

## IN THE MATTER OF

## NATIONAL MEDIA CORPORATION, ET AL.

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

*Docket C-344l. Complaint, June 24, 1993--Decision, June 24, 1993*

This consent order prohibits, among other things, the Pennsylvania-based corporations from disseminating the infomercials for Cosmetique Francais or for Crystal Power and from making false claims regarding the efficacy or safety of any similar cellulite treatment product, similar crystalline stone or any product. The consent order requires that a disclosure statement be placed in certain video advertisements, and that the respondents pay \$275,000 into a fund for consumer redress to be administered by the Commission.

*Appearances*

For the Commission: *Patricia A. Hensley and Kathryn C. Nielsen.*

For the respondents: *Steven John Fellman, Galland, Kharasch, Morse & Garfinkle, Washington, D.C.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Media Corporation and Media Arts International, Ltd., corporations, 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 I. A. Respondent National Media Corporation ("National Media"), is a corporation organized, existing and doing

business under and by virtue of the laws of the State of Delaware. National Media has its principal office and place of business at 4360 Main Street, Philadelphia, Pennsylvania. National Media controls the acts and practices of its wholly-owned subsidiary, Media Arts International, Ltd. (“Media Arts”).

B. Respondent Media Arts is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. Media Arts has its principal office and place of business at 1875 Campus Commons Road, Suite 200, Reston, Virginia.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed numerous products to consumers throughout the United States, including Crystal Power, crystals that purportedly can heal the human body; Cosmetique Francais, a purported cellulite product; HP-9000, a household cleaning product; and Magic Wand, an immersion-style kitchen mixer. These commercials, which are referred to as program-length commercials, run for 30 minutes or less and fit within normal television broadcasting time slots. The commercials for HP-9000 and Magic Wand are part of a series of commercials titled “Amazing Discoveries.” Respondents’ commercials are broadcast on network independent and cable television stations throughout the United States.

PAR. 3. The Crystal Power crystals and Cosmetique Francais are “drugs,” “devices,” and/or “cosmetics” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

#### False and Unsubstantiated Efficacy Claims

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements for Cosmetique Francais, including but not necessarily limited to a 30-minute television commercial identified as “Cellulite Free in 28 Days” and attached as Exhibit A. This advertisement contains the following statements:

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1. Debra Morris: "So, the bottom line, the question is, can you get rid of cellulite?"  
Corrinne Lorraine: "Yes, you can definitely, you know, get rid of it."
2. Debra Morris: "But, if you do have it, can you get rid of it, even if your mother and grandmother have it?"  
Corrinne Lorraine: "Yes. Well, maybe they didn't work on it, so they kept it. But if you do what's right, you know, you can definitely get rid of it."
3. Corrinne Lorraine: "And when you use those products and you get to the point where you feel you've gotten rid of all that, then you can just keep using it if you want once or twice a week to keep up and make sure it doesn't come back, you know."  
Debra Morris: "So, you're saying in 28 days I can get rid of this?"  
Corrinne Lorraine: "Yes."  
Debra Morris: "In 28 days. And then only once or twice a week to keep it off?"  
Corrinne Lorraine: "Yes."
4. Announcer: "Now, from Cosmetique Francais comes the easy, safe, natural body contour system that promises 28 days to freedom. Freedom from those ugly lumps, bumps, and bulges you couldn't lose before.  
"During your morning bath or shower, apply the super-concentrated contouring lotion. Rub into the affected areas like liquid soap. This fragrant, pleasant lotion will tighten and reduce spongy skin tissues.  
"After you dry off, use the body firming cream. All it takes is a minute of gentle massage. The natural herbs and exotic plant extracts will do the rest, contouring your body, tightening and toning superficial tissues and improving skin texture.  
"Each night before retiring, apply a small amount of the Cosmetique Francais tissue refining oil. This is one of nature's most potent beautifiers. It corrects that orange peel appearance, stimulates dermal metabolism, and makes skin silky smooth.  
"Yes, only forty-nine-ninety-five to be cellulite-free in 28 days."

5. Suzanne: “It happened and I’ve gotten rid of it.”  
“I’m about the same weight. I have lost about five pounds since I’ve started. And I think it’s just I’ve just gotten more conscious of it now that I’ve been looking and doing my body. But it tightened up my skin. It got rid of the orange peel area.  
“But I had that [orange-peel] area and I was real worried and it did get rid of it. It firmed it up and I do not have it any more.”
6. Kathleen: “I told her that no matter how much I worked out, these areas, there wasn’t anything I could do to get rid of them. The aerobics wouldn’t help, swimming, the weights. Nothing was getting rid of the cellulite in my thighs and on my buttocks.  
“So she told me about the products that she was using and I obviously saw the way she looked and I started using them. And I would say it took about a month for me and just all of a sudden one day I looked in the mirror and they were gone. Just slowly but surely. And I kept using them and now it’s completely gone. And these were years that I had this. And I had been working out consistently and eating right for years and that wasn’t doing it.”
7. Debra Morris: “Are you telling me that, right now, if I said, ‘Okay, go put on bathing suits,’ you three would all come out here and you don’t have, I mean, is this, do you have any of those little dimples?”
- Suzanne: “No.”  
Kathleen: “No.”

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the “Cellulite Free in 28 Days” advertisement attached as Exhibit A, respondents have represented, directly or by implication, that:

- A. Use of Cosmetique Francais substantially reduces or eliminates cellulite.
- B. Use of Cosmetique Français stimulates dermal metabolism.

C. Use of Cosmetique Francais substantially reduces or eliminates cellulite in 28 days.

D. Continued use of Cosmetique Francais once or twice a week after the cellulite has been reduced or eliminated will prevent its recurrence.

E. Use of Cosmetique Francais is more effective than dieting or exercise in reducing or eliminating cellulite.

PAR. 7. In truth and in fact:

A. Use of Cosmetique Francais does not substantially reduce or eliminate cellulite.

B. Use of Cosmetique Francais does not stimulate dermal metabolism.

C. Use of Cosmetique Francais does not substantially reduce or eliminate cellulite in 28 days.

D. Continued use of Cosmetique Francais once or twice a week after the cellulite has been reduced or eliminated will not prevent its recurrence.

E. Use of Cosmetique Francais is not more effective than dieting or exercise in reducing or eliminating cellulite.

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

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the "Cellulite Free in 28 Days" advertisement attached as Exhibit A, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph six, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 10: Respondents have disseminated or have caused to be disseminated advertisements for the Crystal Power crystals, including but not necessarily limited to a 30-minute television commercial identified as "Crystal Power." This advertisement contains the following statements:

1. Eva Sutter: "The doctors couldn't believe I was cured. I couldn't believe - It was, I still don't at times understand exactly what happened. But it did happen."
  
2. Eva Sutter: "It did happen. It indeed did happen. It was verified. There were mammography tests taken. There were pictures: It was gone. There was this lump that they absolutely told me could not, there was no way, and it happened in a matter of two weeks. It was like, it was a miracle. And it scared me. And it changed things."  
"And there was a final moment where I did not frantically (sic), you could not miss this lump, it was so protruding that the slightest touch, you could -- it was sticking up. And I went to this lady who was my therapist who had a tank and had crystals in a tank room. And I said, 'Alma,' I said, 'Alma,' I said, 'Alma, there's this lump and it's this size and it's not a cyst. They don't know what it is. They didn't say it, but pretty clear -- it was pretty clear to me. I got it. I got it.' I was clear what they were telling me."  
"And this woman just looked at me and she said, 'I think you should do two things. Find out, find out what that lump is there to tell you. Find out what's going on and do some meditation, do some prayer work, and work with crystals.' And she wasn't going to tell me how to work with crystals either. She said 'You have some crystals.' She gave me one crystal, she did give me one small crystal."  
"There I was with the crystal, with the same situation, with the lump and I did it. I for once, I couldn't afford to be the cynical self that just disputed everything. I did, I did exactly the few things that were suggested. I trusted it. I trusted it and I worked with it, not knowing exactly what I was doing. You know, I really didn't know what I was doing. And I had to kind of go with faith and not check it every 15 or 13 (sic) seconds or so. Is the lump still there? Is this still happening? Because I had seen it. I had seen it on the picture. I had felt a needle go

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into it. I mean, it was there. And literally, literally it was, it was gone.”

3. Eva Sutter: “The next day, it was gone. Totally, absolutely gone. I mean from this size [indicating the size of a 50 cent piece], the next day it was gone.”  
“At that particular time, the crystal saved my life.”

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph ten, including but not necessarily limited to the “Crystal Power” advertisement, respondents have represented, directly or by implication, that:

- A. Use of the Crystal Power crystals can cure breast cancer.
- B. Use of the Crystal Power crystals can eliminate lumps in women’s breasts.

PAR. 12. In truth and in fact:

- A. Use of the Crystal Power crystals cannot cure breast cancer.
- B. Use of the Crystal Power crystals cannot eliminate lumps in women’s breasts.

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

PAR. 13. Through the use of the statements contained in the advertisements referred to in paragraph ten, including but not necessarily limited to the “Crystal Power” advertisement respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph eleven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 14. In truth and in fact, at the time they made the representations set forth in paragraph eleven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

## Deceptive Claim Regarding Product Safety

PAR. 15. Respondents have disseminated or have caused to be disseminated advertisements for HP-9000, including but not necessarily limited to a 30-minute television commercial identified as “Amazing Discoveries: HP-9000.” This advertisement contains the following statements:

1. Ian Long: “Michael, this is actually a chemical bleach, unlike a chlorine bleach which will burn your skin. This will not harm, hurt your skin in any way, shape or form.”
2. Ian Long: “As I say, it’s a chemical bleach. It will not harm your skin in any way, shape or form. In fact, this has been exclusively tested throughout Europe. You know how particular the Germans are. The Germans actually gave this particular product something no other product of this kind has ever, ever had. They actually print it on the box. Look, you can always tell the original, it’s printed on the box the results of that test. Sehr gut means, very simply, very good.”
3. Announcer: “Hands stained with grease, ink and iodine clean up in seconds, even under the fingernails. And HP-9000 is completely safe.”

PAR. 16. Through the use of the statements and depictions contained in the advertisements referred to in paragraph fifteen, including but not necessarily limited to the “Amazing Discoveries: HP-9000” advertisement, respondents have represented, directly or by implication, that HP-9000 is completely safe for use on human skin and will not hurt or harm the skin in any way.

PAR. 17. In truth and in fact HP-9000 is not completely safe for use on human skin and can hurt or harm the skin. Therefore, the representation set forth in paragraph sixteen was, and is, false and misleading.

PAR. 18. Through the use of the statements and depictions contained in the advertisements referred to in paragraph fifteen, including but not necessarily limited to the “Amazing Discoveries: HP-9000” advertisement, respondents have represented, directly or



by implication, that at the time they made the representation set forth in paragraph sixteen, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 19. In truth and in fact, at the time they made the representation set forth in paragraph sixteen, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph eighteen was, and is, false and misleading.

#### Deceptive Demonstrations

PAR. 20. Respondents have disseminated or have caused to be disseminated advertisements for the Magic Wand, including but not necessarily limited to a 30-minute television commercial identified as “Amazing Discoveries: Magic Wand.” This advertisement depicts the Magic Wand crushing the pulp of a whole, fresh pineapple and states that it is done “in seconds, literally seconds.” The pulp is then used to make a tropical drink. The advertisement also depicts the Magic Wand whipping skim milk, which is shown in the advertisement being used as mousse-like desserts and cake frosting.

PAR. 21. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the “Amazing Discoveries: Magic Wand” advertisement, respondents have represented, directly or by implication, that:

A. The Magic Wand can crush a whole, fresh pineapple in seconds.

B. Skim milk whipped by the Magic Wand can be used as mousse-like desserts and cake frosting.

PAR. 22. In truth and in fact:

A. The Magic Wand cannot crush a whole, fresh pineapple in seconds, or in any reasonable period of time.

B. Skim milk whipped by the Magic Wand cannot be used as mousse-like desserts and cake frosting, because it stays whipped for only a few minutes.

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

PAR. 23. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the "Amazing Discoveries: Magic Wand" advertisement, respondents have represented, directly or by implication, that:

A. The demonstration of the Magic Wand included an unaltered, whole, fresh pineapple used to make a tropical drink.

B. The demonstration of the Magic Wand included mousse-like desserts and cake frosting made from skim milk whipped by the Magic Wand.

PAR. 24. In truth and in fact:

A. The demonstration of the Magic Wand did not include an unaltered, whole, fresh pineapple used to make a tropical drink. Respondents substituted crushed pineapple pulp with a slice of pineapple on top to resemble a whole, fresh pineapple.

B. The demonstration of the Magic Wand did not include mousse-like desserts and cake frosting made from skim milk whipped by the Magic Wand. Respondents substituted Cool Whip dairy topping to resemble mousse-like desserts and prepared frosting mix to resemble cake frosting.

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

### Deceptive Format

PAR. 25. Through the advertising and dissemination of the “Crystal Power,” “Cellulite Free in 28 Days,” “Amazing Discoveries: HP-9000,” and “Amazing Discoveries: Magic Wand” advertisements, respondents have represented, directly or by implication, that these commercials are independent television programs and not paid commercial advertising.

PAR. 26. In truth and in fact, the “Crystal Power,” “Cellulite Free in 28 Days,” “Amazing Discoveries: HP-9000,” and “Amazing Discoveries: Magic Wand” advertisements are not independent television programs and are paid commercial advertising. Therefore, the representation set forth in paragraph twenty five, was, and is, false and misleading.

### Deceptive Endorsements

PAR. 27. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the “Cellulite Free in 28 Days” advertisement, respondents have represented, directly or by implication, that various testimonials and endorsements contained therein reflect the typical or ordinary experiences of consumers, in terms of eliminating cellulite, after using Cosmetique Francais.

PAR. 28. In truth and in fact, the various testimonials and endorsements contained in the advertisements referred to in paragraph five do not reflect the typical or ordinary experiences of consumers, in terms of eliminating cellulite, after using Cosmetique Francais. Therefore, the representation set forth in paragraph twenty seven was, and is, false and misleading.

PAR. 29. Respondents have disseminated or have caused to be disseminated advertisements for various products, including but not necessarily limited to the “Amazing Discoveries: HP-9000” and the “Amazing discoveries: Magic Wand” advertisements, which display the purported seal of an organization called the National Association

of Advertising Producers (“NAAP”), and contain the following statement:

“The following special promotional program has been approved by the National Association of Advertising Producers for its integrity and excellence.”

PAR. 30. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty nine, including but not necessarily limited to the “Amazing Discoveries: HP-9000” and “Amazing Discoveries: Magic Wand” advertisements, respondents have represented, directly or by implication, that:

A. The NAAP is an existing organization whose qualifications give it the expertise to evaluate commercials for their integrity and excellence.

B. The NAAP is an entity that, at the time of providing its endorsements, was independent from all of the individuals and entities marketing the products.

PAR. 31. In truth and in fact:

A. The NAAP is not an existing organization whose qualifications give it the expertise to evaluate commercials for their integrity and excellence.

B. The NAAP is not an entity that, at the time of providing its endorsements, was independent from all of the individuals and entities marketing the products. In fact, the NAAP was created and controlled by respondents.

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

PAR. 32. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Azcuenaga recused.

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## EXHIBIT A

## TRANSCRIPTION OF TAPE # 26

## CELLULITE FREE IN 28 DAYS

Woman #1: What is cellulite? That's a very good question and one that women never want to answer. It's the little monster pods that form at the bottom of your derriere.

Woman #2: Like most women do, it's that icky stuff that, you know, when you sit down, it kind of oozes out to the side, you know, kind of ripples up. See, whenever you sit down you're so conscious of it so you try to sit on the edge of a chair so it has some place to hang. I don't like it. I don't like it at all.

Woman #3: Cellulite is international and nobody's safe from it .

Woman #4: I think cellulite is people, or pollution on people. We should do everything in our power to get rid of this pollution today. It's just really taking over the population. And I think it's just a disgusting display of human pollution. We should really do something to clean up these beaches.

Man #1: Cellulite -- I think that's one of those new sugar substitutes, isn't it?

Man #2: I would never date a woman with cellulite. That would be the most embarrassing thing, to walk down the street. It'd look like you're dating two people or something like that. I would never, never, no.

Man #3: It's ugly. Right? I'd say it's something that if a woman can get rid of it, that would be great.

Corrinne Lorraine: How do you look from behind? If that's an embarrassing question, you're going to love the next half hour.

Debra Morris: Hi. I'm Debra Morris. Joining me today is my co-host, Craig Morris. Our guest today is Corrinne Lorraine, an actress I'm sure all of you have seen before. Corrinne, welcome!

Corrinne Lorraine: Thank you, Debby.

Debra Morris: Okay, Id like you to tell me your story.

Corrinne Lorraine: One day I was sitting like this on my bed and I just, I put my hands like this and I felt, you know, all those . . . it just felt like little bumps, you know, and I said, "Oh, my God!" and I looked and I saw all this cellulite there, you know, all those little fatty lumps accumulated full of fat. And I just

really, I got crazy, because I said I can't, you know, walk around like this, you know, and what happened is that I knew of a wonderful man whose name is Mark Traynor. He's an internationally well-known cosmetologist and beauty consultant to many stars and I went to him because I know he goes to Europe a lot and always bring back, brings back wonderful products. And I thought, "Well, what better person to ask" you know. So, I went to him, and as a matter of fact, which was really incredible, he was about to go to France, which is my native country. And, I don't say my home any more because I really feel this is my home now. But I was born there, and, you know, in France they use nature's healing products. They use a lot of products from the earth and try to keep things very healthy. They're not into preservatives and colorings and, you know, as much as it's become, unfortunately, here. So, I asked him if maybe he could find something while he was there. And he said, he promised he would come back with an answer for me. So you can imagine how anxious I was to have him back! And when he did come back he had this wonderful three-part body contouring system that just blew my mind. It was just incredible.

- Craig Morris: And it did work for you? And it helped you out? Your orange peel syndrome?
- Corrinne Lorraine: Yes! Yes, Craig! My orange peel syndrome. Yes! Yes!
- Craig Morris: That's pretty traumatic.
- Debra Morris: Okay. So how long was it before you started seeing results?
- Corrinne Lorraine: It took me about four weeks. I mean, I was, I really had it let go, I mean, let it go and I didn't even know about it. You don't really look at yourself in the mirror like this all the time, you know, you can't look and don't really pay too much attention to that, you know!
- Mark Traynor: What do the French women do to treat this particular problem? And I came across a wonderful product that we call Cosmetique Francais. It's a body contouring system. I brought it back. I gave it to Corrinne. She used it. She gave it to her friends. We brought it to a fitness center where numerous women used it and they all seemed to love it.
- Doriann Traina: I found out through Bobbi Strauss, our exercise studio here. She introduced it one morning before classes and asked for some volunteers to give it a trial basis. And about seven of the girls volunteered and I was a little

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- skeptical in the beginning, but I figured I'd give it a shot. And I exercise five days a week and I try to eat properly, but I still had the problem areas on the upper thigh and on the abdomen. And I tried it for and after two weeks, I really started to see a difference in my skin texture and in the firmness on my upper thigh.
- Renee Lawrence: She said that they had this new product on the market and would any of us care to try it. And I'm interested in staying youthful so I said, "I've got some problem areas. I'd be delighted to try it." So I did. And I was amazed. I really saw results. And just to make sure that I wasn't deluding myself, I asked my husband. He's pretty honest. And he said, "You know, it really looks better."
- Linda Allen: When I turn around and look at myself in the mirror, there is such a difference. It, it's I can't believe it myself. It is, it is really a wonder process. It, it's just very exciting to use. It feels good to put on. I just feel totally different about my body now.
- Dorothee Heller: She asked for volunteers. I think I was the one with the hand up first.
- Interviewer: And why was that?
- Dorothee Heller: Because I do have a problem. I have very heavy thighs. And when I shower or whatever, putting on stockings, I feel those lumps and bumps. It's really very upsetting. And I thought to try this and see if it would help.
- Interviewer: And?
- Dorothee Heller: And it did. It really did. I found after, I used it for about four weeks and I found that the lumps and bumps disappeared. It was much smoother, much firmer. Very, very smooth. Smooth thighs. Nice.
- Maggie Amrhein: I've had people stop me, parents, students, people on the street, commenting and telling me how great I look. How great my body looks. How much of an improvement they've seen in the past month. And I really feel this has a lot to do with it.
- Dorothee Heller: First of all, that it made my skin very smooth.
- Interviewer: Uh, huh.
- Dorothee Heller: So my husband told me I have very smooth thighs. I asked him, "Compared to whom?"
- Debra Morris: I understand that anyone can reduce cellulite in 28 days and that you have some tips that will help us do that.
- Corrinne Lorraine: That's right. So my tips are, first drink a lot of water. Then, avoid fatty foods. Exercise. Stimulate circulation.

- Every morning use a body firming creme. And, every evening use a tissue refining oil.
- Debra Morris: So, the bottom line, the question is, can you get rid of cellulite?
- Corrinne Lorraine: Yes, you can definitely, you know, get rid of it.
- Debra Morris: Is it in your genes? Do you have it from the time you're born?
- Corrinne Lorraine: No, you're not born with it, although they think, studies have shown that it's genetically carried. And if your mother and grandmother have it, there's very strong chances that you'll have it to some extent in your body. Yes.
- Debra Morris: But, if you do have it, can you get rid of it even if your mother and grandmother have it?
- Corrinne Lorraine: Yes. Well, maybe they didn't work on it, so they kept it. But if you do what's right, you know, you can definitely get rid of it.
- Debra Morris: What is your answer to, say, to someone who says there is no such thing as cellulite?
- Corrinne Lorraine: You know, I don't know about them saying there's no cellulite. I mean, call it again my orange peel, you know, type skin look or any words you want to use, but I mean, if you just, as you were saying, look at the women on the beach and if you ask the millions of women who have problems with it if it exists, I mean they'll tell you. I mean, it's just, you know, I don't think it's funny at all to say it doesn't exist, because women are really having a terrible problem with it, you know. They lose their, their, their shape, they feel less sexy, they feel old, they don't want to put on shorts or bathing suits when they go on the beach, you know. And plus, it's not even a question of age, you know, young girls get it, you know, 15, 16, 17. I mean you see them on the beach, you know. It's just terrible! So to say it doesn't exist, I think, is a little crazy.
- Craig Morris: Can thin people get cellulite also?
- Corrinne Lorraine: Yes! Well, I did!
- Craig Morris: Really?
- Corrinne Lorraine: Yes, I did.
- Craig Morris: Is it harder for thin people to get rid of cellulite or . . . ?
- Corrinne Lorraine: I think it shows more because it's not lost in the . . . It does show right away, you know, when you're thin, I mean, and right away you can see those. . .
- Craig Morris: And it's the same little dimples that you get?



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- Corrinne Lorraine: Yes, yes. And they're not cute, those dimples!
- Debra Morris: Is it a gradual process?
- Corinne Lorraine: Yes.
- Debra Morris: And once you get it off, do you have to keep up whatever you're doing to keep it off? Do you understand my question?
- Corrinne Lorraine: Yes, I think so. Yes. What you want to know is, can you do it in one time? No. I mean it would be, that would be too much of a miracle. But I think, already, to be able to do it in 28 days is a great miracle. I mean, what's a month in somebody's life when you've been plagued with something like that sometimes for years, and, you know, months and months. So, I think 28 days is close to a miracle, you know. And when you use those products and you get to the point where you feel you've gotten rid of all that, then you can just keep using it if you want once or twice a week to keep up and make sure it doesn't come back, you know.
- Debra Morris: So, you're saying in 28 days I can get rid of this?
- Corinne Lorraine: Yes.
- Debra Morris: In 28 days. And then only once or twice a week to keep it off?
- Corrinne Lorraine: Yes.
- Debra Morris: Then how come there are so many women walking around . . .
- Corrinne Lorraine: Because they don't know about it, Debby, not yet. But I guess after this they will. Hopefully, they'll be using the product and, you know, it works for most people, and, you know, I can't say that it works for, you know, everybody because I don't think any product, you know, on the market works for everybody. There might be a few people that it's not going to help. I don't know. But I can tell you that it's worked for myself. It's worked for my friends, you know, and I just know that it works.
- Doriann Traina: I started seeing a difference after about two weeks.
- Interviewer: Uh, huh.
- Doriann Traina: About two weeks, I started . . . the difference on the smoothness of my skin . . .
- Interviewer: Yes.
- Doriann Traina: . . . was much faster. Probably about after about really seven days of continuing it. And I did it religiously. I figured if I was going to do it . . .
- Interviewer: Do it.

- Doriann Traina: . . . I was going to do it religiously. And after about seven days I definitely felt a difference in the texture of my skin. And my husband even noticed it, because we have a summer house and I went out with a bathing suit on for the first time last week, and he said he saw a difference also.
- Kathy Robson: I have an eight year old son. Jeffrey. And he is skinny! And I always say, "Oh, Jeff, if I had your legs I'd be so happy." And I started using this cream and I put on a bathing suit, literally about two weeks later, he said, "Mom: You look good." He said, "From the back, you look nice!" And he doesn't understand what happened or what went on, but for him to notice, I thought it was great, I ran to the beach.
- Dorothee Heller: I think, definitely, to try it. I just feel it's a good product and it's something that you should try, if you have that, that sort of a problem.
- Maggie Amrhein: I would say try it. It's going to make a difference and it's easy to use and I think that's the results.
- Linda Allen: I have used the system for a month now. And all you need is two, three weeks to really see any results. I feel better. I look better. I feel sexier. It just, it's, I just don't think a woman can not afford to use it. I mean, you just have to. It's wonderful.
- Announcer: From France, the beauty capital of the world, comes the long-awaited answer to one of the human body's most nagging problems. The unsightly burden of cellulite. The formations of fat attack thighs, buttocks, abdomen and arms of young and old alike.
- Now, from Cosmetique Francais comes the easy, safe, natural body contour system that promises 28 days to freedom. Freedom from those ugly lumps, bumps and bulges you couldn't lose before.
- Yes, you can be only 28 days away from a slimmer, sexier, more attractive you! With this remarkable and simple-to-use three-step body contour system. During your morning bath or shower, apply the super-concentrated contouring lotion. Rub into the affected areas like liquid soap. This fragrant, pleasant lotion will tighten and reduce spongy skin tissues. After you dry off, use the body firming cream. All it takes is a minute of gentle massage. The natural herbs and exotic plant extracts will do the rest, contouring your body, tightening and toning superficial tissues and improving skin texture. Each night before

retiring, apply a small amount of the Cosmetique Francais tissue refining oil. This is one of nature's most potent beautifiers. It corrects that orange peel appearance, stimulates dermal metabolism, and makes skin silky smooth. One. Two. Three. The simple, safe, easy three-step body contouring system from Cosmetique Francais. In less than five minutes a day of faithful use, you can start being proud of your figure again. Wear shorts, a bathing suit, lingerie, without being ashamed of unsightly cellulite. With this amazing French system you'll see results in just 28 days without painful surgery or spending huge amounts of money. The complete Cosmetique Francais body contouring system is now available in the United States through this exclusive television offer. And it's only forty-nine-ninety-five, plus three dollars shipping and handling. Yes, only forty-nine-ninety-five to be cellulite-free in 28 days. And as an extra bonus you'll receive an imported all-natural loofah pad to stimulate your skin while bathing or showering and to make you feel good all over. Now with the revolutionary body contouring system from Cosmetique Francais you can say good-bye to unsightly cellulite and hello to a slimmer, smoother, sexier, you! The complete system is only forty-nine-ninety-five, plus three dollars shipping and handling. And it comes with a one hundred percent money back guarantee. Keep it for ten days. If not totally satisfied, return for a full refund.

Debra Morris: We've just been joined by Suzanne and Kathleen, who are also actresses. And so my question to you is, okay, Kathleen, tell me, or Suzanne, tell me your story.

Suzanne: Um, well, I feel very fortunate to have met Corrinne. I was having a problem. I was going out on auditions and I was having a problem. My agent would call and he would say, "Okay, you have a bathing suit audition," and I would just go "oh, no!" and cringe and not want to go out. So I knew I had a problem. And I knew I had some, I had to do something about it. And I've tried all sorts of things that haven't worked and, finally, Corrinne introduced me to the body contouring, the three, the three steps of it. And it worked, and I just, I feel so relieved because I thought this was going to be a problem I was going to have for a long time, for the rest of my life. It happened and I've gotten rid of it.

- Debra Morris: Now, were you heavy? You haven't lost any weight. You're the same weight, you've just gotten. . .
- Suzanne: Right. I'm about the same weight. I have lost about five pounds since I've started. And I think it's just, I've just gotten more conscious of it now that I've been looking and doing my body. But it tightened up my skin. It got rid of the orange peel area.
- Corrinne Lorraine: That famous orange peel area that Craig loves so much.
- Craig Morris: I don't like the orange peel! Let's get something straight here! I can get in a lot of trouble here!
- Suzanne: Right. But I had that area and I was real worried and it did get rid of it. It firmed it up, and I do not have it anymore.
- Renee Lawrence: Well, frankly, I did it very religiously. It was kind of fun and very effortlessly (sic). I put it on in the morning and in the evening and I couldn't believe it, but I thought I started to see results. So I kind of asked my husband. And he said, "Yeah, I really think it's better." I could not believe it. I really, because friends of mine have actually gone for operations and here, you know, I could just do it so easily. So I felt, "Gee, this is wonderful."
- Suzanne: I just, I feel so much better about myself. You were talking about, "Do you feel sexier and better about yourself?" And, um, I do. I feel, I feel wonderful.
- Craig Morris: So are you still doing the upkeep now, a couple times a week or what?
- Suzanne: Yes. I'm doing it three times a week because I just love it. I feel like when I go out of the house in the morning without the cream and without doing the gel in the shower, that I've forgotten something. I just love it. I've really gotten used to it.
- Corrinne Lorraine: That's great. I'm really happy.
- Debra Morris: Okay, Kathleen, tell me your story.
- Kathleen: Well, I met Corrinne at the gym. We were both working out one day and we were talking and she's an actress and I'm an actress and a model and I was really working, you know, with the weights and I was telling her that I had an audition the next day and I had to wear a bathing suit. And I said I had been in the gym for the last seven days in a row trying, you know, working there . . . seeing me there, they were ready to reserve a sleeping space for me at night.
- Corrinne Lorraine: I noticed.
- Kathleen: I told her that no matter how much I worked out, these areas, there wasn't anything I could do to get rid of them.

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- The aerobics wouldn't help, swimming, the weights. Nothing was getting rid of the cellulite in my thighs and on my buttocks. So she told me about the products that she was using and I started using them. And I would say it took about a month for me and just all of a sudden one day I looked in the mirror and they were gone. Just slowly but surely. And I kept using them and now it's completely gone. And these were years that I had this. And I had been working out consistently and eating right for years and that wasn't doing it.
- Corrinne Lorraine: It's amazing, because, before I found this, you know, I had the same, the same thing, you know. I was going to the gym, and going crazy, and on the bicycle and the weights and. . .
- Kathleen: You do, because you think that's what's going to work for you.
- Corrinne Lorraine: . . . I mean what, why isn't this going away? I mean, you lose weight, you know, overall, but in those specific areas, it's just stay (sic) there, you know, they just don't budge. I mean and . . .
- Kathleen: They don't at all.
- Corrinne Lorraine: And, uh, you kill yourself, you know, you're exhausted, and you still look like . . . You don't want to put a bathing suit on. So.
- Kathleen: That's right.
- Corrinne Lorraine: Yeah. So I was, it's, it's amazing.
- Kathleen: The other great thing about it, too, is I noticed that after a couple of weeks, my skin really was so much softer, too, than it had been. Really. It just, I don't know if it was, I think it was the combination of the contouring cream and then the oil that I was using at night just really left it soft. So it was not only I got rid of the orange peel, but my skin was much softer, too.
- Woman #5: Well, during the test period of the time that I was using the product, I did notice at the end of the, well, even at the end of a week, I saw a change coming about in the outer thigh and hip area, which is where I was using the product.
- Bobbi Strauss: So I took a long look in the mirror, and sure enough, I had a few spots that I wanted to really work on. I used the cream for a month. My husband even remarked when I put my suit on, "Boy, your rear looks tighter and your legs look great." So, I guess it worked!

- Debra Morris: Are you telling me that, right now, if I said, "Okay, go put on bathing suits," you three would all come out here and you don't have, I mean, is this, do you have any of those little dimples?
- Suzanne: No.
- Kathleen: No.
- Debra Morris: To me, I just can't imagine thighs without dimples. I mean, they go together!
- Craig Morris: There's still hope for you!
- Debra Morris: He knows! I do still have it. And I noticed all three of you have incredible legs. I don't know if you can tell! You're all wearing short skirts. I mean . . .
- Corrinne Lorraine: That's true.
- Debra Morris: Does this come with, I mean, is this part of the territory? Do you all of a sudden.
- Corrinne Lorraine: I think so. I guess when you feel, you know good about the way you look, I mean, you just, I mean, not that you want to show everything! But, you can show a lot more, you know. And like here, too, you know, you get cellulite here sometimes. You know, you feel your knees are, like, all fat and full, you know. And, I mean, look! Now it's nice.
- Suzanne: Right. Like I said, I, like you were talking, I do feel sexier, and I do feel that I can wear the shorter skirts . . .
- Corrinne Lorraine: Exactly.
- Suzanne: . . . And I'm not going to walk by a group of guys and have them go "uhhh." Or have them, have them say something. So I do wear them and it is a direct result of using the system.
- Craig Morris: I want to know, specifically, when you wake up in the morning and you say, "Okay, today I'm going to do the cellulite program" or something, what actually do you use? What steps do you take?
- Corrinne Lorraine: No, I don't look that serious about it.
- Suzanne: Right.
- Kathleen: Yeah.
- Corrinne Lorraine: Because it's fun to use. It's easy, you know, and it's not "I'm going to do this!" But I definitely think about doing it. I wouldn't forget. The first thing you do is, when you're in the shower, you use this loofah mitt that I showed you before already that stimulates circulation. And the best way to use it is, you rub in a circular motion one way first. And then you rub the other way. And it really works, you

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know, deep inside the tissues and everything, so that's the first thing to do.

Debra Morris: Okay. Okay. So after step one, what do you do then?

Corrinne Lorraine: Then, in the shower, you use this, which is the contouring lotion, which is like a, um, liquid soap and it's beautiful. It's just great. It's, it's really wonderful.

Debra Morris: It smells really good.

Corrinne Lorraine: Yeah. It smells wonderful. I mean, the products are just great. They smell wonderful. And they're really fun, you know.

Craig Morris: And you just put that on, when you're in the shower, just like a soap?

Corrinne Lorraine: Yeah, it's easy.

Suzanne: Yeah.

Kathleen: You just rub it in.

Corrinne Lorraine: And then when you get out and you're all towel dry...

Debra Morris: Now, do you have to get the area very dry, I mean...

Corrinne Lorraine: For the morning cream, yes.

Debra Morris: Okay.

Corrinne Lorraine: You should be, you know, dry. I mean not, you know...

Craig Morris: Air dried.

Corrinne Lorraine: Yes, just dry, you know, just dry yourself with a towel. And then you use the body firming cream, which is also very nice.

Suzanne: It's wonderful.

Corrinne Lorraine: It's a very light-textured cream. Like this! And not greasy at all. You know, you can see it just disappears into the skin.

Debra Morris: Okay. Now.

Corrinne Lorraine: It smells so nice.

Debra Morris: Yeah, it does.

Corrinne Lorraine: You know, keep rubbing it and it, it feels like water after a while, just absolutely not greasy at all.

Debra Morris: So it's not . . . so you massage . . . so you massage... does it help if you massage this in, too?

Corrinne Lorraine: Uh, yeah, I think you should really massage it and, and the best way to do it is to rub towards . . . you should always rub towards your heart. You know, to stimulate the blood better and going towards your heart, so up, you know, it's better.

Debra Morris: Okay.

Corrinne Lorraine: Yeah.

Debra Morris: Okay. And so, this is the morning regimen.

- Corrinne Lorraine: Yes.
- Debra Morris: And you said at night you were supposed to do something, too?
- Corrinne Lorraine: Yes. And it's this tissue refining oil, which is wonderful. And as Suzanne was saying, you know, it leaves your skin very smooth and soft and succulent. And it's also, you know, wonderful. So, this is it.
- Debra Morris: Okay, so you, you put this on, on top of . . . at the end of the day, like before you go to sleep?
- Corrinne Lorraine: Your skin should be a little . . . yes, and you can just moisten your skin a little before for the night one. So, it just helps a little more.
- Craig Morris: So now we've taken care of my sister's cellulite on her hands . . .
- Corrinne Lorraine: Yes, the fat off your fingers!
- Debra Morris: Now if we can just work on a couple of other areas I would be set. Now, now what is in this? I mean what am I putting on my thighs?
- Corrinne Lorraine: Wonderful, wonderful exotic plants, herbal extracts.
- Maggie Amrhein: I thought, at first I thought, "Oh, no, it's so involved. I have to do this and that and this." And I have a very busy lifestyle I'm out in the morning. I'm dancing and teaching all day long. I don't get home until late at night. But I found it very easy to use. It just takes a couple of seconds. There's really nothing to it. It's very easy.
- Renee Lawrence: It makes you feel very smooth and, my God, it's wonderful to lose that ugly cellulite. It's just so awful. Makes you feel younger. It gives you a lift. And I think, in life, that's what you want. A little fun. A little lift. Feel better. Look better. And I've enjoyed it.
- Linda Allen: If a woman cares about herself, she will definitely use the French body contour system. Definitely.
- Announcer: From France, the beauty capital of the world comes the long-awaited answer to one of the human body's most nagging problems. The unsightly burden of cellulite. The formations of fat attack thighs, buttocks, abdomen and arms of young and old alike. Now, from Cosmetique Francais comes the easy, safe, natural body contour system that promises 28 days to freedom. Freedom from those ugly lumps, bumps and bulges you couldn't lose before. Yes, you can be only 28 days away from a slimmer, sexier, more attractive you! With this remarkable and simple-to-use three-step body contour system. During your morning



bath or shower, apply the super-concentrated contouring lotion. Rub into the affected areas like liquid soap. This fragrant, pleasant lotion will tighten and reduce spongy skin tissues. After you dry off, use the body firming cream. All it takes is a minute of gentle massage. The natural herbs and exotic plant extracts will do the rest, contouring your body, tightening and toning superficial tissues and improving skin texture. Each night before retiring, apply a small amount of the Cosmetique Francais tissue refining oil. This is one of nature's most potent beautifiers. It corrects that orange peel appearance, stimulates dermal metabolism, and makes skin silky smooth. One. Two. Three. The simple, safe, easy three-step body contouring system from Cosmetique Francais. In less than five minutes a day of faithful use, you can start being proud of your figure again. Wear shorts, a bathing suit, lingerie without being ashamed of unsightly cellulite. With this amazing French system you'll see results in just 28 days without painful surgery or spending huge amounts of money. The complete Cosmetique Francais body contouring system is now available in the United States through this exclusive television offer. And it's only forty-nine-ninety-five, plus three dollars shipping and handling. Yes, only forty-nine-ninety-five to be cellulite-free in 28 days. And as an extra bonus you'll receive an imported all natural loofah pad to stimulate your skin while bathing or showering and to make you feel good all over. Now with the revolutionary body contouring system from Cosmetique Francais you can say good-bye to unsightly cellulite and hello to a slimmer, smoother, sexier you! The complete system is only forty-nine-ninety-five, plus three dollars shipping and handling. And it comes with a one hundred percent money back guarantee. Keep it for ten days. If not totally satisfied, return for a full refund.

Renee Lawrence:  
 Man #3:  
 Debra Morris:  
 Maggie Amrhein:

It's easy. It's pleasant. And it does the job.  
 Ladies, keep America beautiful. Get rid of that cellulite!  
 This has been an exciting show. Thank you for joining us.  
 I think they'll make their body look much better, much smoother, and the best of results in a very quick time with a very easy process.

## DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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. National Media Corporation is a Delaware corporation with its principal office and place of business at 4360 Main Street, Philadelphia, Pennsylvania.
2. Media Arts International, Ltd., is a Delaware corporation with its principal office and place of business at 1875 Campus Commons Road, Suite 200, Reston, Virginia.
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

## DEFINITIONS

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

## I.

*It is ordered*, That respondents National Media Corporation and Media Arts International, Ltd., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the packaging, labeling, advertising, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from selling, broadcasting or otherwise disseminating, or assisting others to sell, broadcast or otherwise disseminate, in part or in whole:

A. The 30-minute television advertisement for Cosmetique Francais described in the complaint and sometimes known as “Cellulite Free in 28 Days.”

B. The 30-minute television advertisement for crystals described in the complaint and sometimes known as “Crystal Power.”

## II.

*It is further ordered*, That respondents National Media Corporation and Media Arts International, Ltd., corporations, their successors and assigns, and their officers, agents, representatives

and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, in any manner, directly or by implication, in connection with the packaging, labeling, advertising, promotion, offering for sale, sale or distribution of Cosmetique Francais or any substantially similar cellulite treatment product in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that:

- (1) Use of such product substantially reduces or eliminates cellulite;
  - (2) Use of such product stimulates dermal metabolism;
  - (3) Use of such product substantially reduces or eliminates cellulite in 28 days;
  - (4) Continued use of such product once or twice a week after the cellulite has been reduced or eliminated will prevent its recurrence;
- or
- (5) Use of such product is more effective than dieting or exercise in reducing or eliminating cellulite.

For purposes of this part II, a “substantially similar cellulite treatment product” shall be defined as any product of substantially similar composition or possessing substantially similar properties.

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

- (1) Use of such product or service substantially reduces or eliminates cellulite;
- (2) Use of such product or service stimulates dermal metabolism;

(3) Use of such product or service substantially reduces or eliminates cellulite in 28 days;

(4) Continued use of such product or service once or twice a week after the cellulite has been reduced or eliminated will prevent its recurrence; or

(5) Use of such product or service is more effective than dieting or exercise in reducing or eliminating cellulite, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

### III.

*It is further ordered,* That respondents National Media Corporation and Media Arts International, Ltd., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, in any manner, directly or by implication, in connection with the packaging, labeling, advertising, promotion, offering for sale, sale or distribution of crystals or any substantially similar crystalline stone in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that:

- (1) Use of such product can cure breast cancer; or
- (2) Use of such product can eliminate lumps in women’s breasts.

For purposes of this part III, a “substantially similar crystalline stone” shall be defined as a mineral substance having a crystalline structure.

B. Representing, in any manner, directly or by implication, in connection with the packaging, labeling, advertising, promotion, offering for sale, sale or distribution of any product or service in or

affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that:

- (1) Use of such product or service can cure breast cancer;
- (2) Use of such product or service can eliminate lumps in women’s breasts
- (3) Such product or service has the ability to cure or lower the risk of disease, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

#### IV.

*It is further ordered,* That respondents National Media Corporation and Media Arts International, Ltd., corporations, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, in any manner, directly or by implication, in connection with the packaging, labeling, advertising, promotion, offering for sale, sale or distribution of HP-9000 or any substantially similar product in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that such product is completely safe for use on human skin or will not hurt or harm the skin in any way.

For purposes of this part IV, a “substantially similar product” shall be defined as any product that is advertised as a stain remover or cleaning product and that contains as an ingredient: naphtha, sodium hydrosulfite, sodium phosphate or sodium carbonate.

B. Making any representation, in any manner, directly or by implication, in connection with the packaging, labeling, advertising, promotion, offering for sale, sale or distribution of any stain-removal or cleaning product in or affecting commerce, as “commerce” is

defined in the Federal Trade Commission Act, about the safety or health risks associated with the use of such product, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

V.

*It is further ordered,* That respondents National Media Corporation and Media Arts International, Ltd., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, in connection with the packaging, labeling, advertising, promotion, offering for sale, sale or distribution of the Magic Wand or any other immersion-style kitchen mixer of similar size and construction in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that:

- A. The product can crush a whole, fresh pineapple in seconds.
- B. Skim milk whipped by the product can be used as mousse-like desserts and cake frosting.

VI.

*It is further ordered,* That respondents National Media Corporation and Media Arts International, Ltd., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary division or other device, partnership labeling, advertising, in connection with the packaging, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, in any manner, directly or by implication, regarding the performance, benefits, efficacy or safety of any food, drug or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation, *provided, however*, that any such representation for any food product that is specifically permitted in labeling for such food product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to be substantiated by competent and reliable scientific evidence; *provided, further*, that any such representation for any over-the-counter drug product that is specifically permitted in labeling for such over-the-counter drug product in Final Regulations establishing conditions under which such product is safe and effective promulgated by the Food and Drug Administration under the Food, Drug, and Cosmetic Act, will be deemed to be substantiated by competent and reliable scientific evidence.

B. Making any representation, in any manner, directly or by implication, regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under subpart VI.A above), unless at the time of making such representation respondents possess and rely upon competent and reliable evidence that substantiates the representation.

## VII.

*It is further ordered*, That respondents National Media Corporation and Media Arts International, Ltd., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the packaging, labeling, advertising, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:



A. Representing, in any manner, directly or by implication, that any endorsement (as “endorsement” is defined in 16 CFR 255.0(b)) of the product or service represents the typical or ordinary experience of members of the public who use the product or service, unless such is the case.

B. Representing, in any manner, directly or by implication, by words, depictions or symbols, that such product or service has been endorsed by a person, group or organization that is an expert with respect to the endorsement message unless:

(1) The endorser is an existing person, group or organization whose qualifications give it the expertise that the endorser is represented as possessing with respect to the endorsement; and

(2) The endorsement is supported by an objective and valid evaluation or test using procedures generally accepted by experts in that science or profession to yield accurate and reliable results.

## VIII.

*It is further ordered,* That respondents National Media Corporation and Media Arts International, Ltd., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, in connection with any advertisement depicting a demonstration, experiment or test, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that any demonstration, picture, experiment or test depicted in the advertisement proves, demonstrates or confirms any material quality, feature or merit of any product, when such demonstration, picture, experiment or test does not prove, demonstrate or confirm the representation for any reason, including but not limited to:

A. The undisclosed use or substitution of a material mock-up or prop.

B. The undisclosed material alteration in a material characteristic of the advertised product or any other material prop or device depicted in the advertisement.

C. The use of a visual perspective or camera, film, audio or video technique that, in the context of the advertisement as a whole, materially misrepresents a material characteristic of the advertised product or any other material aspect of the demonstration.

## IX.

*It is further ordered,* That respondents National Media Corporation and Media Arts International, Ltd., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the packaging, labeling, advertising, promotion, offering for sale, sale or distribution of an product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating:

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

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

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

*Provided that*, for the purposes of this provision, the oral or visual presentation of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein; provided further that, for a period of six (6) months following the date of entry of this order, subpart IX.B. shall not apply to any commercial or other video advertisement produced prior to the date of entry of this order that contains a disclosure of the fact that the program is a paid advertisement or commercial at the beginning of said program.

#### X.

*It is further ordered*, That respondents National Media Corporation and Media Arts International, Ltd., their successors or assigns, shall pay to the Federal Trade Commission, by cashier's check or certified check made payable to the Federal Trade Commission and delivered to the Regional Director, Federal Trade Commission, 915 Second Avenue, Suite 2806, Seattle, Washington, the sum of two hundred seventy-five thousand dollars (\$275,000.00). Respondents shall make this payment on or before the tenth day following the date of entry of this order. In the event of any default on any obligation to make payment under this section, interest, computed pursuant to 28 U.S.C. 1961(a), shall accrue from the date of default to the date of payment. The funds paid by respondents shall, in the discretion of the Federal Trade Commission, be used by the Commission to provide direct redress to purchasers of Cosmetique Francais, Crystal Power and/or the Magic Wand. If the Federal Trade Commission determines, in its sole discretion; that redress to purchasers of these products is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Commission.

## XI.

*It is further ordered,* That respondents shall distribute a copy of this order to each of their operating divisions, to each of respondents' present and future principals and officers, and to every present and future employee, agent and representative who performs discretionary functions in sales or advertising, and shall secure from each such person a signed statement acknowledging receipt of the copy of the order.

## XII.

*It is further ordered,* That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation, such as a dissolution, the emergence of a successor corporation, the creation or dissolution of a subsidiary, transfer of the business by assignment to another entity, or any other change in the corporation that may affect compliance obligations under the order.

## XIII.

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

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

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

C. All advertisements and promotional materials subject to this order.

## XIV.

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

Commissioner Azcuenaga recused.

Complaint

116 F.T.C.

IN THE MATTER OF

## ABBOTT LABORATORIES

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

*Docket C-3442. Complaint, June 24, 1993--Decision, June 24, 1993*

This consent order prohibits, among other things, an Illinois-based marketer of very-low-calorie diet programs (rapid weight loss, modified fasting diets of 800 or fewer calories per day) from making false or unsubstantiated claims about health risks, weight loss, or weight loss maintenance; and requires certain disclosures in conjunction with safety and weight loss maintenance claims.

*Appearances*

For the Commission: *Brinley H. Williams* and *David V. Plottner*.  
For the respondent: *Katherine M. Grundin*, in-house counsel,  
Abbott Park, IL.

## COMPLAINT

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

PARAGRAPH 1. Respondent Abbott Laboratories is an Illinois corporation, with its offices and principal place of business at One Abbott Park Road, Abbott Park, Illinois.

PAR. 2. Respondent is engaged, and has been engaged, in the sale and offering for sale of the physician-supervised New Direction Weight Control System (hereinafter "New Direction") very-low-calorie diet ("VLCD") programs and related nutritional products to the public through cooperating physicians, hospitals and clinics.

VLCDs are rapid weight-loss, modified fasting diets of 800 calories or less per day requiring medical supervision. The New Direction VLCD diet programs provide 800 or fewer calories per day. The New Direction diet programs include "foods" within the meaning of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52.

PAR. 3. Respondent has created advertisements and provided camera-ready advertising copy to participating physicians, hospitals and clinics for placement in various periodicals that are in general circulation to the public to promote its New Direction diet programs to prospective patients. Respondent further advertises its New Direction diet programs to the public by means of brochures and pamphlets that it provides to participating physicians, hospitals and clinics to give to patients and prospective patients. Typical of respondent's advertising and promotional materials, but not necessarily all-inclusive thereof, are the advertisements attached hereto as Exhibits A through H.

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

PAR. 5. Respondent's advertising and promotional materials contain the following statements.

(A) The Safety Claims

- (1) The NEW DIRECTION System is safe: Metabolic and clinical tests have proven NEW DIRECTION Nutritional Beverage to be safe and effective for rapid weight loss. [Exhibit A.]
- (2) Using a very-low-calorie beverage, lose weight quickly and safely in a hospital-based program operated by our medical staff. [Exhibit B.]
- (3) It's a hospital-based, medically supervised program of rapid, safe weight loss and complete education to help you keep the weight off. [Exhibit C, p. 2.]
- (4) Rapid, safe weight loss, using New Direction Nutritional Beverage, which provides 100% of the US RDA for vitamins, minerals and protein. [Exhibit C, p. 2.]
- (5) With NEW DIRECTION, losing weight is medically supervised, safe and long-lasting. Break the cycle. And head in a NEW DIRECTION. [Exhibit F.]

(B) The Maintenance Claims

- (1) Learn to stay slimmer for life: We'll help you learn to eat, think and exercise differently to keep extra weight off. [Exhibit B.]
- (2) It's a hospital-based, medically supervised program of rapid, safe weight loss and complete education to help you keep the weight off. [Exhibit C, p. 2.]
- (3) It's the one weight control system with everything you need to lose weight for life. It begins with medically supervised, safe, rapid weight loss and nutrition education. [Exhibit D.]
- (4) Lose weight quickly, safely, and permanently. [Exhibit E.]
- (5) . . . proven technique for lifelong weight loss. [Exhibit G.]
- (6) You name the diet-I've tried it. They all start out the same. First come the promises-the enthusiasm-the hunger-finally: the panic! And I gain back everything I've lost. How can I take control?  
Head in a NEW DIRECTION. After do-it-yourself diets you gain back all the weight you lost. But the NEW DIRECTION Weight Loss Program is different. [Exhibit F.]
- (7) Our NEW DIRECTION program has physicians, psychologists and dietitians working with you right here at our hospital, to take weight off and keep it off. [Exhibit F.]
- (8) Diets, diets, diets. Everyone's got a diet. There's the grapefruit diet-the Malibu diet-the lose-while-you-snooze-diet. But whatever I lose, I always gain right back. Isn't there a way to keep the weight off?  
Head in a NEW DIRECTION. Fad diets might take weight off, but they can't keep it off. The NEW DIRECTION Weight Loss Program is different. [Exhibit H.]
- (9) NEW DIRECTION is a total, step-by-step medical program that works with your mind as well as your body. Psychologists, physicians and dietitians counsel with you right here at our hospital to help you develop new habits for lasting weight control . . . [Exhibit H.]

PAR. 6. By and through the use of the statements referred to in paragraph five(A), above, and others of similar import and meaning not specifically set forth herein, respondent represents and has represented, directly or by implication, that the New Direction diet programs are safe. Respondent has failed to disclose that physician supervision is required to minimize the potential risk to patients of the development of health complications on very-low-calorie diets. In view of the representation that the New Direction program is safe, the disclosure as to the requirement for medical supervision is necessary. Therefore, in light of respondent's failure to disclose, said representation was and is misleading.



PAR. 7. By and through the use of the statements referred to in paragraph five(B), above, and others of similar import and meaning not specifically set forth herein, respondent represents and has represented, directly or by implication, that:

(A) The New Direction diet programs are successful long-term or permanent treatments for obesity; and

(B) The typical New Direction patient is successful in maintaining achieved weight loss.

PAR. 8. By and through the statements and representations referred to in paragraphs five(B) and seven, above, respondent represents and has represented, directly or by implication, that at the time respondent made those representations, respondent possessed and relied upon a reasonable basis for those representations.

PAR. 9. In truth and in fact, at the time respondent made the statements and representations referred to in paragraphs five(B) and seven, above, respondent did not possess and rely upon a reasonable basis for those representations. Therefore, the representation set forth in paragraph eight was and is false and misleading.

PAR. 10. The dissemination of the aforesaid false and misleading representations constituted, and now constitutes, unfair or deceptive acts or practices in or affecting commerce, and false advertisements, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. 45(a) and 52.

EXHIBIT A

# Don't choose a weight loss program until you weigh all the evidence

The NEW DIRECTION® System for Lasting Weight Control is a comprehensive, scientific, profitable approach that offers hospitals more than other hospital-based weight loss programs. Just weigh the evidence.

The NEW DIRECTION System is comprehensive. The protocol is a medically supervised, multidisciplinary approach that includes nutrition education, behavior modification and exercise for lifelong weight control, yet is flexible and simple to run.

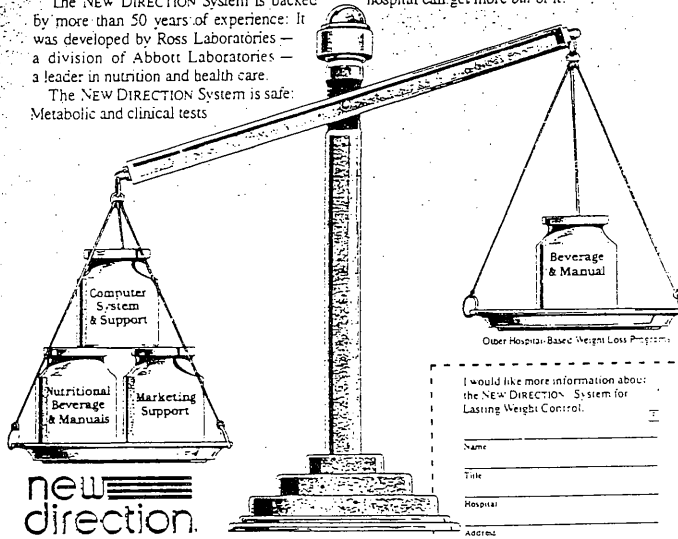
The NEW DIRECTION System is backed by more than 50 years of experience. It was developed by Ross Laboratories — a division of Abbott Laboratories — a leader in nutrition and health care.

The NEW DIRECTION System is safe. Metabolic and clinical tests

have proven NEW DIRECTION® Nutritional Beverage to be safe and effective for rapid weight loss.

The NEW DIRECTION System is efficient to operate. It includes a dedicated, computer hardware-software package that maximizes operating efficiencies and profitability, with minimal personnel — and no surprise costs.

Don't choose a weight loss program without weighing the evidence. We've put more into the NEW DIRECTION System so your hospital can get more out of it.



**new direction**  
 system for lasting weight control

I would like more information about the NEW DIRECTION System for Lasting Weight Control.

Name \_\_\_\_\_  
 Title \_\_\_\_\_  
 Hospital \_\_\_\_\_  
 Address \_\_\_\_\_  
 City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
 Phone \_\_\_\_\_

Mail to: NEW DIRECTION Center, Dept. 222  
 Ross Laboratories  
 625 Cleveland Avenue  
 Columbus, Ohio 43216  
 or call (614) 229-1212

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 B1125430

**new direction**

EXHIBIT B

**new**  
**direction**<sup>™</sup>  
system for lasting weight control

- For adults with at least 30 pounds to lose.
- Using a very-low-calorie beverage, lose weight quickly and safely in a hospital-based program operated by our medical staff.
- Learn to *stay slimmer* for life: We'll help you learn to eat, think and exercise differently to keep extra weight off.
- Head in a new direction: Call today for a free orientation session.!

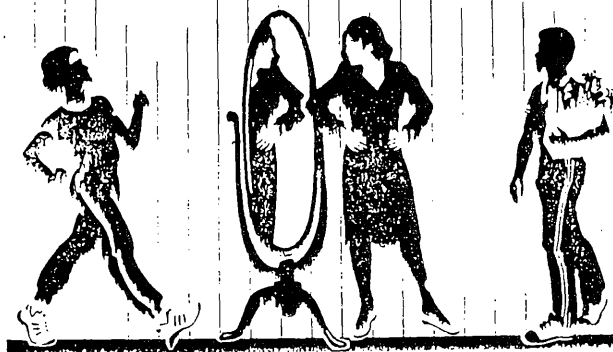


EXHIBIT C - PAGE 1 OF 5

C3442  
B141111

*“Are You  
Ready For  
Weight Control?”*



“If you have more than 40 pounds to lose  
(50 pounds for men) and you're ready to  
make some lifestyle changes in how you  
eat and exercise — then it's time you think  
about yourself — it's time for the  
New Direction System™ Lasting  
Weight Control.”

EXHIBIT C - PAGE 2 OF 5



\*This is a true answer to the questions most people ask about the New Direction System. For more information, call your local New Direction office to see the many benefits.

*What is the New Direction System?*

It's a hospital-based, medically supervised program of rapid, safe weight loss and complete education to help you keep the weight off. It emphasizes lifelong weight control rather than just dieting alone. After a thorough screening, the program has three phases. Medical professionals — physicians, registered dietitians and nurses, behaviorists and exercise specialists — work with you in each phase.

**Screening**

- Thorough medical examination
- Careful psychological, mental and nutritional evaluations
- Possibly an exercise stress test

**1. Reducing**

- Rapid, safe weight loss using New Direction® Nutritional Beverage, which provides 100% of the US RDA for vitamins, minerals and protein
- Careful monitoring by hospital medical staff

## EXHIBIT C - PAGE 3 OF 5

- Weekly educational and support sessions
- Nutrition education, behavior modification and changes in everyday activity habits to help you avoid regaining weight
- Structured exercise program encouraged

2. **Adapting**

- Gradual return to eating regular foods
- Practicing new food, eating and exercise habits
- Weekly education-support sessions
- Medical monitoring by hospital professionals

3. **Sustaining**

- Eating a balanced diet of regular foods
- Weekly education-support sessions
- Fine-tuning new eating and exercise habits
- Individual professional help, if necessary

*How much weight can I lose?*

Many people lose 6 to 10 pounds the first week and 3 to 6 pounds the second week, much of it water. During the Reducing Phase, most participants lose 2 to 4 pounds per week, most of which is fat.

Weight loss often is not the only result. People with hypertension will have lower blood pressure and people with high blood sugar will experience improvement. Other medical benefits include lower serum cholesterol and triglyceride levels and less pain in weight-bearing joints.

*How long is the program?*

Depending on how much weight you need to lose, the Reducing Phase may last 3 to 6 months or longer. Adapting takes 5 weeks. We ask participants to attend Sustaining sessions for at least 6 months—preferably a year—to settle into habits that help keep weight off.

*How  
much  
does it  
cost?*

The cost of Screening depends on what your hospital charges for a complete physical exam with EKG, blood tests and urinalysis. Screening also includes interviews with the behaviorist and dietitian. After you enroll, fees are based on the phase you are in and are billed weekly or monthly. Total cost depends on how much weight you need to lose and how quickly you meet the goals you set for yourself.

Compare the cost of the program with what you spend now for food, medical care for weight-related conditions and higher-risk health insurance. When you deduct food costs (during Reducing) and any reimbursement you may receive from your health insurance, the net cost of the program may be small.

If you have a weight-related health condition, insurance may pay for part or all of Screening and medical monitoring and some other costs, too. Much of each insurance claim form is filled out

*What if  
I have  
problems  
making  
changes  
I'll  
need for  
lasting  
weight  
control?*

by the New Direction computer, often resulting in quicker reimbursement.

Since we are part of a hospital system, help is just moments away. Many problems can be solved in weekly education-support sessions. For those that can't be, the professional staff is available for individual counseling. And remember, we ask for at least a 6-month commitment to the Sustaining Phase to help participants grow strong in new habits and overcome difficult problems for lasting weight control.

EXHIBIT C - PAGE 5 OF 5

*"If you're ready..."*



"The New Direction System offers an intensive, yet cautious approach to weight loss and weight control. It is not a quick fix or an easy answer.

"It works, with your help.

"If you're ready to put time, money and effort into a lighter, healthier you, call your New Direction hospital for more information."

NEW DIRECTION  
HOSPITALS

ROSS LABORATORIES

© 1987 ROSS LABORATORIES, INC. MADE IN U.S.A.



EXHIBIT D

new  
direction

C3442  
B141111

NOTE: Use this prepared newspaper ad stick to fit a 14" x 5" column ad space

# "I diet all the time. Why am I still overweight?"

Dieting alone won't help you take weight off and keep it off.

NEW DIRECTION® can.

It's the one weight control system with everything you need to lose weight for life. It begins with medically supervised, safe, rapid weight loss and nutrition education. These are combined with behavior modification and physical activity to help keep weight off.

So if you have at least 30 pounds to lose and want a medically supervised program, come to NEW DIRECTION.

Free orientation session  
(800) 000-0000


Hospital logo and  
address go here.

new  
direction  
PHYSICIAN CONSULTATION

Complaint

116 F.T.C.

## EXHIBIT E

C3442  
B141111

*Lose weight quickly,  
safely, and permanently*

Feel good about you! If you have 40 lbs. or more to lose and are serious about losing weight, has the weight loss program for you. New Direction combines rapid weight loss with counseling and classes on nutrition and exercise for permanent weight loss. Participants are under the care of a physician, a psychologist, nurses, registered dietitian, and exercise physiologists.

*for a free information session,  
Call and  
Head in a New  
Direction*

EXHIBIT E

586

Complaint

## EXHIBIT F

Booth-read radio commercial scripts      The following are two 60-second radio commercial scripts, entitled Diet Vet and Diet Man.

## #1-DietVet

WOMAN: You name the diet-I've tried it. They all start out the same. First come the promises-the enthusiasm-the hunger-finally: the panic! And I gain back everything I've lost. How can I take control?

ANN\*: Head in a NEW DIRECTION. After do-it-yourself diets you gain back all the weight you lost. But the NEW DIRECTION Weight Loss Program is different.

WOMAN: That's what they all say.

ANN: Our NEW DIRECTION program has physicians, psychologists and dietitians working with you right here at our hospital, to take weight off and keep it off.

WOMAN: I won't gain it back?

ANN: With NEW DIRECTION, losing weight is medically supervised, safe and long-lasting. Break the cycle. And head in a NEW DIRECTION.

WOMAN: NEW DIRECTION is different. I'm losing weight. I'm keeping it off. I'm holding my own.

ANN: The NEW DIRECTION Weight Loss Program. Only at (NAME OF HOSPITAL). Call 000-0000. That's 000-0000.

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\*ANN=Announcer

Advertising Manual

Complaint

116 F.T.C.

## EXHIBIT G

What Have You  
Got To Lose?

<p>If you're more than 30 pounds over your recommended weight, you've got a lot to lose. The New Direction Weight Management Program is medically supervised and safe. Come and learn more about this proven technique for lifelong weight loss.</p>	<p>Tuesday, January 13 7:00 p.m.</p> <p>Hospital Speaker-Nutritionist Free of Charge. Call for registration or information</p>
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## EXHIBIT H

## #2 DietMan

MAN: Diets, diets, diets. Everyone's got a diet. There's the grapefruit diet-the Malibu diet-the lose-while-you-snooze diet. But whatever I lose, I always gain right back. Isn't there a way to keep the weight off?

ANN\*: Head in a NEW DIRECTION. Fad diets might take weight off, but they can't keep it off. The NEW DIRECTION Weight Loss Program is different.

MAN: Oh, sure it is.

ANN: NEW DIRECTION is a total step-by-step medical program that works with your mind as well as your body. Psychologists, physicians and dietitians counsel with you right here at our hospital to help you develop new habits for lasting weight control.

MAN: I won't gain the weight back?

ANN: With NEW DIRECTION, losing weight can be for life. Break the cycle. And head in a NEW DIRECTION.

MAN: NEW DIRECTION is different. I'm losing weight. I'm keeping it off. I'm in control.

ANN: The NEW DIRECTION Weight Loss Program. Only at (NAME OF HOSPITAL). Call 000-0000. That's 000-0000.

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\*ANN=Announcer

## 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 Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 Abbott Laboratories is an Illinois corporation, with its offices and principal place of business at One Abbott Park Road, Abbott Park, Illinois.
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

## DEFINITIONS

(1) For purposes of this order, "*competent and reliable scientific evidence*" means those tests, analyses, research, studies, surveys or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession or science to yield accurate and reliable results.

(2) "*Very-low-calorie diet*" or "*VLCD*" means any dietary regimen that provides 800 calories per day (K cal/day) or less.

## I.

*It is ordered*, That respondent Abbott Laboratories, a corporation, its successors and assigns, officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, promotion, offering for sale or sale of any weight loss or weight control product, program or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(A) Making any representation, directly or by implication, regarding the safety of any very-low-calorie diet ("VLCD") program, unless respondent clearly and prominently discloses, in close proximity to any such representation, that physician monitoring is required to minimize the potential for health risks, or otherwise misrepresenting any health risk of the program.

(B) Misrepresenting the likelihood that patients of respondent's diet program(s) will regain all or any portion of lost weight.

(C) Making any representation, directly or by implication, about the success of patients on any diet program in achieving or maintaining weight loss or weight control unless, at the time of making such representation, respondent possesses and relies upon a

reasonable basis consisting of competent and reliable scientific evidence substantiating the representation; *provided, however*, that for any representation that:

(1) Any weight loss achieved or maintained through any diet program is typical or representative of all or any subset of patients using the program, said evidence shall, at a minimum, be based on a representative sample of:

(a) All patients who have entered the program, where the representation relates to such persons; or

(b) All patients who have completed a particular phase of the program or the entire program, where the representation only relates to such persons; and

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of patients who were followed for a period of at least two years after completion of respondent's program (including any periods of participation in active maintenance); and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of patients who were followed for a period of time after completing the program that is either:

(a) Generally recognized by experts in the field of treating obesity as being of sufficient length to constitute a reasonable basis for predicting that weight loss will be permanent; or

(b) Demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

(D) Representing, directly or by implication, that any patients of any diet program have successfully maintained weight loss, unless respondent discloses, clearly and prominently and in close proximity to such representation:

(1) The following information:

(a) The average percentage of weight loss maintained by those patients;

(b) The duration over which the weight loss was maintained, measured from the date that patients ended the active weight loss phase of the program; *provided, however*, that if any portion of the time period covered includes participation in respondent's maintenance program(s) that follows active weight loss, such fact must also be disclosed; and

(c) If the patient population referred to is not representative of the general patient population for that program, the proportion of the total patient population in respondent's programs that those patients represent, expressed in terms of a percentage or actual numbers of patients, or the statement, "New Direction makes no claim that this [these] result[s] is [are] representative of all patients in the New Direction program;" and

(2) The statement:

"For many dieters, weight loss is temporary;"

*provided, however*, that respondent shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondent's diet program.

## II.

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



## III.

*It is further ordered,* That respondent shall maintain for a period of three (3) years after the date on which the representation was last made, and make available to the Federal Trade Commission staff upon request for inspection and copying, all materials possessed and relied upon to substantiate any claim or representation covered by this order, and all test reports, studies, surveys or information in its possession or control and which, to its knowledge, contradict, qualify or call into question any such claim or representation.

## IV.

*It is further ordered,* That respondent and its successors or assigns shall forthwith distribute a copy of this order to each of its officers, agents, representatives, independent contractors and employees, including participating hospitals or clinics, that are engaged in the preparation and placement of advertisements or promotional materials, who communicate with patients or prospective patients, or who have any responsibilities with respect to the subject matter of this order; and, for a period of ten (10) years from the date of entry of this order, distribute same to all of respondent's future officers, agents, representatives, independent contractors and employees having said responsibilities. *Provided, however,* that nothing in this order shall obligate respondent with respect to advertising or promotional materials of participating physicians, hospitals and clinics that are neither owned, operated nor controlled by respondent when said advertising is not prepared, approved or placed by respondent.

## V.

*It is further ordered,* That respondent and its successors and assigns 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 they have complied with this order.

Commissioner Owen dissenting with respect to the numerical disclosure requirements for short radio and television advertisements.

Complaint

116 F.T.C.

IN THE MATTER OF

SHARPER IMAGE CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3443. Complaint, June 28, 1993--Decision, June 28, 1993*

This consent order prohibits, among other things, a San Francisco-based retail chain and mail order company and its president from making false or unsubstantiated advertising claims for a telephone tap detector (Tap Detector V), an exercise device (Chest Maximizer), and an anti-fatigue nutritional supplement (Essential Factors) or similar products.

*Appearances*

For the Commission: *C. Steven Baker* and *Alan E. Krause*.

For the respondents: *Vincent A. Ruiz, Gutierrez & Associates*,  
San Francisco, CA.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Sharper Image Corporation, a corporation, and Richard Thalheimer, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Sharper Image Corporation is a Delaware corporation, with its office and principal place of business located at 650 Davis Street, San Francisco, California.

Respondent Richard Thalheimer is an officer and director of the corporate respondent. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this

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

PAR. 2. Respondents have advertised, offered for sale, sold and distributed a product known as the Tap Detector V (previously known as the "Privacy Protector"), which product is advertised as a means of determining whether there is a tap on a telephone.

PAR. 3. Respondents have advertised, offered for sale, sold and distributed a product known as a Chest Maximizer, which product is advertised as a means of enhancing the effects of regular push-ups off the floor.

PAR. 4. Respondents have advertised, offered for sale, sold and distributed a product known as Essential Factors, which product is advertised as an anti-fatigue nutritional supplement. Essential Factors is a "food" or "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 6. Respondents have disseminated or caused to be disseminated advertisements for the Tap Detector V (previously known as the "Privacy Protector"), Chest Maximizer and Essential Factors, including, but not necessarily limited to, the attached Exhibits A-D. These advertisements contain the following statements:

1. "[The Tap Detector V's] Advanced circuitry even blocks extension phones from interfering with facsimile or computer modem transmissions." (Exhibit A)
2. "[The Tap Detector V is] FCC-approved." (Exhibit A)
3. "If you hired a detective agency to find a tap on your phone, that single service would cost about \$300. But you can guard the privacy of your line even more effectively with the Privacy Protector™ -- for just \$59." (Exhibit B)
4. "[The Chest Maximizer's] deep push-ups give you three times the results in fewer reps. . . ." (Exhibit C)
5. "Can you really get extra energy from a vitamin? This US-patented formula says yes. Oxy-Energizer™ is the first nutritional supplement ever to be granted a US patent. Supported by over 300 independent clinical trials, this anti-fatigue formula consistently demonstrates increases in stamina, endur-

ance, recovery time, and cardiovascular function -- results that simply can't be duplicated by any other nutritional supplement." (Exhibit D)

6. "The proof of patent #3,009,858. Oxy-Energizer contains a trade-secret blend of potassium, magnesium, and aspartic acid. People who take the formula feel more energetic throughout the day, especially at normal tired periods in midafternoon and early morning. Double-blind swimming, running, and aerobics studies consistently show improvements in stamina and endurance for subjects who regularly take the active ingredients in Oxy-Energizer. Taken daily, the formula can help you accomplish more at the office because you're not fighting tiredness. After work, you have more energy to enjoy sports or a late evening out. You may even feel less need for sleep (most test subjects do)." (Exhibit D)

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

1. When the Tap Detector V is operational on a phone it prevents any extension phone from interfering with a data transmission on any other phone.
2. The Privacy Protector is more effective in detecting taps on a phone line than an inspection of the phone system by a detective.
3. The FCC has approved the Tap Detector V as effective.
4. The United States Government has accepted the active ingredient in Essential Factors as effective for relieving fatigue and providing extra energy.

PAR. 8. In truth and in fact:

1. When the Tap Detector V is operational on a phone it does not prevent any extension phone from interfering with a data transmission on any other phone.
2. The Privacy Protector is not more effective in detecting taps on a phone line than an inspection of the phone system by a detective.
3. The FCC has not approved the Tap Detector V as effective.

4. The United States Government has not accepted the active ingredient in Essential Factors to be effective for relieving fatigue and providing extra energy.

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

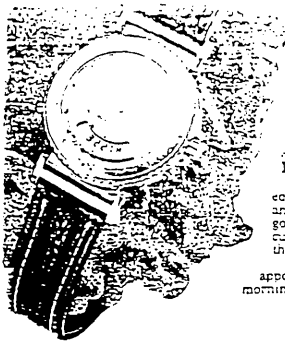
PAR. 9. Through the use of the statements contained in the advertisements referred to in paragraph six, including but not necessarily limited to the advertisement attached as Exhibit C, respondents have represented, directly or by implication, that the use of the Chest Maximizer will produce three times the results that a person would get by doing fewer regular push-ups off the floor.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph six, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs seven and nine, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time they made the representations set forth in paragraphs seven and nine, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

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

EXHIBIT A



Casio changes time.

Casio's new alarm watch is a timepiece that's just what you need. It's a watch that's both practical and stylish. It's a watch that's both comfortable and durable. It's a watch that's both easy to use and easy to carry. It's a watch that's both a timepiece and a timepiece.

**Analog elegance.**  
**Digital convenience.**

For those who admire traditional analog elegance, this watch with luminous hour and position markers—both in stainless steel and gold. But at the base of the dial, a precision curved liquid crystal display gives you all the modern conveniences. Hourly and daily alarms remind you of appointments and wake you in time for early morning meetings. Dual-time feature gives you

the ability to set a second time zone. The watch also features a day-date window, a water-resistant case, and a leather strap with a metal buckle. The watch is available in stainless steel and gold. Casio is known for watches that work perfectly—without being overpriced. Now Casio adds classic design. Order today.  
# Alarm Chronograph  
#FC0710 \$199. (S.30)

Fourteen-karat symbol of your personal style.

In ancient times, a philosopher wrote that every woman reflected four distinct qualities: romance, energy, nostalgia, and mystery. To symbolize these different styles, Sharper Image jewelry designers create four distinctive rings from rich 14K gold. The one your eye is drawn to first may say which quality is strongest in you.

The romantic Pearl Ring evokes an oyster opening its shell to offer its treasure. The 3/8mm cultured pearl (bornstone for June) reflects light in the open setting.

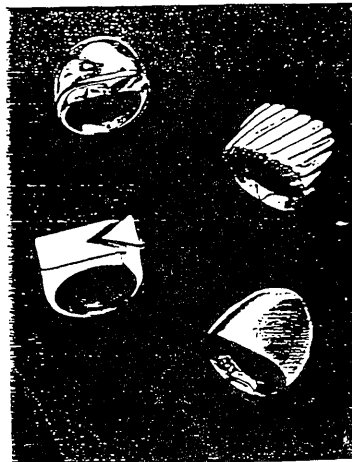
The geometric lines of the Arrow Ring inspire feelings of drive and energy. The chevron shape is cut from a flattened strip of gold, which is then wrapped into ring form.

The Cigar Band Ring recalls the age when men gave cigar bands to their daughters to wear. Although nostalgic in inspiration, the metal band has a clean, contemporary look. It can be engraved by your jeweler or left smooth.

On the top of the Ridge Ring, a step pattern is repeated in a complex, twisting motion that reflects light. The ridges appear to wave completely around the finger. Or do they? That's the mystery of this unusual ring.

All rings are available in full and half sizes 4-8. Select one today as a trademark of your personal style.

- # Ladies' 14K Gold Rings
- Pearl #FC168 \$299 (S.30)
- Arrow #FC139 \$349 (S.30)
- Cigar Band #FC167 \$299 (S.30)
- Ridge #FC169 \$299 (S.30)



You always get the best price.  
FOR OUR FULL MATCHING WORTH,  
SEE SHARPER IMAGE STORES

When you're talking, who's listening?

Tab Detector V7 detects the hidden changes in the electrical signals by pulse measurement, loss of energy, dropping over a noise threshold. A warning light alerts you to the danger. An extension phone has been used on the hook, and the green light flashes when the line is busy. It's a handy, easy even broadcast system.

from listening with the same or better modern transmissions. Just 1 1/2 x 2 1/4 x 1/2 inch. It's a handy, easy to use at home, office, or travel. No battery. No power needed. It's made and assembled in the West. Order today and keep all your personal calls private.  
# Tab Detector V7  
#FC1109 \$29.95 (S.30)

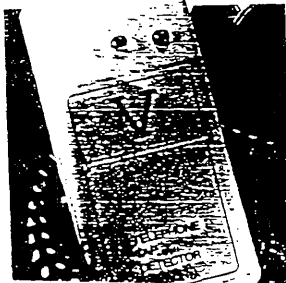
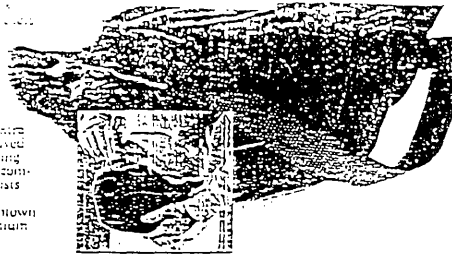




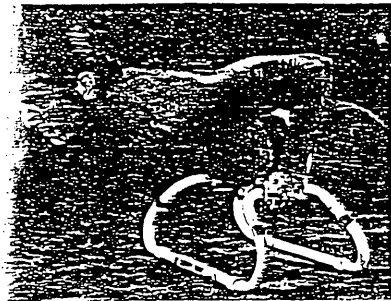
EXHIBIT C

**Portable security system in premium leather.**

The great new Safari Messenger bag is made of the finest leather. It's the only messenger bag that's also a money belt. It has a built-in money belt with 10 pockets for cash, coins, and credit cards. It also has a built-in money belt with 10 pockets for cash, coins, and credit cards. It also has a built-in money belt with 10 pockets for cash, coins, and credit cards. It also has a built-in money belt with 10 pockets for cash, coins, and credit cards.



This snappy pack goes from mountain trails to downtown streets with equal style—at a remarkable price for premium leather.  
**Leather Family Pack #FKN7141 \$29 (3.50)**



**Fewer push-ups, faster results.**

Do a regular push-up. Now try one on Excel's Chest Maximizer and feel the difference. The Chest Maximizer extends your chest muscles naturally for extra extension, increasing motion, then contracts powerfully as your arms push through a longer motion. These deep push-ups give you three times the results in fewer reps—so even on your busiest days you can still find time to work out.

New spring-loaded adjustment pins make it easy to set up the Chest Maximizer for different exercises. By varying the width of the pins you can concentrate on different muscle groups and get the balanced air-embody workout recommended for stronger sports performance.

Right-angled neoprene handgrips are contoured for comfort. Rubberized, shock absorbing, heavy-gauge steel rods measure 16L x 1.5D x 9H. One-year warranty.

Order Excel's Chest Maximizer today and find the powerful inner body you want—without straining your wallet.  
**Excel Chest Maximizer #FEN311 \$25 (3.00)**

For more ideas, give call  
**800 844-1111**  
 Monday-Friday, 9:00am-5:00pm  
 Saturday 9:00am-4:00pm

**Lifeline makes the full-body workout fully portable.**

Lifeline 300 turns ordinary stretching into serious exercise—and gives you a complete workout at home or on the road. Just 20 lbs., this compact gym system fits into a 15L x 11 x 40" case, and tucks into your premise or carry-on.

Adjust the spring resistance to any weight you want, and you can perform over 15 different exercises using exercises for your torso, neck, arms, leg, back, and shoulders. Flexible rubber tubing (the strongest available) provides progressive, variable resistance throughout the full range of motion. Unlike lifting and throwing, stretching is always controlled by the size of the stroke, and never overloading the return. So using the included bar and handgrips gives you the flexibility and balanced muscle building exercises from progressive and training.

Wrap the included 19" bar around your waist, and you can run in place and do resistance. Or wrap it around your ankles for abdominal and leg exercises, such as squats, step bends, and more. The 19" bar is a contoured VHS video tape included shows you how to get the most out of the exercises. Comes with detailed instructions and a six-month warranty.

Lifeline's quality and durability keep you from the gym. The only exercise machine that's portable and compact.



**Lifeline 300 #LIF300 \$29 (3.50)**



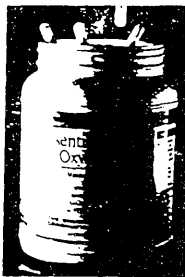
606

Complaint

EXHIBIT D

Can you really get extra energy from a vitamin?  
This US-patented formula says yes.

Oxy-Energizer is the first nutritional supplement ever formulated in the US nation. Supported by 100 independent scientific studies, this anti-fatigue formula consistently demonstrates increases in stamina, endurance, recovery time, and overall actual performance—results that cannot be duplicated by any other nutritional supplement.



Once provided only to professional athletes like Kathy Smith, Essential Factors™ with the patented Oxy-Energizer is now available through The Sharper Image.

The proof of patent #3,009,858.

Oxy-Energizer contains a trace secret blend of potassium, magnesium, and aspartic acid. Double-blind swimming, running, and aerobics studies consistently show improvements in stamina and endurance of subjects who regularly used these ingredients. Taken daily, the formula can help you accomplish more at the office because you're not feeling tiredness. After work, you have more energy to enjoy sports or a late evening out.

Because vitamins and mineral amplify the effects of Oxy-Energizer, the manufacturer's complete energy formula is the most potent nutritional supplement you can buy. Oxy-Energizer is derived completely from pure, allergen-free, vitamin-free, natural sources—the rarest and most expensive ingredients available. If it's the only energy source, it's the only nutritional supplement you can buy.

Nutrients are absorbed, not flushed away.

Vitamins and minerals can only be absorbed in the first part of the digestive system, just past the stomach. In order to be effective, a supplement must fully dissolve in minutes prior to reaching this small area.

Most multivitamins are made by "gluing" together and compressing pills of nutrient matter. But the binders, cellulose and starch prevent your body from breaking down the pills. The sudden flash of heat produced in the digestive process actually destroys many nutrients.

Essential Factors with Oxy-Energizer begins with 100% pure ingredients, purchased in small amounts to help fight tiredness. Ingredients are microencapsulated into an extra-fine pH-balanced powder and inserted into capsules in a 100% neutral process. The gelatin capsule dis-

...the first nutritional supplement ever formulated in the US nation. Supported by 100 independent scientific studies, this anti-fatigue formula consistently demonstrates increases in stamina, endurance, recovery time, and overall actual performance—results that cannot be duplicated by any other nutritional supplement.

Essential Factors with Oxy-Energizer  
90-day Supply #1WV601 \$149.95  
120-day Supply #1WV601 \$149.95



Where Kathy Smith gets extra energy.

Star of eight best-selling workout videos, fitness authority Kathy Smith can use all the energy she can get. She's also NBC TODAY Show fitness correspondent, a health club owner, and a new mother. Her latest video, *Pregnancy Workout*, shows how to exercise safely during pregnancy. For over five years, a pillow of Essential Factors with Oxy-Energizer has helped her stay fit and energized.

## DECISION AND ORDER

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

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

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

1. Respondent Sharper Image Corporation, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 650 Davis Street, San Francisco, California.

Respondent Richard Thalheimer is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

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 Sharper Image Corporation, a corporation, its successors and assigns, and its officers and directors; and Richard Thalheimer, individually and as an officer and director of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of the Tap Detector V (previously known as the "Privacy Protector"), or any substantially similar product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Any such product will prevent any extension telephone from interfering with a data transmission on any other phone; or

B. Any such product is more effective in detecting taps on a telephone line than an inspection of the phone system by a detective.

*It is further ordered,* That respondents Sharper Image Corporation, a corporation, its successors and assigns, and its officers and directors; and Richard Thalheimer, individually and as an officer and director of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of the Chest Maximizer, or any exercise product, in or affecting commerce, as "commerce" is defined in the

Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. The use of the Chest Maximizer will produce three times the results that a person would get by doing fewer regular push ups off the floor; or

B. Such product can achieve any result superior or comparable to that achieved with any other product or exercise;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

### III.

*It is further ordered,* That respondents Sharper Image Corporation, a corporation, its successors and assigns, and its officers and directors; and Richard Thalheimer, individually and as an officer and director of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that:

A. The FCC has approved the Tap Detector as effective;

B. Essential Factors with Oxy-Energizer has been accepted by the United States Government, or any agency or division thereof, as effective for relieving fatigue or providing extra energy; or

C. Any such product has been accepted or approved by the United States Government, or any agency or division thereof, as effective.

#### IV.

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

A. All materials which come into their possession from a vendor or any other source and that were relied upon in disseminating such representation; and

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

#### V.

*It is further ordered,* That respondents shall, within thirty (30) days after the date of service upon them of this order, and for three (3) years thereafter, distribute a copy of this order to each current and future officer, employee, agent and/or representative engaged in the preparation or placement of advertising or other promotional materials covered by this order and shall obtain from each such person a signed statement acknowledging receipt of the order.

#### VI.

*It is further ordered,* That respondents and their successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolu-

tion, 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 under this order and that respondents shall require, as a condition precedent to the closing of any sale or other disposition of all or substantial part of their assets, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of the order.

#### VII.

*It is further ordered,* That for a period of five (5) years from the date of service of this order, the individual respondent named herein shall promptly notify the Commission in the event of the discontinuance of his present business or employment and of each affiliation with a new business or employment which involves the retail sale of consumer products through mail order catalogs, 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 said respondent is newly engaged as well as a description of said respondent's duties and responsibilities in connection with the business or employment.

#### VIII.

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

IN THE MATTER OF  
THE RIGHT START, INC., ET AL.

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

*Docket C-3444. Complaint, June 30, 1993--Decision, June 30, 1993*

This consent order prohibits, among other things, a California-based mail-order company, and its president, from making false and unsubstantiated advertising claims regarding the "Air Purifier," a small electric air filter, and the "Travel Tray," a foam board tray that is used to hold children's snacks and toys when they are riding in an automobile. The respondents are prohibited from representing that the use of any air filtering device can reduce the risk, alleviate, prevent, or cure respiratory problems, unless the representations are substantiated by competent and reliable scientific evidence. In addition, the company is prohibited from representing that any product it sells has been approved or endorsed, unless the endorsement is supported by an objective test conducted by qualified persons.

*Appearances*

For the Commission: *C. Steven Baker* and *Catherine R. Fuller*.  
For the respondents: *John Rawls, Blanc, Williams, Johnston & Kronstadt*, Los Angeles, CA.

COMPLAINT

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

PARAGRAPH 1. Respondent Right Start is a California corporation, with its principal office or place of business located at 5334 Sterling Center Drive, Thousand Oaks, California.

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

PAR. 2. Respondents have advertised, offered for sale, sold and distributed numerous products for infants and children through a mail order catalog, including a product known as the Air Purifier, which product is a small electric air filter, and a product known as the Travel Tray, which product is a foam board tray for use in automobiles to hold children's snacks and toys.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for the Air Purifier and Travel Tray, including, but not necessarily limited to, the attached Exhibits 1-2. These advertisements contain the following statements:

1. That the "Air Purifier extracts unhealthy bacteria and pollutants out of the air before they can harm your child." (Exhibit 1).
2. That the Air Purifier "emits negative ions which help combat respiratory problems." (Exhibit 1).
3. That the Air Purifier "is recommended by Good Housekeeping for allergy sufferers." (Exhibit 1).
4. That the Travel Tray "... [i]s Consumer Product Safety Commission approved for ages 18 mos. and over." (Exhibit 2).

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits 1-2, respondents have represented, directly or by implication, that:

1. Use of the Air Purifier can significantly reduce a child's risk of bacterial infection.
2. The Air Purifier emits negative ions which alleviate respiratory problems.



3. The Air Purifier is recommended by Good Housekeeping magazine as an effective product for removing allergens from the air.

4. The Travel Tray has been evaluated by the Consumer Product Safety Commission (“CPSC”) and found to be safe for use in automobiles for children 18 months and older.

PAR. 6. In truth and in fact:

1. Use of the Air Purifier cannot significantly reduce a child's risk of bacterial infection.

2. The negative ions emitted by the Air Purifier do not alleviate respiratory problems.

3. The Air Purifier is not recommended by Good Housekeeping magazine as an effective product for removing allergens from the air.

4. The Travel Tray has not been evaluated by the Consumer Product Safety Commission (“CPSC”) and found to be safe for use in automobiles for children 18 months and older.

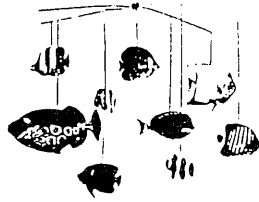
Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibit 1, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five (1) and (2), respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph five (1) and (2) respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

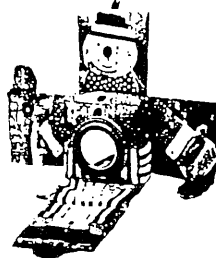
PAR. 9. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT 1



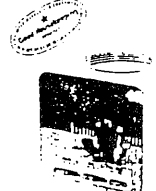
There's something fishy about this mobile.

Our Tropical Fish Mobile features small, smart-swimming, phosphate-free, hand-detailed tropical fish. About the size of regular mobiles, its colors are guaranteed to dazzle both babies and adults. It also comes with a fascinating booklet detailing the mysteries of these deep-sea beings. Measures 21" diameter x 18" high. Some assembly required.  
Tropical Fish Mobile, #1001, \$16.95 (1 lb.)  
\$16.95



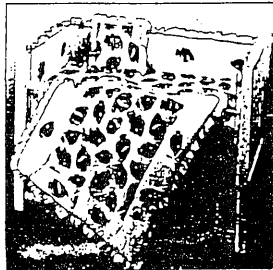
Blux unfolds into a sight and sound adventure.

Our soft, colorful Jack In The Box is far sweeter than he looks. Although he starts out as a lullaby, his long flaps, held closed by velcro tabs, unfold into songs and lights. There's even a built-in radio on his tummy. Soothe him and he speaks. Babes love him because he's so soft and cuddly, also stimulating. Putting him together again is a wonderful way to develop hand-eye coordination and separating abilities. Size, 12 1/2" x 11 1/2" x 11 1/2". For 18 mos. & up.  
Jack In The Box, #1012, \$12.95 (1 lb.)  
\$12.95



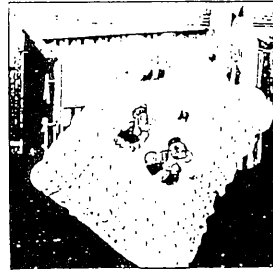
The air in your nursery should be as pure as your child.

Nothing gets sweeter for a nursery than a clean, fresh atmosphere. So do everything you can to keep the air in your child's nursery. Our Air Purifier extracts actual dust, pollen and pollutants out of the so in our tiny, safe, teeny-tiny child. It won't burn or cause any damage to his lungs or respiratory problems common in so many nurseries. Induction. Recommended by the American Academy of Pediatrics. Measures 16 1/2" x 14 1/2" x 10 1/2".  
Air Purifier #1004, \$29.95 (1 lb.) \$29.95  
Extra Filter Refills, #1005, \$2.95 (1 lb.) \$2.95



Fiesta Fish Bedding

There's nothing fishy about this colorful aquatic-inspired design. The polka-dot fish is a dream in clean and the design will swim away with your little Fiesta Fish Bedding.  
Cottonone, #1006, \$49.95 (1 lb.) \$49.95  
Bumper, #1007, \$29.95 (1 lb.) \$29.95  
Dust Ruffle, #1008, \$24.95 (1 lb.) \$24.95  
Pillow, #1009, \$22.95 (1 lb.) \$22.95  
Fitted Sheet, #1010, \$24.95 (1 lb.) \$24.95  
SHEET SET, #1011, \$119.95 (1 lb.) \$119.95  
\$119.95



Elephant Memories

What bedding set could offer more big-time fun than our playful Elephant Memories? This polka-dot, cotton bedding set incorporates wonderfully playful baby elephant appliques guaranteed to get your little giggle from your little polka-dot.  
Elephant Memories Bedding.  
Cottonone, #1013, \$49.95 (1 lb.) \$49.95  
Headboard Bumper, #1014, \$49.95 (1 lb.) \$49.95  
Dust Ruffle, #1015, \$29.95 (1 lb.) \$29.95  
Pillow, #1016, \$24.95 (1 lb.) \$24.95  
Fitted Sheet, #1017, \$24.95 (1 lb.) \$24.95  
SHEET SET, #1018, \$119.95 (1 lb.) \$119.95  
\$119.95

EXHIBIT

Complaint

EXHIBIT 2



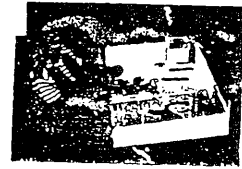
Fuzzy friends keep babies comfy and protected.

With soft, fuzzy friends, babies can enjoy the ride. The fuzzy friends are made of soft, plush material and are designed to fit snugly around the baby's head and neck. They are also machine washable and dry quickly.



You can see out, but the sun can't glare in.

Let the sun shine in, but keep the glare out. The fuzzy friends are made of soft, plush material and are designed to fit snugly around the baby's head and neck. They are also machine washable and dry quickly.



Travel time should be fun time.

Attach our durable, fold-down tray to the back of your baby's car seat. The tray is made of sturdy plastic and is designed to hold up to 10 lbs. of toys and books. It also has a built-in high chair tray for your baby's meals.



Swivel seat saves bending, backaches and bumps on the head.

Put your baby in the car seat just once. Let the car seat do the rest. The swivel seat allows you to rotate the car seat 180 degrees, so you can easily get in and out of the car seat without bending over. It also has a built-in high chair tray for your baby's meals.



This mirror takes a back seat to nobody.

Let your baby see the world from their own perspective. The mirror is made of clear plastic and is designed to fit snugly around the baby's head and neck. It is also machine washable and dry quickly.



Keep your eye on the road—and on your baby.

Let the sun shine in, but keep the glare out. The sunshade is made of soft, plush material and is designed to fit snugly around the baby's head and neck. It is also machine washable and dry quickly.

DEPOSITION EXHIBIT 77C 15 10/11/64

## DECISION AND ORDER

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

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

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

1. Respondent The Right Start, 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 at 5334 Sterling Center Drive, Thousand Oaks, California.

Respondent Stanley Fridstein is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

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 Right Start, a corporation, its successors and assigns, and its officers, and Stanley M. Fridstein, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of any air filtering device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that use of any such product can: (1) reduce the risk of bacterial infection, or (2) alleviate, prevent or cure respiratory problems, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

### II.

*It is further ordered,* That respondents Right Start, a corporation, its successors and assigns, and its officers, and Stanley M. Fridstein, individually and as an officer of said corporation, and respondents'

agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of any product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product has been recommended, approved or endorsed by a person, group, or public or private organization that is an expert with respect to the endorsement message unless the recommendation, approval or endorsement is supported by an objective and valid evaluation or test of the product conducted by persons qualified to do so, using procedures generally accepted by experts in the science or profession to yield accurate and reliable results.

### III.

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

A. All materials that come into their possession from a vendor or any other source and that were relied upon in disseminating such representation; and,

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

### IV.

*It is further ordered,* That respondents shall, within thirty (30) days after the date of service upon them of this order, and for three (3) years thereafter, distribute a copy of this order to each current and future officer, employee, agent and/or representative engaged in

the preparation or placement of advertising or other promotional materials covered by this order and shall obtain from each such person a signed statement acknowledging receipt of the order.

V.

*It is further ordered,* That respondents and their successors and assigns 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 under this order and that respondents shall require, as a condition precedent to the closing of any sale or other disposition of all or substantial part of their assets, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of the order.

VI.

*It is further ordered,* That for a period of five (5) years from the date of service of this order, the individual respondent named herein shall promptly notify the Commission in the event of the discontinuance of his present business or employment and 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 said respondent is newly engaged as well as a description of said respondent's duties and responsibilities in connection with the business or employment.

VII.

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

Complaint

116 F.T.C.

IN THE MATTER OF

YKK (U.S.A.) INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3445. Complaint, July 1, 1993--Decision, July 1, 1993*

This consent order prohibits, among other things, a New Jersey-based manufacturer and seller of zippers from requesting, suggesting, or advocating that any competitor: raise, fix or stabilize prices or price levels; cease providing free equipment or other discounts; cease providing any services or products or engage in any other pricing action. In addition, the respondent is prohibited from entering into, attempting to enter into, adhering to, or maintaining any combination, conspiracy, agreement, plan or program with any competitor to fix, raise, establish, maintain or stabilize prices or service levels.

*Appearances*

For the Commission: *Richard B. Dagen, Michael E. Antalics and James C. Egan.*

For the respondent: *James Lundquist, Barnes, Richardson & Colburn, Washington, D.C.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that YKK (U.S.A.) Inc., a corporation, hereinafter sometimes referred to as respondent or "YKK," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent YKK (U.S.A.) Inc. is a corporation organized, existing and doing business under and by virtue of



the laws of the State of New York, with its office and principal place of business located at 1251 Valley Brook Avenue, Lyndhurst, New Jersey.

PAR. 2. Respondent is now, and for some time has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of zippers and related products; and the leasing of equipment for installing zippers. Zippers and related products means slide fasteners, including, but not limited to, fastener chains, sliders and separating end components.

PAR. 3. Respondent maintains and has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. At all times relevant herein, YKK and Talon, Inc. were competitors in the manufacture, advertising, offering for sale, sale and distribution of zippers and related products. YKK and Talon, Inc. together account for approximately 82 percent of all zippers manufactured and/or sold in the United States.

PAR. 5. On July 1, 1988, an attorney for YKK sent a letter to the President of Talon accusing Talon of "unfair and predatory sales" tactics in the sale of zippers and related products along with a request that Talon stop engaging in these "unfair" practices by taking immediate action to cease offering free equipment to customers and to withdraw outstanding offers of free equipment to customers purchasing at the same time chain, sliders and other zipper components.

PAR. 6. At a meeting on October 21, 1988, YKK's attorney asked an attorney for Talon to urge Talon to desist from offering free installation equipment.

PAR. 7. Talon's provision of free installation equipment to such customers is a form of discounting. An agreement between Talon and YKK to cease this form of discounting would have constituted an unreasonable restraint of competition.

PAR. 8. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and

practices herein alleged are continuing and will continue in the absence of the relief herein requested.

Commissioner Azcuenaga dissenting.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of 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 Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

1. Proposed respondent YKK (U.S.A.) Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1251 Valley Brook Avenue, Lyndhurst, New Jersey.

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. “*Respondent*” means YKK (U.S.A.), Inc., its predecessors, subsidiaries, divisions, groups, and affiliates controlled by YKK (U.S.A.), Inc., and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. “*Zippers and related products*” means slide fasteners, including, but not limited to, fastener chains, sliders and separating end components.

### II.

*It is ordered*, That respondent, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any zippers and related products, and leasing of installation equipment, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, forthwith cease and desist from:

A. Requesting, suggesting, urging, or advocating that any competitor raise, fix or stabilize prices or price levels, cease providing free equipment or other discounts, cease providing any services or product, or engage in any other pricing action;

B. Entering into, attempting to enter into, adhering to, or maintaining any combination, conspiracy, agreement, understanding, plan or program with any competitor to fix, raise, establish, maintain or stabilize prices, price levels, or service levels.

*Provided, however,* that YKK shall remain free to request that a competitor refrain from engaging in illegal conduct.

### III.

*It is further ordered,* That respondent shall:

A. Within thirty (30) days of the date on which this order becomes final, provide a copy of this order to all of its directors, officers, and management employees;

B. For a period of five (5) years from the date on which this order becomes final, and within ten (10) days after the date on which any person becomes a director, officer, or management employee of respondent provide a copy of this order to such person; and

C. Require each person to whom a copy of this order is furnished pursuant to subparagraphs III.A and B of this order to sign and submit to YKK within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject YKK to penalties for violation of the order.

### IV.

*It is further ordered,* That respondent shall:

A. Within sixty (60) days from the date on which this order becomes final, and annually thereafter for five (5) years on the anniversary date of this order, and at such other times as the Commission may by written notice to the respondent require, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order; and

B. For a period of five (5) years after the order becomes final, maintain and make available to the staff of the Federal Trade Com-

mission for inspection and copying, upon reasonable notice, all records of communications with competitors of respondent relating to any aspect of pricing or services for zippers, related products, and installation equipment, and records pertaining to any action taken in connection with any activity covered by parts II, III and IV, of this order.

C. Notify the Commission at least thirty days prior to any change in corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today accepts a consent order that significantly inhibits the ability of an attorney fully to represent the interests of his or her client. The order also suggests a view of the Robinson-Patman Act with which I cannot join.

The theory of violation is that an attorney for YKK, on behalf of his client, invited Talon, through its attorney, to fix prices.<sup>1</sup> The attorney for YKK, a member of a private law firm who also is a member of YKK's board of directors, believed that Talon was providing free zipper assembly machinery to some but not other customers and that this practice was unlawful.<sup>2</sup> YKK's attorney requested that Talon cease engaging in this practice. The complaint alleges that the attorney's request violated Section 5 of the Federal Trade Commission Act.

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<sup>1</sup> *I.e.*, to eliminate selective discounting in the form of providing free zipper assembly machinery to certain customers.

<sup>2</sup> Allegations of unlawful pricing practices have surfaced in the U.S. zipper industry for years. Beginning in the 1970's, when YKK was entering the U.S. market, members of the U.S. zipper industry complained that YKK engaged in unlawful pricing practices, including the provision of free installation equipment. *See* In the Matter of Slide Fasteners, Report to the President in Inv. No. TA-201-6, USITC Publication 757 (1976); In the Matter of Certain Slide Fastener Stringers, ITC Inv. No. 337-TA-85, 1981 ITC LEXIS 212 (1981) (ITC opinion); 1980 ITC LEXIS 51 (1980) (ALJ opinion). Although the International Trade Commission took no action against YKK, the FTC in 1981 issued an order against YKK for alleged violations of Section 2(a) of the Robinson-Patman Act. 98 FTC 25 (1981).

I have supported the general theory that invitations to collude may be challenged as unlawful unilateral conduct under Section 5 of the Federal Trade Commission Act when the evidence shows an unambiguous offer to fix prices and no justification is offered for the conduct.<sup>3</sup> Neither of these circumstances exists in this case. First, the alleged invitation to collude is at best highly ambiguous, and the available evidence plainly resolves any ambiguity against liability. Second, the context of the alleged invitation -- a discussion of claims of law violations between two attorneys on behalf of their clients -- suggests an important efficiency: the public interest in encouraging the negotiation and settlement of legal disputes.

A request by an attorney on behalf of his client that one of his client's competitors cease engaging in apparently unlawful conduct is legitimate conduct. Indeed, the order expressly provides that "YKK shall remain free to request that a competitor refrain from engaging in illegal conduct." Although such requests clearly are permitted by the order, the complaint treats the request of YKK's attorney not as a legitimate request to cease unlawful conduct but as an invitation to fix prices. This apparent inconsistency requires explanation.

Since the request alleged in the complaint cannot explain the basis for liability, we must look elsewhere for the allegedly unlawful invitation to collude. According to the Analysis of Proposed Consent Order To Aid Public Comment ("Analysis To Aid Public Comment"),<sup>4</sup> YKK's attorney "went beyond" requesting that Talon cease the unlawful conduct or offering to refrain from suing if Talon ceased the unlawful conduct. Instead, according to the Analysis To Aid Public Comment, "the attorney representing YKK offered to Talon a *quid pro quo* that YKK would refrain from providing free equipment if Talon would." Analysis To Aid Public Comment at 1.

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<sup>3</sup> In addition, the evidence of the alleged invitation should be independent of any testimony or material within the control of the competitor who received the offer. See Concurring Statement of Commissioner Mary L. Azcuenaga in Quality Running Gear, Inc., Docket C-3403 (Nov. 5, 1992).

<sup>4</sup> An analysis is prepared in every consent case "to facilitate public comment on the proposed order." By its terms, an Analysis To Aid Public Comment "is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms."

It is not disputed that YKK's attorney requested that Talon cease engaging in allegedly unlawful pricing practices.<sup>5</sup> It also is not disputed that YKK's attorney told Talon's attorney that YKK had "received advice from officials in Washington, that we, YKK, can meet" Talon's discriminatory prices.<sup>6</sup> The apparent willingness of the majority to infer an unlawful invitation to collude from these statements fails to take account of the Robinson-Patman Act.

Under the Robinson-Patman Act, a firm that is facing its competitor's discriminatory prices may elect to meet those prices and defend against a price discrimination case by claiming the meeting competition defense provided in Section 2(b) of the Act.<sup>7</sup> The statement by YKK's attorney that YKK lawfully could meet Talon's discriminatory prices is a paraphrase of the statutory meeting competition defense. The defense is available whether or not a lawyer, in whatever situation, mentions that the option exists. YKK could defend against liability under Section 2(a) of the Act (and against civil penalty liability under the 1981 order) if it could show that its differential prices were offered in "good faith to meet an equally low price of a competitor."<sup>8</sup>

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<sup>5</sup> The complaint identifies two instances in which the request was made: The first was a letter dated July 1, 1988, in which YKK's attorney "request[ed] that Talon stop engaging in these 'unfair' practices by taking immediate action to cease offering free equipment to customers . . . ." Complaint paragraph 5. The second was during a meeting on October 21, 1988, when YKK's attorney "asked an attorney for Talon to urge Talon to desist from offering free equipment." Complaint paragraph 6.

<sup>6</sup> The evidence of the conversation between YKK's attorney and Talon's attorney, including the quoted language, is based on a contemporaneous memorandum prepared by YKK's attorney ("YKK memorandum") and voluntarily provided to the Commission with YKK's report of compliance with the 1981 order. The memorandum and the two requests identified in the complaint (*see* note 5 *supra*) are the evidence on which the alleged "*quid pro quo*" is based. YKK has allowed disclosure of the memorandum (saving the identity of individuals involved), providing a rare opportunity for public discussion of the record on which a Commission consent order is based. The record in the case is scant, and I can find no other evidence that arguably supports liability.

<sup>7</sup> Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), bars sellers from discriminating in price between competing customers, subject to certain statutory requirements. Section 2(b) of the Act, 15 U.S.C. 13(b), permits a seller to rebut a *prima facie* case of price discrimination by showing that the lower price to a customer was made in good faith to meet the equally low price of a competitor. The elements of the meeting competition defense must be proved by its proponent.

<sup>8</sup> 15 U.S.C. 13(b). "Meeting competition" under Section 2(b) is different from engaging in normal competition. The meeting competition defense arises when a firm offers price cuts to selected customers, *i.e.*, discriminates in price.

The flip side of the Section 2(b) meeting competition defense is that it is not available except to meet a competitor's offering. If Talon ceased its discriminatory pricing, YKK could no longer defend its differential prices under Section 2(b).<sup>9</sup> As a consequence, any request that Talon cease allegedly unlawful discriminatory pricing implicitly included a "threat" that YKK could lawfully meet Talon's competition as well as an "offer" that YKK would not meet Talon's discriminatory price competition if Talon acceded to the request. The "threat" and the "offer" are products of the Robinson-Patman Act. The Act creates a mutuality that exists whether or not it is described out loud, and it is from this that the majority apparently infers an unlawful offer of a "*quid pro quo*."

The evidence makes clear that the attorneys for YKK and Talon were concerned with mutual allegations of unlawful pricing practices and that their discussion was grounded in these provisions of the Robinson-Patman Act. YKK's attorney said that a recent "Talon promotion raised a number of questions about fair competition" and described "YKK's position that [Talon's] targeting certain of [YKK's] customers . . . with very low prices . . . constituted an unfair trade practice."<sup>10</sup> Talon's attorney replied that Talon had "not engaged in any free placement of equipment, since" the July 1988 letter from YKK's attorney<sup>11</sup> but that Talon would continue to meet the low prices of its competitors. YKK's attorney said that "if Talon continues or restarts any of its programs to give free machines for one year, we have received advice from officials in Washington, that we, YKK, can meet such competition." YKK memorandum.

YKK also was engaging in unlawful pricing, Talon's attorney continued, claiming "that YKK not only sells at low prices in order

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<sup>9</sup> For the sake of exposition, the text assumes that YKK and Talon were the only competitors in the zipper market.

<sup>10</sup> "Unfair trade practice" has been used by the Commission to refer to "unfair methods of competition . . . or other illegal practices," including unlawful price discrimination. *E.g.*, FTC, Trade Practice Rules for the Slide Fastener Industry (June 21, 1958), rescinded, 42 Fed. Reg. 19,859 (March 16, 1977).

<sup>11</sup> Talon's discontinuance of its free equipment program after receiving the request from YKK's lawyer may have reflected a concern that the program could not withstand challenge under the Robinson-Patman Act.



to target-and-take Talon customers, but that YKK beats, rather [than] simply meets our competition.” Talon’s attorney claimed to have “hard evidence that YKK . . . h[ad] giv[en] away equipment to meet and beat competition from Talon” and “opened a file and began to read from ‘evidence’ that YKK priced . . . ‘below YKK’s list and also, below Talon’s prices.’” YKK’s attorney said that “the reports [if] true . . . could not be actionable because . . . there was other competition besides head-to-head operations by Talon and YKK . . .” YKK memorandum.

YKK’s attorney also said that “YKK would consider it ‘a plus . . .’ if Talon would continue its current policy of not giving away free equipment to their customers.” YKK memorandum. It is hardly surprising and, under the circumstances, not especially troubling that YKK’s attorney would view it as “a plus” if Talon acceded to his request and discontinued its discriminatory pricing program. If Talon in fact ceased the practice, as Talon’s attorney claimed it had, YKK would no longer face the costs of potential litigation and of documenting its compliance with the meeting competition defense.

At the close of the discussion, YKK’s attorney said that YKK had “no intention . . . at this time to file a complaint against Talon.” Talon’s attorney said “that Talon does not have any intention of preparing legal action against YKK, if the status quo continues.” After the meeting, YKK’s attorney advised his client in terms of the Robinson-Patman Act and the Act’s meeting competition defense: “If, as Talon has alleged, we are beating rather than simply meeting competition, they would have grounds for a complaint unless we could prove affirmatively that we were not meeting a Talon price but a price by some other competitor that was very low.” YKK’s attorney also told his client that “[w]e have good defenses and they should be reviewed soon.”<sup>12</sup> YKK memorandum.

The majority apparently would distinguish between threats to litigate and threats to meet discriminatory prices under Section 2(b). Under the approach described in the Analysis To Aid Public

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<sup>12</sup> The availability of the meeting competition defense likely was particularly important to YKK’s attorney, because of YKK’s potential liability for civil penalties for unlawful price discrimination under the Commission’s 1981 order against YKK.

Comment, an attorney can request that the allegedly discriminatory pricing cease, threaten legal action or offer to “refrain from taking legal action,”<sup>13</sup> Analysis To Aid Public Comment at 1, if the discriminatory pricing practices cease. But a statement by an attorney that his client can lawfully avail itself of the statutory meeting competition defense, along with a suggestion that his client would prefer not to be placed in the position of doing so, will be construed by the Commission as an unlawful invitation to fix prices. I see no basis in principle for this approach. Both litigation and meeting competition are lawful options available to a firm meeting discriminatory prices in the marketplace, and a lawyer surely would advise a client charged with or facing discriminatory prices of the availability of these options.<sup>14</sup>

Implicit in the theory of the complaint, as explained in the Analysis To Aid Public Comment, is the notion that YKK was trying to persuade a competitor to stop engaging in beneficial competitive conduct by offering to agree to forgo the same beneficial conduct. This underlying theme has a strong superficial appeal, but it is fundamentally invalid in this situation. The conduct at issue is discriminatory pricing and, by definition under the Robinson-Patman Act, the conduct is not good. Although it may seem counter-intuitive, YKK was not asking Talon to stop doing something right but rather to stop violating Section 2(a).<sup>15</sup>

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<sup>13</sup> For example, the statement in the Analysis To Aid Public Comment that “the attorney representing YKK went beyond . . . an offer that YKK would refrain from taking legal action against Talon if Talon ceased illegal conduct” implies that litigation threats are protected. See *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) (“If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.”).

<sup>14</sup> *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), is inapposite. In that case, the Court rejected a defense, asserted by firms indicted on criminal price-fixing charges, that their explicit exchanges of price information were necessary to verify each other's prices in order to comply with Section 2(b) of the Robinson-Patman Act. The point is not that YKK should be able to avoid liability under Section 5 by asserting a spurious need to comply with the Robinson-Patman Act but that the majority has derived its alleged unlawful invitation to collude from a recitation of a statutorily created defense.

<sup>15</sup> YKK's attorney had a valid interest in protecting his client against unfair competition by attempting to persuade Talon to stop violating Section 2(a). Neither YKK nor Talon, of course, would be barred by the Act from granting across-the-board price discounts to customers on the same functional level; the Act bars price discrimination, not lower prices. We cannot assume, however, that either firm could offer these discounts to all customers without risking its financial health and ability to stay in business.

Also implicit in the theory of the complaint, as explained in the Analysis To Aid Public Comment, is the notion that the better way to level the playing field between YKK and Talon is for YKK to emulate the behavior of Talon and offer its own selective discounts under cover of the Section 2(b) defense.<sup>16</sup> This assumption ignores real world costs and risks of significant dimension. If a firm wants to undertake the risk and cost of documenting conduct in the hope of establishing the protection of Section 2(b), that is one thing. It is quite another for the Commission implicitly to require that course of action in preference to requesting a competitor to cease violating Section 2(a).

One irony pervades this case: YKK is the only zipper firm under a Robinson-Patman order. Because of the Commission's 1981 order against YKK, YKK's attorney must be particularly sensitive to the need for his client, to avoid liability for civil penalties under the Commission's order, to limit differential price offers to meeting competition situations. Indeed, YKK's attorney sought and obtained advice from the FTC that YKK lawfully could meet discriminatory prices offered by its competitors.<sup>17</sup> Then, when YKK's attorney repeated the advice that he had received from the staff of the Commission about compliance with an order of the Commission under a law enforced by the Commission, the Commission alleges an unlawful solicitation to fix prices. YKK surely has been caught between the proverbial devil and the deep blue sea.

The purpose of challenging invitations to collude under Section 5 presumably is to deter such conduct, because of the danger that it will ripen into actual collusion. Although such deterrence has value, we should remember that extending an invitation to fix prices, which is a unilateral act, involves less competitive harm than actual price fixing. This underscores the need scrupulously to protect lawful discussion in these cases. To ensure that legitimate communication is not inhibited we should challenge only naked invitations to

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<sup>16</sup> The choice to challenge the request by YKK's attorney, while failing to examine Talon's allegedly unlawful pricing practices, suggests a willingness to tolerate discrimination against some customers so that other customers may benefit from discounting.

<sup>17</sup> The 1981 order does not expressly permit YKK to claim the statutory defenses in the Robinson-Patman Act but requires YKK to cease and desist from offering discriminatory prices.

collude, those that unambiguously solicit an unlawful agreement on price and have no other function. *See United States v. American Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984). Because the communications by YKK's attorney were an assertion of his client's lawful alternatives, they did not constitute a naked invitation to collude.<sup>18</sup> The proposed consent order infringes on legitimate communications by an attorney on behalf of his or her client and is inconsistent with the public interest.

I dissent.

CONCURRING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

I share the concern that our efforts in the invitation to collude area should not encompass, and thereby deter, legitimate business activity (or legal representation related thereto), and have repeatedly urged caution by the Commission in this regard.<sup>1</sup> One of the difficulties in the Commission's efforts to explore the frontiers of Section 5 law through consent agreements is that much of the pertinent evidence supporting the Commission's action is not ordinarily a matter of public record. I have found reason to believe that a violation occurred in this matter based on an investigative record which, in my view, is replete with inculpatory evidence that far outweighs any that might be interpreted as exculpatory. This case involves, in my judgment, activity by a corporate official, who incidentally happened to wear a legal hat, that was not in fact a good faith effort to resolve a legal dispute; rather, I find reason to believe that the legal dispute served simply as a pretext for an invitation to engage in a naked price restraint (in the form of ceasing certain discounts) where market power exists. I am therefore thoroughly comfortable with the Commission's decision to issue as final the consent agreement in this matter.<sup>2</sup>

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<sup>18</sup> Another puzzling aspect of this case is that the order is imposed on the client for the conduct of its attorney, apparently leaving the attorney free, were he so inclined, to engage in similar conduct for other clients.

<sup>1</sup> *See* Concurring Statements of Commissioner Deborah K. Owen in Quality Trailer Products Corporation, C-3403 (Nov. 5, 1992) and AE Clevite, Inc., C-3429 (June 8, 1993).

<sup>2</sup> As in the cases cited in note 1 *supra*, I have accepted certain provisions in the Commission's order here, which could preclude some otherwise legal conduct, as fencing-in relief. This should not be interpreted as a finding that otherwise legitimate joint activity that involves ancillary price discussions thereby becomes illegal.

## CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I concur in the Commission's decision to issue the complaint and accord final approval to the consent order in this matter. Given the unusual factual context of the "invitation to collude" that forms the gravamen of the complaint, and the paucity of information that would otherwise appear in the final record of this decision, I feel compelled to explain the analysis underlying my vote.

The consent order in this matter settles charges that YKK solicited an agreement from its largest competitor whereby the firms mutually would refrain from offering free installation equipment with the sale of their zipper products. Such an agreement -- like an agreement mutually to forbear on pricing or any other significant dimension of competition -- is conduct "that appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'" and is, therefore, "inherently suspect" under the standards set forth in the Commission's decision in *Massachusetts Board of Registration in Optometry*.<sup>1</sup> An unambiguous solicitation of such an agreement is likewise "inherently suspect."<sup>2</sup> I find reason to believe that YKK invited such an anticompetitive agreement and that no plausible efficiency justification exists for this conduct.

YKK's invitation, however, arguably was the consequence of settling allegations of unlawful price discrimination under the Robinson-Patman Act.<sup>3</sup> Indeed, settlement of a competitor's claim of primary line injury for unlawful price discounting implies that the discounting will cease. This could suggest that prosecution of anticompetitive restraints must make an accommodation for such restraints imposed for the purpose of settling such a claim.

The context of private settlement, however, does not remove from antitrust scrutiny inherently suspect conduct that lacks an efficiency justification. In civil cases generally, a legitimate intent or

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<sup>1</sup> 110 FTC 549, 604 (1988).

<sup>2</sup> See *Quality Trailer Products Corp.*, Docket C-3403 (Nov. 5, 1992) (consent order based on invitation to agree to fix prices of certain axle products in violation of Section 5 of the FTC Act.).

<sup>3</sup> 15 U.S.C. 13a, *et seq.*

purpose would not justify a restraint that has unreasonably anti-competitive effects.<sup>4</sup> Moreover, even a good faith attempt to avoid Robinson-Patman liability will not excuse anticompetitive conduct that is clearly inconsistent with the broader purposes of the U.S. antitrust laws.<sup>5</sup>

In *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), the Supreme Court held that an exchange of information concerning current prices was *per se* unlawful, even though the stated purpose was to assure compliance with the “meeting competition” defense of Section 2(b) of the Robinson-Patman Act. In that case, the defendants asserted that exchanges of price information allowed each seller to verify that any discriminatory prices it offered were necessary to meet a competitor's price. The Court held, however, that the agreement was not necessary to avoid Robinson-Patman liability. Interseller verification was not necessary to invoke the defense; a “good faith belief, rather than an absolute certainty” that a price concession was being offered by a competitor was all that was necessary to invoke Section 2(b).<sup>6</sup> Noting the potential tension between the rationales underlying the Sherman and Robinson-Patman Acts, the Court held that the requirements of the Robinson-Patman Act should be construed so as to ensure its coherence with the Sherman Act.<sup>7</sup>

Similarly, the anticompetitive conduct in this matter cannot be justified by an attempt to comply with, or settle claims under, the Robinson-Patman Act. The evidence strongly suggests that YKK

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<sup>4</sup> See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 25-26 nn. 41 & 42 (1984); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372 (1933) (“[g]ood intentions will not save a plan otherwise objectionable”).

<sup>5</sup> *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 447-459 (1978); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953) (as a general rule, the Robinson-Patman Act should be construed so as to ensure its coherence with “the broader antitrust policies that have been laid down by Congress.”).

<sup>6</sup> 438 U.S. at 451. The Court held that an exchange of information concerning current prices could not satisfy the “controlling circumstances” test where the stated purpose was to assure compliance with the meeting competition defense of Section 2(b) of the Robinson-Patman Act. *Id.* Settlement of the Robinson-Patman Act dispute in this matter similarly is not a “controlling circumstance” that would excuse the anticompetitive behavior.

<sup>7</sup> 438 U.S. at 458 (citing *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953)).

issued an unambiguous invitation to one of its largest competitors to enter into an agreement mutually to discontinue a form of discounting that was an important dimension of competition between the firms. Although YKK's invitation arguably was intended as an offer of settlement to resolve claims of unlawful discounting under the Robinson-Patman Act, the invited agreement far exceeded the scope of what was reasonably necessary to achieve a settlement. The potential effects of such an invitation are unambiguously anti-competitive.

Assuming *arguendo* that YKK's threats of litigation were made in good faith,<sup>8</sup> the appropriate *quid pro quo* for the competitor's commitment to cease from engaging in the putative violation was YKK's commitment to forgo initiating litigation. YKK, however, went further, offering to discontinue an important form of discounting in exchange for the competitor's commitment to discontinue such discounting. This conduct poses a substantial threat to competition, particularly in cases such as this where the evidence strongly suggests that the relevant firms, acting in concert, have market power.<sup>9</sup>

Private settlement discussions of disputes between competitors alleging unlawful discounting do not provide the basis for a defense to anticompetitive conduct. On the contrary, the Supreme Court's analysis in *U.S. Gypsum* is more consistent with the view that such settlement discussions provide a context for anticompetitive behavior and should be carefully scrutinized.<sup>10</sup> Price-fixing is an obvious means for competitors to resolve allegations of unlawful discounting. Given the potential for abuse in this context, the

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<sup>8</sup> I do not find it necessary to determine whether YKK reasonably believed that its competitor was engaged in violations of the Act, since I believe that the solicitation far exceeds the scope of what was reasonably necessary to settle a legitimate Robinson-Patman Act claim.

<sup>9</sup> The complaint notes that YKK and Talon, the competitor that was the recipient of the unlawful solicitation account for more than 80% of zippers sold in the United States.

<sup>10</sup> The Court rejected even a limited Robinson-Patman compliance exception to unlawful exchanges of contemporaneous price information, finding that such an exception would "remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby." 438 U.S. at 458 (citing *Automatic Canteen*, 346 U.S. at 74).

Commission should make clear that competitors attempting to resolve claims of unlawful discounting under the Robinson-Patman Act understand that any settlement or attempted settlement must pass scrutiny under U.S. antitrust laws forbidding unreasonable restraints of trade, including Section 5 of the FTC Act.<sup>11</sup>

CONCURRING STATEMENT OF COMMISSIONER DENNIS A. YAO

I appreciate the concern that has prompted Commissioner Azcuenaga to dissent in this matter. I am disturbed by the possibility that this consent agreement may be misinterpreted to mean that a simple discussion settling alleged Robinson-Patman Act violations could lead to an FTC enforcement action alleging an “invitation to collude” actionable under Section 5 of the FTC Act. Price-cutting and alleged violations of the Robinson-Patman Act form two sides of the same coin because the Robinson-Patman Act seeks to forestall certain types of price discounts. Because charging that a competitor has violated the Robinson-Patman Act implies that, while the complainant is not discounting, the competitor is and must cease discounting or face a lawsuit, one could interpret a charge of a Robinson-Patman Act violation as an implicit “invitation” that the other side “agree” to end price discounting. Consequently, some might assume that discussions settling alleged Robinson-Patman Act violations could be construed by the FTC as an offer to agree to end price discounts and, hence, an “invitation to collude” by raising prices. To prevent this possible misconception from chilling efficient settlement discussions of legal disputes, it is necessary to explain in greater detail than usual why there is sufficient reason here to believe that YKK's behavior violated Section 5 of the FTC Act.<sup>1</sup>

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<sup>11</sup> A similar analysis would apply to purely private settlements of U.S. international trade law disputes. See U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations (1988), reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13,109, at Section 7 and Case 17.

<sup>1</sup> The Analysis of Proposed Consent Order to Aid Public Comment which the Commission has issued in this matter also provides a fuller description of this matter than is contained in the complaint and consent order. Because Analyses are not included in the bound final Commission decisions, I have appended the Analysis to my concurring statement for reference purposes.



Most importantly, the lawyer's actions here went beyond requesting that his client's competitor cease an allegedly unlawful practice of offering free installation equipment to customers buying chain, slider and other zipper components. YKK's lawyer, who is also a member of YKK's board of directors, privately met with a lawyer for YKK's competitor, Talon, and suggested that YKK would refrain from providing free equipment if Talon agreed to cease offering free equipment. Because Talon's provision of free equipment is a form of discounting, an agreement between Talon and YKK to cease this form of discounting would have violated the law.<sup>2</sup> Consequently, an offer to agree that both parties end price discounts, as happened here, should similarly be unlawful.<sup>3</sup> Absent an offer to agree on a factor such as price, however, a lawyer's *bona fide* threat of litigation standing alone should not violate Section 5, even if the logical result of that threat is that the other side would have to end a price discount in order to settle the dispute. To suggest otherwise could potentially chill settlement discussions in legal disputes.

The evidence strongly suggests that such a *quid pro quo* offer was made. Although at the meeting YKK's lawyer discussed his apparently good faith belief that Talon's offering of free installation equipment violated the Robinson-Patman Act and other trade regulation rules, his own written description of the meeting demonstrates that he went beyond discussing alleged violations of the law and offered a *quid pro quo*. Specifically, he recounts that he told Talon's lawyer that "it would be good for the industry if no one 'gave away' installation equipment" and, in the same sentence, that "YKK would consider it 'a plus ...' if Talon would continue its current policy of not giving free equipment to their customers."<sup>4</sup>

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<sup>2</sup> *United States v. United States Gypsum Co.*, 438 U.S. 422, 448-59 & n. 23 (1978) (agreement among competitors to verify actual prices is actionable under Section 1 even if supposedly done to avoid Robinson-Patman Act violations).

<sup>3</sup> See, e.g., *Quality Trailer Products Corp.*, Docket C-3403 (Nov. 5, 1992) (FTC complaint charged that respondent violated Section 5 by making an unambiguous offer to fix prices of certain axle products).

<sup>4</sup> (ellipsis in original). At an earlier point in the meeting, Talon's attorney had informed YKK's attorney that Talon was no longer offering free installation equipment.

Further buttressing this case is the fact that this offer of a *quid pro quo* is not the product of disputed deposition testimony between competitors, but rather is described in explicit detail in a document written by YKK's lawyer. While such documentary evidence -- because of its rarity -- is not necessary in order to find clear evidence of an unlawful offer, it serves as a powerful counter to any argument that the evidence here is ambiguous. Finally, these two companies may have market power -- the complaint notes that YKK and Talon together account for approximately 82 percent of all zippers manufactured and/or sold in the United States. Market power increases the incentives of the parties to seek to fix prices (since collusion is more likely to be successful when the parties have market power) and thus increases the probability of an anticompetitive motive on the part of the offeror, further reducing any ambiguity in the evidence concerning the offer.

Although the Commission must take care in cases like this to avoid any misimpression that mere settlement discussions could lead to a Section 5 action, the Commission cannot abdicate its responsibility to challenge an unlawful invitation to collude solely because it occurs during an otherwise lawful conversation. The evidence described above shows that YKK's lawyer, a member of its board of directors, went beyond discussing alleged violations of the Robinson-Patman Act and offered Talon a *quid pro quo* at the meeting. Hence, I find that there is reason to believe that, in doing so, YKK violated Section 5.

#### Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from YKK (U.S.A.) Inc.

The proposed consent order has been placed on the public record for 60 days for reception of comments by interested persons. Comments received during this period will become part of the public record. After 60 days, the Commission will again review the agreement and the comments received and will decide whether it

should withdraw from the agreement or make final the agreement's proposed order.

The complaint alleges that Talon, a competitor of YKK (U.S.A.) in the sale of zippers, was engaged in a form of price discounting, by offering free installation equipment along with its sales of zipper components. An attorney representing YKK complained in a letter to the President of Talon about such offers, characterizing them as "unfair and predatory" sales tactics. At a subsequent meeting between attorneys for the two companies, YKK's attorney then attempted to get Talon to cease this discounting. Specifically, the complaint alleges that, at a meeting on October 21, 1988, YKK's attorney characterized Talon's discounting as unlawful and asked an attorney for Talon to urge Talon to desist from offering free installation equipment. However, YKK's attorney also told Talon's attorney that YKK could lawfully meet Talon's price discounts.

The Commission has reason to believe that the attorney representing YKK went beyond a demand that Talon cease illegal conduct or an offer that YKK would refrain from taking legal action against Talon if Talon ceased illegal conduct. Rather, the Commission has reason to believe that the attorney representing YKK offered to Talon a *quid pro quo* that YKK would refrain from providing free equipment if Talon would. The complaint further alleges that an agreement between Talon and YKK to cease discounting would have constituted an unreasonable restraint of competition. Finally, the Commission has reason to believe that YKK's invitation to Talon to enter into an agreement by which both parties would refrain from offering free equipment to customers violates Section 5 of the Federal Trade Commission Act. The complaint does not allege that Talon accepted YKK's offered agreement to cease discounting.

YKK (U.S.A.) Inc. has signed a consent agreement to the proposed consent order. The order prohibits YKK (U.S.A.) Inc. from requesting, suggesting, urging, or advocating that any competitor raise, fix or stabilize prices or price levels, cease providing free equipment or other discounts, cease providing any services or products or engage in any other pricing action. The proposed consent

order, also prohibits YKK (U.S.A.) Inc. from entering into, attempting to enter into, adhering to, or maintaining any combination, conspiracy, agreement, understanding, plan or program with any competitor to fix, raise, establish, maintain or stabilize prices, price levels or service levels. The order, however, permits YKK to request that a competitor refrain from engaging in illegal conduct. The order's provisions apply to zippers and related products, and installation equipment. Zippers and related products are defined as slide fasteners, including, but not limited to, fastener chains, sliders and separating end components.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

IN THE MATTER OF  
GRIFFIN BACAL, INC.

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

*Docket C-3446. Complaint, July 2, 1993--Decision, July 2, 1993*

This consent order prohibits, among other things, a New York advertising agency from misrepresenting any performance characteristic of any toy it promotes. In addition, in any demonstrations or tests used in the advertising for the toys, the respondent is prohibited from knowingly misrepresenting that the demonstration or test proves or confirms any material feature of the toy.

*Appearances*

For the Commission: *Rosemary Rosso* and *Toby M. Levin*.

For the respondent: *Peter Kadzik, Dickstein, Shapiro & Morin*,  
Washington, D.C.

COMPLAINT

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

PARAGRAPH 1. Respondent is a New York corporation, with its principal office and place of business at 130 Fifth Avenue, New York, New York.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Hasbro, Inc., and prepared and disseminated advertisements to promote the sale of Battle Copter toy aircraft vehicles.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for the Battle Copter aircraft vehicle, including but not necessarily limited to the attached Exhibit A. These advertisements contain the following statements and depictions:

A. Exhibit A, a television advertisement, contains depictions of children launching and playing with toy Battle Copters and scenes of Battles Copters hovering and flying in the air, including the following scenes:

1. One sequence depicts two Battle Copters hovering together, approaching the viewer. The ad cuts to a scene showing a boy launching a Battle Copter vertically up and out of view. The final scene in this sequence shows what appears to be the just-launched Battle Copter traveling toward the viewer. In this scene, the audio portion of the ad states that Battle Copters “really fly high.”

2. A second sequence depicts a boy launching a Battle Copter up and out of view. The sequence then cuts to a scene depicting two Battle Copters entering the screen from opposite sides of the frame and flying across the screen to the center where they collide.

3. A third sequence shows a boy launching a Battle Copter into the air. The segment then cuts to a fantasy scene showing two actors engaged in battle while they hover in life-sized helicopters, until one helicopter is hit and explodes. The sequence then returns to a non-fantasy scene showing two Battle Copters approaching each other and colliding in mid-air in the center of the screen.

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that the demonstrations in the television advertisements of the Battle Copter

toys hovering and flying in the air were unaltered and that the results shown accurately represent the performance of actual, unaltered Battle Copter toys under the depicted conditions.

PAR. 6. In truth and in fact, the demonstrations in the television advertisements of the Battle Copter toys hovering and flying in the air were not unaltered and the results shown did not accurately represent the performance of actual, unaltered Battle Copter toys under the depicted conditions. Among other things, the Battle Copter toys depicted in the advertisements were suspended from monofilament wire attached to poles, which were moved by humans to create the hovering and flying effect, and battery-operated motors were installed to make their rotors spin around while they were being held in place or moved along on the monofilament wire attached to poles. Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that the Battle Copter toys can hover and can fly in a sustained and directed manner.

PAR. 8. In truth and in fact, Battle Copter toys cannot hover and are not able to fly in a sustained and directed manner. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

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

Complaint

116 F.T.C.

EXHIBIT A

**RADIO TV REPORTS**  
41 East 42nd Street New York, NY 10017 (212) 309-1400

PRODUCT: G.I. JOE  
PROGRAM: THE LETSONS 2/18/91  
#WOR: NEW YORK 7:28AM

1 CHORUS: G.I. Joe.

2 MUSIC MAN: Need a lift Duke?

3 DUKE: Thanks.

4 Look, Cobra's got the plasmator!

5 ANNCR: But here comes G.I. Joe Battle-Copters. Zip-rip copters that really fly high.

6 DUKE: Perfect for dropping in unexpected. ANNCR: Watch out Duke!

7 Cobra's got Battle-Copters too!

8 ANNCR: Cobra and G.I. Joe Battle-Copters can work with any figure. CHORUS: G.I. Joe.

9 MAN SIMCS: A real American hero. CHORUS: G.I. Joe.

10 ANNCR: G.I. Joe and Cobra Battle-Copter sold separately with figure.

11 DUKE: I hate when this happens!

12 CHORUS: Go Joe! (MUSIC OUT)

Exhibit A

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

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

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 Griffin Bacal, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 130 Fifth Avenue, in the City of New York, State of New York;
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

## I.

*It is ordered,* That respondent Griffin Bacal 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 advertising, offering for sale, sale or distribution of any toy, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. In connection with any advertisement depicting a demonstration, experiment or test, making any representation, directly or by implication, that the demonstration, picture, experiment or test depicted in the advertisement proves, demonstrates or confirms any material quality, feature or merit of any toy when such demonstration, picture, experiment or test does not prove, demonstrate or confirm the representation for any reason, including but not limited to:

1. The undisclosed use or substitution of a material mock-up or prop;
2. The undisclosed material alteration in a material characteristic of the advertised toy or any other material prop or device depicted in the advertisement; or
3. The undisclosed use of a visual perspective or camera, film, audio or video technique;

that, in the context of the advertisement as a whole, materially misrepresents a material characteristic of the advertised toy or any other material aspect of the demonstration or depiction.

*Provided, however,* that notwithstanding the foregoing, nothing in this order shall be deemed to otherwise preclude the use of fantasy segments or prototypes which use otherwise is not deceptive.

*Provided further,* however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know that the

demonstration, experiment or test did not prove, demonstrate or confirm the representation.

B. Misrepresenting, directly or by implication, any performance characteristic of any Battle Copter toy or any other toy.

## II.

*It is further ordered,* That respondent Griffin Bacal, Inc. shall distribute a copy of this order to each of its operating divisions and to each officer, agent and personnel responsible for the preparation, review or placement of advertising, or other materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

## III.

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

A. Any and all videotapes, in complete and unedited form, and any and all still photographs taken during the production of any advertisement depicting a demonstration, experiment, or test; and

B. Any and all affidavits or certifications submitted by an employee, agent or representative of respondent to a television network or to any other individual or entity, other than counsel for respondent, which affidavit or certification affirms the accuracy or integrity of a demonstration or demonstration techniques contained in an advertisement.

In addition, respondent, its successors and assigns, for three (3) years after the date of service of this order, shall maintain and, within thirty (30) days of any written request, make available to the

Federal Trade Commission for inspection and copying all signed statements obtained pursuant to section II, above.

IV.

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

V.

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