaged in the advertising, offering for sale, sale and distribution of various dietary and health care products, including Shane toothpaste. In connection with the marketing of

Shane, respondents are now and have been engaged in the dissemination, publication, and distribution of advertisements and promotional material for the purpose of promoting the sale of Shane. As advertised, Shane is a "drug" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 3. Respondents have caused Shane to be transported from their places of business in various states to purchasers located in other states. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated and caused the dissemination of certain advertisements and promotional materials for Shane, such as the advertising materials attached hereto as Exhibits A through F, through the United States mails and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Through the use of the advertisements and promotional materials referred to in paragraph four, and others not specifically set forth herein, respondents have represented, and now represent, directly or by implication, that:

a. the use of Shane will cure, or alleviate the symptoms of, canker sores (recurrent aphthous stomatitis), cold sores (herpes simplex type I lesions), and the gum problems associated with gingivitis and periodontitis;

b. Shane is superior to other toothpastes in reducing or eliminating plaque; and

c. the use of Shane will lessen the sensitivity of the teeth to hot and cold substances.

PAR. 6. Through the use of the advertisements and promotional materials referred to in paragraph four, respondents have represented and now represent directly or by implication that, at the time of making the representations set forth in paragraph five, they possessed and relied upon a reasonable basis for those representations.

PAR. 7. In truth and in fact, respondents, at the time of making the representations set forth in paragraph five, did not possess and rely upon a reasonable basis for those representations. Therefore, the representation set forth in paragraph six was and is unfair and deceptive.

PAR. 8. The use by respondents of the aforesaid unfair and deceptive representation has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representation was and is true and has

induced, or is likely to induce, directly or indirectly, the purchase of Shane.

PAR. 9. The acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid advertisements and promotional materials, were and are all to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission act, as amended.

## ORDER

### I.

*It is ordered,* That respondents Jerome Milton, Inc., a corporation, its successors and assigns, and its officers, and Jerome Milton Schulman, individually and as an officer of Jerome Milton, Inc., and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of Shane toothpaste, any other toothpaste, or any other oral hygiene product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such product:

- a. cures or alleviates the symptoms of canker sores (recurrent aphthous stomatitis), cold sores (herpes simplex type I lesions), or the gum problems associated with gingivitis and periodontitis;
- b. reduces plaque more effectively than any other toothpaste or oral hygiene product;
- c. reduces the sensitivity of teeth to hot and cold substances; or
- d. has any other therapeutic property

unless at the time of making such representation, respondents possess and rely upon competent and reliable evidence substantiating the representation. For purposes of this order, "competent and reliable evidence" shall mean a test, analysis, research project, or study in which the evidence has been objectively obtained and evaluated by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate results.

### II.

*It is further ordered,* That respondents, their successors and assigns, for at least three (3) years after the date of the last dissemination of

the representation, shall maintain and upon request make available to the staff of the Commission for inspection and copying copies of, and dissemination schedules for, every advertisement containing any representation(s) about oral hygiene product(s), copies of all evidence relied on for such representation(s), and copies of any document(s) in the possession or control of respondents, their successors and assigns contradicting or qualifying any such representation.

### III.

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

### IV.

*It is further ordered,* That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. In addition, for a period of five years from the effective date of this order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the individual 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 the respondents forthwith distribute a copy of this order to each of the corporate respondent's operating divisions and to all present and future employees, agents, or representatives engaged in the preparation and placement of advertising and that the corporate respondent shall secure from each such person a signed statement acknowledging receipt of the order.

## VI.

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

EXHIBIT A

# Radio TV Reports

41 East 42nd Street New York N.Y. 10017  
(212) 599-5500

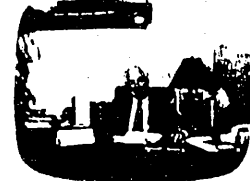
PRODUCT: SHANE TOOTHPASTE  
PROGRAM: SECRET OF DR. KILDARE 6/20/1  
WGN-TV (CHICAGO) 10:08AM



1. JEROME SCHULMAN: I'm Jerome Schulman. For years, I've had problems



2. with my gums and teeth, and sensitivity to hot and cold.



3. I've tried the major brands of toothpaste with no results.



4. Since I'm a chemist, I developed a toothpaste



5. called Shans. Now, people across the country are using Shane with excellent results.



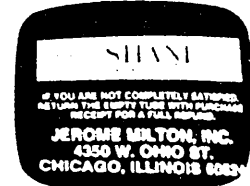
6. Gary Clark, Milwaukee, writes "Shane is fantastic".



7. and a letter from Chicago, "The best toothpaste I've ever used".



8. Buy Shane. If it isn't the finest toothpaste you've ever used,



9. return the empty tube with the purchase receipt, and I will give you a full refund.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

While Radio TV Reports Inc. endeavors to assure the accuracy of material supplied by it, it cannot be responsible for mistakes or omissions

EXHIBIT B

**Radio TV Reports**

41 East 42nd Street New York N.Y. 10017  
(212) 599-5500

PRODUCT PROGRAM STATION BREAK  
WITI-TV (MILWAU.)



1. MAN: Why are more people switching from ordinary toothpaste to Shane? Here's Geri Rosin.



2. GERI ROSIN: In the past, I've had problems with my teeth



3. being sensitive to hot and cold, and also plaque formations, and nothing on the market seemed to work.



4. Then I heard about Shane Toothpaste.



5. I noticed how refreshing it tasted, and it had a very soothing effect on my gums and teeth.



6. Almost immediately, the sensitivity was gone, and within months,



7. the plaque formation



8. almost disappeared.



9. ANNCR: Buy it now at Walgreen's.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

While Radio TV Reports Inc. endeavors to ensure the accuracy of material supplied by it, it cannot be responsible for mistakes or omissions.

## EXHIBIT C

**JEROME MILTON**

WHY ARE MORE CHICAGO AREA PEOPLE SWITCHING FROM ORDINARY TOOTH-  
PASTE TO SHANE.

HERE ARE SOME SHANE USERS TO TELL YOU WHY.....

GERI ROSIN OF MENOMONEE FALLS, WISCONSIN, "BY NATURE I AM  
SKEPTICAL OF ANY NEW PRODUCT THAT CLAIMS MIRACULOUS RESULTS,  
BUT YOUR SHANE TOOTHPASTE DOES EVERYTHING ITS SAID TO DO ---  
PLUS MORE! I HAVE GONE THROUGH PERIODONTAL SURGERY TWICE AND  
HAVE SUFFERED A GREAT DEAL OF PAIN AND DISCOMFORT. MY GREAT-  
EST PROBLEMS WERE SENSITIVITY AND PLAQUE FORMATION, NOTHING  
SEEMED TO HELP. I TRIED SHANE AND ALMOST IMMEDIATELY THE  
SENSITIVITY TO HOT AND COLD WAS GONE. BEST OF ALL PLAQUE  
HAS ALMOST DISAPPEARED AND MY TEETH ARE CLEANER."

AUDRIE KLUSZEWSKI OF CHICAGO, "WHEN I FIRST HEARD THE CLAIMS MADE  
FOR SHANE I WAS SKEPTICAL, BEING A PESSIMIST I LET MY HUSBAND  
USE SHANE FIRST SINCE HE IS A HEAVY SMOKER AND DRINKS EXCESSIVE  
AMOUNTS OF COFFEE. WE WERE AMAZED WITH THE DRAMATIC RESULTS ONE  
BRUSHING MADE, IN ADDITION HIS BLEEDING AND TENDER GUMS ARE IN  
EXCELLENT CONDITION. SHANE IS BETTER THAN ANY TOOTHPASTE WE'VE  
EVER USED."

HALF AS MUCH SHANE PRODUCES BETTER RESULTS THAN ORDINARY TOOTH-  
PASTE. THE EXTRA BENEFITS MORE THAN MAKE UP FOR THE ADDED COST.  
CAN YOU AFFORD LESS? WHY USE AN ORDINARY TOOTHPASTE WHEN YOU CAN  
USE SHANE. SHANE IS AVAILABLE (FOLLOW TAG LIST)



Complaint

110 F.T.C.

EXHIBIT D

:GO SPOT/LIVEANNOUNCER READS:

WHY ARE MORE PEOPLE SWITCHING FROM ORDINARY TOOTHPASTE TO PROFESSIONALLY FORMULATED SHANE? HERE ARE SOME SHANE USERS TO TELL YOU WHY....LOIS GRIFFIN OF ELK GROVE VILLAGE WROTE, "SHANE TOOTHPASTE IS FANTASTIC!" SHE IS ONE WHO MUST HAVE HER TEETH CLEANED EVERY THREE MONTHS AND IT WAS BOTH PAINFUL AND EXPENSIVE. SHE HAS BEEN USING SHANE AND NOW HER DENTIST TELLS HER THAT SHE CAN CUT DOWN ON THE FREQUENCY OF HER VISITS. MARY SWART OF EVERGREEN PARK WROTE THAT SHE HAS HAD CHRONIC PROBLEMS WITH CANKER SORES. SHE LEARNED ABOUT SHANE TOOTHPASTE AND WITHIN THE HOUR AFTER APPLYING SHANE, THE SORENESS WENT AWAY AND IT WAS A JOY TO EAT WITHOUT THE PAIN AND DISCOMFORT. HALF AS MUCH SHANE PRODUCES BETTER RESULTS THAN ORDINARY TOOTHPASTE. THE EXTRA BENEFITS MORE THAN MAKE UP FOR THE ADDED COST. YOU CAN'T AFFORD LESS. WHY USE AN ORDINARY TOOTHPASTE WHEN YOU CAN USE SHANE. IT'S AVAILABLE AT:

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Complaint

EXHIBIT E

JEROME MILTON/SHANE  
:60 SPOT/LIVE

8/3/83

ANNOUNCER READS:

WHY ARE MORE PEOPLE SWITCHING FROM ORDINARY TOOTHPASTE TO PROFESSIONALLY FORMULATED SHANE? HERE ARE SOME SHANE USERS TO TELL YOU WHY....PATRICIA KAWA, FROM PHOENIX, ARIZONA, WROTE SHE HAD RECENTLY VISITED HER DENTIST AND WAS TOLD THAT ALL HER BOTTOM TEETH HAD TO BE EXTRACTED. HER GUMS WERE INFECTED, HER TEETH WERE LOOSE AND SHE WAS SENSITIVE TO HOT AND COLD. SHE STARTED USING SHANE TOOTHPASTE AND THREE AND A HALF MONTHS LATER ALL HER PROBLEMS WERE GONE. SHE'S EVEN BACK TO ENJOYING CORN ON THE COB. SHANE TOOTHPASTE IS TRULY A MIRACLE-- SHE SAID IT HAS CHANGED HER LIFE. CLEO LEVINE OF CLEVELAND, OHIO SUFFERED FOR YEARS WITH PLAQUE PROBLEMS AND SENSITIVITY TO HOT AND COLD. SHE STARTED USING SHANE AND ALMOST IMMEDIATELY THE SENSITIVITY TO HOT AND COLD WAS GONE. HER PLAQUE FORMATION HAS DISAPPEARED TOO. SHE THINKS SHANE IS WONDERFUL. HALF AS MUCH SHANE PRODUCE BETTER RESULTS THAN ORDINARY TOOTHPASTE. THE EXTRA BENEFITS MORE THAN MAKE UP FOR THE ADDED COST. YOU CAN'T AFFORD LESS. WHY USE AN ORDINARY TOOTHPASTE WHEN YOU CAN USE SHANE? SHANE IS AVAILABLE AT:

Complaint

110 F.T.C.

EXHIBIT F

JEROME MILTON/SHANE  
:60 SPOT/LIVE

8/3/83

ANNOUNCER READS:

WHY ARE MORE PEOPLE SWITCHING FROM ORDINARY TOOTHPASTE TO PROFESSIONALLY FORMULATED SHANE? HERE ARE TWO SHANE USERS TO TELL YOU WHY.....GARY CLARK OF MILWAUKEE SAID HE COULD NOT BELIEVE HOW FAST HIS COLD SORE HEALED: SHANE TOOTHPASTE IS GOOD FOR EVERY MOUTH TROUBLE. HE SAID SHANE IS FANTASTIC! CARL HIX OF AURORA SAID, IN HIS OPINION, SHANE TOOTHPASTE IS THE GREATEST PRODUCT SINCE THE DEVELOPMENT OF THE WD-40 LUBRICANT. NORMALLY HIS DENTIST IS REQUIRED TO USE AN "AIR-HAMMER" AND "BELT SANDER" TO REMOVE STAINS AND TARTER FROM HIS TEETH-- AND EVEN THEN, HE DOESN'T REMOVE ALL. AFTER A SHORT PERIOD, SHANE TOOTHPASTE REMOVED ALL THE STAINS AND IS WORKING ON THE TARTER. "SHANE TOOTHPASTE IS TREMENDOUS!" HE SAID. HALF AS MUCH SHANE PRODUCES BETTER RESULTS THAN ORDINARY TOOTHPASTE. THE EXTRA BENEFITS MORE THAN MAKE UP FOR THE ADDED COST. YOU CAN'T AFFORD LESS. WHY USE AN ORDINARY TOOTHPASTE WHEN YOU CAN USE SHANE. IT'S AVAILABLE AT:

## DECISION AND ORDER

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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

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

1. Respondent Jerome Milton, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 4350 West Ohio Street, in the City of Chicago, State of Illinois.
2. Respondent Jerome Milton Schulman is an officer of Jerome Milton, Inc. He formulates, directs, and controls the policies, acts and practices of Jerome Milton, Inc., and his address is the same as that of Jerome Milton, Inc.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

## ORDER

## I.

*It is ordered,* That respondents Jerome Milton, Inc., a corporation, its successors and assigns, and its officers, and Jerome Milton Schulman, individually and as an officer of Jerome Milton, Inc., and re-

spondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of Shane toothpaste, any other toothpaste, or any other oral hygiene product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such product:

- a. cures or alleviates the symptoms of canker sores (recurrent aphthous stomatitis) or cold sores (herpes simplex type I lesions);
- b. reduces the sensitivity of teeth to hot and cold substances;
- c. is useful in the diagnosis, cure, mitigation, treatment, or prevention of disease in man;
- d. reduces plaque more effectively than any other toothpaste or oral hygiene product; or
- e. cures or alleviates the gum problems associated with gingivitis or periodontitis,

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

For purposes of paragraphs a and b, above, "competent and reliable evidence" shall include at least one adequate and well-controlled, double-blind clinical study that conforms to accepted designs and protocols and is conducted by persons qualified by training and experience to do so;

For purposes of paragraphs d and e, above, "competent and reliable evidence" shall include at least two adequate and well-controlled, double-blind clinical studies that conform to accepted designs and protocols and are conducted by different persons, independently of each other, with such persons being qualified by training and experience to conduct such studies;

For purposes of paragraph c, above, "competent and reliable evidence" shall mean test(s), analysis(es), research project(s), or study(ies) in which the evidence has been objectively obtained and evaluated by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate results;

Provided, however, with respect to any representation covered by this part of the order other than a claim concerning superior or comparative efficacy, if the Food and Drug Administration promulgates any standard, or any advisory review panel appointed by the Food and Drug Administration has issued a monograph, establishing that such representation is true, then in lieu of the above studies the respondents may rely on the Food and Drug Administration's standard or the

panel's monograph as long as it has not been superseded and remains in effect.

## II.

*It is further ordered,* That respondents, their successors and assigns, for at least three (3) years after the date of the last dissemination of the representation, shall maintain and upon request make available to the staff of the Commission for inspection and copying copies of, and dissemination schedules for, every advertisement containing any representation(s) about oral hygiene product(s), copies of all evidence relied on for such representation(s), and copies of any document(s) in the possession or control of respondents, their successors and assigns contradicting or qualifying any such representation.

## III.

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

## IV.

*It is further ordered,* That the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment and, for a period of five (5) years after the date of service of this order, shall promptly notify the Commission of each affiliation with a new business or employment, each such notice to include the individual 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.

## V.

*It is further ordered,* That the respondents shall distribute a copy of this order to each of the corporate respondent's operating divisions and to all present and future employees, agents, or representatives engaged in the preparation and placement of advertising and that the

corporate respondent shall secure from each such person a signed statement acknowledging receipt of the order.

VI.

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

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Complaint

IN THE MATTER OF

## TARRANT COUNTY MEDICAL SOCIETY

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

*Docket C-3219. Complaint, Nov. 2, 1987—Decision, Nov. 2, 1987*

This consent order requires, among other things, the Tarrant County Medical Society, of Fort Worth, Texas, to agree not to restrict, regulate or declare unethical any doctor's truthful advertising. Respondent also is required to provide, for 10 years, written notice to any doctor whose advertising it intends to challenge and allow that doctor a reasonable opportunity to respond.

*Appearances*

For the Commission: *Roy Conn.*

For the respondents: *William B. Davis, Cantey, Hanger, Gooch, Munn, & Collins, Fort Worth, TX.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (Title 15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Tarrant County Medical Society is a corporation formed pursuant to the laws of the State of Texas, with its mailing address at 3855 Tulsa Way, Fort Worth, Texas.

PAR. 2. Respondent is a professional association formed to represent the interests of physicians who practice in Tarrant County, Texas. Respondent has approximately 1,300 members, constituting a substantial majority of the physicians in Tarrant County.

PAR. 3. Respondent is a component society of the Texas Medical Association, which in turn is a constituent society of the American Medical Association.

PAR. 4. Members of respondent are engaged in the business of providing medical health care services for a fee. Except to the extent that competition has been restrained as herein alleged, members of re-



spondent have been and are now in competition among themselves and with other physicians.

PAR. 5. Respondent engages in substantial activities which further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. In the conduct of their business, members of respondent receive substantial sums of money, which flow across state lines, from the federal government and from private insurers for rendering medical services, and purchase equipment and supplies and prescribe medicines which are shipped in interstate commerce. The acts or practices described below are in interstate commerce, or affect the interstate activities of respondent's members, third-parties who pay for medical services, other third parties, and some patients of respondent's members, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 7. Respondent has acted as a combination of at least some of its members or has conspired with at least some of its members to hinder, frustrate, or restrict competition among physicians in Tarrant County by restricting or attempting to restrict its members from disseminating information to consumers through truthful, non-deceptive advertising.

PAR. 8. Respondent has engaged in various acts and practices in furtherance of this combination or conspiracy, including:

A. Through its Board of Censors, restricting or attempting to restrict the amount, duration, and size of advertising announcements that members place in newspapers. For example, respondent distributed restrictions to members that limit advertising announcements in newspapers to ten days and one-column inch in size; and

B. Through its Board of Censors, restricting or attempting to restrict the number of telephone directory listings its members place and the size of their print.

PAR. 9. The purposes or effects of the combination or conspiracy and acts or practices of respondent as described above have been and are to unreasonably restrain competition and injure consumers in one or more of the following ways, among others:

A. Vigorous competition among physicians is impeded;

B. Physicians are being deterred from advertising truthful information in the media about their prices, services, and qualifications; and

C. Consumers are being deprived of receiving truthful information about physicians' prices, services, and qualifications.

PAR. 10. The combination or conspiracy and the acts and practices

described above constitute unfair methods of competition and unfair acts or practices which violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such combination or conspiracy is continuing and will continue absent the entry against respondent of appropriate relief.

#### DECISION AND ORDER

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

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

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

1. TCMS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its mailing address at 3855 Tulsa Way, Fort Worth, Texas.

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

## ORDER

## I.

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

A. "TCMS" means respondent Tarrant County Medical Society, its officers, councils, committees, boards, representatives, agents, employees, successors, and assigns; and

B. "Adverse action" means the revocation or suspension of, or refusal to grant, membership in TCMS, or the disciplining or penalizing of any physician.

## II.

*It is ordered*, That TCMS, directly or indirectly, or through any device, shall forthwith cease and desist from:

Restricting, regulating, declaring unethical, impeding, interfering with, or advising against the advertising or publishing by any person or organization of information about the prices, terms, or conditions of sale of physicians' services, or of any information about physicians' services, facilities, or equipment which are offered for sale or made available by physicians or by any organization with which physicians are affiliated, including but not limited to restricting or attempting to restrict the content, format, size, or frequency of any such advertisements or publications.

Nothing contained in this order shall prohibit TCMS from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that TCMS reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

## III.

*It is further ordered*, That TCMS shall cease and desist from:

A. For a period of ten (10) years after service of this order, taking any adverse action against a person alleged to have violated any rule, policy, guideline, or ethical standard relating to physician advertising without first providing such person with written notice of the allegations against such person and without providing such person a reasonable opportunity to respond. The notice required by this part shall, at a minimum, clearly specify the rule, policy, guideline, or ethical stan-

dard alleged to have been violated, the specific conduct that is alleged to have violated the rule, policy, guideline, or ethical standard, and the reasons the conduct is alleged to have violated the rule, policy, guideline, or ethical standard; and

B. Failing to maintain for five (5) years following the taking of any action referred to in this part of the order, in a separate file segregated by the name of any person against whom such action was taken, any document that embodies, discusses, mentions, refers, or relates to the action taken and any allegation relating to it.

#### IV.

*It is further ordered, That TCMS shall:*

A. For a period of five (5) years, commencing on the date this order is served, provide each applicant for membership in TCMS with a copy of this order at the time the applicant applies for membership;

B. Within sixty (60) days after service of this order, publish a copy of the complaint and this order in the *Physician*, or in any successor publication, with the same prominence as regularly published feature articles;

C. Within fifteen (15) days after service of this order, remove from TCMS' documents entitled "Board of Censors Agenda for Meeting with Provisional Members" and "Board of Censors Meeting with Applicants for Membership," and any other existing ethical or policy statement or guideline of TCMS, any provision, interpretation or statement which is inconsistent with Part II of this order, and within sixty (60) days after service of this order, publish, in the manner described in Part IV.B. of this order, a copy of the revised versions of such statements, guidelines, or interpretations to each of its members;

D. Within sixty (60) days after service of this order, send to the Southwest Bell Telephone Company supervisor in charge of professional advertising a copy of this order and accompanying complaint;

E. Within ninety (90) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which TCMS has complied with this order; and

F. For a period of five (5) years after service of this order, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including but not limited to any advice or interpretation rendered with respect to advertising involving any physician.

## V.

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

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Complaint

IN THE MATTER OF

NEW MEDICAL TECHNIQUES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF  
THE FEDERAL TRADE COMMISSION ACT*Docket C-3220. Complaint, Nov. 18, 1987—Decision, Nov. 18, 1987*

This consent order prohibits, among other things, a Mystic, Connecticut manufacturer and distributor of countertop water distillers from misrepresenting that the devices are approved or endorsed by any person or organization and from making false and unsubstantiated claims concerning their ability to remove contaminants and impurities from water. Respondent is required, for three years, to maintain the material to substantiate their claims.

*Appearances*For the Commission: *Joel Winston.*For the respondents: *Richard S. Pastore, Albert, Pastore & Ward,*  
Greenwich, Conn.

## COMPLAINT

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

PARAGRAPH 1. NMT is a Connecticut corporation, with its offices and principal place of business in Mystic, Connecticut, and its mailing address at Post Office Box 429, Broadway Extension, Mystic, Connecticut.

PAR. 2. Respondent has advertised, offered for sale, sold and distributed water distillers and water distiller accessories, including the Aquaspring Home Water Distiller models 1.5, 4, and 5 ("Aquaspring"). These distillers are designed to remove contaminants from water through the process of boiling and recondensing the water.

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

PAR. 4. Typical of respondent's advertisements and promotional materials for Aquaspring, but not necessarily all-inclusive thereof, are the promotional materials attached hereto as Exhibits A, B, C, D

and E. The aforesaid advertisements and promotional materials contain the following statements:

(a) "[D]istilled water is pure water—no chemicals or bacteria. Nothing but water can be found in distilled water." (EX. A)

(b) "Only distillation will remove EVERYTHING from water." (EX. A)

(c) "The distillation process boils the source water, collects the resulting steam, cools and condenses it back into water. Bacteria and germs are immediately killed by the heat of the steam. Salts, sulphur, arsenic, mercury, chlorine and other chemical impurities do not boil at the same temperature as water. They do not, therefore, become steam, and do not travel into the cooling, condensing apparatus of the distiller. These impurities are thus left behind in the boiler with only PURE WATER delivered from the distiller's condenser unit." (EX. A)

(d) "Municipal water supplies are not safe. Recent studies have shown that chlorine, a chemical put into all public water supplies, reacts with organic matter to form chloroform. Chloroform is a known carcinogen. The United States Environmental Protection Agency recognizes the danger of chloroform in our public water supplies and soon will force the water companies to do something about it.

Unfortunately, years will pass before all chloroform is out of our water." (EX. A)

(e) "The United States Health Service, after testing our products, recommended them to their various clinics. Also, again after thorough testing, Duke Medical Center recommends our products." (EX. A)

(f) "Distilled Water—(Boiling and vaporizing) removes bacteria, minerals and chemicals.

Absolutely Pure Water." (EX. B)

(g) "Why should you take chances? You don't have to be a doctor or a well-educated person to understand that with these chemicals and pollutants in our water, it is foolish to take chances when it is so inexpensive to remove them through *distillation, NATURE'S WAY OF PURIFYING WATER.*" [emphasis in original] (EX. C)

(h) "Aquaspring 5 the new Stainless home water distiller, removes objectionable impurities from drinking water." (EX. D)

(i) "Safe \* Pure \* Water" (EX. D AND E)

(j) "The Aquaspring 1.5 converts tap water—even sea water—to safe pure distilled water which far exceeds drinking water standards as established by the Environmental Protection Agency." (EX. E)

(k) "Distillation is the only truly effective way to eliminate dangerous bacteria, viruses, dirt, salt, rust, chlorine and other chemicals and minerals. Other methods of water purification remove some of the contaminants, but only distillation can eliminate all impurities. At a time when our nation's water supplies are so badly polluted it makes good sense to drink distilled water." (EX. E)

PAR. 5. Through the use of the statements referred to in paragraph four (a) through (k) and others in advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that:

(a) Aquaspring will remove all impurities or contaminants from water.

(b) Aquaspring will remove all chemical impurities or contaminants from water.

(c) Aquaspring will remove chloroform from water.

(d) Consumers who use Aquaspring will be protected from all diseases or conditions caused by hazardous water-borne impurities or contaminants.

(e) Aquaspring has been tested, approved and endorsed by the Public Health Service office of the United States Department of Health and Human Services and by the Duke University Medical Center.

PAR. 6. In truth and in fact,

(a) Aquaspring will not remove all impurities or contaminants from water, because it will not remove volatile organic chemicals from water.

(b) Aquaspring will not remove all chemical impurities or contaminants from water, because it will not remove volatile organic chemicals from water.

(c) Aquaspring will not remove chloroform, a volatile organic chemical, from water.

(d) Consumers who use Aquaspring will not be protected from all diseases or conditions caused by hazardous waterborne impurities or contaminants, because Aquaspring will not remove toxic and potentially carcinogenic volatile organic chemicals from water.

(e) Aquaspring has not been tested, approved and endorsed by the Public Health Service office of the United States Department of Health and Human Services or by the Duke University Medical Center.

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

PAR. 7. Through the use of the statements and representations set forth in paragraphs four and five and others not specifically set forth herein, respondent has represented, directly or by implication, that, at the time it made the representations, respondent possessed and relied upon a reasonable basis for such representations.

PAR. 8. In truth and in fact, at the time respondent made said representations, respondent did not possess and rely upon a reasonable basis for such representations. Therefore, respondent's representations as set forth in paragraph seven were and are false and misleading.

PAR. 9. In the advertising and sale of Aquaspring, respondent has failed to disclose to consumers that Aquaspring does not remove from water volatile organic chemicals, which are potentially hazardous to health. This fact would be material to consumers in their decisions on whether to purchase or how to use Aquaspring. The failure to disclose this fact, in light of the representations made as alleged in paragraph five, is a deceptive practice.

PAR. 10. The acts and practices of respondent as alleged in this



Complaint

110 F.T.C.

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

"YOUR INSTANT SOLUTION TO WATER POLLUTION"©

Aquaspring® Model 1.5.  
Weighs only six pounds.  
9 1/4" square at base. 110 volt.



**NEW MODEL  
4 FEATURES:**  
*CUT OFF SWITCH  
HEAVIER MOTOR  
BRACKETS  
FIRE RETARDANT  
SHROUD  
THREE-WIRE  
CORD*

Aquaspring® Model 4:  
110 volt. 60 cycles. 720 watts. Capacity: 4 gal. per day  
Height: 16 1/4"; Base: 9 1/4" sq.; Weight: 11 pounds.



\* New Aquaspring®  
Model #5 High Speed  
Stainless Steel Water  
Distiller - meets larger  
requirements. Weighs  
only 12 lbs., 110 Volt,  
9 1/4" square at base.

\* Available 1984

Note: New Medical Techniques' distillers come with a pyrex boiler. Stainless steel is optional.

\* Trademark of New Medical Techniques, Inc.  
Covered by U.S. patents.  
**ONE YEAR WARRANTY**

Copyright 1978 by New Medical Tech  
Box 429, Mystic, Connecticut C

100C17

One of the  
dirtiest words  
in the  
world . . .

**WATER**

100010

**Q** Is distilled water good for you?

**A** Yes, distilled water is pure water — no chemicals or bacteria. Nothing but water can be found in distilled water. Our bodies need water, they do not need the chemicals which can be found in our adulterated tap water.

**Q** Who are the largest users of distilled water for drinking purposes?

**A** Well, the entire United States Navy drinks distilled water when aboard ship. On every naval ship there is a distillation unit which converts sea water into distilled water. The principle of this distillation is exactly the same as with our products, the Aquaspring® water purifier — distillers.

Patients on sodium restricted diets are advised to drink only distilled water. The United States Health Service, after testing our products, recommended them to their various clinics. Also, again after thorough testing, Duke Medical Center recommends our products. The United States Air Force, after thorough testing in Turkey, approved our products.

**Q** Is there any other way of obtaining distilled water besides buying your products?

**A** Yes, you can buy distilled water in supermarkets and drug stores at prices ranging from \$1.10 to \$2.00 a gallon. Making your own distilled water with one of our units is much less expensive — you need only pay for the electricity.

100C11

**Q** Are there any other advantages to using Aquaspring® products rather than bottled water?

**A** Yes, in addition to the tremendous yearly savings in money, you have the following advantages:

1. Source of supply. You know that since you make it right in your own home, it is really distilled water and pure. On the other hand, the Federal Trade Commission has found many instances of mislabeling where it is stated their product is "to be used for distilled water purposes" and yet in the small print it acknowledges it was not distilled water.

2. Another advantage is the well designed 1/2 gallon receiving and storage bottle which is ideal for pouring and storing.

**Q** Is distillation the only method of getting pure water?

**A** Yes, filters, reverse osmosis, electro dialysis, and ultraviolet rays will not give you pure water. Only distillation will remove EVERYTHING from water.

**Q** Does distillation remove (take out) mercury, arsenic, sulphur, salt, chlorine, and all mineral impurities?

**A** Yes.

**Q** Does a filter take out any of these mineral impurities?

**A** No.

100C12

**Q** Is spring or mineral water pure water?

**A** No. It is merely taken out of a spring, tap or well?

**Q** Why is distilled water so pure?

**A** The distillation process boils the source water, collects the resulting steam, cools and condenses it back into water. Bacteria and germs are immediately killed by the heat of the steam. Salts, sulphur, arsenic, mercury, chlorine and other chemical impurities do not boil at the same temperature as the water. They do not, therefore, become steam, and do not travel into the cooling, condensing apparatus of the distiller. These impurities are thus left behind in the boiler with only PURE WATER delivered from the distiller's condenser unit.

**Q** Is distilled water tasteless?

**A** Yes, all pure water is tasteless. Distilled water served cold, is acknowledged to be delicious.

**Q** What should distilled water be used for?

**A** Mainly for drinking and cooking. The supply of distilled water from an AQUASPRING® is ample for a family of 3 or 4 for drinking and cooking. The larger size unit will take care of families up to 8 to 12.

100C13

**Q** A friend told me that distilled water is great to cook with. Why is that?

**A** As distilled water adds no foreign substances to your food, the original tastes and flavors of your foods are preserved. If you ever wonder why someone else's food always tastes better than yours, chances are they use a better water than you do.

**Q** Is distilled water the best base for mixing powdered milk, Tang, instant coffee, tea, and dehydrated soups?

**A** It most certainly is. S.S. Project HOPE uses a large distillation unit, converting sea water to pure distilled water, which is then mixed with powdered milk and cooled and makes a delicious drink of which they have dispensed millions of quarts.

**Q** The food did taste much better when I was young; could it be because we got our water from a well?

**A** Could be, but well water can be dangerous, especially when the well is located on a small plot where it is almost impossible to keep the seepage from the cesspool or septic tank out of the well.

**Q** What is being done about such contamination?

**A** Almost nothing. A great many persons have stated that the only way we are going to start purifying the water will be in the American home. It took a long time to inform the public about distillation, what it was, how easy our products are to operate, and how economical they are.

**Q** Can you get seriously ill from drinking contaminated water?

**A** Yes. Many doctors have written, giving evidence that water, contaminated with human excrement, caused the cholera epidemics which were prevalent in many areas of the earth. These

100C14

same conditions exist today and the cholera epidemics are spreading.

**Q** Could such an epidemic happen in this country?

**A** Yes. The U.S. Public Health Service has been trying to shock the apathy and complacency of the American public by this dangerous fact. There are many areas where water not only contains poisonous minerals such as arsenic and mercury, but also has human excrement.

**Q** Just how safe are our municipal water supplies?

**A** Municipal water supplies are not safe. Recent studies have shown that chlorine, a chemical put into all public water supplies, reacts with organic matter to form chloroform. Chloroform is a known carcinogen. The United States Environmental Protection Agency recognizes the danger of chloroform in our public water supplies and will soon force the water companies to do something about it. Unfortunately, years will pass before all chloroform is out of our water.

**Q** Can water be clear and still contaminated?

**A** Yes. For example, in Suffolk County, Long Island, there is a prevalence of both detergents and cesspool seepage and the water still is fairly clear.

**Q** How long will it take to correct water pollution in the United States?

**A** Some people say it will take 10 years, others say 100 years. It is anybody's guess. The facts are the U.S. Public Health Service reports show that practically every river and lake in the United States is contaminated, some having very dangerous pollution.

100015

## Distilled Water

- Drink it.
- Cook with it.
- It makes great ice cubes.
- Mix baby's formula with it.
- Use it in your iron,
- your car battery,
- and your humidifier, they will all last longer and work better.
- Use it to make coffee
- or tea you will love.
- Soups, juices and
- prepared foods taste best when made with it.
- When you travel abroad, bring your distiller and never worry about native water again.
- Shampoo with it,
- your hair will shine.
- Use it when washing
- delicate fabrics.
- Buy an Aquaspring® today.



100016

125

Complaint

EXHIBIT B

# Aquaspring®

N.M.T., INC., Mystic, CT 06355

Qty.	Item	Price
	Aquaspring - Model 1.5 with Pyrex Boiler and Two Rectifying Bottles	* \$167.00
	Aquaspring - Model 4 with Pyrex Boiler and Four Rectifying Bottles	* \$271.00
	Aquaspring - Model 5 Stainless Steel with Pyrex Boiler and 4 Rectifying Bottles	* \$322.00
	Pyrex Boiler for all Aquasprings	** \$12.25
	Stainless Steel Boiler for all Aquasprings	** \$31.75
	Extra pairs Rectifying Bottles	1 ** per pair \$14.00
	Carrying Case for Model 1.5 only	** \$12.00
	Scarf off Cleaner Quart Container	** \$18.70
	** Prices include postage on orders in U.S.A.	
	Conn. residents only, add 7 1/2% Sales Tax	

\* Suggested Retail  
 Check or Money order enclosed  
 Ship C.O.D. Add \$2.50  
 TOTAL ENCLOSED \_\_\_\_\_  
 SHIP TO: \_\_\_\_\_  
 NAME \_\_\_\_\_  
 ADDRESS \_\_\_\_\_  
 CITY \_\_\_\_\_  
 ZIP CODE 10021  
 Prices subject to change without notice.

**DO YOU KNOW ABOUT WATER?**  
 Boiling Water removes bacteria, but not minerals or chemicals.  
 Filtering Water - (charcoal, etc.) removes undissolved matter only, not bacteria, minerals or chemicals.  
 Distilled Water - (Boiling and vaporizing) removes bacteria, minerals and chemicals.  
**Absolutely Pure Water.**

N.M.T. Inc.  
 P.O. Box 429  
 Mystic, Connecticut 06355

Parameter	Before	After
Alkalinity	6.8	Less than 2.0
Chlorine	11.8	Less than 0.7
Chloride	0.6	0.0
Copper	0.03	0.0
Fluoride	1.0	Less than 0.05
Hardness	12.5	Less than 2.0
Iron	0.11	Less than 0.04
Manganese	0.01	Not Reported
Nitrate	0.1	Less than 0.15
Nitrogen, Ammonia	0.1	Less than 0.02
Total Phosphorus	0.11	Less than 0.01
Sodium	8.8	Less than 7.4
Conductance, Specific	290.0	4
Sulfate	37.0	0.4

**USE SCALE OFF CLEANER** on a regular basis. It contains an inhibitor that protects against corrosion.

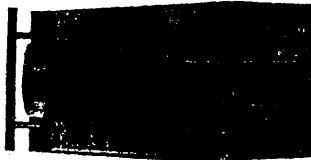
**UNPLUG THE DISTILLER AFTER EACH CYCLE.**

**NEVER ADD WATER TO THE RESIDUE.**  
 Rinse out boiler, start with **100C20**

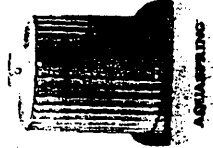
# Aquaspring®

## Home Water Distiller

New Aquaspring® Model #5 High Speed Stainless Steel Water Distiller - meets larger requirements. 120 Volt, 950 Watts, 9 1/2" square at base.



Aquaspring® Model 4:  
 Capacity: 4 gal. per day. Weight: 11 lbs. Height: 16 1/2"; Base: 9 1/2" sq.; 120 volt. 60 cycles. 720 watts.



Aquaspring® Model 1.5:  
**SPECIFICATIONS:**  
 120 volt, 60 cycles, 235 watts. Capacity: 1 1/2 to 2 gal. per day. Height: 13 1/2"; Base 9 1/2" sq. Weight: 6 pounds.

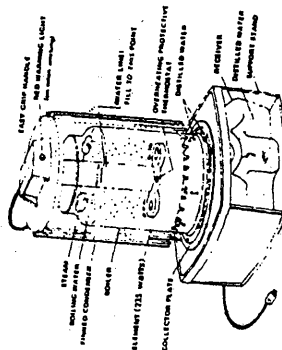
ONE YEAR WARRANTY **100C19**

Complaint

110 F.T.C.

# Aquaspring®

"YOUR INSTANT SOLUTION TO WATER POLLUTION"®



**Q** Is distilled water good for you?  
**A** Yes, distilled water is pure water — no chemicals or bacteria.

**Q** Is there any other way of obtaining distilled water besides buying your products?  
**A** Yes, you can buy distilled water in supermarkets and drug stores at various prices.

**Q** Are there any other advantages to using Aquaspring® products rather than bottled water?  
**A** Yes, in addition to the tremendous yearly savings in money, you have the following advantage:  
 Source of supply. The well designed 1/2 gallon receiving and storage bottle which is ideal for pouring and storing.

**Q** Is distillation the only method of getting pure water?  
**A** Yes, filters, reverse osmosis, electrolysis, and ultraviolet rays will not give you pure water. Only Distillation will remove bacteria from water.

**Q** Does distillation remove (take out) mercury, arsenic, sulphur, salt, chlorine, and all mineral impurities?  
**A** Yes.

### MODEL 4 & 5 FEATURES

- CUT OFF SWITCH
- HEAVIER MOTOR BRACKETS
- FIRE RETARDANT SHROUD
- THREE WIRE CORD

### OTHER FEATURES

- EPA NUMBER #19832-CT-01
- PLASTIC FDA APPROVED
- ALUMINUM PARTS ANODIZED (Glass-like coating)
- PURIFIES WATER (Removes Bacteria and solids.)
- COMPACT — FITS ON COUNTER
- REQUIRES NO ASSEMBLY
- TOTALLY AUTOMATIC
- QUIET LONG LIFE MOTOR
- QUALITY CONSTRUCTION (Paris-Labor)
- FAST (2 1/2 to 3 hrs. per cycle)

Model 5 Ul. Approved.

U.S. PATENTS  
 D-195771  
 D-196108  
 D-196147

100C22

100C18

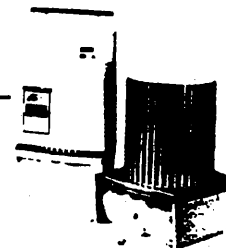
100C23

## EXHIBIT C

## NEW MEDICAL TECHNIQUES, INC.

MASON'S ISLAND ROAD • MYSTIC • CONNECTICUT 06355 • 203 536 4981

AQUASPRING -- YOUR INSTANT SOLUTION TO WATER POLLUTION™



## TEN COMMON SENSE REASONS WHY YOU SHOULD DRINK DISTILLED WATER

1. There are 12 thousand chemicals on the market today, 500 being added yearly. Regardless of where you live, in the city or on the farm, some of these chemicals could be getting into your drinking water.
2. Because everybody's body chemistry is different, these chemicals could have a drastic effect on your health.
3. No one on the face of the earth today knows what effect these could have on your body, as they go into thousands of different combinations. (It is like making a mixture of colors; one drop could change the complete color.)
4. There has not been equipment designed to detect these chemicals, and there may not be for many years to come.
5. The Navy has been drinking distilled water for several generations.
6. Distilled water is chemical and mineral free. Distillation removes all of the chemicals and impurities that it is possible to remove and if distillation doesn't remove them, there is no known method today that will.
7. Though the body does need minerals, there is no organic or inorganic mineral in water that makes a minute amount of difference, as most minerals that the body can assimilate are found in fruits, vegetables or foods. Because minerals in water vary from area to area, water would be a poor source of minerals. We feel it is much better to clean the water up and remove these chemicals, pollutants and inorganic minerals, drink distilled water, and if you feel you should, supplement it with fruits and vegetables.
8. Dr. Schroeder, one of our leading trace mineral experts, states: "There is more of a danger of the body receiving an over-abundance of minerals than an under-abundance, which could be replaced."
9. We have sold tens of thousands of distillers throughout the United States and in many foreign countries. We have had thousands of people tell us and hundreds of people write us that it has helped them physically and given them a feeling of general well-being.
10. Why should you take chances? You don't have to be a doctor or a well-educated person to understand that with these chemicals and pollutants in our water, it is foolish to take chances when it is so inexpensive to remove them through distillation, NATURE'S WAY OF PURIFYING WATER.

100031



Complaint

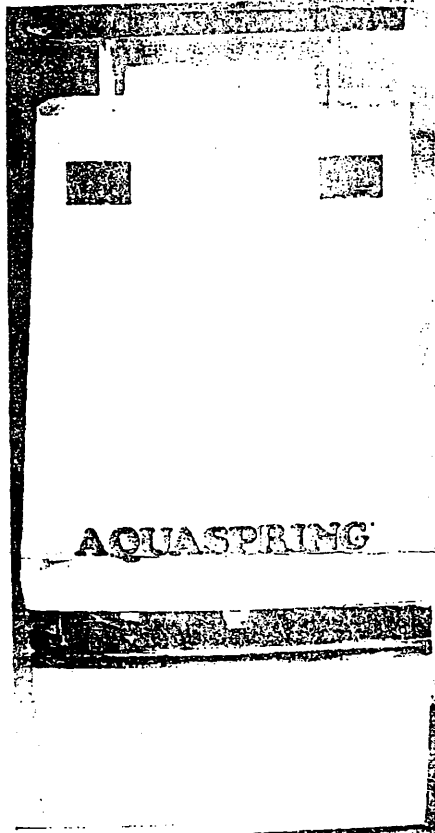
110 F.T.C.

EXHIBIT D

# NEW AQUASPRING<sup>®</sup>-5

## HI-SPEED-STAINLESS Home Water Distiller

ENJOY CLEAN REFRESHING WATER IN  
YOUR OWN HOME WITHOUT PLUMBING  
EXPENSIVE EQUIPMENT WATER AQUASPRING  
IS THE ALTERNATIVE



Safe • Pure • Water

**AQUASPRING-5** the new Stainless home water distiller, removes objectionable impurities from drinking water. This remarkable compact appliance, manufactured by New Medical Techniques, Inc., distills tap water — or even sea water — and converts it to fresh pure drinking water — efficiently, silently, and for only pennies per gallon. Yield is 5 gallons\* of distilled water a day.

**AQUASPRING'S** Pure Distilled Water brings out the delicious natural flavor of coffee, tea, soups, mixed drinks, juice concentrates, even ice cubes... recommended for special diet formulas and salt-free diets...eliminates drinking problems at summer cottages, fishing camps, travel trailers...excellent for color photography, electric irons, batteries.

**AQUASPRING** is compact and portable, weighs only 9 pounds. It plugs in like your toaster, and its action is completely automatic. No expensive plumbing hookups are needed.

**AQUASPRING** removes rust, dirt, salts, pesticides, chlorine, fluorides, alum, sulphur, and mineral impurities to make safe, pure distilled drinking water which meets U.S.P. standards...

It's that simple. Let **AQUASPRING-5** work while you sleep — the automatic electric circuit will turn the unit off when it produces one half gallon of water\*. And an Add Water neon light goes on to let you know that you can make additional water. This neon light consumes a minute amount of energy and may serve as a nite-lite in your kitchen.

**Specifications:**

120 volts, 60 cycle AC, 950 watts. Height-17½", Base-9½" square, Weight-9 lbs. (approx.)

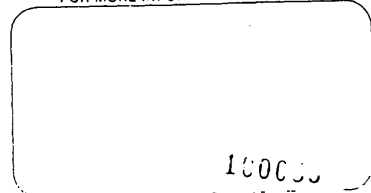
**WARRANTY:** Guaranteed for 12 months against defects in material or workmanship.

Trademark of New Medical Techniques, Inc., Mystic, CT 06355  
Covered by U.S. patents issued and pending.

\* Approx.

U.L. Approved - Listed 424D

FOR MORE INFORMATION CONTACT



## EXHIBIT E

**AQUASPRING®-1.5****Home Water Distiller**

ENJOY CLEAN REFRESHING WATER IN YOUR OWN HOME WITHOUT BUYING EXPENSIVE BOTTLED WATER. AQUASPRING IS THE ALTERNATIVE.

The **AQUASPRING-1.5** is a portable electric water distiller capable of providing distilled water for families up to four people.\* The **AQUASPRING-1.5** converts tap water — even sea water — to safe pure distilled water which far exceeds drinking water standards as established by the Environmental Protection Agency.

**Specifications**

110-120 volts, 60 cycle AC 235 watts. Height 13 1/2". Base 9 1/2" square. Weight 6 lbs. U.L. listed.

**Why distillation?**

Distillation is the only truly effective way to eliminate dangerous bacteria, viruses, dirt, salt, rust, chlorine and other chemicals and minerals. Other methods of water purification remove some of the contaminants, but only distillation can eliminate all impurities. At a time when our nation's water supplies are so badly polluted it makes good sense to drink distilled water.

**How does it operate?**

The **AQUASPRING-1.5** which is U.L. listed, is fully engineered and designed to provide years of trouble free service. It can be operated 24 hours a day and requires only routine cleaning. The distiller is an attractive appliance which sits on any kitchen counter or other level surface and can be easily stored if not in use. You simply lift off the top, fill the boiler with water, replace the top, and plug into any outlet. Each cycle takes 7 to 8 hours and will produce 1/2 gallon\*\* of distilled water, depending upon ambient conditions.

**Is it expensive to operate?**

The **AQUASPRING-1.5** operates for pennies per cycle, and when compared to the high cost of bottled water the savings is significant. But more important — you know that the water is indeed pure, fresh, distilled water.

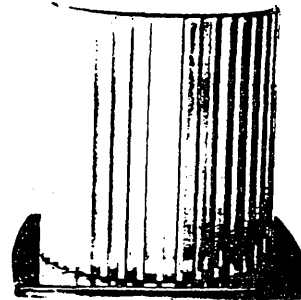
**Who uses distilled water?**

For years Aquasprings have been providing homes, camps, businesses, schools, hospitals, doctors' offices, scientific labs, and photographic studios with distilled water.

For people on special diets and people concerned about the quality of the water they drink — distilled water is a must.

The **AQUASPRING-1.5** comes complete with Pyrex Boiler, two Receiving Bottles, and a Stainless Steel Collecting Plate. **NO PLUMBING IS REQUIRED** — Just plug it in and you're on your way to fresh, pure DISTILLED water. One year warranty.

AQUASPRING  
by New Medical Techniques, Inc.



**AQUASPRING**

DO NOT IMMERSE IN WATER

**Safe • Pure • Water**

FOR MORE INFORMATION CONTACT

100034

## DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that 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 New Medical Techniques, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its offices and principal place of business located in Mystic, Connecticut and its mailing address at Post Office Box 429, Broadway Extension, Mystic, Connecticut.

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

## ORDER

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

A. "*Aquaspring*" shall mean the Aquaspring Home Water Distiller Models 1.5, 4, and 5 offered for sale, sold, or distributed by New Medical Techniques, Inc., a Connecticut corporation, under the Aquaspring trade name or any other trade name, including but not limited to "Medi-Tech" and "The Home Water Still."

B. "Water purification device" shall mean any product or construct which is designed to be used for the removal or reduction, by any method, of any impurities or contaminants from water intended for human consumption.

C. "Volatile organic chemical" shall mean any synthetic or naturally occurring organic chemical which, when present in water, generally will evaporate when the water is heated to a temperature at or less than 100 degrees Celsius.

D. "Competent and reliable scientific test" shall mean a test in which persons with skill and expert knowledge in the field to which the test pertains conduct the test and evaluate its results in an objective manner using testing, evaluation, and analytical procedures that ensure accurate, reliable, and reproducible results.

## I.

*It is ordered,* That respondent New Medical Techniques, Inc., a corporation; its successors and assigns; and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Aquaspring or any other water purification device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, that:

A. Any such device has been tested, approved, or endorsed by any person, firm, organization, or government agency;

B. Any such device will protect the user from any health hazard associated with any water-borne contaminant; and

C. Any such device (1) is capable of removing any impurity or contaminant from water, (2) will provide absolutely pure water or will remove all contaminants from water, or (3) is capable of removing all chemicals or any specific chemical from water.

## II.

*It is further ordered,* That respondent New Medical Techniques, Inc., a corporation; its successors and assigns; and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Aquaspring or any other water purification device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

A. Any such device will protect the user from any health hazard associated with any water-borne contaminant, unless, at the time the representation is made, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation; and

B. Any such device (1) is capable of removing any impurity or contaminant from water, (2) will provide absolutely pure water or will remove all contaminants from water, or (3) is capable of removing all chemicals or any specific chemical from water, unless, at the time the representation is made, respondent possesses and relies upon a reasonable basis consisting of a competent and reliable scientific test that substantiates the representation.

### III.

*It is further ordered,* That respondent; its successors and assigns; and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Aquaspring or any other water purification device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, any performance or efficacy characteristic of any water purification device, unless, at the time the representation is made, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation.

### IV.

*It is further ordered,* That for three years from the date that the representations to which they pertain are last disseminated, respondent shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

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

B. All test reports, studies, surveys or other materials in its possession or control or of which it has knowledge that contradict, qualify or call into question such representation or the basis upon which respondent relied for such representation, including complaints from consumers.

## V.

*It is further ordered,* That respondent shall include the following notice in all advertising and promotional materials for the Aquaspring or any other water purification device that does not substantially remove volatile organic chemicals from water, if that advertising or promotional material represents, directly or by implication, that the device will remove any chemical contaminant from water or will protect the user from any health hazard associated with any water-borne contaminant:

NOTICE: This device is not designed to remove potentially hazardous volatile organic chemicals from water.

*Provided, however,* That the above notice shall not be required where the representation is limited solely to an itemization of those contaminants that the device will substantially remove. Nothing contrary to, inconsistent with, or in mitigation of the above required language shall be used in any such advertising or promotional material. In print advertising and promotional material, the above required language shall appear in at least ten-point bold type print, in close conjunction with the representation. In any television advertising, film, videotape or slide promotional material, the above required language shall be included both orally and visually in a manner designed to ensure clarity and prominence. In radio advertising, the above required language shall be read in a clear manner.

## VI.

*It is further ordered,* That respondent shall deliver by certified mail or in person a copy of this order to all present and future distributors of Aquaspring, and instruct said distributors in writing not to make any of the representations, directly or by implication, prohibited by this order. Delivery shall be made within thirty (30) days after the date of service of this order to all present distributors. For all future distributors, delivery shall be made prior to the time said distributors begin distribution of the product.

## 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 or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VIII.

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

IN THE MATTER OF  
GENERAL RAILWAY SIGNAL CO., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL  
TRADE COMMISSION AND CLAYTON ACTS

*Docket C-837. Consent Order, Sept. 24, 1964—Modifying Order, Dec. 10, 1987*

The Federal Trade Commission has modified a 1964 consent order (66 F.T.C. 882) by permitting General Railway Signal Co. to engage in any conduct or enter any agreement that is ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws.

ORDER MODIFYING CONSENT  
ORDER ISSUED SEPTEMBER 24, 1964

On August 12, 1987, General Railway Signal Company ("General Railway"), filed a "request to reopen proceeding and modify order" ("request"), pursuant to Section 2.51 of the Commission's Rules of Practice. The request asks the Commission to reopen the proceeding and modify the consent order issued September 24, 1964, ("the order") to permit General Railway to engage in any conduct or enter any agreement that is ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the anti-trust laws.

The Commission has previously considered the petition of American Standard Inc. ("American Standard"), successor to respondent Westinghouse Air Brake Co. ("WABCO"), which requested, among other things, that the Commission modify the order in Docket No. C-837 to permit American Standard to engage in lawful joint venture activity. On November 13, 1986, the Commission granted that request in the public interest, finding that American Standard had made an adequate showing that currently evolving technological and economic factors in the railroad signaling equipment and systems industry have created a competitive need for American Standard to participate in joint ventures to research, develop and produce integrated railroad systems and to bid for turnkey railroad projects.

After reviewing General Railway's Request and other relevant information, the Commission has concluded that it is in the public interest to modify the order to permit General Railway to engage in conduct that is ancillary to and reasonably necessary for the formation or operation of any joint venture that is lawful under the anti-trust laws. General Railway has made an adequate showing that the same industry conditions that warranted modification of the order to



permit American Standard to engage in lawful joint venture activity also warrant modification of the order to extend General Railway the same relief. The currently evolving technological and economic factors in the railroad signaling equipment and systems industry cited by General Railway, and previously cited by American Standard, have created a competitive need for General Railway to also participate in joint ventures to research, develop and produce integrated railroad systems and to bid for turnkey railroad projects. The order's present language, designed to restrain conduct that might facilitate collusive agreements, could be interpreted to prohibit otherwise lawful joint venture activity. It is in the public interest to modify the order to enable General Railway to participate in otherwise lawful joint venture activity because the competitive injury that General Railway will likely suffer if it cannot engage in such lawful activity is not outweighed by any need to retain the order in its current form.<sup>1</sup>

Accordingly, *It is ordered*, That this matter be and it hereby is reopened and that the Commission's order issued on September 24, 1964, be and it hereby is modified to make the new subparagraph (4), which was previously added by the Commission on November 13, 1986, read as follows:

(4) Nothing contained in the foregoing paragraphs of the order shall be construed to prohibit respondents WABCO and General Railway Signal Company from engaging in any conduct or entering into any agreement that is ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws.

<sup>1</sup> The order's provisions are aimed at horizontal conduct and agreements. The order language prohibiting agreements with "any other person, persons or business entity not a party hereto" is limited by the existing exemption for any "bona fide offer, agreement or transaction with any other person, persons or business entity to purchase or sell railroad signaling and control systems or railroad signaling equipment at prices, terms or conditions of sale independently determined and offered and independently accepted." The new modification for lawful joint venture activities will be a further limitation. The "any other person . . . not a party hereto" language will, in practical effect, mean only vendors of signaling equipment or systems.

## IN THE MATTER OF

## WYOMING STATE BOARD OF CHIROPRACTIC EXAMINERS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF  
THE FEDERAL TRADE COMMISSION ACT*Docket C-3221. Complaint, Jan. 13, 1988—Decision, Jan. 13, 1988*

This consent order requires, among other things, the Lander, Wyoming board, which has exclusive authority to license chiropractors in the state, to refrain from prohibiting, restricting, impeding or discouraging any person from advertising truthful, nondeceptive information made available by any licensed chiropractor. Respondent is prohibited from characterizing such advertising as unethical or unprofessional.

*Appearances*

For the Commission: *R. Norman Cramer, Jr.*

For the respondent: *Glenn R. Harrison, Wyoming State Board of Chiropractic Examiners, Lander, WY.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, *as amended*, 15 U.S.C. Section 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Wyoming State Board of Chiropractic Examiners has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

## RESPONDENT

PARAGRAPH 1. Respondent Wyoming State Board of Chiropractic Examiners ("the Board") is organized, exists and transacts business under the laws of the State of Wyoming, with its principal office and place of business located at the office of Glenn R. Harrison, D.C., its Secretary-Treasurer, 550 Main Street, Lander, Wyoming. The Board is subject to the Commission's jurisdiction pursuant to Section 5 of the Federal Trade Commission Act.

PAR. 2. Membership on the Board is limited to practicing chiropractors. The Board is composed of three chiropractors, who are appointed by the governor to staggered three-year terms. Wyo. Stat. Sections 33-10-102, -103 (1977).

PAR. 3. All Board members must have practiced chiropractic con-

tinuously in Wyoming for at least three years preceding their appointment to the Board, and members must continue to practice chiropractic while on the Board. Wyo. Stat. Section 33-10-102 (1977). Board members spend a relatively small percentage of their time on Board matters, and compensation is limited to \$10.00 per day of actual service plus a per diem and mileage allowance. Wyo. Stat. Section 33-10-114(b) (1977).

PAR. 4. The Board has exclusive authority to license chiropractors in Wyoming. It is unlawful to practice chiropractic in Wyoming without first obtaining a license from the Board. Wyo. Stat. Section 33-10-105 (1977).

PAR. 5. The Board is authorized to adopt rules and regulations necessary for the performance of its duties. Wyo. Stat. Section 33-10-104 (1977). The Board is also authorized to refuse to issue a license to, or to suspend or revoke an existing license of, any person found guilty of any of fourteen enumerated offenses. Wyo. Stat. Section 33-10-110 (a, b) (1977).

#### TRADE AND COMMERCE

PAR. 6. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, chiropractors in Wyoming compete with one another, and with members of the Board.

PAR. 7. In the conduct of their businesses, chiropractors in Wyoming advertise in media having interstate circulation, receive and treat patients from other states, use supplies and equipment that are shipped across state lines, and for rendering chiropractic services, receive from the federal government and from private insurers substantial sums of money that flow across state lines. The acts and practices described below are in or affect interstate commerce within the meaning of Section 5 (a)(1) of the Federal Trade Commission Act. 15 U.S.C. Section 45 (a)(1) (1982).

#### STATE POLICY CONCERNING CHIROPRACTIC ADVERTISING

PAR. 8. The Board is authorized by statute to discipline chiropractors for "dishonest, unethical or unprofessional conduct likely to deceive, defraud or harm the public", and for "advertis[ing] . . . in any unethical or unprofessional manner." Wyo. Stat. Section 33-10-110 (a)(vi, xii) (1977). After these statutory provisions were enacted, the United States Supreme Court issued decisions holding broad bans on truthful, nondeceptive advertising to be contrary to the First Amendment of the United States Constitution. In 1978, the Wyoming Legislative Service Office and the Governor of Wyoming advised the Board

that some of its restrictions on truthful, nondeceptive advertising were invalid and probably unenforceable. In 1983, the Wyoming Attorney General's Office also informed the Board of the constitutional problems created by its restrictions on truthful, nondeceptive advertising. The State of Wyoming has no articulated policy to restrict truthful, nondeceptive advertising by chiropractors.

#### BOARD CONDUCT

PAR. 9. The Board has restrained competition among chiropractors in Wyoming by combining or conspiring with its members or others, or by acting as a combination of its members or others, to restrict unreasonably the dissemination by chiropractors of truthful, nondeceptive information. In furtherance of this combination or conspiracy, the Board has engaged in the following acts or practices, among others:

(A) Adopted and maintained "Standards To Be Followed" that:

(1) characterize advertisements in telephone directories as unethical; prohibit all advertising in the telephone directory with the exception of a practitioner's name, address and —two additional descriptive lines of information"; and ban "box ads" in telephone directories; and

(2) prohibit various forms of advertising in other media, without regard to whether such advertising is false or deceptive, by stating that "public relations" material "will deal strictly with the principles of chiropractic as a health science. The copy will never be flamboyant; will never promise cures or radical results; will never offer nor imply free consultations or examinations, nor make any statement regarding fees; will never refer to special types of technic [sic] or other methods in any manner that would imply superiority over others; will never adversely criticize other health sciences; will never make claims that cannot be substantiated by standard laboratory and diagnostic procedures";

(B) Encouraged private competing chiropractors to agree on the extent and type of advertising to permit in their area; and

(C) Directed individual chiropractors to abandon their efforts to disseminate truthful, nondeceptive information, and to stop offering free consultations or examinations.

#### CONSUMER AND COMPETITIVE INJURY

PAR. 10. The combination or conspiracy, and the acts and practices described above have restrained and continue to restrain truthful, nondeceptive advertising, and thereby have restrained, and have the tendency and capacity to restrain competition unreasonably, and to injure consumers, in the following ways, among others:

(A) Consumers of chiropractic services are deprived of the benefits of vigorous competition among chiropractors;

(B) Consumers are deprived of truthful, nondeceptive information about chiropractic fees and services;

(C) Chiropractors are prevented from disseminating truthful, nondeceptive information about their fees and services; and

(D) Chiropractors are unreasonably restrained from competing in or entering the market for chiropractic services.

PAR. 11. The acts and practices described above constitute unfair methods of competition and unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act. The acts and practices, or the effects thereof, are continuing and will continue in the absence of the relief requested.

#### DECISION AND ORDER

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

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

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

1. Respondent Wyoming State Board of Chiropractic Examiners is organized, exists and does business under and by virtue of the laws of the State of Wyoming, with its office and principal place of business

located at the office of Glenn R. Harrison, D.C., its Secretary-Treasurer, at 550 Main Street, in the City of Lander, State of Wyoming.

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

## ORDER

### I.

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

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

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

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

### II.

*It is further ordered,* That after the date of service of this order, the Board, directly or indirectly, or through any device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, impeding or discouraging any person from offering, publishing or advertising any price, term or condition of, or any other information concerning, any chiropractic service offered for sale or made available by any licensed chiropractor. The practices from which the Board shall cease and desist include, but are not limited to:

1. adopting or maintaining any rule, regulation, policy, or course of conduct that prohibits or seeks to prohibit advertising information about any chiropractic service;

2. taking or threatening to take any disciplinary action against any person for advertising information about any chiropractic service; or
3. declaring it to be an illegal, unethical, unprofessional, or otherwise improper or questionable practice for any person to advertise information about any chiropractic service; and

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

*Provided that*, Nothing contained in this part shall prohibit the Board from formulating, adopting, disseminating and enforcing reasonable rules or taking disciplinary or other action, to prohibit advertising that the Board reasonably believes to be false or deceptive within the meaning of Wyo. Stat. Section 33-10-110(a)(vi), as limited by the First and Fourteenth Amendments to the United States Constitution.

*Provided further that*, This order shall not be construed to prevent the Board from petitioning for or seeking legislation concerning the practice of chiropractic.

### III.

*It is further ordered*, That the Board shall:

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

1. Within thirty (30) days after the date of service of this order, to each person licensed to practice chiropractic in Wyoming as of the date of service of this order and to each person whose application for, or a request for reinstatement of, a license is pending on such date; and

2. For five (5) years after the date of service of this order, to each person who applies for a license to practice chiropractic in Wyoming within (30) days after the Board receives such application;

B. Within ninety (90) days after the date of service of this order, remove from its Rules and Regulations and any other policy statement or guidelines, any provision, interpretation or statement that is inconsistent with Part II of this order;

C. For five (5) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission (or its staff), for inspection and copying, copies of all records relating to advertising, including but not limited to written communications and any summaries of oral communications to or from the Board

regarding the offering, publishing or advertising of information about any chiropractic service;

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

E. Within one hundred twenty (120) days after the date of service of this order, submit to the Federal Trade Commission a written report setting forth in detail the manner and form in which the Board has complied and is complying with this order.

#### APPENDIX A

### ANNOUNCEMENT

As you may be aware, the Federal Trade Commission has issued a consent order against the Wyoming State Board of Chiropractic Examiners that became final on [date]. The order provides that the Board may not prohibit chiropractors from advertising their services in a truthful, nondeceptive manner. The Board may not (1) adopt or maintain rules, regulations or policies that prohibit truthful, nondeceptive advertising with respect to the sale of chiropractic services; (2) take disciplinary action (such as the suspension, revocation or refusal to issue a license) or threaten disciplinary action against any person or organization that so advertises; or (3) declare it to be illegal, unethical, unprofessional, or otherwise improper or questionable for persons to engage in truthful, nondeceptive advertising. The Board is also prohibited from encouraging any person or organization to take actions that the order prohibits the Board from taking. The order does not affect the Board's authority to prohibit advertising that is likely to deceive or mislead the public, nor does the order prevent the Board from disciplining licensees for engaging in such advertising. Further, the order does not prevent the Board from seeking legislation concerning the practice of chiropractic.



Decision and Order

110 F.T.C.

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

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(Title)

Wyoming State Board of  
Chiropractic Examiners

153

Modifying Order

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

**MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL  
TRADE COMMISSION AND CLAYTON ACTS***Docket C-2929. Consent Order, Sept. 26, 1978—Modifying Order, Feb. 23, 1988*

The Federal Trade Commission has modified a 1978 consent order (92 F.T.C. 405) with respondent and its subsidiaries by removing the ban on "preticketing", the listing of suggested retail prices on tags, with respect to the raincoats and outerwear sold by Londontown. The Commission also ordered the respondents to show cause why the provision should not be set aside in its entirety.

**ORDER REOPENING AND MODIFYING ORDER ISSUED SEPTEMBER 26, 1978,  
AND ORDER TO SHOW CAUSE**

October 26, 1987, respondents Interco Incorporated ("Interco"), Londontown Corporation ("Londontown") and Queen Casuals, Inc. ("Queen Casuals") filed a "Request As Supplemented To Reopen And Set Aside A Portion Of Order" ("request"), 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. Londontown is a division and Queen Casuals is a wholly owned subsidiary of Interco. The request asked the Commission to reopen the consent order issued on September 26, 1978 ("the order") and set aside a portion of paragraph 4 of Part I of the order. Respondents' request was placed on the public record for thirty days, pursuant to section 2.51 of the Commission's Rules. No comments were received.

Paragraph 4 of Part I of the order, the provision at issue here, prohibited respondents for a three year period ending October 10, 1981, from communicating in writing any resale price or sale period to any reseller or prospective reseller of its products. After October 10, 1981, respondents are permitted by the order to suggest resale prices on the pages of any list, book, advertising, promotional material or other document if they include the following statement on such material:

**"THE (RESALE PRICES OR SALE PERIODS) QUOTED HERE-  
IN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE  
YOUR OWN (RESALE PRICE OR SALE PERIODS)."**

Paragraph 4 of Part I of the order also provides:

"A respondent shall not, however, suggest resale prices on any

tag, ticket or other marking affixed or to be affixed to any product shipped to a reseller.”

It is this latter provision, which prohibits a practice known as “pre-ticketing,” that respondents request the Commission to set aside insofar as it is applicable to raincoats and outerwear sold by Londontown.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4; *Hospital Corporation of America*, Docket No. 9161, Letter to Peter J. Nickles, Esquire (November 27, 1987), at 3.

The Commission may also modify an order pursuant to section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, section 2.51 of the Commission’s Rules, 16 CFR 2.51, invites respondents in petitions to reopen to show how the public interest warrants the requested modification. In the case of a request for modification based on this latter ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of section 5(b) plainly anticipates that the petitioner must make a “satisfactory showing” of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission may properly decline to reopen an order if a request is “merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.” S. Rep. No. 96-500,

96th Cong., 1st Sess. 9-10 (1979). If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether the modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders. See *Federated Department Stores v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

After reviewing respondents' request, the Commission has concluded that the respondents have not made a satisfactory showing that changed circumstances require that the ban on preticketing in the order should be set aside. Respondents have submitted market share and concentration data for the years 1983-1986 that tend to indicate that Londontown does not have market power in the manufacture, distribution and sale of raincoats and outerwear. However, the complaint in this matter made no allegation as to market power or market shares, and there is no reason to believe that the order or the ban on preticketing was imposed because of considerations of market share or market power. Changed factual circumstances justify modification of an order only when the changed circumstances are significant and respondent shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Albertson's Inc.*, Docket No. C-3064, (petition to reopen and set aside order granted on July 1, 1987) at 2-3; *Cooper Industries, Inc.*, Docket No. C-2970, Letter to Sean F. Boland, Esquire (September 16, 1987), at 1; *Hospital Corporation of America*, Docket No. 9161, Letter to Peter J. Nickles, Esquire (November 27, 1987), at 3. The changed circumstances alleged by respondents clearly do not meet this standard and are irrelevant to the allegations of the complaint. Accordingly, these changes do not constitute changed circumstances that require modification of the order.

The Commission has concluded, however, that it is in the public interest to reopen and set aside the ban on preticketing in the order. Respondents have shown that the ban on preticketing prohibits them from marketing their products in a manner that is available to their competitors and that would otherwise be lawful. Accordingly, the ban on preticketing places the respondents at a competitive disadvantage with respect to their competitors who are not subject to similar provisions.

The affirmative need to modify the order to eliminate the competitive disadvantage outweighs any continuing need for the prohibition on preticketing. The ban on preticketing is in the nature of a "fencing-

in" provision to prevent respondents from using otherwise lawful preticketing as a device to accomplish vertical price fixing. The Commission believes that the conduct that led to the entry of this order has been interrupted for a sufficient period of time so that the ban on preticketing is no longer necessary either to dissipate the effects of respondents' past conduct or to prevent its recurrence.

Respondents have requested that the ban on preticketing be removed only with respect to raincoats and outerwear sold by Londontown. However, the Commission believes that the provision should be deleted in its entirety inasmuch as it no longer appears to be serving a remedial purpose and is inhibiting lawful competitive behavior.

Accordingly, *It is ordered*, That this matter be and it hereby is reopened and that the last sentence of paragraph 4 of Part I of the Commission's Decision and Order issued on September 26, 1978, shall be modified as of the effective date of this order to read as follows:

A respondent shall not, however, suggest resale prices on any tag, ticket or other marking affixed or to be affixed to any product shipped to a reseller except as to raincoats and outerwear sold by Londontown.

*It is further ordered*, That respondents show cause why the foregoing provision should not be set aside in its entirety. In accordance with Section 3.72 of the Commission's Rules of Practice, 16 CFR 3.72, respondents have 30 days from the date of service of this order to file an answer hereto or be deemed to have accepted the action proposed herein.

Commissioner Bailey dissenting.

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Complaint

IN THE MATTER OF  
PREFERRED PHYSICIANS, INC.

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

*Docket C-3222. Complaint, Feb. 26, 1988—Decision, Feb. 26, 1988*

This consent order prohibits, among other things, an association of doctors in Tulsa, Okla., from conspiring to restrain competition and from fixing or increasing the prices they charge third-party payers for their services. In addition, the respondent is prohibited, for five years, from advising its members on the desirability or appropriateness of any price to be paid for physicians' services by any third-party payers.

*Appearances*

For the Commission: *Toby G. Singer.*

For the respondents: *Michael M. Eaton, Arent & Fox, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, Title 15, U.S.C. Section 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Preferred Physicians, Inc., a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Preferred Physicians, Inc. (hereinafter "respondent") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma. Respondent's principal office and place of business is located at 6161 South Yale Avenue, Tulsa, Oklahoma.

PAR. 2. Respondent's shareholders (sometimes referred to as its "members") are physicians licensed to practice in the State of Oklahoma, and are generally engaged in the business of providing medical services to patients for a fee. Except to the extent that competition has been restrained as herein alleged, respondent's members have been and are now in competition among themselves, and with other physi-

cians and health care providers, with respect to the provision of health care services in the Tulsa, Oklahoma area.

PAR. 3. In the conduct of their business of providing medical services, respondent's members treat patients from states other than Oklahoma, use supplies and equipment that are shipped across state lines, and receive substantial sums of money that flow across state lines for rendering medical services. Fees for medical services rendered by respondent's members are paid, at times, by the federal government, by patients or third-party payers in the states other than Oklahoma, and by patients or third-party payers in the State of Oklahoma with funds collected from third-party payers in states other than Oklahoma. The general business practices of respondent's members, and the acts and practices described below, affect the interstate movement of patients, the interstate purchase of medical supplies and products, and the interstate flow of funds, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 4. Respondent's members are often paid for the services they render by third-party payers, including health maintenance organizations ("HMOs"). HMOs generally invite health care providers, including physicians, to enter into agreements to provide services to the subscribers of the third-party payers. These agreements establish the terms and conditions of the relationship between the physicians and the third-party payers, including the prices to be paid for the physicians' services. Through such agreements, HMOs may obtain discounts from physicians' usual prices, and physicians may obtain access to additional patients.

PAR. 5. Respondent has over 250 members, all of whom have hospital privileges at St. Francis Hospital in Tulsa, Oklahoma. At least 174 out of 251 physicians with active staff privileges at St. Francis Hospital are members of respondent. Because only members of the hospital's staff may admit patients to St. Francis Hospital, respondent's members, if they act in concert, can effectively control access to that hospital.

PAR. 6. St. Francis Hospital is generally regarded as the leading hospital in the Tulsa area, in terms of its size, its reputation, and the price and quality of its services. Some large employers in Tulsa are hesitant to offer any health benefits plan that does not include preferred coverage for services received at St. Francis Hospital. Therefore, any physician group that controls access to St. Francis Hospital has substantial leverage with third party payers in the Tulsa area.

PAR. 7. Third party payers compete with each other to attract subscribers for their health benefit plans on the basis of prices, services covered and many other factors important to consumers. Therefore,

each third party payer seeks to minimize its costs, while also arranging for the participation of sufficient health care providers, in terms of quantity, quality and other relevant factors, to attract subscribers to its health benefits program. Accordingly, in the Tulsa area, prior to respondent's formation, third party payers offered to physicians fee schedules or other reimbursement mechanisms that the third party payers thought would minimize their costs while still attracting enough physicians in each specialty to make their health benefit programs attractive to consumers. Often, third party payers such as HMOs asked physicians to accept payments lower than the fees they usually charged, or to accept reimbursement on some basis other than fee-for-service. Physicians each decided independently whether to accept or reject any particular offer. If an offer were not accepted by a sufficient number of physicians, either in the aggregate or in particular specialties, the third-party payer either altered the terms of the proposal to make it more attractive or withdrew the offer.

PAR. 8. In or about 1984, many of the physicians in the Tulsa area who had hospital privileges at St. Francis Hospital decided and agreed not to compete with each other with respect to whether, and on what terms, to contract with third-party payers. To implement their agreement not to compete with one another, they formed respondent corporation to negotiate on their behalf with third-party payers. Their purpose was to resist competitive pressures to discount fees and to avoid accepting reimbursement on any basis other than the traditional fee-for-service method of payment for physicians' services.

PAR. 9. Respondent has acted as a combination of its members, has conspired with at least some of its members, and has acted to implement an agreement among its members, to restrain competition among physicians, by, among other things, facilitating, entering into, and implementing an agreement, express or implied:

A. That respondent would negotiate the terms and conditions of agreements between respondent's members and third-party payers, including the prices to be paid for the members' services, and that individual members would not negotiate directly with third-party payers;

B. That respondent's members would take a uniform position on the prices to be sought from third-party payers, and that the starting point for price negotiations with third-party payers would be the physician fee schedule used by the St. Francis Hospital preferred provider organization (the "Redbook").

PAR. 10. Several HMOs sought to enter into agreements with respondent's members. Some of these third-party payers attempted to negotiate the terms and conditions of the agreements, including the



prices to be paid for the members' services, with individual members, but in accordance with the agreement described in Paragraphs Eight and Nine, individual members would negotiate only through respondent and would not negotiate directly with these third-party payers. Other third-party payers agreed to, and did, negotiate the terms and conditions of the agreements, including the prices to be paid for the members' services, with respondent rather than with individual members. In its negotiations with these third-party payers, respondent sought to obtain agreements that the third-party payers would adopt the Redbook fee schedule. Inherent in these negotiations was a threat that if the third-party payers did not agree to the terms and conditions acceptable to respondent, the third-party payers would be unable to obtain agreements with respondent's members.

PAR. 11. Those third-party payers that did not negotiate with respondent were unable to obtain, or were hindered in obtaining, agreements with respondent's members to provide services to the subscribers of the third-party payers. The third-party payers that were unable to obtain agreements with respondent's members were unable to provide their subscribers with the option of treatment at St. Francis Hospital, the hospital in the area with the best reputation for high quality and low cost services. Those third-party payers that negotiated with respondent and succeeded in obtaining agreements with respondent's members to provide services to the subscribers of the third-party payers were denied the benefits of competition among physicians.

PAR. 12. By engaging in the acts or practices described in paragraphs eight through eleven, respondent has acted as a combination of at least some of its members, or has combined or conspired with at least some of its members, to fix or increase the prices charged by, or otherwise to restrain competition among, physicians in the Tulsa area.

PAR. 13. Respondent has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

A. Engaging in negotiations with third-party payers on behalf of its members, inherent in which were threats that if the third-party payers did not agree to terms and conditions, including prices, that were acceptable to respondent, respondent's members would refuse to enter into agreements to provide services to the subscribers of the third-party payers.

B. Recommending to its members that they enter into agreements, with third-party payers only when the agreements' terms and conditions, including prices, were acceptable to respondent.

PAR. 14. Respondent's actions described in paragraphs eight through thirteen have had, or have the tendency and capacity to have, the following effects, among others:

A. Restraining competition among physicians in the area of Tulsa, Oklahoma.

B. Fixing or increasing the prices that physicians in the Tulsa area charge for their services.

C. Depriving third-party payers and their subscribers of the benefits of competition among physicians in the Tulsa area.

PAR. 15. The combination or conspiracy and the acts and practices described in paragraphs eight through thirteen constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Respondent's combination or conspiracy, or the effects thereof, is continuing and will continue in the absence of the relief herein requested.

#### DECISION AND ORDER

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

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

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

1. Respondent Preferred Physicians, Inc. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of Oklahoma, with its office and principal place of business located at 6161 South Yale Avenue, in the City of Tulsa, State of Oklahoma.

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

#### ORDER

##### I.

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

A. "*PPI*" means Preferred Physicians, Inc. and its Board of Directors, committees, officers, representatives, agents, employees, successors, and assigns.

B. "*Third-party payer*" means any person or entity that reimburses for, purchases, or pays for health care services provided to any other person, and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs.

C. "*Integrated joint venture*" means a joint arrangement to provide pre-paid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services.

##### II.

*It is further ordered,* That PPI, directly, indirectly, or through any corporate or other device, in connection with the provision of health care services by its members in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, shall forthwith cease and desist from:

A. Entering into, attempting to enter into, organizing, implementing, or continuing any agreement or understanding, express or implied, with any PPI member or among any PPI members, to deal with

any third-party payer on collectively determined terms by, for example:

1. acting on behalf of any PPI member or members to negotiate with any third-party payer; or
2. communicating that PPI members will refuse to enter into or withdraw from any agreement, actual or proposed, with any third-party payer if any term or condition is not acceptable to PPI or to PPI members collectively.

B. For a period of five (5) years after the date the order is served, providing comments or advice to any PPI member on the desirability or appropriateness of any price to be paid for physicians' services by any third party payer, including, but not limited to, advice that any PPI member refuse to enter into or withdraw from any agreement, actual or proposed, with any third-party payer because of the price to be paid for physicians' services.

*Provided that*, Nothing in this order shall prevent PPI from:

(1) forming or becoming an integrated joint venture and dealing with any third-party payer on collectively determined terms in that capacity, as long as the physicians participating in the joint venture remain free to deal with any third-party payer other than through the joint venture; or

(2) upon the request of a third-party payer, performing utilization review or credentialing activities in connection with the provision of services by PPI members to subscribers of the third-party payer.

### III.

*It is further ordered*, That PPI:

A. Distribute by first-class mail a copy of this order to each of its members within thirty (30) days after the date the order is served.

B. For a period of five (5) years after the date the order is served, provide each new PPI member with a copy of this order at the time the member is accepted into membership.

### IV.

*It is further ordered*, That PPI:

A. File a written report with the Commission within ninety (90) days after the date the order is served, and annually for three (3) years on the anniversary of the date the order was served, and at such other times as the Commission may be written notice to PPI require, setting

forth in detail the manner and form in which it has complied and is complying with the order.

B. For a period of five (5) years after the date the order is served, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including, but not limited to, all documents generated by PPI or that come into PPI's possession, custody, or control, regardless of source, that discuss, refer, or relate to any price, term, or condition of any agreement, actual or proposed, with any third-party payer.

V.

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

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

I have voted to accept the consent order in this matter. However, I would have preferred an order that included a provision for automatic termination after ten years. In my view, an antitrust conduct order should be preserved only so long as its benefits outweigh its costs. Maintaining an order such as this in perpetuity is not ordinarily appropriate. Its procompetitive remedial benefits can be expected to decline over time, and it may also begin to have adverse effects on certain procompetitive practices.

With respect to orders in merger cases, the Commission has already concluded that "order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years."<sup>1</sup> The Commission has determined that such provisions will in most cases have served their remedial purposes after ten years, and "the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time."<sup>2</sup> For similar reasons, I believe that the consent order at issue here should automatically terminate after ten years.

<sup>1</sup> *Hercules, Inc.*, 100 FTC 531 (1982) (modifying order); see also, e.g., *MidCon Corp.*, 107 FTC 48, 58 (1986) (consent order) (ten years); *Hospital Corp. of America*, 106 FTC 361, 524 (1985) (ten years), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, — U.S. —, No. 86-1492 (May 3, 1987); *Columbian Enterprises, Inc.*, 106 FTC 551, 554 (1985) (consent order) (five years).

<sup>2</sup> *Hercules, Inc.*, 100 FTC at 531.

IN THE MATTER OF  
GENERAL MOTORS CORPORATION, ET AL.

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

*Docket 9074. Consent Order, June 11, 1980—Modifying Order, March 4, 1988*

The Federal Trade Commission has modified a 1980 consent order (95 F.T.C. 825) with respondents by changing the accounting procedures for the sale of repossessed cars and light trucks. The Commission has replaced the repossession accounting procedure with a "repossession guide" which respondents must provide to its dealers.

ORDER REOPENING THE PROCEEDING AND  
MODIFYING CEASE AND DESIST ORDER

On November 5, 1987, General Motors Corporation (GM) and General Motors Acceptance Corporation (GMAC) filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and Part VIII.B of the order in this matter, to reopen the proceeding and modify the order issued against GM and GMAC on June 11, 1980, in Docket No. 9074, 95 FTC 825.

This matter arose out of allegations that certain franchised General Motors dealerships and certain dealerships owned in whole or in part by GM were failing to account for and pay to defaulting customers surpluses generated by the sale of repossessed motor vehicles.<sup>1</sup> A complaint was issued against GM, [4] GMAC and a franchised GM dealer on February 10, 1976. Similar complaints were issued against Chrysler Corporation (D.9072), Ford Motor Company (D.9073), their respective credit subsidiaries, and a franchised dealer of each. GM and GMAC consented to the order that is the subject of this decision. Similar consent orders were issued against Chrysler and Ford and their respective credit subsidiaries.

A principal feature of each of these orders is a repossession accounting procedure that dealers of these automobile manufacturers were to use in conjunction with the disposition of repossessed motor vehicles returned to them under a recourse or repurchase agreement. The repossession accounting procedure was intended to bring about the uniform calculation of surpluses and deficiencies resulting from the

<sup>1</sup> The obligation of the secured creditor or his guarantor to account for and pay surpluses arises out of Article Nine of the Uniform Commercial Code (UCC), which has been adopted by 49 states and the District of Columbia. Under the UCC, a secured party, after repossession and disposition of the collateral, is required to account to the defaulting buyer for any surplus of proceeds from the sale or disposition of the collateral in excess of the amount needed to satisfy all secured indebtedness, reasonable expenses of retaking, holding, preparing for sale, selling, and the like, and allowable legal costs and fees. See U.C.C. § 9-504.

resale of repossessed motor vehicles by Chrysler, Ford, and GM dealers. Each of these orders also contained a most favored corporation provision. In the GM order that provision is found at Part VIII.B. It reads as follows:

"In the event any of the proceedings presently bearing Docket Nos. 9072, 9073 or 9074 result in a final adjudicated or consent order prescribing standards less restrictive (including deferral to state law) than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence [5] or amount of surpluses or deficiencies, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then the Commission shall, within 120 days of a General Motors respondent's request pursuant to Section 2.51 of the Commission's Rules of Practice, reopen this proceeding and order modifications of this order to such less restrictive standards proscribed in the other order(s). The enumeration of subject matter contained in clauses (1), (2) and (3) of this paragraph is exclusive."

It is implicit in the application of uniform standards such as the repossession accounting standards that GM, Ford and Chrysler have required their dealers to follow under their respective orders, that those applying such standards will bear similar added costs. A function of uniformity is to avoid creating an artificial competitive imbalance among those affected. The purpose of Part VIII.B is to avoid creating such a competitive imbalance if a similarly situated respondent is able to demonstrate the need for less restrictive standards. On April 3, 1987, we issued our decision modifying the order against Ford and Ford Credit in Docket No. 9073. We concluded, based on the materials submitted, that it was in the public interest to defer to state law with respect to the subject matter enumerated in clauses (1) and (2) of the most favored corporation provision set out above and accordingly ordered modification to that order consistent therewith.

Since there is now a final order in a related proceeding prescribing less restrictive standards with respect to enumerated [6] subject matter and GM and GMAC having petitioned to modify their order in the same manner as that granted Ford, we conclude that the modifications requested are warranted.

*It is therefore ordered*, That the proceeding be reopened and that the final order issued June 11, 1980, in Docket No. 9074 be, and it hereby is modified to read as follows:

#### I. DEFINITIONS

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

A. "*General Motors respondents*" or "*respondents*" means General Motors Corporation ("General Motors") and General Motors Acceptance Corporation ("GMAC"), corporations. References to General Motors respondents shall include their successors, assignees, officers, agents, representatives and employees, as well as any corporations, subsidiaries, divisions or devices through which they act in the United States. However, references to General Motors shall not include GMAC and references to General Motors respondents shall not include dealerships. The requirements imposed on the General Motors respondent shall apply only to transactions within the United States.

B. "*Vehicle*" means an automobile or truck with a gross vehicle weight rating less than 11,000 pounds (4,990 kilograms) or a motor home. The term includes all [7] parts, accessories and appurtenances of the vehicle. A van is deemed a "truck."

C. "*Dealership*" or "*dealer*" means a corporation, partnership or proprietorship as to its operations within the United States pursuant to a Sales and Service Agreement with General Motors' Buick, Cadillac, Chevrolet, Oldsmobile, or Pontiac divisions, or the GMC Truck Division.

D. "*Retail sale*" means the sale of a vehicle by a dealer, other than for purposes of resale (e.g., sales to dealers or wholesalers), lease or rental, to a customer who is not a fleet purchaser.

E. "*Recourse financing*" means the financing of a retail sale subject to an agreement between a financing institution and a dealership (generally called a "repurchase", "recourse," or "guaranty" agreement) which provides that the dealership is obligated to pay off the outstanding obligation to the financing institution after receiving a transfer of the repossessed vehicle.

F. "*Equity dealership*" means a dealership in which General Motors holds 50 percent or more of the voting stock or is entitled to elect 50 percent or more of the board of directors.

G. "*Financing customer*" means a purchaser of a vehicle [8] from a dealership by means of a retail installment contract.

H. "*Disposition*" or "*dispose*" means a dealership's sale or lease of a repossessed vehicle previously sold by that dealership and returned to it by or for a financing institution pursuant to a recourse agreement. Such sale or lease includes only transactions with an independent third party; i.e., it does not include a sale or lease to the financing institution, the dealership or a representative of either. Disposition or dispose shall not mean the transfer of a repossessed vehicle to a dealership pursuant to a recourse agreement, or to a person or firm liable under a guaranty, endorsement, or recourse agreement covering the repossessed vehicle, nor mean a sale subsequent to a judicial sale.



I. "Proceeds" means whatever is received for a repossessed vehicle upon its disposition, as proceeds are described in the Initial Compliance Report. Among other things, it does not include charges for separately priced warranties and service contracts itemized in the sales contract or lease.

J. "Allowable expenses" means commercially reasonable expenses allowable under applicable state law. The expenses must be reasonable and directly resulting from the repossessing, holding, preparing for disposition [9] and disposing of the vehicle, and not otherwise reimbursed to the dealership disposing of the vehicle.

K. "Contract balance" means (1) the unpaid balance as of the date of repossession, less any payments made thereafter and less applicable finance charge, insurance premium and service contract rebates deducted by the financing institution, plus (2) other charges authorized by contract or law and actually assessed or incurred prior to repossession. It may reflect a deduction for insurance, service contract and warranty payments received or to be received by the financing institution.

L. "Surplus" means:

- + proceeds
- + applicable insurance or warranty reimbursements received by the dealership or financing institution unless these reimbursements were deducted in computing the contract balance
- + any other applicable rebates or credits not deducted in computing the contract balance
- allowable expenses
- amounts paid to discharge any [10] security interest in the vehicle provided for by law

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= Surplus. A negative (minus) amount produced by this calculation is referred to as a "deficiency"

M. "Pay" or "paid," in reference to payment of a surplus, means a commercially reasonable attempt to pay.

## II. REPOSSESSION ACCOUNTING PROCEDURES

*It is further ordered,* That General Motors shall provide to all dealers within 60 days of service of this modified order, and to each new dealer within 30 days of entering into a Sales and Service Agreement, guidelines for determining the existence of surpluses and for accounting for surpluses and for any deficiencies sought.

A. These guidelines (the "repossession accounting guide") shall, by physical insertion or as a supplement, be made a part of the General Motors uniform accounting system referred to in the various dealer

Sales and Service Agreements between General Motors and its dealers. These agreements provide that this system (currently called the "General Motors Dealers Standard Accounting System Manual") should be followed in dealership operations. The repossession accounting guidelines shall also be incorporated into any [11] subsequent set or compendium of comparable instructions.

B. The repossession accounting guidelines shall include a standardized form ("dealer repossession accounting form") which dealers should use in determining for each vehicle the existence and amount of any surplus and of any deficiency sought, and in recording payment of each surplus, in accordance with the provisions of Paragraph C below.

C. The repossession accounting procedures shall provide that:

1. Each surplus should be determined and paid to the recourse financing customer within a reasonable period of time of disposition in accordance with a method conforming to Paragraphs I.H through I.L of this order;

2. Expenses other than allowable expenses should not be deducted in calculating surpluses and deficiencies sought;

3. Dispositions should be commercially reasonable. The dealer should make the same efforts to obtain the best available price for a repossessed vehicle as would be made for a comparable used vehicle, except that a dealer is not required to offer a warranty without extra charge even though such [12] warranties are provided on other used vehicles.

4. If any rebate owed to the recourse financing customer's account has not been received at the time the dealer repossession accounting form is completed, such rebate should be applied for promptly;

5. If any rebate is received after completion of the dealer repossession accounting form, any surplus or deficiencies should be redetermined and any remaining surplus paid within a reasonable time of disposition or within a reasonable time of receiving the rebate, whichever is later;

6. The dealer repossession accounting form should be prepared by the dealer for each disposition of a repossessed vehicle and:

a. should set forth the calculations of each surplus and of each deficiency sought;

b. should identify the vehicle and the financing customer and should be signed by a person authorized to sign retail installment contracts on behalf of the dealership; [13]

c. a copy of the form should be sent with the surplus payment to each recourse financing customer to whom a surplus is paid and

should be sent to each recourse financing customer from whom a deficiency is sought; and

d. should be retained by the dealer, together with all relevant underlying documentations, for at least two years from the date of disposition.

7. Dealers should not obtain waivers of surplus or redemption rights from recourse financing customers, except as allowable under applicable state law.

8. Failure to account for and pay surpluses to customers may expose the dealer to legal action.

### III. EQUITY DEALERSHIPS PROCEDURES

*It is further ordered, That:*

A. General Motors shall require each General Motors employee who is a director of an equity dealership to:

1. Provide the "repossession accounting guide" described in Part II of this order to each such dealership; and

2. Vote for resolutions so each such dealership [14] handles repossessions in accordance with applicable state law.

### IV. GMAC RETAIL PLAN CHANGES, DEFICIENCY REPRESENTATIONS, POST-REPOSSESSION NOTICES

*It is further ordered, That GMAC:*

A. Shall, in connection with the extension and enforcement of retail credit obligations relating to the sale of vehicles by dealers, cease and desist from:

1. Purchasing a repossessed vehicle at or through any type of sale (title clearance) conducted by GMAC.

2. Misrepresenting, directly or indirectly, orally, in writing, or in any other manner, that the debtor may be liable to pay a deficiency where GMAC knows or should know that it is not entitled under state or federal law to collect a deficiency.

3. Collecting or attempting to collect a deficiency from a defaulting customer, or from his or her successors or assigns, where GMAC knows or should know that (a) it is not entitled under state or federal law to collect such deficiency, or (b) such deficiency is greater than the amount determined in accordance with the definitions set forth in Part I of this order. For purposes of this subparagraph, the [15] definitions of "proceeds" and "allowable expenses" will apply to GMAC's own dispositions.

4. Obtaining waivers of redemption or surplus rights from financing customers, except as allowable under state law.

B. Shall incorporate, by addendum or otherwise, provisions to the following effect into its Retail Plan as it relates to recourse financing, and into any subsequent edition or successor document:

1. dealers are to permit redemption by the customer whose vehicle has been repossessed, at any time until there is a binding agreement for disposition;

2. dealers are to permit redemption in accordance with the post-repossession notice sent by GMAC to the customer;

3. dealers are to determine whether a surplus exists on a recourse financing repossession according to the repossession accounting procedures described in Part II of this order;

4. in determining surpluses and deficiencies, dealers are not to deduct expenses other than allowable expenses; [16]

5. dealers are to account for and pay each surplus within a reasonable period of time of disposition.

C. Shall develop revised retail installment contract forms which (except as modified as described in Paragraph D below) include a clear, concise statement in lay language that, in the event of repossession:

1. no expenses other than reasonable expenses incurred as a direct result of repossessing, holding, preparing for disposition and disposing of the vehicle may be deducted from the proceeds in determining a surplus or deficiency; and

2. any surplus realized on the resale or other disposition of the vehicle is to be paid to the customer.

D. Shall distribute the revised retail installment contract forms to all dealers who use GMAC forms after the Commission issues a final rule or final adjudicated order not less restrictive than the Paragraph C statements of allowable expenses and the duty to any surpluses. If the final rule or final adjudicated order is less restrictive than the Paragraph C statements, GMAC shall complete the distribution after the Commission has modified Paragraph C to render it consistent with the final rule or final adjudicated [17] order. GMAC shall direct its branch offices that after the distribution to a dealership of the revised GMAC retail installment contract forms, they are not to purchase from the dealership GMAC forms of retail installment contracts that are not on the revised forms.

E. Shall establish and follow a procedure for uniformly sending a written notice ("post-repossession notice") to GMAC financing customers as soon as practicable after repossession.

1. GMAC shall periodically examine its branches' files, in accordance with its usual monitoring procedures to determine whether the

post-repossession notices have been and are being sent and shall institute appropriate actions to assure that the procedure for sending post-repossession notices is adhered to.

2. The post-repossession notice shall have a GMAC heading and shall specify in clear, lay language:

a. the name and address of the place at which the vehicle is being stored and the address and telephone number of the GMAC branch office to be contacted; [18]

b. the date or interval of time within which the customer may redeem by reinstating the contract in states where the creditor is required to permit reinstatement of the contract;

c. the amount necessary to redeem by reinstating the contract at the time the notice is dated, if the customer is entitled to or will be permitted to redeem by reinstatement;

d. the net amount necessary to redeem by discharging the customer's obligation at the time the notice is dated, except where the customer is entitled to or will be permitted reinstatement until the vehicle is disposed of;

e. the date or interval of time prior to which the vehicle will not be disposed of;

f. that the vehicle can be redeemed at any time prior to a binding agreement for its disposition; [19]

g. that additional expenses may be incurred and may increase the amount necessary to redeem the vehicle if redemption is delayed (as further described in the Initial Compliance Report);

h. that GMAC should be contacted for further information about getting the vehicle back;

i. that any surplus resulting from a sale or lease is to be paid to the customer within a reasonable time after disposition (the notice may also state that an agreement between the dealer and GMAC provides that the dealer is to pay any surplus);

j. that failure to account for and pay a surplus may give the customer a right to sue for the amount of the surplus and for any penalties provided by law

k. that the customer will be liable for a deficiency or that the deficiency cannot be collected (the [20] notice is to include the applicable language only);

1. that the customer should call the insurance company or the dealer to make sure that any insurance or service contract has been cancelled and that the customer has a right to credit for any refunds.

F. Shall issue no new materials to dealers inconsistent with this order.

G. In any action by the Commission seeking civil penalties for a

violation of subparagraphs A.2-.4 and Paragraph E, GMAC may not be held liable if it shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. In applying this paragraph, judicial interpretations of Section 130(c) of the Truth in Lending Act, 15 U.S.C. 1640(c) (1974), shall be used.

V. EFFECT OF INCONSISTENT RULE OR ORDER

*It is further ordered, That:*

A. In the event the Federal Trade Commission issues a final Trade Regulation Rule establishing standards less restrictive on automobile manufacturers, financing companies or dealerships than a corresponding provision [21] or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence or amount of surpluses or deficiencies, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then such less restrictive standards shall, on the effective date of the Rule, supersede and replace the corresponding provision(s) of this order. The enumeration of subject matter contained in clauses (1), (2) and (3) of this Paragraph is exclusive. However, the General Motors respondents shall advise the Commission of their intention to rely upon any provision of a Trade Regulation Rule as having superseded any provision of this order 30 days in advance of reliance thereon.

B. In the event any of the proceedings presently bearing Docket Nos. 9072, 9073 or 9074 result in a final adjudicated or consent order prescribing standards less restrictive (including deferral to state law) than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence or amount of surpluses [22] or deficiencies, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then the Commission shall, within 120 days of a General Motors respondent's request pursuant to Section 3.72 of the Commission's Rules of Practice, reopen this proceeding and order modifications of this order or other relief as necessary and appropriate to conform this order to such less restrictive standards prescribed in the other order(s). The enumeration of

such matter contained in clauses (1), (2) and (3) of this paragraph is exclusive.

VI. STANDARD REPORTING AND RECORDKEEPING

*It is further ordered, That:*

A. The General Motors respondents shall maintain complete business records relative to the manner and form of their continuing compliance with this order. These include, but are not limited to, copies of notices sent to financing customers pursuant to Part IV. The General Motors respondents shall retain all such records for at least three years and shall, upon reasonable notice, make them available for inspection and photocopying by authorized representatives of the Federal Trade Commission. [23]

B. Promptly following service of this order, General Motors shall distribute a copy of this order to its car divisions, GMC Truck Division, and Motors Holding Division unless previously furnished, and GMAC shall distribute a copy of this order to each of its regional managers, unless previously furnished.

C. Each of the General Motors respondents shall notify the Commission at least 30 days prior to any proposed corporate change which may negate any of the obligations of the General Motors respondents arising out of this order. Such changes include dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the discontinuance of General Motors present program for investing in equity dealerships, and the creation or dissolution of subsidiaries or any other change which may have such effect. No notice need be provided in the event of General Motors terminating, reducing or acquiring any interest in an equity dealership.

IN THE MATTER OF  
ROCHESTER ANESTHESIOLOGISTS, ET AL.

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

*Docket 9199. Complaint, Sept. 30, 1985—Decision, Mar. 8, 1988*

This consent order prohibits, among other things, the anesthesiologists, of Rochester, N.Y., from boycotting third-party insurance providers: by combining or taking any joint action against competing anesthesiologists; by engaging in price fixing or tampering with the reimbursement levels or terms of any third-party payor for anesthesia services; or by fixing or setting their fees.

*Appearances*

For the Commission: *David M. Narrow.*

For the respondents: *Kenneth A. Payment, Harter, Secret & Emery, Rochester, N.Y. Harry P. Truehart, III, Nixon, Hargrave, Devans & Doyle, Rochester, N.Y. Robert Conklin, Hodgson, Russ, Andrews, Woods & Goodyear, Buffalo, N.Y. and James S. Grossman, Mousaw, Vigdor, Reeves, Heilbronner & Kroll, Rochester, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

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

(a) "*Blue Shield*" means Genesee Valley Medical Care, Inc., also known as Blue Shield of the Rochester Area.

(b) "*Third-party payor*" means any person or entity that engages in the process of reimbursing for, purchasing, or paying for health care services provided to any other person. Third-party payors include, but are not limited to, health insurance companies; prepaid hospital, medical or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider



organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs.

2. The following are the respondents' addresses:

(a) The address of respondents Jose F. Calimlim, M.D.; Frank J. Colgan, M.D.; Svend Eldrup-Jorgensen, M.D.; Jim E. Fuller, M.D.; Alastair J. Gillies, M.D.; Robert M. Lawrence, M.D.; Clara L. Linke, M.D.; Sylvia H. Marshall, M.D.; John A. Moreland, M.D.; Sriyalatha I. Nadaraja, M.D.; Seymour J. Sandler, M.D.; Pratima M. Shah, M.D.; Jaimala Thanik, M.D.; and Judit S. Wagner, M.D., is Strong Memorial Hospital, 601 Elmwood Avenue, Rochester, New York.

(b) The address of respondents Robert L. Jamison, M.D.; Stuart L. Kaplan, M.D.; Jacob Krieger, M.D.; Mehdi-Mohtashemi, M.D.; Kariappa Narayan, M.D.; David A. Sherman, M.D.; Roger Thompson, M.D.; and Tae B. Whang, M.D., is Rochester General Hospital, 1425 Portland Avenue, Rochester, New York.

(c) The address of respondents Marjanne H. Crino, M.D.; Theodore G. Ford, M.D.; Bridget A. Fraser, M.D.; Robert P. Geraci, M.D.; Manuel Gonzales, M.D.; David Hwei-Yu Hsu, M.D.; Shirley D. Hunter, M.D.; Gary C. Kent, M.D.; Paul P. Marocco, M.D.; Naseer A. Tahir, M.D.; Michael M.H. Tan, M.D.; Richard C. Templeton, M.D.; and Balkrishna Venkatesh, M.D., is the Genesee Hospital, 224 Alexander Street, Rochester, New York.

3. The respondents are medical doctors specializing in the practice of anesthesiology.

4. Respondents are engaged in the business of providing anesthesia services to patients for a fee. Fees for respondents' services are paid, at times, by patients or third-party payors in states other than New York and, at times, by patients or third-party payors in New York State with funds collected from third-party payors in states other than New York. The funds used by third-party payors to pay the fees for respondents' services are sometimes collected from employers and employees in states other than New York. Respondents' general business practices, and the acts and practices described below, affect the interstate flow of funds, the interstate purchase of medical supplies and products, and the interstate movement and billing of patients. Respondents' general business practices, and the acts and practices described below, are in or affected commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

5. Except to the extent that competition has been restrained as alleged herein, respondents have been and are now in competition

with at least some of the other respondents and with other anesthesiologists.

6. Anesthesiologists in Rochester may participate in various plans offered by certain third-party payors, including Blue Shield, by signing a participation agreement. Such agreements usually provide that the third-party payor will reimburse the participating physician directly for services provided to its subscribers, and that the participating physician will, in most situations, not charge more than an agreed-upon amount.

7. Each of the respondents have combined or conspired with at least some of the other respondents or others, in most cases since at least 1979, to restrain competition over certain terms of dealing with third-party payors and consumers, in order to increase the fees paid to them for providing anesthesia services. In furtherance thereof, respondents, among other things, have:

(a) agreed to negotiate collectively over the pricing terms on which they would participate in plans offered by third-party payors;

(b) engaged in such collective negotiations;

(c) agreed to threaten to departicipate from or not to participate in certain plans offered by third-party payors;

(d) concertedly threatened, explicitly or implicitly, to departicipate from or not to participate in certain plans offered by third-party payors;

(e) agreed to departicipate from or not to participate in certain plans offered by third-party payors; and

(f) concertedly departicipated from or refused to participate in certain plans offered by third-party payors.

8. In particular, for example, respondents jointly negotiated, through a committee of representatives, with Blue Shield during the summer and fall of 1980 in order to obtain substantially higher payments from Blue Shield. In the course of such negotiations, respondents' representatives communicated to or threatened Blue Shield that if their demand for substantially higher reimbursement was not met, respondents would departicipate from Blue Shield. Respondents subsequently departicipated concertedly from Blue Shield and increased significantly the fees they obtained for services rendered to Blue Shield subscribers. Since departicipating, none of respondents has participated in Blue Shield and no anesthesiologist at any of Rochester's three largest hospitals currently participates in Blue Shield. As a result of the departicipations, consumers in Rochester have suffered substantially increased costs for anesthesia services.

9. As an additional example, at various times since 1979 at least some respondents, through a representative or representatives, joint-

ly negotiated with Preferred Care, a health maintenance organization doing business in Rochester, in order to obtain higher payments from Preferred Care. In the course of such negotiations, those respondents communicated to or threatened Preferred Care that if their demands for higher reimbursement at the rates they specified were not met, they would refuse to participate in Preferred Care or to render services to Preferred Care subscribers. Preferred Care, in each instance, acceded to the demand for higher reimbursement at the rates specified by those respondents. As a result, Preferred Care incurred higher costs for providing anesthesia services to its subscribers and, in turn, Preferred Care subscribers incurred increased premium costs paid to Preferred Care.

10. Respondents' actions described above in paragraphs seven, eight and nine have had, or have the tendency to have, the following effects, among others:

(a) competition among anesthesiologists in the Rochester area has been lessened, limited, or restrained;

(b) fees for anesthesia services provided by some or all of respondents have been raised, fixed, or stabilized;

(c) the ability of third-party payors to compete in the Rochester area has been adversely affected; and

(d) subscribers to, policyholders of, enrollees in, or users of, plans offered by third-party payors have suffered either higher costs for anesthesia services provided by respondents, or higher premiums or costs for those plans.

11. Respondents' acts and practices, described above, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violations, or the effects thereof, are continuing and will continue in the absence of the relief requested.

#### DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named below with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

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

1. The following are the respondents' addresses:

(a) The address of respondents Jacob Krieger, M.D.; Mehdi-Mohtashemi, M.D.; Kariappa Narayan, M.D.; David A. Sherman, M.D.; and Tae B. Whang, M.D., is Rochester General Hospital, 1425 Portland Avenue, Rochester, New York.

(b) The address of respondent Stuart L. Kaplan, M.D., is 2966 Clover Street, Pittsford, New York.

(c) The address of respondents Marjanne H. Crino, M.D.; Theodore G. Ford, M.D.; Bridget A. Fraser, M.D.; Robert P. Geraci, M.D.; Manuel Gonzalez, M.D.; David Hwei-Yu Hsu, M.D.; Shirley D. Hunter, M.D.; Gary C. Kent, M.D.; Paul P. Marocco, M.D.; Naseer A. Tahir, M.D.; Michael M.H. Tan, M.D.; Richard C. Templeton, M.D.; and Balkrishna Venkatesh, M.D., is Genesee Hospital, 224 Alexander Street, Rochester, New York.

(d) The address of respondents Jose F. Calimlim, M.D.; Frank J. Colgan, M.D.; Svend Eldrup-Jorgensen, M.D.; Jim E. Fuller, M.D.; Robert M. Lawrence, M.D.; John A. Moreland, Jr., M.D.; Sriyalatha I. Nadaraja, M.D.; Seymour J. Sandler, M.D.; Pratima M. Shah, M.D.; and Jaimala Thanik, M.D., is Strong Memorial Hospital, 601 Elmwood Avenue, Rochester, New York.

(e) The address of respondent Judit S. Wagner, M.D., is Highland Hospital, 1000 South Avenue, Rochester, New York.

(f) The address of respondent Sylvia M. Marshall, M.D., is Lakeside Memorial Hospital, Inc., 156 West Avenue, Brockport, New York.

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

## ORDER

## I.

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

A. "*Blue Shield*" means Genesee Valley Medical Care, Inc., also known as Blue Shield of the Rochester Area.

B. "*Third-party payor*" means any person or entity that engages in any aspect of the process of reimbursing for, purchasing, or paying for health care services provided to any other person. Third-party payors include, but are not limited to, health insurance companies; prepaid hospital, medical or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing such self-insured health benefits programs.

C. "*Blue Shield's service area*" means Monroe, Livingston, Ontario, Seneca, Wayne, and Yates counties in New York State.

D. "*Competing anesthesiologist[s]*" as to any respondent means one or more anesthesiologist[s] practicing in the same geographic area as said respondent, for example Blue Shield's service area; but an anesthesiologist is not a "competing anesthesiologist" if he or she is a member of the same single entity or group practice as said respondent, for example the anesthesiologists who are employed by the University of Rochester's Strong Memorial Hospital.

E. "*Participating physician in Blue Shield*" and "*participate in Blue Shield*" includes both direct participation in Blue Shield and indirect participation through an employing hospital.

## II.

*It is further ordered,* That each respondent shall forthwith cease and desist from, directly or indirectly,

A. Agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination, with any competing anesthesiologist[s] to fix, stabilize, set, or tamper with (1) the amount or any term of reimbursement or payment from, or the price or any term of purchase by, any third-party payor for any anesthesiologist's services, or (2) any pricing formula, conversion factor, or fee for any anesthesiologist's services; *Provided, however,* That this paragraph shall not prohibit any agreement, combination, or concert-

ed action solely to provide information or views to any third-party payor concerning any issue, including reimbursement.

B. Agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination, with any competing anesthesiologist[s] to (1) boycott, refuse to deal with, departicipate from, or not participate in, any health plan or program offered by any third-party payor, or (2) threaten to boycott, threaten to refuse to deal with, threaten to departicipate from, or threaten not to participate in, any health plan or program offered by any third-party payor, or (3) boycott or threaten to boycott any anesthesiologist on the basis of his or her participation in any health plan or program offered by any third-party payor.

### III.

*It is further ordered,* That for a period of ten (10) years from the date this order becomes final each respondent shall forthwith cease and desist from, directly or indirectly,

A. Taking any action, individually or concertedly, to establish or implement a policy, practice, or work assignment schedule, on a rotational basis or otherwise, under which anesthesiologists are assigned to hospital patients in a manner intended to (1) limit, reduce, or suppress any anesthesiologist's incentive to participate in a third-party payor's health plan or program, or (2) prevent the accommodation of requests for an anesthesiologist who participates in a specific health plan or program offered by a third-party payor; *Provided, however,* That this paragraph shall not prohibit any respondent from taking any action, individually or concertedly, to establish or implement a policy, practice, or work assignment schedule, on a rotational basis or otherwise, that is no broader than reasonably necessary for the efficient provision of quality care, and is uniformly applied.

B. Taking any action, individually or concertedly, to deter, hinder, limit, or impede the obtaining of medical staff membership or clinical privileges by any anesthesiologist on the basis of his or her participation status in any plan or program offered by any third-party payor, or on the basis of the level of his or her fees.

### IV.

*It is further ordered,* That for a period of five (5) years from the date this order becomes final, each respondent shall forthwith cease and desist from directly or indirectly entering into or continuing, or attempting to enter into or continue, any partnership or corporate

agreement that encompasses a majority of the anesthesiologists on the active medical staff at Rochester General Hospital or a majority of the anesthesiologists on the active medical staff at Genesee Hospital, and that has or would have the purpose or the effect of eliminating or restraining competition among anesthesiologists at either of those hospitals.

V.

*It is further ordered, That:*

A. During any period of time within seven (7) years after the date this order becomes final that any respondent is a member of the active medical staff of any hospital in Blue Shield's service area and is not a participating physician in Blue Shield, that respondent shall disclose clearly and conspicuously to patients and prospective patients, as soon as reasonably possible after the patient or prospective patient is referred to or contacts that respondent, or is scheduled to receive anesthesia from that respondent, whichever occurs first, the following written notice:

Notice to Blue Shield Subscribers

I do not participate in Blue Shield. You will be personally liable for my entire bill, and Blue Shield will reimburse you for only a portion of my bill. Most patients who are Blue Shield subscribers will personally have to pay more out-of-pocket if they use a non-participating anesthesiologist than if they use an anesthesiologist who participates in Blue Shield. If you wish to obtain the names of anesthesiologists at this or other hospitals who do participate in Blue Shield, contact Blue Shield, your surgeon, or the hospital's department of anesthesia.

\_\_\_\_\_  
[name]

*Provided, however,* That this notice need not be disclosed to patients who are known by the respondent not to be enrolled in or covered by any Blue Shield plan or program.

B. Paragraph V.A need not be complied with by a respondent during any portion of the seven (7) years after the date this order becomes final if, instead, during that period, the following notice is provided to patients and prospective patients who will be receiving anesthesia services at the hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff:

Notice to Blue Shield Subscribers

Most patients who are Blue Shield subscribers will personally have to pay more out-of-pocket if they use a non-participating anesthesiologist than if they use an anesthesiologist who participates in Blue Shield. If you wish to try to arrange for an anesthesiologist who participates in Blue Shield to provide your anesthesia, please contact your surgeon or the hospital's department of anesthesiology as soon as possible. The name and current Blue Shield participation status of each anesthesiologist who normally practices at this hospital is: [followed by a list specifying the names of all anesthesiologists on the hospital's active medical staff who participate in Blue Shield, and the names of all anesthesiologists on the hospital's active medical staff who do not participate in Blue Shield].

If provided, the above notice shall be provided to the patient or prospective patient before admission to the hospital if reasonably possible; otherwise it shall be provided as soon after admission as is reasonably possible.

*Provided, however,* That during any period of time that no anesthesiologist on the hospital's active medical staff participates in Blue Shield, the notice contained in this paragraph V.B shall read as follows:

Notice to Blue Shield Subscribers

The anesthesiologists who normally practice at this hospital do not participate in Blue Shield. You will be personally liable for the entire anesthesia bill, and Blue Shield will reimburse you for only a portion of the bill. Anesthesiologists who do participate have agreed to charge Blue Shield subscribers whose income does not exceed a specified level no more than a certain fee. If you wish to try to make special arrangements for treatment by an anesthesiologist who participates in Blue Shield, direct your inquiry to the hospital's anesthesia department, or your surgeon. If you wish to discuss the possibility of admission to a different hospital that has participating anesthesiologists, contact your surgeon.

## VI.

*It is further ordered, That:*

A. Within thirty (30) days after this order becomes final, each respondent who does not participate in Blue Shield shall send the following notice to each physician who has surgical privileges at any



hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff:

Notice Regarding Blue Shield Subscribers

In helping your patients at \_\_\_\_\_ Hospital select an anesthesiologist, it may be useful for you to know that I do not participate in Blue Shield, and that I use a conversion factor of \_\_\_\_\_ in calculating my fee. Most patients who are Blue Shield subscribers will personally have to pay more out-of-pocket if they use a non-participating anesthesiologist, such as myself, than if they use an anesthesiologist who participates in Blue Shield.

\_\_\_\_\_  
[name]

B. Within thirty (30) days after this order becomes final, each respondent who does participate in Blue Shield shall send the following notice to each physician who has surgical privileges at any hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff:

Notice Regarding Blue Shield Subscribers

In helping your patients at \_\_\_\_\_ Hospital select an anesthesiologist, it may be useful for you to know that I participate in Blue Shield. Most patients who are Blue Shield subscribers will personally have to pay more out-of-pocket if they use a non-participating anesthesiologist than if they use an anesthesiologist who participates in Blue Shield.

\_\_\_\_\_  
[name]

C. For a period of seven (7) years from the date this order becomes final, each respondent shall send, within twenty (20) days of any change in his or her participation status with respect to Blue Shield or, if respondent does not participate in Blue Shield, any change in his or her conversion factor, an appropriately revised notice to each physician who has surgical privileges at any hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff.

D. For a period of seven (7) years from the date this order becomes final, on each anniversary of the date that this order becomes final, each respondent shall send the appropriate notice to each physician who has surgical privileges at any hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff.

E. Paragraphs VI.A, VI.B, VI.C, and VI.D need not be complied with by a respondent during any portion of the seven (7) years after the date this order becomes final if, instead, during that period, the following notice is sent to each physician with surgical privileges at the hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff:

Notice Regarding Blue Shield Subscribers

In helping your patients at \_\_\_\_\_ Hospital select an anesthesiologist, it may be useful for you to know which anesthesiologists participate in Blue Shield. Anesthesiologists who participate in Blue Shield have agreed to charge their patients who are Blue Shield subscribers, and whose income does not exceed a specified level, no more than a certain fee. Most patients who are Blue Shield subscribers will personally have to pay more out-of-pocket if they use a non-participating anesthesiologist than if they use an anesthesiologist who participates in Blue Shield. The name and current Blue Shield participation status of each anesthesiologist who normally practices at this hospital is: [followed by a list specifying the names of all anesthesiologists on the hospital's active medical staff who participate in Blue Shield, and the names of all anesthesiologists on the hospital's active medical staff who do not participate in Blue Shield].

If sent, the above notice shall be sent within thirty (30) days after the date this order becomes final. Thereafter, for a period of seven (7) years, the notice, with any revisions, shall be sent on each anniversary of the date that this order becomes final, and within sixty (60) days of any change in the participation status of any anesthesiologist who is a member of the active medical staff.

VII.

*It is further ordered,* That each respondent shall provide any patient, prospective patient, or physician who requests information from that respondent or respondent's agent regarding respondent's fees, prices, or participation status in any third-party payor's plan or program, with the requested information, including, when requested, respondent's fee or price, or the best estimate thereof, and an explanation of how respondent's fee or price will be determined, including the exact conversion factor that will be used, if one will be used.

## VIII.

*It is further ordered,* That this order shall not prohibit any respondent from:

A. Participating in professional peer review of fees charged by individual physicians in individual cases; or

B. Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding.

## IX.

*It is further ordered,* That:

A. Within thirty (30) days after this order becomes final, respondent Robert P. Geraci shall provide a copy of this order and complaint to each anesthesiologist who is a member of the Genesee Hospital Department of Anesthesia and who is not a respondent in this matter, that respondent Jacob Krieger shall provide a copy of this order and complaint to each anesthesiologist who is a member of the Rochester General Hospital Department of Anesthesia and who is not a respondent in this matter, and that respondent Robert M. Lawrence shall provide a copy of this order and complaint to each anesthesiologist who is a member of the Strong Memorial Hospital Department of Anesthesia and who is not a respondent in the matter.

B. Sixty (60) days after this order becomes final, and at such other times as the Commission may by written notice require, each respondent shall submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which he or she is complying, or has complied, with this order.

C. For a period of seven (7) years from the date this order becomes final, each respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any change in his or her practice that may affect compliance with the obligations arising from this order.

Commissioners Bailey and Azcuenaga were recorded as voting in the negative.

## DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I have voted not to accept the consent agreement in *Rochester Anesthesiologists*, Docket No. 9199, because it fails to contain a jurisdictional admission for some respondents. As required by Rule 2.32,

Paragraph 3 of the Agreement Containing Consent Order To Cease and Desist recites that "Respondents admit all of the jurisdictional facts set forth in the Commission's complaint in this proceeding." Paragraph 4, also in compliance with Rule 2.32, recites in part that the respondents waive "[a]ll rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement." Paragraph 3 of the agreement also states, however, that for purposes of any enforcement action, "respondents employed by the University of Rochester note their denial that the commission has jurisdiction over them in their capacity as employees of the University of Rochester." Most, if not all, of the respondents now employed by the University of Rochester were also so employed at the time of the alleged violation. With this language, the agreement is inconsistent on its face, and it does not settle the jurisdictional question, as Rule 2.32 plainly anticipates it should.

Although there may be a difference between admitting jurisdictional facts and admitting that those facts confer jurisdiction, Rule 2.32 plainly requires that a respondent entering into a consent agreement admit both. The purpose of a consent agreement is to settle the case, to resolve the issues that the parties would have litigated. The policy underlying Rule 2.32, which is unequivocal in requiring jurisdictional admissions in every case, is the necessity that the Commission assert jurisdiction only when it has jurisdiction. Any departure from the standard jurisdictional admission invites speculation as to the scope of the limitation and creates uncertainty about the Commission's authority to issue and enforce the order.

If jurisdiction is in question, the Commission should decide the issue now. If the Commission is uncertain of its jurisdiction, it should not impose an order by consent with a respondent any more than it would do so following litigation. If we are sure of our jurisdiction, as in this case, then we should not accept a qualified jurisdictional admission. It is the responsibility of the Commission, not the courts, to determine its jurisdiction in the first instance. See *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972); *American General Insurance Co. v. FTC*, 496 F.2d 197 (5th Cir. 1974). When we waver in asserting jurisdiction but still impose a law enforcement remedy, we abdicate our most fundamental responsibility.

I dissent.

Complaint

110 F.T.C.

IN THE MATTER OF

## GREAT EARTH INTERNATIONAL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5  
AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3223, Complaint, Mar. 15, 1988—Decision, Mar. 15, 1988*

This consent order prohibits, among other things, a Santa Ana, Calif.-based food supplements franchisor from making certain claims about the supplements' effectiveness. Respondent is also prohibited from using the name "Growth Hormone Releaser," "GHR," or any similar name unless it has substantiation that the product stimulates the body or pituitary gland to release significantly greater amounts of human growth hormone in users than in non-users.

*Appearances*For the Commission: *Janice Frankle.*For the respondent: *Michael Hart, Hart & Hart, Los Angeles, CA.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Great Earth International, Inc., a corporation, hereinafter referred to as respondent, has violated Sections 5 and 12 of the Federal Trade Commission Act, and that an action by it is in the public interest, issues this complaint and alleges that:

PARAGRAPH 1. Great Earth International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1801 Parkcourt Place, Suite A, Santa Ana, California.

PAR. 2. Respondent is, and has been engaged in the manufacture, labeling, packaging, offering for sale, promotion, sale and distribution to the public of various nutrient supplements, such as "GHR Formula-P.M.," "L-Arginine," "L-Ornithine," and other foods, as "food" is defined in the Federal Trade Commission Act, and other products.

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of various advertising and promotional materials, including, but not limited to, the advertising and promotional materials attached hereto as Exhibits A through I, to promote the sale of its nutrient supplements and other foods and other products. As advertised, respondent's nutrient supplements are

"food[s]," within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. Respondent operates in various states of the United States and in the District of Columbia. Respondent's manufacturing, labeling, packaging, offering for sale, promoting, sale and distribution of nutrient supplements and other foods and other products constitute the maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertisements and promotional materials for nutrient supplements and other foods and other products by various means in or affecting commerce, including, *inter alia*, the placement of advertisements in newspapers and national magazines distributed through the mail and across state lines. Such advertisements and promotional materials were for the purpose of inducing, and were likely to induce, directly or indirectly, the purchase by the public of respondent's nutrient supplements and other foods and products.

PAR. 6. Typical examples of respondent's advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are the advertisements and promotional materials attached hereto as Exhibits A through I. Specifically, these advertisements and promotional materials have contained the following statements:

A. In regard to "GHR Formula-P.M.":

1. "How to get the body of your dreams while you sleep. When you go to sleep, GHR Formula-P.M. goes to work. How? Simply by helping your body do more of what it already does every night. About 90 minutes after you fall asleep, your pituitary gland begins releasing Growth Hormone, which burns fat and builds muscle. But in your adult years, less Growth Hormone is released and less fat is burned. GHR Formula-P.M. is taken at bedtime, permitting it to be digested and absorbed by about the same time your pituitary begins to work its nightly magic. The result is an increase in the amount of Growth Hormone in your bloodstream. In other words, GHR Formula-P.M. helps you start regaining your youthful metabolism and lean, firm figure overnight."

2. "When you go to sleep, GHR Formula-P.M. goes to work

- Burning away fat
- Building lean muscle tissue
- Firming
- Toning
- Shaping"

3. "The nutrients in GHR Formula-P.M. can stimulate the release of Growth Hormone and raise blood levels. This improves your body's ability to burn unwanted excess body fat and build lean muscle."

4. "The special formula of Amino Acids in GHR Formula-P.M. can help raise your body's metabolic rate naturally."
5. "[M]any . . . athletes turn to anabolic steroids to accomplish their goals. GHR Formula-P.M. is a safe natural alternative for athletes. As a natural anabolic supplement it will help athletes to build lean muscle tissue and burn body fat."
6. "Lose While You SNOOZE."
7. "Many products claim to help you burn fat while you sleep but few really can. Most just don't contain the right balance of nutrients to properly stimulate the release of Growth Hormone. But GHR Formula-P.M. does! It's scientifically formulated for maximum effectiveness. **It really works!**"
8. "You can lose fat plus firm and tone your muscles without lifting a finger."
9. "Hunger Free Diet"
10. "Now you can have the firm, fat-free physique of youth with GHR Formula-P.M."
11. "Avoid Starvation Diets"

**B. In regard to "L-Ornithine" and "L-Arginine":**

1. "Two Amino Acids shown to help burn fat and build muscle when taken in combination."
2. "Sleep away fat! Life Extension proponents now claim rapid weight loss is possible, while you sleep, by supplementing your diet with these fat burning, muscle building amino acids."
3. "THE MUSCLE BUILDING FAT BURNING HELPERS."
4. "They help speed up healing and protect against physical and mental fatigue."

**C. In regard to "L-Ornithine" only:**

1. "An amino acid that functions in the body as a growth hormone and immune system stimulator. Helps protect against fatigue."

PAR. 7. Through the use, *inter alia*, of the statements set forth in paragraph six (A) through six (C), and other statements contained in advertisements or promotional materials not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that:

**A. GHR Formula-P.M. will:**

1. Stimulate the pituitary gland to release greater amounts of human growth hormone in users of the product than in non-users of the product.
2. Alter human metabolism in such a way that the metabolism of users of the product will function in a manner similar to the metabolism of youth.
3. Burn fat, build lean muscle tissue or firm, tone or shape muscles.
4. Help athletes or muscle builders achieve results similar to the results these individuals generally believe are achievable through use of anabolic steroids, e.g., rapid and substantial muscular development.

5. Taken before sleep, will promote greater weight loss during sleep in users of the product than in non-users of the product.

B. "L-Ornithine" or "L-Arginine," or both, will:

1. Stimulate the pituitary gland to release greater amount of human growth hormone in users of the products than in non-users of these products.

2. Promote greater burning of fat or building of muscle in users of these products than in non-users of these products.

3. Promote more rapid healing and greater protection against physical and mental fatigue in users of these products than in non-users of these products.

4. Promote greater stimulation of the immune system and greater protection against fatigue in users of these products than in non-users of these products.

PAR. 8. In truth and in fact:

A. GHR Formula-P.M. will not:

1. Stimulate the pituitary gland to release greater amounts of human growth hormone in users of the product than in non-users of the product.

2. Alter human metabolism in such a way that the metabolism of users will function in a manner similar to the metabolism of youth.

3. Burn fat, build lean muscle tissue or firm, tone or shape muscles.

4. Help athletes or muscle builders achieve results similar to the results these individuals generally believe are achievable through the use of anabolic steroids, e.g., rapid and substantial muscular development.

5. Taken before sleep, promote greater weight loss during sleep in users of the product than in non-users of the product.

B. "L-Ornithine" or "L-Arginine," or both, will not:

1. Stimulate the pituitary gland to release greater amounts of human growth hormone in users of these products than in non-users of these products.

2. Promote greater burning of fat or building of muscle in users of these products than in non-users of these products.

3. Promote more rapid healing and greater protection against physical and mental fatigue in users of these products than in non-users of these products.

4. Promote greater stimulation of the immune system or greater protection against fatigue in users of these products than in non-users of these products.

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



PAR. 9. Through the use, *inter alia*, of the representations set forth in paragraph seven, and other representations contained in advertisements or promotional materials not specifically set forth herein, respondent has represented and now represents, directly or by implication, that at the time of making the representations set forth in paragraph seven respondent has possessed and relied upon a reasonable basis for these representations.

PAR. 10. In truth and in fact, at the time of making the representations set forth in paragraph seven, respondent did not possess and rely upon a reasonable basis for making the representations. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. The aforesaid acts or practices of respondent were and are to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act and false advertisements in violation of Section 12 of the Federal Trade Commission Act.

EXHIBIT A

**GHR FORMULA  
P.M.**

<b>EACH TABLET PROVIDES:</b>		<b>Six tablets provide:</b>
L-Ornithine.....	500 mg.	3000 mg.
L-Tryptophan.....	167 mg.	1000 mg.
Glycine.....	667 mg.	4000 mg.
Vitamin B-6.....	15 mg.	90 mg.
(Pyridoxine HCl)		
Niacinamide.....	.40 mg.	240 mg.

No sugar, salt, starch, yeast, artificial coloring, flavoring, or preservatives added.  
 Components in this product are derived from natural sources.  
 Natural Protective Coating Utilized.



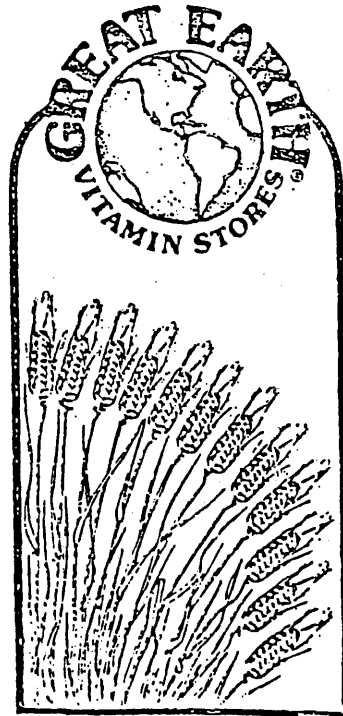
your neighborhood  
vitamin information center

**GREAT EARTH VITAMINS #55**  
169 W. JACKSON BLVD.  
CHICAGO, ILLINOIS 60603  
(312) 939-2777

©Great Earth International, Inc., 1984

**GHR  
FORMULA  
P.M.**

*another great new product  
for your good health.*



**GHR FORMULA P.M.**

*How can GHR Formula-P.M. help me burn fat and increase muscle?*

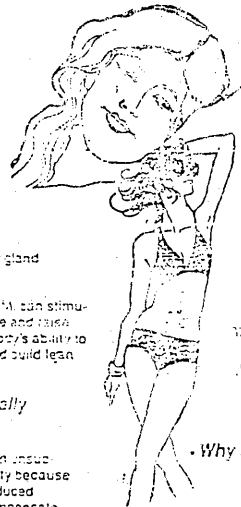
Human Growth hormone is stored in the pituitary gland. It helps us convert fat into muscles and energy, but as we grow out of our childhood years, the release of Growth hormone from the pituitary gland slows dramatically.

The nutrients in GHR Formula-P.M. can stimulate the release of Growth hormone and raise blood levels. This improves your body's ability to burn unwanted excess body fat and build lean muscle.

*Can GHR Formula-P.M. really help me lose weight?*

If you have tried dieting and have been unsuccessful, you may be having difficulty because of a reduced metabolism. Most reduced calorie diets cause the body to compensate by slowing metabolism. Thus, weight loss slows down or stops.

The special formula of Amino Acids in GHR Formula-P.M. can help raise your body's metabolic rate naturally, and will make you more successful in your weight loss program. By supplementing your daily diet with GHR Formula-P.M. you will maximize your body's ability to burn off stored fat and excess calories.



*What else should I take with GHR Formula-P.M.?*

Many serious athletes are concerned with increasing their muscle mass and minimizing body fat. Unfortunately, many of these athletes turn to anabolic steroids to accomplish their goals.

GHR Formula-P.M. is a safe natural alternative to anabolic steroids. It will help athletes to build lean muscle mass and burn fat. It is taken regularly in conjunction with a sound exercise program. It can enhance the development of lean body mass.

*Why should I take GHR Formula-P.M. before bedtime?*

The natural release of Growth hormone occurs normally about 90 minutes after falling asleep. Taking GHR Formula-P.M. before bedtime will allow it to be digested and absorbed in time for it to coincide with the natural release cycle of Growth Hormone, thus maximizing the amount released.

*What else should I take with GHR Formula-P.M.?*

If you are trying to lose weight, try our Hunger Free™ Diet Packs to help you control hunger during the day. Should body building be your goal, you should consider our Great Body™ Protein Powder and a program of supplements specifically designed for your accelerated muscle development. Both dieters and athletes need a sound basic nutritional supplement program like our NSP™ to ensure nutritional support for the extra demands they place on their bodies.

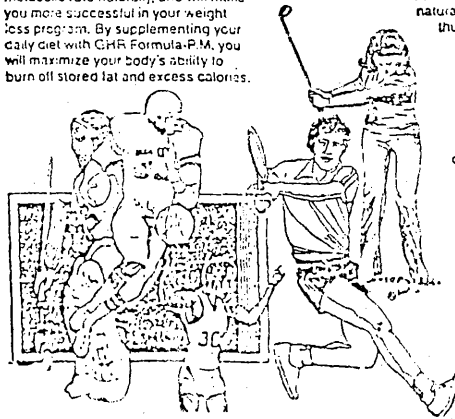


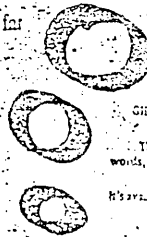
EXHIBIT B

# How to get the body of your dreams while you sleep



When you go to sleep, GHR formula-PM goes to work

- Burning away fat
- Building lean muscle tissue
- Firming
- Toning
- Shaping



about 90 minutes after you fall asleep, your body begins releasing Growth Hormone, which burns fat and builds muscle. But in your adult years, less Growth Hormone is released and less fat is burned.

GHR Formula-PM is taken at bedtime, promoting it to be released and absorbed by about the same time your pituitary begins to work normally again.

The result is to increase the amount of Growth Hormone in your bloodstream. In other words, GHR Formula-PM helps you start retaining your youthful muscles and lean, firming, toning, and shaping.

It's available only at Great Earth Vitamin's, so come in today. We'll help you wake up to the body you've been dreaming of.

12.99

## GREAT EARTH VITAMINS

Offers good thru 12/31/85 at participating stores only.



1721 SHERMAN AVENUE, EVANSTON  
(between Oak and Clark Streets)  
475-0225

CHICAGO  
 2511-1211    55 E CHICAGO AVE    3300 N. MICHIGAN AVE    5100 E. 57TH ST  
 847-7101    847-7101    877-0400    877-0400

DELIVERY AVAILABLE IN THE LOOP AREA. CALL ANY OF OUR STORES FOR MORE INFO.



180 Stores Nationwide to Serve You • Satisfaction Guarantee • Free Vitamin Consultations

A PUBLIC RELATIONS COMPANY

MARCH 1985

EXHIBIT C



# SLEEP AWAY FAT!

**AMAZING NEW FORMULA LETS YOU LOSE FAT WHILE YOU SNOOZE**

- BURN OFF BODY FAT!
- BUILD LEAN MUSCLE TISSUE!
- FIRM AND TONE YOUR BODY!
- REGAIN YOUR YOUTHFUL METABOLISM!
- AVOID STARVATION DIETS!

**NOW, WITH GHR FORMULA-P.M.**

AVAILABLE EXCLUSIVELY AT GREAT EARTH VITAMIN STORES.

Taken at bedtime, this special synergistic combination of amino acids and vitamins works to burn up body fat while you sleep more lean muscle tissue. You lose fat plus firm and tone your body!

This amazing new formula stimulates the release of Growth Hormone while you sleep which improves your body's ability to burn off body fat. If you've been unsuccessful at dieting you may be having difficulty because of a reduced metabolism. GHR FORMULA-P.M. can help raise your body's metabolic rate naturally! By increasing your level of Growth Hormone you can have the firm fat-free look of youth!

Many products claim to help you burn fat while you sleep but few really can. Most just don't contain the right balance of nutrients to properly stimulate the release of Growth Hormone. But GHR FORMULA-P.M. does! It's scientifically formulated for maximum effectiveness. *it really works!*



**GHR FORMULA-P.M.**  
Lose while you snooze!

**1299**  
120 tablets



**HUNGER FREE™ DIET PACK**  
Attack hunger all day!

**1699**  
42 packets  
3 free per packet

Three special tablets with all natural ingredients: 1) GREAT SHAPE™ helps you feel full and reduces water retention. 2) SUPPRESSED™ controls your hunger. 3) LIPOTROPIC FORMULA helps emulsify fats.



**MAINTAIN™ DHEA COMPLEX**  
Maintain your weight loss!

**FREE**

When you purchase GHR FORMULA-P.M. and the HUNGER FREE DIET PACK you receive MAINTAIN™ FREE!

Eat as you normally would and keep those extra pounds off! MAINTAIN™ prevents excess calories from turning to unwanted fat. Your body just burns them off!


## GREAT EARTH® VITAMINS

now, it's possible to...

# LOSE WHILE YOU SNOOZE!

**NEW!** Sleep away fat with GREAT EARTH<sup>®</sup> VITAMIN'S new **GHR FORMULA-P.M.**

*Now, new maximum strength GHR FORMULA-P.M. available only at GREAT EARTH VITAMIN STORES.*



**1299**  
60 tabs

While you sleep, this special synergistic combination of amino acids and vitamins works to burn body fat and helps you to develop more lean muscle tissue. You can lose fat plus firm and tone your muscles without lifting a finger!

This fantastic formula works by stimulating the natural release of Growth Hormone while you are sleeping. It is Growth Hormone which is responsible for a youthful metabolism and muscle tone. Now you can have the firm, fat-free physique of youth with GHR FORMULA — P.M.

**GREAT EARTH VITAMIN STORES**  
OVER 775 STORES NATIONWIDE TO SERVE YOUR SATISFACTION GUARANTEED

Offer good thru / / at participating stores only

MAR. XTRA SINGLE PRODUCT AD 3col x 7" 91559

EXHIBIT E

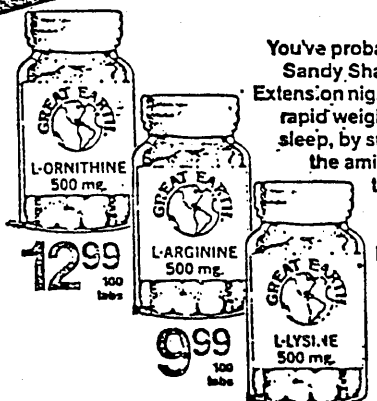
*"Life Extension" proponents now claim it's possible to...*

# SLEEP AWAY FAT!


*Trim while you sleep with GREAT EARTH'S special offer on the "Life Extension" diet.*

You've probably seen Durk Pearson and Sandy Shaw on TV discussing the Life Extension night time diet. They're claiming rapid weight loss is possible, while you sleep, by supplementing your diet with the amino acids known to stimulate the human growth hormone.

Save big on this program now by getting FREE L-Lysine with the purchase of L-Ornithine and L-Arginine in the 1299 size.



**1299** 100 tabs  
**999** 100 tabs  
**FREE!** 100 tabs



**PRICES MAY VARY**  
Prices in effect 11 / / at participating stores only

OVER 450 STORES NATIONWIDE TO SERVE YOU & SATISFACTION GUARANTEED

SINGLE PRODUCT NO. 97 No. 91501

**AMAZING DIET BREAKTHROUGH!**  
 Lets you maintain your ideal weight!  
**AND IT'S YOURS FREE!**  
 When you purchase Great Earth's Vitamin Stores' new Snooze and Lose, Hunger Free Diet.

**ATTACK HUNGER ALL DAY!  
 HUNGER FREE™ DIET PACK**  
**1699** 42 packets  
 3 tabs per packet  
 Three special tablets with all natural ingredients:  
 1. GREAT SHAPE helps you feel full and reduces water retention. 2. SUPPREEZE controls hunger. 3. LIPTROPIC FORMULA helps emulsify fats.

**LOSE WHILE YOU SNOOZE!  
 GHR FORMULA - P.M.**  
**1299** 60 tabs  
 SLEEP AWAY FAT! While you sleep this special synergistic combination of amino acids and vitamins works to burn up body fat and helps you develop more lean muscle tissue.

<b>VITAMIN C</b> 500 mg. TIMED RELEASE <b>199</b> 100 tabs with natural rose hips	<b>NATURALE</b> OXY E COMPLEX 200 IU. Our best <b>199</b> 30 tabs	<b>LECITHIN</b> CAPSULES 19 grain <b>199</b>
<b>ZINC</b> 15 mg. from Zinc Gluconate <b>149</b>		

**MORE SPECIALS**



EXHIBIT G

# SLEEP AWAY FAT!

## AMAZING NEW FORMULA LETS YOU LOSE FAT WHILE YOU SNOOZE



- BURN OFF BODY FAT!
- BUILD LEAN MUSCLE TISSUE!
- FIRM AND TONE YOUR BODY!
- REGAIN YOUR YOUTHFUL METABOLISM!
- AVOID STARVATION DIETS!

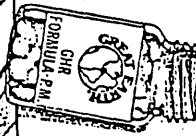
**NOW, WITH GHR FORMULA-P.M.  
AVAILABLE EXCLUSIVELY  
AT GREAT EARTH VITAMIN STORES.**

Calcium is essential, and is supplied with a gentle source of calcium to help build strong bones and teeth. Vitamin D helps the body absorb calcium and helps regulate the body's metabolism. The best fat burner is available only at Great Earth Vitamin Stores.

This special formula is formulated to stimulate the release of Growth Hormone while you are sleeping, which improves your body's ability to burn off body fat. If you've been unsuccessful at dieting, you may be having difficulty because of a reduced metabolism. GHR FORMULA-P.M. can help raise your body's metabolic rate naturally by increasing your level of Growth Hormone you can burn the fat and tone the skin of youth!

Many products claim to help you burn fat while you sleep but few really can. Most just claim to provide the right balance of nutrients to properly stimulate the release of Growth Hormone. But GHR FORMULA-P.M. does! It's scientifically formulated for maximum effectiveness. It's the only one!

**GHR FORMULA-P.M.**



**12<sup>99</sup>**  
60 TABLETS

### GREAT EARTH VITAMINS

STORES NATIONWIDE TO SERVE YOU • YOUR NATURAL DIET HEADQUARTERS



VITAMIN STORES

Complaint

EXHIBIT H

**L-ORNITHINE**  
**500 mg.**  
helps build muscles.  
burn fat

**1199**  
100 tabs

An amino acid that functions in the body as a growth hormone and immune system stimulator. Helps protect against fatigue.

EXHIBIT I

**HIGHEST QUALITY VITAMINS AT DOWN TO EARTH PRICES**

**GREAT EARTH VITAMIN STORES**

**TRAINED STAFF OF NUTRITION PROFESSIONALS TO SERVE YOU!**

**L-ORNITHINE 500 mg. 1199 100 tabs**

**L-ARGININE 500 mg. 899 100 tabs**

L-Arginine and L-Ornithine are amino acids which function in the body as growth hormone and immune system stimulators. They aid the body in building muscle and burning off fat. They help speed up healing and protect against physical and mental fatigue.

L-Ornithine is twice as potent as L-Arginine.

**OVER 100 STORES NATIONWIDE TO SERVE YOU. SATISFACTION GUARANTEED.**

Prices in effect 10/1/77 at participating stores only

## DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Great Earth International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1801 Parkcourt Place, Suite A, in the City of Santa Ana, State of California.

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

## ORDER

## I.

*It is ordered,* That respondent Great Earth International, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufac-

turing, labeling, packaging, offering for sale, selling, advertising or distributing of the nutrient supplements known from 1983 to 1987 as "GHR Formula-PM" (presently known as "Tri-Amino Plus P.M."), "L-Arginine," "L-Ornithine," or any other food of substantially similar composition, or any other free form amino acid nutrient supplement containing arginine, ornithine, tryptophane, glycine, or any combination thereof, in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such food will:

A. Stimulate greater production or release of human growth hormone in users of such product than in non-users.

B. Alter human metabolism in such a way that the metabolism of users of such product will function in a manner similar to the metabolism of youth.

C. Help users achieve results similar to or superior to the results these users generally believe are achievable through use of anabolic steroids, *e.g.*, rapid or substantial muscular development.

D. Promote greater weight loss during sleep in users of such product than in non-users of such product, when consumed before sleep.

E. Promote greater burning of fat or building, firming, toning or shaping of muscle in users of such product than in non-users.

F. Promote more rapid healing and greater protection against physical and mental fatigue in users of such product than in non-users.

G. Promote greater stimulation of the immune system and greater protection against fatigue in users of such product than in non-users.

## II.

*It is further ordered,* That respondent Great Earth International, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, packaging, offering for sale, selling, advertising or distributing of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such product will:

A. Beneficially affect, cure, prevent or reduce the risk of any disease or any other undesirable physical, mental or emotional state or condition;

B. Improve or strengthen any bodily part, organ, system, function or ability;

C. Eliminate, inhibit, reduce or otherwise neutralize or render harmless any harmful substance or organism that may be found in the body or environment; or

D. Assist or enable a user to lose or control weight or fat, or suppress appetite

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. "*Competent and reliable*" shall mean for purposes of this order tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in that profession or science to yield accurate and reliable results.

### III.

*It is further ordered,* That respondent Great Earth International, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from using the name "Growth Hormone Releaser," "GHR" or any other name of similar meaning as a brand name or description for any product, unless such product stimulates the body to produce, or the pituitary gland to release, significantly greater amounts of human growth hormone in users than in non-users and, at the time of using such name, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation inherent in use of such name.

### IV.

*It is further ordered,* That respondent, its successors and assigns, shall, for at least three (3) years after the last dissemination of the representation, maintain and upon reasonable request make available to the Federal Trade Commission at a place it designates for inspection and copying copies of:

A. All materials that respondent relied upon in making any representation covered by this order.

B. All test reports, studies, surveys, or demonstrations in its possession or control that contradict any such representation.

## V.

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

## VI.

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