IN THE MATTER OF

COLLINS BUICK, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TRUTH IN LENDING ACT, THE CONSUMER LEASING ACT, REGULATION Z AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3426. Complaint, May 10, 1993--Decision, May 10, 1993

This consent order prohibits, among other things, a Kentucky auto dealership and its principal operating officer from misrepresenting -- in advertising any extension of consumer credit or any consumer lease -- the financing or other terms of the advertised transaction, and from violating certain provisions of the Truth in Lending Act or the Consumer Leasing Act.

Appearances

For the Commission: *David Medine, Carole L. Reynolds* and *Beverly R. Childs.*

For the respondents: *Randall Gardner, Barowitz & Goldsmith,* Louisville, KY.

COMPLAINT

The Federal Trade Commission, having reason to believe that Collins Buick, Inc., a corporation, and William Kevin Collins, individually and as an officer of the corporation, hereinafter sometimes referred to as respondents, have violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1661, as amended, and its implementing Regulation Z, 12 CFR 226, the Consumer Leasing Act ("CLA"), 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, and the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint and alleges:

PARAGRAPH 1. Collins Buick, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Kentucky, with its principal place of business located at 4120 Bardstown Road, Louisville, Kentucky.

PAR. 2. William Kevin Collins is an individual and an officer and director of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is 4120 Bardstown Road, Louisville, Kentucky.

PAR. 3. In the ordinary course and conduct of their business, and at least since January 1, 1991, respondents have been engaged in the dissemination of advertisements that promote, directly or indirectly, credit sales and other extensions of other than open end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit," are defined in the TILA and Regulation Z. In the ordinary course and conduct of their business, and at least since January l, 1991, respondents have been engaged in the dissemination of advertisements that promote, directly or indirectly, consumer leases, as the terms "advertisement," and "consumer lease," are defined in the CLA and Regulation M.

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

COUNT I

PAR. 5. Respondents, in the course and conduct of their business, in numerous instances including but not limited to Exhibits A and B, have disseminated or caused to be disseminated advertisements that state an initial, low monthly payment and an initial number of payments. Respondents' advertisements fail to disclose that the financing to be signed at purchase requires the consumer to make a substantial balloon payment, or a second series of installment payments, at the conclusion of the initial payments.

PAR. 6. Respondents' aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT II

PAR. 7. Respondents, in the course and conduct of their business, on numerous occasions have disseminated, or caused to be disseminated, advertisements that state an initial number and amount of payments required to reply the indebtedness, but fail to state the terms of repayment, by failing to disclose the amount of the final, balloon payment, or the number and amount of the second series of installment payments, required at the end of the initial payments, based on the financing to be signed at purchase.

PAR. 8. Respondents' aforesaid practice violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT III

PAR. 9. Respondents, in the course and conduct of their business, on numerous occasions have disseminated, or caused to be disseminated, advertisements that state the amount or percentage of any down payment, the number of payments or period of repayment, or the amount of any payment, but fail to state all of the terms required by Regulation Z, as follows: the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate, using that term or the abbreviation "APR."

PAR. 10. Respondents' aforesaid practice violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT IV

PAR. 11. Respondents, in the course and conduct of their business, on numerous occasions have disseminated, or caused to be

disseminated, advertisements that state the amount of any payment, the number of required payments, or that any or no down payment or other payment is required at consummation of the lease, but fail to state all of the terms required by Regulation M, as applicable and as follows: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the number, amount, due dates or periods of scheduled payments and the total of such payments under the lease; and a statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price).

PAR. 12. Respondents' aforesaid practice violates Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c).

EXHIBIT A

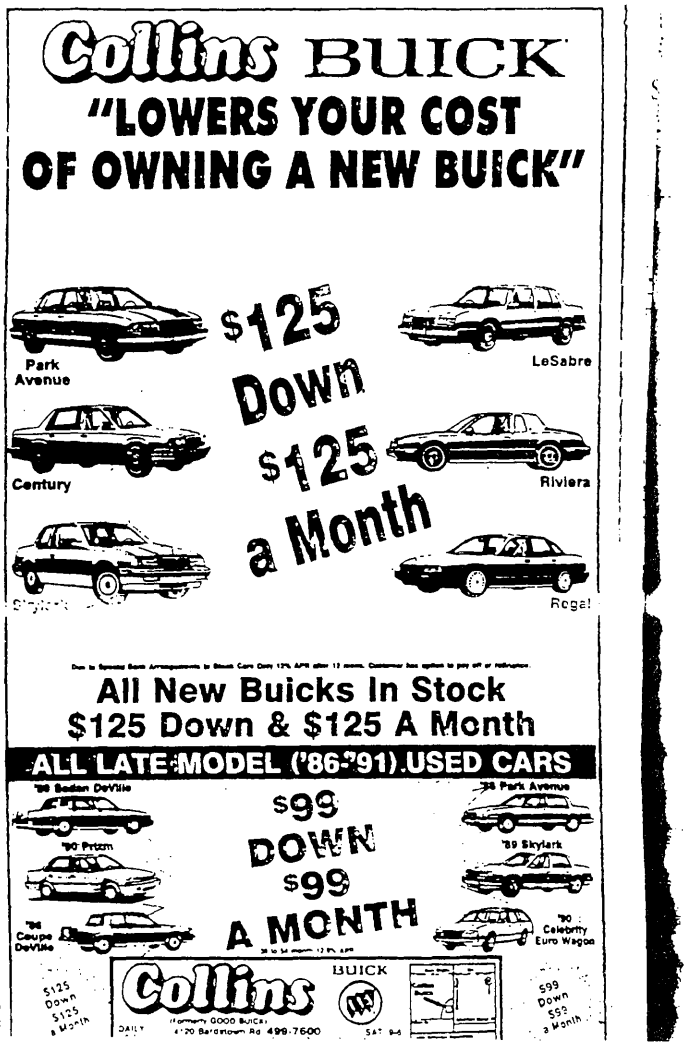
Collins BUICK
"LOWERS YOUR COST OF OWNING A NEW BUICK"
Park Avenue
LeSabre
$125 Down $125 a Month
Century
Riviera
Regal
All New Buicks In Stock
$125 Down & $125 A Month
ALL LATE-MODEL ('86-'91) USED CARS
$99 DOWN $99 A MONTH
Collins BUICK

EXHIBIT B


MORE THAN YOU EXPECT!
CAR Show
Kentucky Fairgrounds
April 4-7
1991 PARK AVE.
NOW WAS $26,000.00
$21,900
19 To Choose From
Free
JAMAICA VACATION
Enjoy a week on the beach in beautiful Jamaica. Airfare from Atlanta & accommodations included with any new car purchase.
$149.00 Per Month
Any Used Car In Stock
Over 200 Cars To Choose From
1986-1991 Models
Hurry For Best Selection
BEST OF SHOW
1990 REGAL LTD.
Demo
SAVE THOUSANDS
1990 SKYLARKS
Loaded
$8995
8 To Choose From
Collins
Open Daily
9AM to 8PM
Saturday 9AM to 6PM
Sunday Noon to 6PM
BUICK
2 Miles from the Watterson on Bardstown Road and 5 miles from the Snyder Freeway
499-7600
JUST 60 SECONDS FROM BILL COLLINS FORD
COLLINS BUICK

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 complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge the respondents with violation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* and its implementing Regulation Z, 12 CFR 226, the Consumer Leasing Act, 15 U.S.C. 1667 *et seq.* and its implementing Regulation M, 12 CFR 213 and the Federal Trade Commission Act, 15 U.S.C. 45 *et seq.*; and

The respondents 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 considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts and Regulation, 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 Collins Buick, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Kentucky, with its principal office and place of business located at 4120 Bardstown Road, Louisville, Kentucky.

2. Respondent William Kevin Collins is an individual and officer and director of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is 4120 Bardstown Road, Louisville, Kentucky.

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

ORDER

I.

It is ordered, That respondent Collins Buick, Inc., a corporation, its successors and assigns and its officers, and William Kevin Collins, individually and as an officer of the corporate respondent, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote directly or indirectly any extension of consumer credit, as "advertisement," and "consumer credit" are defined in the TILA and Regulation Z, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the terms of financing the purchase of a vehicle, including but not limited to whether there may be a balloon payment or second series of installment payments, and the amount of any balloon payment or the number and amount of any second series of installment payments.

B. Stating any number or amount of payment(s) required to repay the debt, without stating accurately, clearly and conspicuously, all of the terms required by Regulation Z, as follows:

(1) The amount or percentage of the down payment;

(2) The terms of repayment, including the amount of any balloon payment, or the number and amount of any second series of installment payments, and

(3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as more fully set out in Section 226.24(c) of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 CFR 226.24(c)).

C. Stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without stating, clearly and conspicuously, all of the terms required by Regulation Z, as follows:

(1) The amount or percentage of the down payment;

(2) The terms of repayment, and

(3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c)).

D. Stating a rate of finance charge without stating the rate as an "annual percentage rate" using that term or the abbreviation "APR," as required by Regulation Z. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b)).

E. Failing to state only those terms that actually are or will be arranged or offered by the creditor, in any advertisement for credit that states specific credit terms, as required by Regulation Z. (Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(a) of Regulation Z, 12 CFR 226.24(a)).

II.

It is ordered, That respondent Collins Buick, Inc., a corporation, its successors and assigns and its officers, and William Kevin Collins, individually and as an officer of the corporate respondent, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote or assist directly or indirectly any consumer lease, as "advertisement," and "consumer lease" are defined in the CLA and Regulation M, do forthwith cease and desist from:

A. Stating the amount of any payment, the number of required payments, or that any or no down payment or other payment is required at consummation of the lease, unless all of the following items are disclosed, clearly and conspicuously, as applicable, as required by Regulation M:

(1) That the transaction advertised is a lease;

(2) The total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments are required;

(3) The number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease;

(4) A statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price), and

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lessee has such liability.

(Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c)).

B. Stating that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases or will lease such property at those amounts or terms, as required by Regulation M.

(Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(a) of Regulation M, 12 CFR 213.5(a)).

III.

It is further ordered, That respondents, their successors and assigns shall distribute a copy of this order to any present or future officers, agents, representatives, and employees having responsibility with respect to the subject matter of this order and that respondents, their successors and assigns shall secure from each such person a signed statement acknowledging receipt of said order.

IV.

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

V.

It is further ordered, That for five years after the date of service of this order respondents, their successors and assigns shall maintain and upon request make available all records that will demonstrate compliance with the requirements of this order.

VI.

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

IN THE MATTER OF

PROMODES, S.A., ET AL.

Docket 9228. Show Cause Order, May 12, 1993

ORDER TO SHOW CAUSE

On May 17, 1990, the Federal Trade Commission issued an order against Promodes, S.A. and Red Food Stores, Inc. (collectively, "respondents") in Docket No. 9228. Paragraph II of the order, among other things, requires respondents to divest six specific supermarkets in the Chattanooga, Tennessee Metropolitan Statistical Area, by March 1, 1991, to an acquirer or acquirers that receives the prior approval of the Commission. Paragraph II of the order also requires respondents to maintain the viability and marketability of the supermarkets pending divestiture. Paragraph III of the order provides for the appointment of a trustee to divest the supermarkets in the event respondents have not accomplished the divestitures mandated by paragraph II of the order in a timely manner.

Respondents did not divest the supermarkets by March 1, 1991, as required by paragraph II of the order. On January 6, 1992, the Commission appointed Neill A. Thompson, III, as trustee pursuant to paragraph III of the order. Since his appointment, Mr. Thompson has divested one supermarket pursuant to the order and has filed an application for Commission approval to divest another. By letter dated May 12, 1993, the Commission extended the trustee's time to divest certain of the supermarkets covered by the order, but did not extend the time to divest the supermarkets described in paragraphs II(A)(1) ("the Lee Highway store") and II(A)(2) ("the Fort Oglethorpe store") of the order.

The trustee made all reasonable efforts to obtain offers for the Lee Highway and Fort Oglethorpe stores. Despite these efforts, he was unable to divest the supermarkets. It now appears to the Commission that it is extremely unlikely that the Lee Highway and

Fort Oglethorpe stores can be divested within a reasonable time. Certain structural problems with the building housing the Lee Highway store make it unattractive to potential acquirers. These problems arose subsequent to the order and are beyond the control of the respondents to correct. Although the trustee's compliance reports indicate that at one time there was some interest in purchasing this store, that interest has dissolved in large part due to the structural problems of the building that arose subsequent to the order.

Also subsequent to the order, new supermarkets have opened in the immediate vicinity of the Fort Oglethorpe store, resulting in a substantial decrease in its sales and creating considerable doubt about its future viability as a supermarket. In addition, no potential acquirer has shown a specific interest in this supermarket.

The order does not expressly provide for the termination of the respondents' obligation under paragraph II to divest in the event that the trustee appointed pursuant to paragraph III is not able to divest all the supermarkets. Accordingly, respondents continue to be obligated to divest the supermarkets and to maintain the supermarkets pending divestiture. However, the record in this case establishes that it is extremely unlikely that the required divestiture of the Lee Highway and Fort Oglethorpe stores can be accomplished within a reasonable time, notwithstanding the trustee's good faith efforts to divest the stores. The costs to respondents of further divestiture efforts therefore are an inequitable and unbargained-for element of the consent order.[1]

In view of the foregoing, the Commission has determined in its discretion that it is in the public interest to reopen the proceeding in Docket No. 9228 and modify the order in this case by setting aside paragraphs II(A)(1) and II(A)(2).

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[1] We distinguish the costs imposed on a respondent by continued attempts to comply with an order requirement made ineffectual by subsequent events from the kinds of costs ordinarily imposed by an order. For example, certain definable and predictable costs are always associated with a respondent's compliance obligations under a consent order. These costs are accepted by the respondent as part of the settlement of the case.

Accordingly, the Commission hereby issues this Order to Show Cause why the proceeding in Docket No. 9228 should not be reopened to modify the order as described above.

In accordance with Section 3.72 of the Commission's Rules of Practice and Procedure, 16 CFR 3.72, respondents have thirty (30) days from the date of service of this order to file an answer to this Order to Show Cause or be deemed to have accepted the action proposed herein.

IN THE MATTER OF

KKR ASSOCIATES, L.P., ET AL.

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

Docket C-3253. Consent Order, June 13, 1989--Modifying Order, May 13, 1993

This order denies in part and grants in part a petition to reopen the proceeding and to modify the Commission's consent order issued June 13, 1989 (111 FTC 670) by requiring only notification to the Commission, instead of prior approval, for acquisitions of relevant products, if respondents are not at that time engaged in that relevant product market. The Commission concluded that changed conditions of fact warranted reopening and modifying the order. However, the respondents' request to eliminate entirely the prior approval clause was denied.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST TO REOPEN AND MODIFY ORDER ISSUED JUNE 13, 1989

On January 13, 1993, respondents KKR Associates, L.P., et al., ("KKR")[1] filed a Petition to Reopen Proceedings and Modify Consent Order ("Petition") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. Respondents request that the Commission delete paragraph V of the order in Docket No. C-3253 ("order") that became final on June 22, 1989. Paragraph V prohibits respondents, for a ten-year period, from acquiring without prior Commission approval, firms that produce or hold branded trademarks related to the relevant products. Alternatively, respondents request that paragraph V of the order be

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[1] The Petition was filed by all the named respondents to the order in Docket No. C-3253: KKR Associates, L.P., a limited partnership; Kohlberg Kravis Roberts & Co., L.P., a limited partnership; RJR Nabisco, Inc. (successor by merger to RJR Acquisition Corporation), a corporation; Whitehall Associates, L.P. (formerly known as RJR Associates, L.P.), a limited partnership; RJR Nabisco Holdings Group, Inc. (formerly known as RJR Holdings Corp.), a corporation; Henry R. Kravis, a natural person; Robert I. MacDonnell, a natural person; Michael W. Michelson, a natural person; Paul E. Raether, a natural person; and George R. Roberts, a natural person.

modified to include only packaged nuts as a relevant product. In conjunction with that alternative, respondents request that a "poison pill" provision be added that would allow them to acquire, without the Commission's prior approval, an interest in or assets of a company not involved in the production or marketing of packaged nuts at the time of respondents' acquisition announcement, even if subsequently the acquisition candidate acquires an interest in another company involved in the production or marketing of packaged nuts. If such a situation occurred, respondents' proposed modification would, require them to hold separate and then divest the packaged nut-related assets of the subsequently acquired company. Respondents also request such other lesser relief as appears just and proper to the Commission.

For the reasons discussed below, the Commission has determined that respondents have shown that changed conditions of fact require reopening and modifying the order. The Commission has determined to grant a modification of the order more limited than that requested by respondents. Specifically, we will require only notification, instead of prior approval, for acquisitions of relevant products if respondents are not at that time engaged in that relevant product market. The Commission has also determined that respondents have not at this time demonstrated that it is in the public interest to modify the order to include a poison pill provision.

The Complaint And Order

The complaint alleged that KKR's acquisition of RJR Nabisco would substantially lessen competition in the United States in three branded food product markets -- packaged nuts, shelf-stable oriental foods (including shelf-stable oriental entrees, noodles, vegetables and soy sauce) ("shelf-stable oriental foods"), and catsup -- in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45. The order settled those charges by requiring KKR to divest assets and businesses, of either RJR or Beatrice/Hunt-Wesson, associated with the development, production, distribution and sale, of branded packaged nuts, shelf-stable

oriental foods and catsup.[2] On October 3, 1989, the Commission approved the divestiture of the Chun King business of Nabisco to a joint venture between Yeo Hiap Seng Ltd. and Fullerton (Overseas) Holdings Private Ltd. On October 5, 1989, the Commission approved the divestiture of the Fisher Nut division of Beatrice/Hunt-Wesson to The Procter & Gamble Co. On December 28, 1989, the Commission approved the divestiture of RJR Nabisco's Del Monte Corporation processed food divisions (including catsup) to DMPF Holdings Corp. The divestitures were made in a timely manner.

For a period of ten years until June 22, 1999, paragraph V of the order prohibits each respondent from acquiring, without prior Commission approval, any interest in any company that is engaged in the production of any relevant product, or that owns or licenses a branded trademark used in connection with the sale of any relevant product. Paragraph V provides that prior Commission approval is not required for (1) acquisitions by the corporate respondents of used equipment for not more that $500,000 and (2) acquisitions by the individual and partnership respondents, for investment purposes only, of an interest of not more than 5 percent in any concern.

Respondents' Petition

Respondents assert in their Petition that reopening and modification are required by changed conditions of fact and public interest considerations.[3] The change of fact alleged by respondents is KKR's sale of the Beatrice Company to ConAgra, Inc. Thus, respondents assert, when the Order was entered, KKR controlled both RJR Nabisco and Beatrice/Hunt Wesson, which created an overlap in each of the relevant product markets. As required by the order, respondents divested certain assets defined in the order used in manufacturing relevant products. Subsequently, respondents

[2] Paragraph I.p. of the order defines "relevant products" as "branded: catsup/ketsup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts."

[3] Respondents do not assert any changed conditions of law.

divested absolutely and completely any continuing interest in Beatrice/Hunt Wesson. Petition at 5-6. Because they no longer have an interest in Beatrice/Hunt Wesson, respondents claim that there has been a change in circumstances requiring a reopening and modification of the order.

Respondents also assert that reopening and modification are warranted by public interest considerations. According to the respondents, the prior approval requirement of paragraph V of the order unfairly burdens KKR's merchant banking activities and burdens competition in financial markets. Petition at 9-11. Respondents assert that public interest concerns dictate that the prior approval provision be removed because it is a barrier to the free flow of capital. *Id.* at 11. Respondents claim that the public disclosure and delay inherent in the prior approval process effectively prevent KKR from acquiring any interest in any company that has any involvement in manufacturing a relevant product or is a licensor or licensee of a trademark used in connection with a relevant product. *Id.* at 10.

Standards For Reopening And Modification

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require such reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. Louisiana-Pacific Corp., Docket No. 4C-2956, Letter to John C. Hart (June 5, 1986) ("L-P Letter") at 4.[4]

The Commission may modify an order when, although changed circumstances would not require reopening, the Commission

[4] *Cf United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that "[a] decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification." *Id.*

determines that the public interest requires such action. *Id.* Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *See* Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983) ("Damon Letter") at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.[5] If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.[6]

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[5] The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). *See also* Section 2.51(b) of the Commission's Rules of Practice (requiring affidavits in support of petitions to reopen and modify).

[6] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support finality of orders).

Respondents Have Demonstrated Changed Conditions Of Fact that Require Reopening And Modifying The Order

Respondents assert that KKR's divestiture of its interest in Beatrice/Hunt-Wesson constitutes a change in circumstances that requires reopening and modifying the order. Today, having completed the divestiture requirements of the order and having sold Beatrice/Hunt-Wesson, KKR no longer exercises control over any firm engaged in the manufacture and sale of two of the relevant products under the order: branded catsup and branded shelf-stable oriental foods. KKR currently competes in only one relevant product market, branded packaged nuts. Respondents have demonstrated that KKR's exit from the branded catsup and shelf-stable oriental foods markets eliminates the need for the prior approval provision as it is currently written, because an acquisition in either of these markets could not give rise to a competitive overlap.

KKR no longer owns interests or assets in the shelf-stable oriental foods or catsup markets. There appears, therefore, to be little need for the Commission to review KKR's first acquisition back into either of these relevant product markets, because at time of that acquisition respondents would not be competing in that market. KKR's first acquisition back into a relevant product market from which it had exited would simply substitute one seller for another without affecting market concentration or otherwise affecting competition. Although at the time the order was entered the remedial purpose of the prior approval provision for future acquisitions in the relevant markets was clear, respondents' subsequent exit from two of these markets eliminates the need to review their re-entry. Accordingly, respondents have shown a change of fact that requires reopening the order as it is currently written.

Having determined to reopen the order, the Commission next considers whether the order should be modified and, if so, how. In this matter, respondents' exit, and current absence, from the market

does not support setting aside the prior approval provision in its entirety. Rather, it is appropriate to modify the order only with respect to respondents' re-entry into a relevant market. Respondents' "exit" from two of the relevant markets may be temporary.[7] The Commission, therefore, has an interest in monitoring respondents' acquisitions in the relevant product markets from which they have exited so long as there is some likelihood that they will again be competitors in the relevant product markets. If respondents re-enter the branded catsup market or branded shelf-stable oriental foods market, they will return to the situation contemplated when the order was issued; the Commission will continue to have a significant enforcement interest in approving any subsequent acquisition of firms that produce, or have branded trademarks related to, these relevant products. Because the Commission has already concluded that there is a need to review increases in concentration in the order's relevant product markets, a prior approval for a second acquisition of such assets would be appropriate.[8]

A modification of the order allowing respondents to re-enter a market without the Commission's prior approval recognizes that the prior approval requirement is a limitation on KKR's investment

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[7] Respondents cite *In the Matter of Union Carbide Corporation*, Order Modifying Consent Order, September 28, 1977, 108 FTC 184 (1986), to support the requested modification on a the basis of changed conditions. In Union Carbide, respondent requested that the Commission modify the order to delete welding products and gas welding apparatus as products covered by the prior approval provision because respondents had divested all such assets and intended to stay out of the welding business. *Id.* at 188. The Commission modified the Union Carbide order because respondents had clearly exited a business covered by the order and had demonstrated that they had no intention of re-entering the business. KKR, in contrast, has not definitively stated an intention to remain out of these markets. Indeed, KKR's desire to be able to re-enter these markets unfettered by the order is the gravamen of its Petition.

[8] Prior approval provisions are included in orders to ensure prior Commission review of future acquisitions in markets where potential anticompetitive effects have been identified. In the instant case, once respondents have re-entered a relevant product market, the Commission's interest in reviewing future acquisitions in that market re-emerges. In view of these considerations, and in light of the modifications ordered herein, respondents' Petition fails to demonstrate that deletion of paragraph V of the order in its entirety would be in the public interest.

activities.[9] Although the costs imposed by the order were contemplated, it was not contemplated that these costs would apply to acquisitions of interests in a market in which respondents did not then compete. A prior approval provision in a Commission order contemplates that a respondent will continue to do business in the relevant market. A respondent's subsequent exit from the market eliminates the need for prior approval with respect to a re-entry acquisition. Under these circumstances, modifying the order is warranted to enable respondents to re-enter a relevant product market from which they have exited.[10] Consequently, the order shall be modified to permit such re-entry, with notice to the Commission but without the Commission's prior approval. The notice requirement is appropriate to ensure that the Commission has the information necessary to enforce the prior approval provision for acquisitions subsequent to the re-entry.

Respondents Have Not Demonstrated An Affirmative Need Under The Public Interest Standard That Would Justify Adding A "Poison Pill" Provision To The Order

Respondents' Petition requests the addition of a "poison pill" provision. Respondents argue that a target of a hostile tender offer by respondents could defeat that offer simply by acquiring an interest in an overlapping product, such as a small regional nut packager. Once such an overlap was established, KKR would need prior Commission approval in order to pursue the tender offer. The

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[9] Respondents have indicated, based on their experience in the merchant banking field, that KKR's investment activities as individuals and as a merchant bank are significantly limited because billions of dollars cannot be invested in the relevant products without the Commission's prior approval. Respondents argue that when they have exited a market, a prior approval requirement only hinders their ability as a merchant banking firm to invest money in financial markets without obstacles. The unmodified order, according to respondents, will not promote competition, but will only cause a burden, or inefficiency, on financial markets.

[10] Respondents have not exited the branded packaged nuts market. Therefore, the modification would not alter respondents' obligation to obtain the Commission's prior approval for an acquisition of packaged nuts assets unless and until respondents have exited that relevant product market.

public disclosure and delay inherent in the prior approval process, respondents argue, are likely to prevent KKR's tender offer from succeeding. In this manner, the Petition states, the order could have the unintended and undesirable effect of becoming a weapon for frustrating any possible investment by KKR. *See* Petition at 10.

Respondents' Petition, however, provides insufficient support for its assertion that KKR's future investment efforts' could be frustrated by such defensive acquisitions. Respondents have not expressly identified any actual KKR acquisitions that may have been frustrated by the poison pill strategy described. Nor have respondents offered any specific facts to demonstrate that the poison pill strategy is nonetheless a realistic basis of concern for the future. Indeed, respondents' supporting affidavit does not directly address the poison pill aspect of their Petition. Accordingly, respondents have failed to carry their burden of demonstrating an affirmative need under the public interest standard to warrant reopening the order and adding a poison pill provision.[11]

The Commission's denial of this portion of respondents' Petition is, of course, without prejudice to renewed consideration upon a more complete showing. Should respondents pursue this relief through a second petition, the analysis might be aided by a presentation of facts tending to show that the poison pill defensive strategy is not only hypothetically possible, but also a realistic basis for concern. Such a showing could include facts as to the time strictures applicable to KKR's investment undertakings; facts concerning defensive strategies adopted by acquisition targets in the past; and facts relating to the practical ability of acquisition targets

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[11] Respondents also provide insufficient support with respect to another proposed alternative--limitation of the order's prior approval requirement to permit acquisitions of firms deriving *"de minimis"* revenues from the manufacture of packaged nuts. *See* Petition at 3 n.1. The Petition provides no information demonstrating that (i) the applicability of the order's prior approval requirement to the acquisition of small packaged nut manufacturers results in any threshold injury to respondents or (ii) the reasons favoring establishment of *de minimis* exception at any particular level outweigh the reasons for continuing to impose the prior approval requirement.

to identify and acquire interests that would trigger a prior approval requirement under the order.[12]

Conclusion

Accordingly, *it is ordered*, that this matter be reopened and that the order in Docket No. C-3253 be, and it hereby is, modified, as of the effective date of this order.

Paragraph V of the order is rewritten and modified as follows:

It is further ordered, That:

A. For a ten (10) year period commencing on the date this order becomes final, each respondent (but in the case of an individual respondent, only so long as he remains a general partner, officer, director, or employee of a nonindividual respondent) shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly through subsidiaries, partnerships or otherwise, assets used or previously used in (and still suitable for use in), or any interest in, or the whole or any part of the stock or share capital of, any company that is engaged in the production of any relevant product, or that owns or licenses a branded trademark used in connection with the sale of any relevant product.

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[12] In support of their request, respondents cite *Atlantic Richfield Co.*, 55 Fed. Reg. 51,963 (1990), a Commission consent order that included a poison pill provision. The denial of respondents' request for a poison pill provision does not mean that such provisions should not be included in orders, but only that respondents have not shown that such a modification is warranted here. Unlike respondents' proposal, the Atlantic Richfield order (i) required that the poison pill assets be divested within a fixed period and to a purchaser approved by the Commission; (ii) authorized the Commission to appoint a trustee to effect the divestiture if Atlantic Richfield failed to do so; and (iii)imposed affirmative obligations on Atlantic Richfield to effect arrangements -- including the possible divestiture of ancillary assets and businesses -- necessary to assure the viability and competitiveness of the assets and businesses of the acquired entity. If respondents were to renew their request for a poison pill provision, respondents might wish either to include the features incorporated in prior consent order provisions of this nature, or to provide adequate justification for any variances.

1. *Provided, however*, that the corporate respondents may, in the ordinary course of business, make purchases of used equipment for not more than $500,000.

2. *Provided further*, that the individual and partnership respondents, and each pension, benefit or welfare plan or trust controlled by the corporate respondents may acquire, for investment purposes only, an interest of not more than five (5)-percent of the stock or share capital of any concern. For the purposes of this proviso, any purchase by any such pension, benefit or welfare plan or trust made at the direction or suggestion of any individual or partnership respondent shall be included in the five (5) percent of the stock or share capital that the individual or partnership respondents may acquire.

B. The requirement of prior Commission approval set out in paragraph V.A. shall not apply to the acquisition of any asset used or previously used in (and still suitable for use in), or any interest in, or the whole or any part of the stock or share capital of, any company that is engaged in the production of a relevant product, or that owns or licenses a branded trademark used in connection with the sale of a relevant product if, at the time of such acquisition, no respondent owns, directly or indirectly, any asset used or previously used in (and still suitable for use in), or any interest in, or the whole or any part of the stock or share capital of, any company that is engaged in the production of that relevant product, or that owns or licenses a branded trademark used in connection with the sale of that relevant product, other than assets or interests already acquired without prior Commission approval pursuant to paragraphs V.A.1. or V.A.2. *Provided, however,* that for any such acquisition exempted from the requirements of paragraph V.A., by this paragraph V.B., each acquiring respondent shall provide notice to the Commission of such acquisition within ten (10) days of such acquisition.

Commissioner Azcuenaga concurring in the result.

IN THE MATTER OF

THE CLOROX COMPANY

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

Docket C-3427. Complaint, May 17, 1993--Decision, May 17, 1993

This consent order prohibits, among other things, a California-based manufacturer of various household and food products from misrepresenting the total fat, saturated fat, cholesterol, or sodium content of any salad dressing.

Appearances

For the Commission: *Ann V. Maher* and *Marianne Watts*.

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

COMPLAINT

The Federal Trade Commission, having reason to believe that the Clorox Company, a corporation, hereinafter sometimes referred to as respondent, has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a Delaware corporation with its office and principal place of business located at 1221 Broadway, Oakland, California.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed food products, including Hidden Valley Ranch Take Heart salad dressings (hereinafter, "Take Heart salad dressings").

PAR. 3. Respondent has disseminated or caused to be disseminated advertisements and promotional materials for Take Heart salad dressings, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 5. Respondent has disseminated or caused to be disseminated advertisements for Take Heart salad dressings, including but not necessarily limited to, the advertisements attached hereto as Exhibits A and B. Specifically, the aforesaid advertisements contain the following statements and depictions:

A. (Depiction of a continuous stream of salad dressing over lettuce). From Hidden Valley comes a delicious way to give up fat and cholesterol. Take Heart. [On screen large-print display: No fat. No cholesterol]. Take Heart fat-free salad dressings have all the delicious taste you'd expect from Hidden Valley. [On screen small-print display: Original Ranch Flavor is 91% fat free]. Original Ranch; sweet, lively French; [Depiction of stream of French dressing over onions] rich, creamy Blue Cheese [Depiction of stream of Blue Cheese dressing over broccoli]. Take Heart. The good for you dressings that taste great. From Hidden Valley [On screen small-print display: As part of a low fat, low cholesterol diet]. (Exhibit A)

B. (Depiction of a continuous stream of salad dressing over lettuce). Ah! From Hidden Valley comes a delicious way to give up fat [On screen large-print display: No fat] and cholesterol [On screen large-print display: No cholesterol]. Take Heart, Take Heart fat-free salad dressings. [On screen small-print display: Original Ranch Flavor is 91% fat free]. The good for you dressing that taste [sic] great from Hidden Valley. [On screen small print display: As part of a low fat, low cholesterol diet]. (Exhibit B)

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that in any amount that would be reasonably consumed, Take Heart salad dressings contain no fat.

PAR. 7. In truth and in fact, in any amount that would be reasonably consumed, Take Heart salad dressings do contain fat. For example, the dressings contain either .96 grams (Italian, Blue Cheese, French, and Thousand Island varieties) or 2 grams (Original Ranch variety) of fat per two tablespoons. Therefore, the

representation set forth in paragraph six was and is false and misleading.

PAR. 8. The acts or practices of respondent, as alleged in this complaint, constitute unfair or deceptive acts or practices in or affecting commerce and the making of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

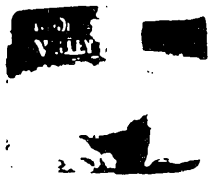
Commissioner Azcuenaga recused.

EXHIBIT A

RADIO TV REPORTS CXHV 1193

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

PRODUCT HIDDEN VALLEY TAKE HEART DRESSING
TITLE "DELICIOUS TASTE"
PROGRAM 48 HOURS 05/15/91
STATION CBS (NEW YORK)



(MUSIC)

WOMAN ANNCR. From Hidden Valley

comes a delicious wa

to give up fat

and cholesterol.

Take Heart.

Take Heart fat-free salad dressings have all the delicious taste

you'd expect from Hidden Valley.

Original Ranch; sweet French;

nch, creamy Blue Cheese.

Take Heart. The good for you dressings that taste great.

From Hidden Valley. OUT!

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

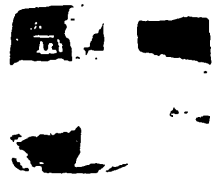
Exhibit A

EXHIBIT B

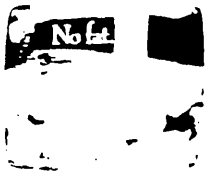
RADIO TV REPORTS

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

PRODUCT: HIDDEN VALLEY DRESSING
TITLE: "DELICIOUS WAY"
PROGRAM: WHEEL OF FORTUNE 5/14/91
STATION: NBC (NEW YORK)



(MUSIC) WOMAN: Ah! From Hidden Valley comes a delicious way



to give up fat

and cholesterol. Take

Take Heart fat-free salad dressings.

The good for you dressing that taste great

from Hidden Valley. (M OUT)

Exhibit B

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

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

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 of facts, other than jurisdictional facts, or of violations of law as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent the Clorox Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1221 Broadway, Oakland, California.

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

ORDER

I.

It is ordered, That respondent the Clorox Company, a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of any salad dressing 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, through numerical or descriptive terms or any other means:

A. The absolute or comparative amount of total fat, saturated fat, cholesterol, or sodium in any such product; or

B. The existence or the amount of total fat, saturated fat, cholesterol, or sodium in any such product relative to any amount or use being advertised or promoted.

Provided, however, that nothing in provisions A and B above shall prohibit any representation as to the amount of total fat, saturated fat, cholesterol, or sodium in any salad dressing if such representation is specifically permitted in labeling, for the serving size advertised or promoted for such product, by regulations promulgated by the U.S. Food and Drug Administration pursuant to the Federal Food, Drug, and Cosmetic Act.

II.

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

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

B. All test reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question any representation that is covered by this order.

III.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the company, 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 company which may affect compliance obligations arising out of this order.

IV.

It is further ordered, That respondent shall, within thirty (30) days after service upon it of this order, distribute a copy of this order to each of its operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertising or other material covered by this order.

V.

It is further ordered, That respondent shall, within sixty (60) days after service upon it 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 it has complied with the requirements of this order.

Commissioner Azcuenaga recused.

IN THE MATTER OF

FLEETWOOD MANUFACTURING, INC., ET AL.

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

Docket C-3428. Complaint, May 18, 1993--Decision, May 18, 1993

This consent order prohibits, among other things, an Arizona-based company and its officer from representing that use, in a manner requiring little or no effort, of their continuous passive motion ("CPM") exercise tables: reduces or helps to reduce body fat; results in or contributes to weight-loss or inch loss; tones or firms human tissue; removes or eliminates cellulite; or provides health or physical fitness benefits similar or superior to those provided by rigorous exercise. In addition, respondents are prohibited from making similar representations, with respect to any passive exercise machine, or fitness or diet program, unless they possess competent and reliable scientific evidence to substantiate such claims. Furthermore, the order also prohibits the respondents from representing that a consumer endorsement or testimonial represents the typical or ordinary experience of those who use the exercise program or CPM machines, unless that is the case.

Appearances

For the Commission: *C. Steven Baker* and *Theresa M. McGrew.*
For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Fleetwood Manufacturing, Inc., a corporation, and Thomas A. Fleetwood, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated Sections 5(a) and 12 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, hereby issues this complaint and alleges that:

PARAGRAPH 1. Respondent Fleetwood Manufacturing, Inc., is an Illinois corporation, with its principal office and place of business located at 1854 South McDonald, Mesa, Arizona.

Respondent Thomas A. Fleetwood, is an officer of the corporate respondent and is responsible for formulating, directing and controlling the acts and practices of respondent Fleetwood Manufacturing, Inc., including the acts and practices alleged in this complaint. His address is 3917 East June Street, Mesa, Arizona.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold and distributed to the public passive exercise machines, including such machines known or referred to as toning tables, vibrator tables, leg tables, situp tables, stretch tables, sandbag tables and waist, tummy and hip tables.

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

PAR. 4. In the course and conduct of their business respondents have prepared, or caused to be prepared, and have disseminated, or caused the dissemination of, advertisements and promotional materials for passive exercise machines by various means in or affecting commerce including, *inter alia*, placing advertisements for broadcast by radio and television, in magazines and newspapers distributed through the mail and across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of respondents' passive exercise machines and the use of said machines by consumers.

PAR. 5. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising and promotional materials, including but not limited to, the advertising and promotional materials attached hereto as Exhibits 1 through 4, and have employed the use of various consumer testimonials and endorsements in said advertising and promotional materials to promote the sale of their passive exercise machines and the use of said machines by consumers.

PAR. 6. Typical of the statements made in such advertisements and promotional materials, but not necessarily all inclusive thereof, are the following:

1. "The Inch by Inch System has developed a successful program of passive exercise by using motorized tables that are designed to tone, firm and reduce in specific areas."

2. "Shape up with the Inch by Inch System. It's the perfect way to lose those unwanted inches and feel great at the same time."

3. "Well I came and I lost nine inches, and I didn't do any dieting. I ate candy and everything all those weeks and lost two to three pounds."

4. "Helping to tone and firm (not build) these muscles and break down unwanted cellulite."

5. "These motorized tables exercise one or more of the major muscle groups, helping to tone and firm these muscles and break down unwanted cellulite."

6. "Just two to three times a week (one hour per session) is equivalent to two hours of calisthenics per day."

PAR. 7. Through the use of the statements referred to in paragraph six and other statements contained in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that use of respondents' passive exercise machines in a manner requiring little or no effort by the user:

1. Reduces overall body fat as well as body fat in particular areas such as hips, thighs, buttocks, arms, or stomach.

2. Results in the loss of inches or girth from various parts of the body, including the stomach, hips, thighs and buttocks.

3. Reduces overall body weight.

4. Contributes to the breakdown or removal of cellulite.

5. Tones and firms muscles and breaks down cellulite.

6. Provides health or physical fitness benefits for normal healthy individuals comparable or superior to the health or physical fitness benefits provided by a program of rigorous physical exercise.

PAR. 8. In truth and in fact, use of respondents' passive exercise machines in a manner requiring little or no effort by the user:

1. Does not result in the loss of inches or girth from various parts of the body including the stomach, hips, thighs or buttocks.

2. Does not reduce overall body fat or fat from any particular area of the body such as the hips, thighs, buttocks, arms or stomach.

3. Does not reduce overall body weight.

4. Does not contribute to the breakdown or removal of cellulite.

5. Does not tone and firm muscles or break down cellulite.

6. Does not provide health or physical fitness benefits for normal healthy individuals comparable or superior to the health or physical fitness benefits provided by a program of rigorous physical exercise.

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

PAR. 9. Through the use of the statements referred to in paragraph six and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time respondents made the representations set forth in paragraph seven respondents possessed and relied upon a reasonable basis for those representations.

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

PAR. 11. Through the use of the advertisements and promotional materials referred to in paragraph six, and others not specifically set forth herein, 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 weight loss and inch loss, after using respondents' passive exercise machines in a manner requiring little or no effort by the user.

PAR. 12. In truth and in fact, the various testimonials and endorsements contained in respondents' advertising and promotional materials, do not reflect the typical or ordinary experiences of

consumers, in terms of weight loss or inch loss, after using respondents' passive exercise machines in a manner requiring little or no effort by the user. Therefore, the representation set forth in paragraph eleven was and is false and misleading.

PAR. 13. The acts and practices of respondents as alleged in this complaint, and the placement in the hands of others of the means and instrumentalities by and through which others may have used said acts and practices, constitute unfair and deceptive acts or practices in or affecting commerce and the dissemination of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Owen dissenting.

EXHIBT 1

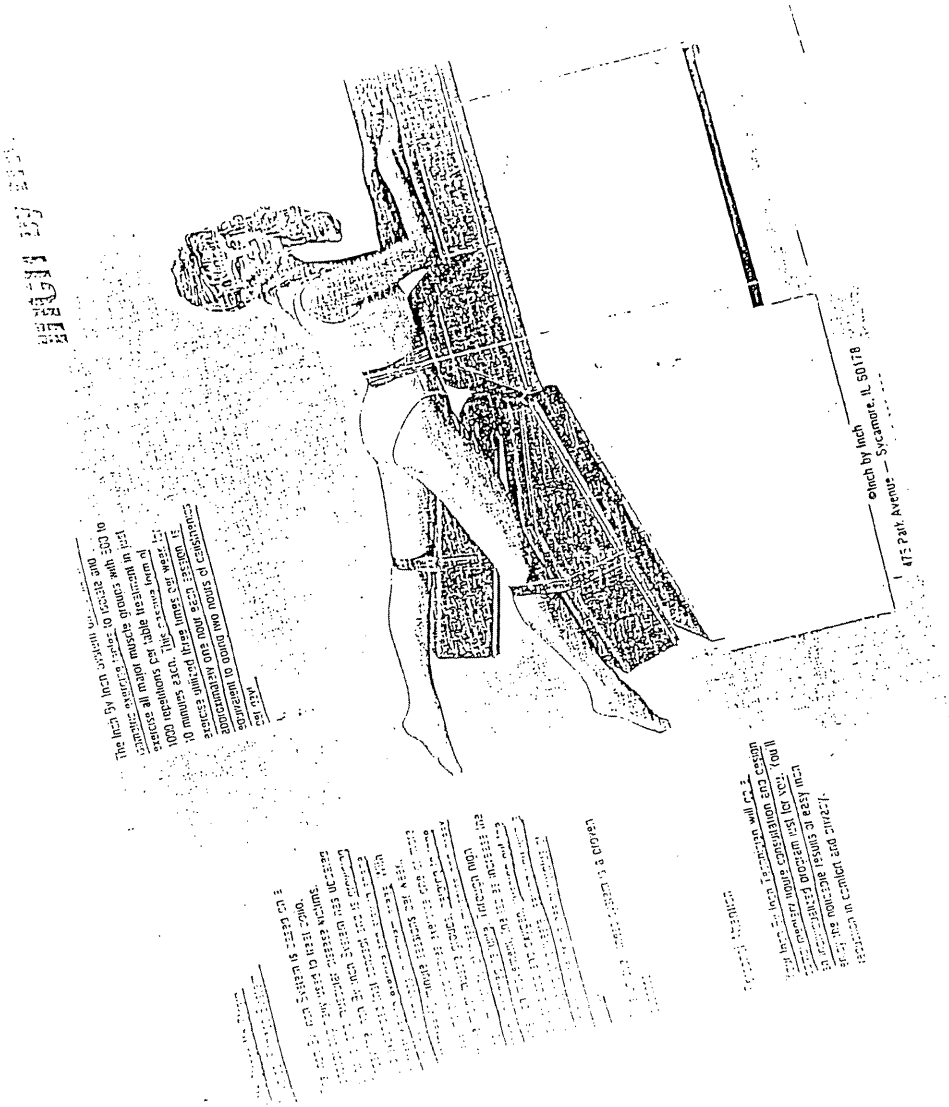


EXHIBIT 2

This table stimulates the blood circulation and eliminates excess water retention. By increasing blood circulation to surface skin cells, the gentle vibration loosens the body of excess water and toxic wastes. Although it is very relaxing, it serves a very important purpose and was designed to work along with the other 5 tables.

Leg Lift Table
This table tones and trims the upper stomach or abdominal muscles while improving flexibility in the upper leg. women feel that a major concern is flabby stomach muscles
By helping you to do your sit-ups the treatment this table can show significant results in just a few weeks

Leg Table
This table is good for the entire leg area; it is especially good for the upper thighs where most women have a problem. This table also helps to eliminate "saddlebags."

Waist-Tummy-Hip Table (3 in 1)
This table exercises the waist, tummy, and hips, while also strengthening the lower back muscles. It combines waist twisting exercise along with leg lifting exercise movements. It also exercises both sides of the body at the same time, giving you the equivalent exercise you would receive from side-bends and sit ups.

Stretch Table
This table is good for the entire part of the body. It lifts the upper back, midriff, upper arms, and helps improve posture, and lower and bustline. It also improves stretching muscles and tendon

How does this compare to Nautilus type exercise?
Our fitness work on the same principal as the Nautilus equipment. With the Nautilus type equipment—the equipment provides the resistance while you do the exercising and pushing. With inch by inch tables, you provide the resistance while the tables do the pushing and pulling. The right resistance provided by the tables will help tone your muscles without the stress and strain that Nautilus type equipment can cause.

I have had a back injury, is the system safe for me?
Inch by inch experience improvements in their conditions through an increased flexibility and strengthened abdominal muscles are a natural support for your back. Strengthened abdominals and muscles recommend them because they exercise the back with no impact or strain.

What other benefit?
Yes, the inch by inch tables move the body in only natural movements. This allows increased flexibility and full range of motion which is great for stiff or arthritic joints.

Will I build muscle?
No. The system is designed to Tone, Firm and Reduce. You will see more definition in the muscles but will not add bulk.

If I have arthritis can I use the system?
Yes. The fact that the system increases flexibility and full range of motion, patients and physicians agree that the system is very beneficial for people with arthritis.

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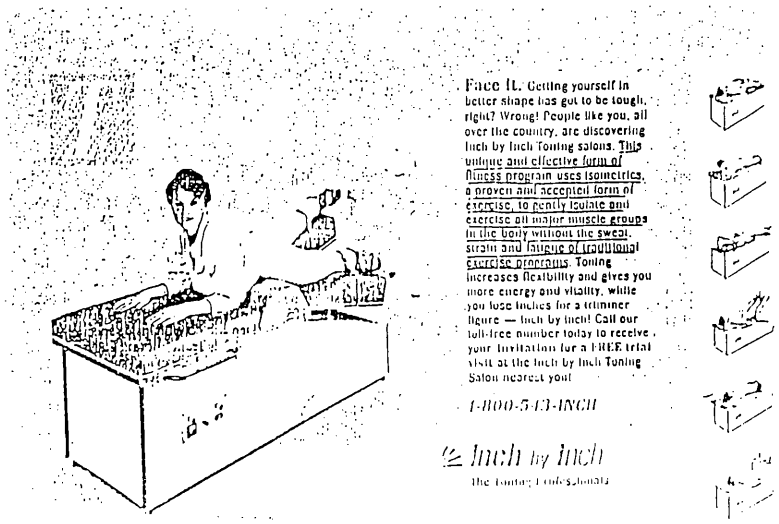
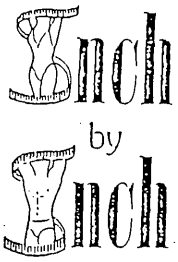


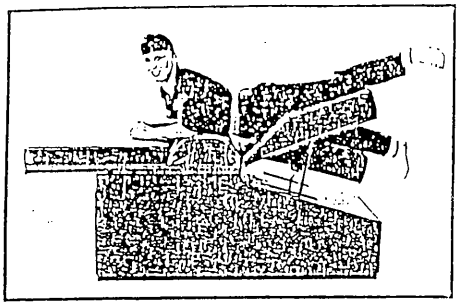
EXHIBIT 3

Shape Up's A Cinch
With



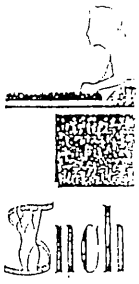
STAUFFER-TYPE MOTORIZED - ISOMETRIC EXERCISE EQUIPMENT

The No Stress/No Strain Program
For Physical Fitness

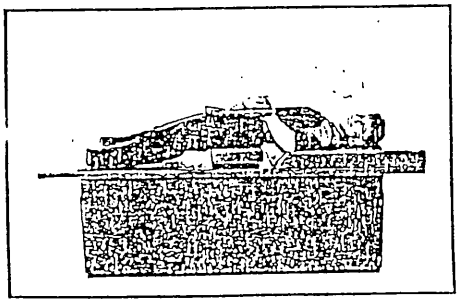


WAIST-TUMMY-HIP TABLE (3 in 1)

This table exercises the waist, tummy, and hips, while also strengthening the lower back muscles. It combines waist twisting exercise along with leg lifting exercise movements. It also exercises both sides of the body at the same time, giving you the equivalent exercise you would receive from side-bends and sit-ups.

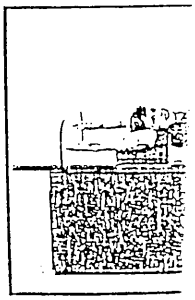


The INCH BY INCH Isometric exercise tables designed to isolate and with 500 to 1000 (10 minutes). This is utilized two times per ses-ion, will give you e of calisthenics per day!



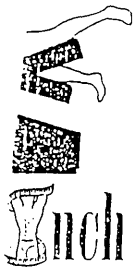
SAND BAG TABLE

This table tones and hums tummy and the hips. The two mooney pads simulate the hip walk exercise which some women are familiar with as a floor exercise to hum and tone the hips. This table is [illegible]



STRETCH TABL

This table is good fo lifts the rib cage whi tones the back and [illegible] It also [illegible] tendons



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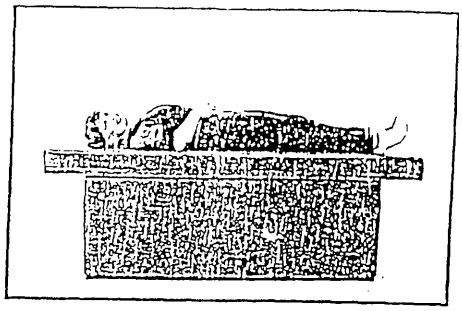
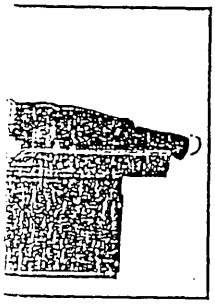


CIRCULATION TABLE

This table stimulates the blood circulation and eliminates excess water retention. By increasing blood circulation to surface skin cells, the gentle vibration helps rid the body of excess water and acid waste. Although it is very relaxing, it serves a very important purpose and was designed to work along with the other 4 tables.



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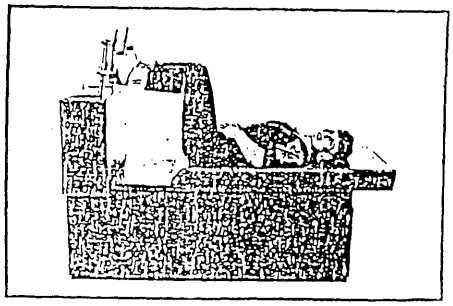


LEG TABLE

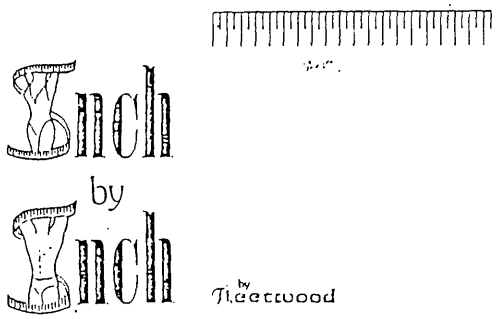
This table is good for the whole leg area. It is especially good for the upper thighs where most women have a problem. There are two different exercises we will be showing you on the table, one concentrates on toning and firming the front thighs and the lower hamstring muscles, and the other one tones and firms the outer thigh and hips to help eliminate

The INCH BY INCH PROGRAM is based on a concept originally known as the Stauffer System, in which therapy equipment was designed to treat polio victims and others with arthritis and various other muscular diseases.

Today, this updated-more modern equipment with the INCH BY INCH PROGRAM is also providing a great way to exercise and stay in shape with amazingly fast inch loss in those problem areas.

With just two 50-minute sessions per week, these motorized tables exercise one or more of the major muscle groups, helping to tone and firm (NOT BUILD) these muscles and break down unwanted "cellulite". Through high repetition movement, the tables increase the flow of blood and oxygen, flushing out the fat-inducing acid waste, leaving you with a trimmer figure and a healthy surplus of energy.

Along with the fact that you can come in your everyday street clothes and not work up a sweat, what more could you ask!



Fleetwood Manufacturing
961 W. State Street
Sycamore, IL 60178
(815) 895-4334

EXHIBIT 4

INCH BY INCH

Narrator: Exercise, a word that oftentimes evokes images of exhaustion and sore muscles. A never ending battle to stay in shape. And sometimes winding up with more than you bargained for. Wouldn't it be great if there were a machine to do some of the work for you? Well, now there is. Shape up with the Inch By Inch System. It's the perfect way to lose those unwanted inches and feel great at the same time!

Victoria Hoge: You see people come in here who have never exercised or have never been able to stick to any particular program, and you see them doing things that they haven't been able to do for quite some time, and getting those real good results!

Narrator: Here's how it works. Based on a concept originially used to treat polio, arthritis and muscular disease victims. The Inch By Inch System has developed a successful program of passive exercise by using motorized tables that are designed to tone, firm and reduce in specific areas.

Simone O'dem: Inch By Inch has helped me to tone, tone areas that I didn't think I'd be able to tone. It's helped me reduce in my thighs and my back area.

Jeanette Battisto: I, I love it, I feel better. I have more energy, and I don't have the arthritis pain that I have been carrying around.

Narrator: Through a series of natural movements, each of the seven tables manipulates and exercises one or more of the major muscle groups without adding any bulk. These tables utilize isometric toning; thereby, eliminating any stress or strain on joints and muscles, in other words, you provide the resistance while the tables do the pushing and pulling for you.

Simone O'dem: You can make it harder for yourself so that you get more benefit out of the machine. If you want to just lay there and let the machine do all the work, you can do that also. You don't have to work the machine. The machine can just work for you.

Narrator: Through high repetitive movements, the exercise tables increase the flow of blood and oxygen flushing out fat induced acid waste, leaving you with a trimmer figure and a greater sense of well being.

Rube Wenger: Well, I came and I lost nine inches, and I didn't do any dieting. I ate candy and everything all those weeks and lost two or three pounds, which I was real glad to see, and I was really amazed with my nine inches. I didn't think I had that many inches to lose all over, but I'm amazed. I'm looking better and my husband says that I look like twenty-five again. He did (laugh).

Narrator: The Waist, Tummy, Hip Table or the 3 in 1 as it's sometimes called, exercises three different areas at once (the waist, the stomach and the hips) while also strengthening the lower back muscles. It firms and tones by combining waist twisting exercise along with leg lifts. This table exercises both sides of your body at the same time, giving the equivalent exercises of side bends and sit-ups. The Side By Side Table exercises the lower part of the body which to deep side bend calisthenics, without any stress in the lower back.

Tony Turner: I went to health clubs and was working out, and I would join one. I would go faithfully for about six months after buying a three year membership, and I just got tired. You're always tired when you leave and you're not clean. You have, you really do have to go home and start all over before you can do anything else. So when a friend of mine came to Inch By Inch and told me that she could tell a difference after one month of visits and the way her clothes were fitting. Well, I thought, "I'll try that". And it really was simple and somehow it gives me more energy. When I leave here, I feel like going out and doing something. I feel like jogging or something because it doesn't wear you out, and, but if I want to just go to a party or anything after here I'm still fresh, and I don't have to go home and start all over. So it's not as time restrictive, so I really can stick with it. I've been coming for six weeks and I don't intend to stop. I really am seeing results. So it doesn't matter how many times I have to come. It's so simple that I can keep on coming.

Narrator: The Sand Bag Table tones and firms hips, buttocks and stomach by using the weight of twenty pound sand bag placed on the abdominal area while two moving pads gently simulate the hip walk exercise. This table will also help to break down cellulite. The messaging action of the moving pads stimulates blood circulation in those particular areas affected by cellulite. The Stretch Table exercises the complete upper portion of the body. Not only does it lift the rib cage to help improve your posture, but at the same time it tones and firms the back, midriff, upper arms, waistline and that hard to reach area, the stomach. It also stretches the muscles and tendons; thereby, improving flexibility. You don't need a warm-up session. You can start right away with your inch loss program. A trained technician will be happy to work with you. Naturally the most successful results come from a combination of dieting and the exercise program. Even if you don't want to lose weight, you can still lose inches and tone up what you do have. Should you decide that you do want to lose weight as well as inches, your Inch By

Inch technician will be happy to provide a personalized figure consultation for you. Each Isometric Toning Table will exercise one or more of the major muscle groups with just 500 to 1,000 repetitions per table treatment for eight minutes each. Just two to three times a week (one hour per session) is equivalent to two hours of calisthenics per day. If you've ever tried to do leg lifts on your own, you'll really appreciate this next table. The Leg Lift Table does the work for you while protecting the muscles in your back. It tones and firms the stomach muscles and at the same time improves flexibility in the lower back. Just 95 to 100 leg lifts per session on this table will give amazing result in a very short time. The Leg Table exercises the entire leg area and is especially built for that common problem that many women have known as "saddle bags". It firms the inner and outer muscles of the upper thighs and the hip area.

Ruby Wenger: After two weeks of one hour sessions, I had lost 6 ½ inches.

Ramona Baldwin: In the first seven sessions, I lost nineteen inches and the last three months I've lost a total of 37 ½ inches.

Brenda Johnson: Since I started with Inch By Inch, I lost 35 ½ inches, and I feel great and this is the only type of exercise I can do. I have Lupis, and I have bone deterioration and until I found Inch By Inch I couldn't do any form of exercising.

Steve Bramlett: I've been going for two and a half months and I've lost fifteen inches.

Leo Treadway: In eighteen visits, I lost five pounds and fourteen inches.

Narrator: The Circulation Table stimulates blood circulation and eliminates excess water retention, through increasing circulation to surface skin cells. It's especially beneficial for improving the quality of the skin and hair and also helps to rid the body of acid waste through gentle vibrations; all the time relaxing and rejuvenating the body.

Simone O'dem: From what I've noticed, the girls that come here, the ones that need it most enjoy it the most because they see more benefit from it. They lose more inches. I myself haven't necessarily lost that many inches, but I have definitely toned up. I can tell by the way my clothes fit and I came here more for stress reduction than anything. It has definitely helped in that area.

Trula Nighswonger: Well, I'm 84 years old and I've realized I was getting lethargic, and I also was getting stiff because of sitting too much, I guess, just sitting and I knew I should do some exercising, but I knew it's not much fun doing it alone, so when I saw this ad in the paper, these exercises, I thought, "that's just

what I needed". So I came down and enrolled and I've been bothering the girls ever since.

Narrator: Let's review some of the benefits of the Inch By Inch program. Trims and Tones: With Inch By Inch, you trim and tone all major muscle groups. With this passive form of exercises, you can experience an amazingly rapid inch loss without losing weight. Say goodbye to unwanted cellulite! Facilitates Weight Loss: If you wish to lose weight in addition to losing inches, Inch By Inch can help you to lose weight fast with our personalized figure consultation and diet program. Reduces Stress: You'll be much more relaxed and you'll Sleep Better. You'll have More Energy. Inch By Inch helps to Improve Your Posture. You'll have greater Flexibility of Movement. Get rid of stiff creaky joints! Improved Mental Outlook. When you look better, you'll feel better. Relief From Daily Aches and Pains. No Warm-Up Required. You can come in straight form work without having to charge clothes and leave the same way. Improved Circulation. You'll glow, and you'll feel better about yourself.

Ruby Wenger: I want to recommend it to everybody. And if your thin and just want to firm up a little bit.

Steve Bramlett: Inch By Inch can benefit anybody. Tennis players, golfers, just whoever is active.

Simone O'dem: I would definitely recommend Inch By Inch to anyone who is interested in losing inches without a lot of stress and effort because you don't have to put a lot of effort into this. It's definitely a thing for vanity. There's no doubt about it; but, who doesn't want to look good?

Narrator: Inch By Inch is a major company that is internationally recognized with centers throughout the United States and Overseas. Inch By Inch supports everone of its centers 100%, and insures customer satisfaction. We hope you've enjoyed our program. You too can look forward to a trimmer healthier body and have fun at the same time. Come in for a complimentary visit. We'll show you our facilities and a trained technician will work out an inch loss program for you. Tone and firm your way to good health with The Inch By Inch System.

Ruby Wenger: My husband said I looked like twenty-five again. He did (laugh).

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 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. Respondent Fleetwood Manufacturing, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 1854 South McDonald, in the city of Mesa, State of Arizona.

2. Respondent Thomas A. Fleetwood is an officer of Fleetwood Manufacturing, Inc. His address is 3917 East June Street, Mesa, Arizona.

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

DEFINITION

For the purpose of this order, the following definition shall apply:

"*Passive Exercise Machine*" means any motorized table, equipment or device that supports body weight, and is capable of continuously moving isolated groups of muscles through a range of motion in a manner requiring little or no effort by the user. For purposes of this order a passive exercise machine shall include such devices known or referred to as toning tables, motorized calisthenics tables or any other device of substantially the same construction, design or operation.

I.

It is ordered, That respondents Fleetwood Manufacturing, Inc., a corporation, its successors and assigns, and Thomas A. Fleetwood, individually and as an officer and director of Fleetwood Manufacturing, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, selling or distributing of any passive exercise machine in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that use of any such machine in a manner requiring little or no effort by the user:

a. Reduces or helps to reduce overall body fat or body fat in any particular areas of the human body.

b. Results in or contributes to inch loss or weight loss or the reduction of any particular part of the human body.

c. Tones or firms human tissue including muscle in a normal healthy individual.

d. Removes or eliminates cellulite or any other form of subcutaneous body fat from the human body.

e. Provides health or physical fitness benefits similar or superior to those provided by rigorous forms of exercise for normal healthy individuals.

II.

It is further ordered, That respondents Fleetwood Manufacturing, Inc., a corporation, and Thomas A. Fleetwood, individually and as an officer of the corporation, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, selling or distributing of any passive exercise machine or any fitness or diet program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that use of any such machine or program:

1. Reduces or helps to reduce overall body fat or body fat in particular areas of the human body.

2. Results in or contributes to inch loss or weight loss or the reduction of any particular part of the human body.

3. Tones or firms human tissue including muscle.

4. Removes or eliminates cellulite or any other form of subcutaneous body fat.

5. Provides health or physical fitness benefits for normal healthy individuals similar or superior to those provided by rigorous forms of exercise.

unless at the time of making such representation, they possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of the order, for any test, analysis research study or other evidence to be "competent and reliable," the test, analysis, research, study, or other evidence shall be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate and reliable results.

B. Representing, directly or by implication, that any consumer endorsement or testimonial in favor of any such machine or program represents the typical or ordinary experience of members of the public who use the machine or program unless such is the case.

III.

It is further ordered, That respondents shall for at least three (3) years after the date the representation is last disseminated, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any representation covered by this order.

B. All tests, reports, studies, surveys, demonstrations or other evidence, including consumer complaints, in their possession or control that contradict, qualify or call into question any representation covered by this order.

C. A copy of each non-identical form of promotional material disseminated by respondents.

IV.

It is further ordered, That respondents shall for at least three (3) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying records of the name and last known address

of each dealer, distributor, purchaser or lessee for commercial use of respondents' passive exercise machine, along with a copy of any training manuals or other training material disseminated to such persons.

V.

It is further ordered, That respondents shall:

A. Within sixty (60) days after the date of service of this order send via certified mail with return receipt, a copy of this order to each person or firm that is a current or former Fleetwood salon operator or dealer, and to each distributor, purchaser or lessee for commercial use of Fleetwood equipment, and that respondents shall maintain for three (3) years and upon request make available to the Federal Trade Commission for inspection and copying each such return mail receipt, as well as a list of the names, addresses and phone numbers of those parties to whom respondents distributed a copy of this order.

B. Distribute a copy of this order to each of respondents' current officers, agents, representatives or employees who are engaged in the preparation of advertisements or other promotional materials, or any training or instructional materials, for passive exercise machines.

VI.

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

VII.

It is further ordered, That the individual respondent named herein shall for a period of 5 years from the date of service of this order, promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment whose activities include the manufacture, advertising, promotion, offering for sale, sale or distribution of passive exercise machines and of his affiliation with any new business or employment in which his own duties and responsibilities involve the manufacture, advertising, promotion, offering for sale, sale or distribution of passive exercise machines, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which respondent is newly engaged, as well as a description of 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 the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Owen dissenting.

IN THE MATTER OF

PROMODES, S.A., ET AL.

Docket 9228. Consent Order, May 17, 1990--Modifying Order, May 20, 1993

This order reopens the proceeding and modifies the Commission's consent order issued May 17, 1990 (113 FTC 372) by requiring the Tennessee company to divest a specific Red Food supermarket in Chattanooga, rather than the store specified in East Ridge. The Commission concluded that the respondents had demonstrated that the public interest warranted the change, and therefore it approved the substitution.

ORDER GRANTING REQUEST TO REOPEN AND MODIFY

Promodes, S.A. ("Promodes") and The Red Food Stores, Inc. ("Red Food") filed a Petition to Reopen and Modify Consent Order ("Petition") in Docket No. 9228 on January 29, 1992, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commissions Rules of Practice and Procedure, 16 CFR 2.51. Promodes and Red Food (collectively, "respondents") request that the Commission reopen and modify the consent order issued by the Commission on May 17, 1990 ("order"), which became final on May 29, 1990, to substitute a supermarket that they are not required to divest for one that paragraph II.A.4 of the order requires them to divest.

For the reasons discussed below, the Commission has determined that respondents have not shown that changed conditions of fact require reopening the order but that they have demonstrated that it is in the public interest to reopen and modify the order for the limited purpose of the substitution of assets to be divested.

I. The Complaint And Order

The complaint in this case alleged that if Red Food, a subsidiary of Promodes, consummated the acquisition of seven supermarkets located in the Chattanooga, Tennessee Metropolitan Statistical Area ("MSA") from The Kroger Company ("Kroger"), the effect may be

substantially to lessen competition in the retail sale of food and grocery items in supermarkets in the Chattanooga, Tennessee MSA in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The order, which was issued with respondents' consent, requires respondents to divest six specific supermarkets in the Chattanooga, Tennessee MSA within nine months of the date the order became final, or March 1, 1991. The order states that one purpose of the divestiture is to remedy the lessening of competition resulting from the acquisition. To date respondents have not divested all six of the supermarkets as required by the order. On January 6, 1992, the Commission appointed Neill A. Thompson, III, trustee to divest the supermarkets, pursuant to paragraph III.A of the order. On March 11, 1992, the Commission approved the Trustee Agreement entered into by respondents and the trustee, which among other things allowed the trustee to market the substitute supermarket in addition to those covered by the order. The Trustee Agreement does not, however, authorize Mr. Thompson to divest the substitute store unless and until the Commission modifies its order to effect the substitution.

II. Promodes' And Red Food's Petition

The trustee has found an aquirer of the substitute store, and has filed an application for the Commission's approval of that divestiture. Respondents, therefore now request that the Commission modify paragraph II.A.4 of the order by deleting the Red Food supermarket, formerly a Kroger store, located at 5080 South Terrace, East Ridge, Tennessee (the "South Terrace store"), which Red Food owns, and substitute the Red Food supermarket located at 2101 Dayton Boulevard, Red Bank, Tennessee (the "Dayton Boulevard store"), which Red Food leases. If the Commission makes this substitution, the pending divestiture application may be approved and the trustee may complete this divestiture.

Respondents assert that the substitution is warranted because of changed conditions of fact and the public interest.[1] They state that a dramatic change in the nature of competition in Chattanooga and the recent recession have made the stores "commercially unattractive and unsalable as going concerns," causing respondents' inability to effect the divestiture. Petition at 4. Respondents assert that financially powerful supermarket chains have entered and expanded in Chattanooga. They state that since "the 1989 Kroger store acquisition, Red Food has had to contend with the entry of four Food Lions, four Food Max's ... and three Save-a-Lots." Petition at 4-5. Respondents assert that as a result of this increased competition, the South Terrace store has suffered declining sales and increasing losses, which have made it difficult for respondents and the Trustee to attract potential buyers. Petition at 5-6. Moreover, respondents state that the recession has increasingly made it difficult for prospective purchasers to obtain credit from banks. Petition at 6.

Respondents argue that the public interest would best be served by approving the substitution. They state that the properties subject to divestiture have been performing poorly, that Red Food's sales in Chattanooga have declined while total food sales have risen and that Red Food's net income has decreased. Therefore, respondents argue, they will be unduly injured if the South Terrace store is sold for a nominal amount. Respondents claim that they need the value of the South Terrace store to offset some of Red Food's losses and to improve other Red Food stores in order to remain competitive in the market. Respondents assert that this constitutes the affirmative need showing required for modification made under the public interest standard. Respondents state that the equities favor a substitution because the Dayton Boulevard store's divestiture will be more procompetitive than the divestiture of the South Terrace store. Therefore, respondents claim, the Dayton Boulevard store is better situated to accomplish the remedial purposes of the order and may speed or encourage divestiture of the entire package of stores.

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[1] Respondents do not assert any changes of law that would require reopening the order.

III. Standards For Reopening And Modification

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require such reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) ("L-P Letter") at 4.[2]

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

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the

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[2] *Cf. United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that "[a] decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification." *Id.*

burden of showing other than by conclusory statements, why an order should be modified.[3] If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.[4]

IV. Promodes And Red Food Have Failed To Demonstrate Changed Conditions Of Fact That Require Reopening Of The Order

Promodes' and Red Food's factual arguments are based on increased competition faced by the South Terrace store and the recession. They claim they have "made all reasonable efforts to divest the store." Previously, however, on February 27, 1991, respondents had filed a Motion for Extension of Time to Divest, and in denying the motion the Commission determined that respondents had not shown that they had made adequate efforts to divest during the divestiture period. None of the information accompanying the Petition alters this conclusion. In addition, respondents have not shown that the new entry has adversely affected their ability to divest the South Terrace store. As the Petition recognizes, the Food Lion store nearby opened in 1988 before the Kroger acquisition and thus the resulting order, and therefore cannot constitute a changed condition of fact. Respondents have also not shown that the K-Marts referred to in the Petition are within the product market defined in the complaint and order or that the product market has

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[3] The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). See also Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

[4] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

changed such that these non-supermarket stores should be included in the market. Accordingly, only the new Food Max is a changed condition of fact. Even as to that store, however, respondents have not shown that the opening of this single store is so significant an event that it either prevents divestiture of the South Terrace store or eliminates the need to achieve the divestiture as required by the order. Moreover, the poor financial performance of the stores cannot be claimed to be totally unexpected because two of the stores to be divested were not acquired from Kroger but were Red Food stores from the beginning, and thus respondents should have been well aware of their financial strength when they agreed to divest them.[5]

Finally, respondents have not demonstrated that they need the revenue from the sale of the South Terrace store to remain competitive in the market. Even if the Commission concluded that Red Food must develop a new retail format to remain viable in the long term, and even if divestiture would be at a minimal price, respondents have not shown that an unrestricted sale of the South Terrace store would be critical to respondents' competitive efforts. Moreover, Red Food in a wholly-owned subsidiary of Promodes, a major European grocery retailer, and as such, should have access to Promodes' financial resources. Promodes and Red Food have not shown that Promodes does not have access to sufficient funds to enable Red Food to improve the stores if it cannot sell the South Terrace store for a large sum.

Moreover, respondents have not shown that the purported changes of fact, if correct, eliminate the need to divest the South Terrace store. The purpose of the divestiture of the South Terrace store, as stated in the order, is to ensure the continuation of the asset as an ongoing, viable supermarket engaged in the same business in which the property is presently employed and to remedy the lessening of competition resulting from respondents' acquisition of the Chattanooga, Tennessee Kroger stores. Respondents have not

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[5] The Petition also compares current sales to sales at the time of the acquisition of Kroger. However, to assert a changed condition of fact, the proper comparison is between current sales and sales at the time the order became final.

shown any changes that reduce or eliminate the need for that remedy. Also, none of the changes asserted by respondents require the substitution of stores.

V. Promodes And Red Food Have Demonstrated An Affirmative Need To Modify The Order And Have Demonstrated That Modification Is In The Public Interest

In a request to modify an order based on the public interest, a petitioner must demonstrate as a threshold matter an affirmative need to modify the order. For example, the Commission may determine that the public interest requires reopening of an order if the respondent demonstrates that the order impedes competition.[6]

The record in this matter raises substantial doubt as to the continued competitive viability of the South Terrace supermarket. Moreover, the South Terrace property has been assessed for a value that is vastly greater than the price at which it likely could be sold for the purpose of operation as a supermarket. Therefore, there is considerable risk that the owner of this store (either respondents or a potential purchaser) will not continue to operate it as a substantial competitor in the market. But the threat to the viability of the South Terrace store alone does not establish affirmative need.

Were no alternative relief proposed that adequately addressed the competitive problem alleged in the Commission's complaint, there would be no affirmative need to modify the order. The threat to the viability of the South Terrace store would not be lessened by relieving respondents of their obligation to divest that store. But respondents propose to divest a viable supermarket in exchange for being relieved of their obligation to divest the South Terrace store. In assessing the effect on competition here, what is relevant is the likely state of competition if the South Terrace store is divested as required by the order relative to the likely state of competition under the alternative proposed by respondents. The respondents' proposal

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[6] *See Damon Corp.*, 101 FTC 689 (1983). *See also* Union Carbide, Docket No. C-2902 (Mar. 15, 1991).

would produce a viable independent competitor in the relevant market, whereas the order's requirement to divest the South Terrace store likely would not. Thus, the harm to competition that is likely to result from divestiture of the South Terrace store as required by the order is sufficient to establish an affirmative need here.

After establishing an affirmative need, the Commission's public interest test first set out in Damon requires a balancing of the reasons favoring the requested modification against any reasons not to make the modification. Here, the reasons in favor of the modification outweigh the reasons for retaining the order's requirement.

An application to approve the divestiture of the Dayton Boulevard store already has been submitted to the Commission, whereas a successful and timely divestiture of the South Terrace store appears less likely to occur. Moreover, the proposed modification appears likely to offer a stronger remedy than that in the order; therefore there appears to be little reason not to grant the requested modification.

The Dayton Boulevard store appears to be a viable supermarket with a positive sales history. It has outperformed the other Kroger stores acquired by Red Food. Although it is smaller than the South Terrace store, its average weekly sales and average weekly sales per square foot have increased in the past two years whereas the South Terrace store's average weekly sales and average weekly gales per square foot have been decreasing. Thus, the Dayton Boulevard store had greater total sales in fiscal 1991 than the South Terrace store, and this trend continued in fiscal 1992. In addition, more customers frequent the Dayton Boulevard store than the South Terrace store. The Dayton Boulevard store is much more likely to achieve profitability than the South Terrace store. The facts, as presented in the Petition, demonstrate that the divestiture of the Dayton Boulevard store will likely have a greater impact on the market and will go further to restore the market to its state prior to the acquisition of the Kroger stores by Red Food. Other evidence that the Dayton Boulevard store offers a better competitive remedy is the fact that the trustee, an agent independent of respondents, has found

an acquirer for that store and has been unable to find an acquirer for the South Terrace store.

In the absence of the requested change there is a considerable risk that the remedial purposes of the order will not be achieved either because the South Terrace store will not be divested or because it will fail as a supermarket within a short period of time after divestiture. Because the Dayton Boulevard store has greater long term prospects as a supermarket, and because an acquirer has been found for that store, the substitution will provide superior relief than the order now provides. In these circumstances it is in the public interest to reopen and modify the order.

VI. Conclusion

Accordingly, *it is ordered*, that this matter be reopened and that the order in Docket No. 9228 be, and hereby is, modified, as of the effective date of this order, as follows:

Paragraph II.A.4 of the order is modified to delete "the Red Food supermarket, which was formerly a Kroger store, located at 5080 South Terrace, East Ridge, Tennessee," and paragraph II.A.4 is rewritten as follows:

The Red Food supermarket, which was formerly a Kroger store, located at 2101 Dayton Boulevard, Red Bank, Tennessee.

Commissioner Owen dissenting with respect to part IV of this order.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur with the decision of the Commission to reopen and modify the order, thereby permitting divestiture of the Dayton Boulevard store in lieu of the divestiture of the South Terrace store that was required by the order. Given the respondents' offer to make

a comparable or possibly superior divestiture in the near future[1] and the alleged uncertain competitive viability of the South Terrace store in the relevant market, modification is in the public interest to accomplish the remedial purposes of the order.

I concur in rejecting as a basis for reopening the allegations that the required divestiture of the South Terrace store would be less profitable for the respondents than would an unrestricted sale. This is a variation of arguments that the Commission considered and rejected in *Louisiana-Pacific Corp.*, 112 FTC 547, 560-63 (1989).[2] Divestiture under an order is required without regard to price,[3] and the possibility that a respondent might obtain a higher price by selling the assets outside the relevant market neither excuses the obligation to divest nor constitutes a reason for reopening the order.[4]

In the unusual circumstances of this case, I agree that the alleged uncertainty concerning the competitive viability of the South Terrace store in the relevant market is sufficient to warrant reopening in the public interest. Such a showing ordinarily would not be sufficient to warrant elimination of a divestiture requirement. The respondents, however, have offered a substitute divestiture that appears more likely to accomplish the remedial purposes of the

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[1] The trustee has identified a potential acquirer for the Dayton Boulevard store and has submitted a request for prior approval of that transaction. The Trustee Agreement between the Respondents and the Commission-appointed trustee, which was approved by the Commission, expressly permitted the trustee to market stores identified by the respondents in addition to the stores required by the order to be divested. The trustee has not identified a potential acquirer for the South Terrace store.

[2] *Civil penalty reimposed* in *United States v. Louisiana-Pacific Corp.*, 1990-2 Trade Cas. Paragraph 69,166 (D. Or. 1990), *aff'd*, 967 F.2d 1372 (9th Cir. 1992); *see also RSR Corp.*, 88 FTC 800, 895 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) ("[T]he possibility [of] . . . some loss of value . . . can be of no relevance to the determination of proper relief in a Section 7 case.")

[3] *See United States v. Beatrice Foods Co.*, 344 F. Supp. 104, 116-17 (D. Minn. 1972), *aff'd*, 493 F.2d 1259, 1275 (8th Cir. 1974), *cert. denied*, 429 U.S. 961 (1975).

[4] The respondents' appraisal of the South Terrace store "and the real estate on which it sits," Petition at 9, at a value greater than the price at which the respondents assert the property could be sold as a grocery may be helpful to assess the likely future competitive viability of the store in the relevant market, but such appraisals should be treated cautiously. Assets to be sold under a divestiture order often will sell for less, because of the element of compulsion. In addition, property valuations may vary widely, depending on the circumstances in and conditions under which they are made. *See United States v. Louisiana-Pacific Corp.*, 554 F. Supp. 504, 510 (D. Or. 1982) (citing eight different "valuations" of divestiture property and concluding that the property "was worth what defendant could get for it."

order in the near term than would adherence to the divestiture required by the order.[5] For that reason, I concur in the decision to reopen and modify the order.

STATEMENT OF COMMISIONER DEBORAH K. OWEN

I concur in reopening and modifying the Consent Order in this matter to substitute the Dayton Boulevard supermarket for the supermarket listed in order paragraph II.A(4) (the South Terrace store). This substitution is clearly in the public interest. However, I dissent from the finding of the Commission that this order modification is not also warranted by changes of fact. I believe that changes in market conditions in the Chattanooga area since issuance of the order have indeed created circumstances today that warrant modification. Among other factors, the extent of entry by several competing supermarket chains has altered the competitive atmosphere in this market. As the Commission itself recognizes, "(t)he record in this matter raises substantial doubt as to the continued competitive viability of the South Terrace supermarket." Presumably, when the Commission originally decided to include the South Terrace store in the list of properties to be divested, it did not perceive any such threat to the store's continued viability. Thus, certain facts must have changed to alter the status of this supermarket. The Commission has acknowledged that new entry in the vicinity of the Fort Oglethorpe store, listed in order paragraph II.A(2), may warrant removing the obligation to divest that store.[1] Just as the opening of new supermarkets in the Fort Oglethorpe neighborhood may justify order modification as to that store, I believe that new entrants in other areas have altered competition in the Chattanooga grocery store market to such a degree that this change, along with other changed conditions, warrants modification.

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[5] *See Mid Con Corp.*, 111 FTC 100 (1988); Mid Con Corp., Docket 9198, Letter to Priscilla Mims, Esq. (Dec. 11, 1987) (unpublished).

[1] *See* Order to Show Cause, D-9228 (May 13, 1993).

IN THE MATTER OF

PROMODES, S.A., ET AL.

Docket 9228. Consent Order, May 17, 1990--Modifying Order, May 21, 1993

This order reopens the proceeding and modifies the Commissions consent order issued May 17, 1990 (113 FTC 372) by setting aside paragraphs II.A.l and II.A.2, thereby relieving the respondents of the obligation to divest the two stores described in those paragraphs.

ORDER REOPENING AND MODIFYING ORDER ISSUED MAY 17, 1990

On May 12, 1993, the Commission issued an Order to Show Cause within 30 days why the 1990 order in Docket No. 9228 should not be modified to set aside paragraphs II.A.1. and II.A.2.

On May 14, 1993, respondents Promodes, S.A. and The Red Food Stores, Inc. filed their Answer of Respondents to Order to Show Cause, stating that respondents agree with the Commission's proposal and urge the Commission to enter an order deleting paragraphs II.A.l and II.A.2 to make clear that respondents no longer have an obligation to divest the two stores described in those paragraphs.

Accordingly, *it is ordered*, that this matter be and it hereby is reopened and that paragraph II of the order in this matter be modified, as of the date this order becomes final, to set aside paragraphs II.A.l. and II.A.2.

IN THE MATTER OF

AE CLEVITE, INC.

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

Docket C-3429. Complaint, June 8, 1993--Decision, June 8, 1993

This consent order prohibits, among other things, a Michigan manufacturer of locomotive engine bearings and its parent company, T&N PLC, from fixing prices or from inviting its competitors to fix or raise prices for locomotive engine bearings in the future. The consent order requires AE Clevite and T&N to provide copies of the FTC complaint and consent order to the directors and officers of the company, subsidiaries, and divisions engaged in the design, manufacture, marketing or sale of locomotive engine bearings in the United States.

Appearances

For the Commission: *Ronald B. Rowe*, *Morris A. Bloom* and *Ernest A. Nagata*.

For the respondent: *Richard Carlton*, *Sullivan & Cromwell*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that the Heavywall Bearing Division ("HBD") of J.P. Industries, Inc. ("JPI"), a corporation, the predecessor in interest of Glacier Clevite Heavywall Bearings ("Glacier Clevite"), a division of AE Clevite, Inc. ("AE Clevite"), a corporation (hereinafter sometimes referred to as "respondent"), 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 AE Clevite is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal offices located at 325 East Eisenhower Parkway, Ann Arbor, Michigan.

PAR. 2. Respondent is an indirect wholly-owned subsidiary of T&N plc ("T&N"), a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its principal offices at Bowdon House, Ashburton Road West, Trafford Park, Manchester M17 1RA, England. Respondent is now, and for some time it or its predecessors in interest have been, engaged in the design, manufacture and sale of locomotive engine bearings.

PAR. 3. For purposes of this complaint, the following definitions apply:

(A) "*Engine bearings*" means the components of internal combustion engines characterized by interfacing surfaces with relative motion of a sliding nature that provide support to a shaft rotating over a thin film of oil (including half bearings, bushings, and thrust washers); and

(B) "*Locomotive engine bearings*" means engine bearings having a wall thickness of greater than one-quarter of an inch for use within locomotive engines.

PAR. 4. On August 20, 1990, T&N completed its tender offer for the outstanding shares of JPI common stock, and on November 8, 1990, the Federal Trade Commission issued a Decision and Order in Docket No. C-3312 as a result of that acquisition. With the purchase of JPI, T&N acquired the JPI HBD's facility in McConnelsville, Ohio for the design, manufacture and sale of locomotive engine bearings. At that time, another T&N subsidiary, The Glacier Metal Co. Ltd. ("Glacier"), was also engaged, at its facility in Ilminster, England, in the design and manufacture of locomotive engine bearings, some of which were sold in the United States.

PAR. 5. The HBD of JPI is the predecessor in interest of Glacier Clevite, a division of respondent AE Clevite.

PAR. 6. Respondent or its predecessors in interest maintain and have 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. 7. At all time relevant herein, Glacier, JPI and Miba Gleitlager AG ("Miba"), an Austrian corporation, were competitors in the design, manufacture and sale of locomotive engine bearings. During 1988 and 1989, JPI and Miba together manufactured more than 95 percent of all locomotive engine bearings sold in the United States. JPI held the largest share and perceived Miba as a competitive threat due to Miba's efforts to increase its market share by undercutting JPI's prices.

PAR. 8. In a conversation that occurred in the spring of 1988 between the general manager of the JPI HBD and the managing director of Miba, the JPI HBD official advised the Miba official that the prices at which Miba sold locomotive engine bearings in the United States aftermarket were lower than those of the JPI HBD, and "as a result, they were ruining the marketplace." Following a response from the managing director of Miba that it was not Miba's intention to undercut the JPI HBD's prices in the marketplace, the general manager of the JPI HBD caused comparative price lists for locomotive engine bearings sold in the United States aftermarket to be faxed to Miba.

PAR. 9. The conduct described in paragraph eight constituted an implicit invitation by the JPI HBD for Miba to refrain from competition in the pricing of locomotive engine bearings sold in the United States aftermarket.

PAR. 10. 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 could recur in the absence of the relief herein requested.

Commissioner Azcuenaga dissented, and having found evidence sufficient to support a reason to believe determination.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Heavywall Bearing Division of J.P. Industries, Inc., the predecessor in interest 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 and T&N plc ("T&N"), their officer and 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 or by T&N 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 mater and having determined that it had reason to believe that respondent's predecessor in interest had violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity it the procedure prescribed in Section 2.34 of it's Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent AE Clevite, Inc. ("AE Clevite") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal offices located at 325 East Eisenhower Parkway, Ann Arbor, Michigan. Respondent is an indirect, wholly-owned subsidiary of T&N plc, a corporation organized, existing and doing business under and by virtue of the

laws of the United Kingdom, with its principal offices located at Bowdon House, Ashburton Road West, Trafford Park, Manchester M17 1RA, England.

2. AE Clevite or its predecessors in interest at all times relevant herein have been, and AE Clevite now is, a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

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

ORDER

I.

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

A. "*Respondent*" means AE Clevite, its predecessors, successors, assigns, subsidiaries and divisions, including Glacier Clevite Heavywall Bearing, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns;

B. "*T&N*" means T&N plc and all direct or indirect majority-owned subsidiaries and divisions of T&N plc that are engaged in the design, manufacturer, marketing, advertising, offering for sale, sale, or distribution of engine bearings;

C. "*Engine bearings*" means the components of internal combustion engines characterized by interfacing surfaces with relative motion of a sliding nature that provide support to a shaft rotating over a thin film of oil (including half bearings, bushings, and thrust washers); and

D. "*Locomotive engine bearings*" means engine bearing having a wall thickness of greater than one-quarter of an inch for use within locomotive engines.

II.

It is ordered, That respondent and T&N, in connection with the design, manufacturer, marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from engaging, directly or indirectly, through any corporation, subsidiary, division, or other device (including through T&N or T&N's other subsidiaries, divisions or affiliated companies), in the following acts or practices:

A. Requesting, proposing, urging or advocating that any competitor fix, raise, establish, maintain or stabilize prices, price levels or service levels;

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

C. Inviting any competitor to raise prices by stating its willingness to follow or match any change in prices, price levels or service levels by any competitor.

Provided, however, that nothing contained herein shall prevent respondent from unilaterally raising, lowering, or otherwise altering its prices, price levels or service levels, publicly announcing any such change, or explaining the reasons for such a change to persons who are not competitors, such as customers, investors, securities analysts, news and financial reporters and the like.

III.

It is further ordered, That:

A. Within thirty (30) days of the date on which this order becomes final, respondent and T&N shall provide a copy of the complaint and order to all of their directors and officers, and

respondent shall provide a copy of the complaint and order to all of its management employees and all other employees engaged in the marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings to customers in the United States who have authority to affect the prices at which such locomotive engine bearings are sold;

B. For a period of three (3) 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 or an officer of T&N or a director, officer or management employee of respondent, or other employee of respondent engaged in the marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings to customers in the United States who has authority to affect the prices at which such locomotive engine bearings are sold, respondent or T&N shall provide a copy of the complaint and order to such person;

C. For a period of three (3) years from the date on which this order becomes final, and within thirty (30) days after the date on which any entity becomes a T&N majority-owned subsidiary, unincorporated division, or other operating entity engaged in the design, manufacture, marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings to customers in the United States, T&N shall provide a copy of the complaint and order to all directors, officers, management employees, and all other employees of such entity engaged in the marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings to customers in the United States who have authority to affect the prices at which such locomotive engine bearings are sold; and

D. Respondent and T&N shall require each person to whom a copy of the complaint and order is furnished pursuant to subparagraphs III.A., B., and C. of this order to sign and submit to respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the complaint and order; (2) represents that the undersigned has read and understands the order; (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject

respondent and T&N to penalties for violation of the order; and (4) identifies the undersigned by name, address, and telephone number.

IV.

It is further ordered, That respondent shall:

A. Within sixty (60) days of the date on which this order becomes final, and annually thereafter for three (3) 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 and T&N have complied and are complying with this order;

B. For a period of three (3) years after the date on which this order becomes final, maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice , all records of communications with competitors of respondent relating to any aspect of pricing or service for locomotive engine bearings to customers in the United States, and records pertaining to any action taken in connection with any activity covered by paragraphs II, III, and IV of this order; and

C. Notify the Commission at least thirty (30) days prior to any change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries engaged in the design, manufacturer, marketing, advertising, offering for sale, sale, or distribution of locomotive engine bearings, or any other change in respondent that may affect compliance obligations arising out of this order.

Commissioner Azcuenaga dissented, not having found evidence sufficient to support a reason to believe determination.

CONCURRING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

Based on the reasoning articulated in my earlier statement on invitations to collude,[1] I have voted in favor of the final issuance of the consent agreement in this matter. Several aspects of this case are worthy of note, however.

As previously indicated, I believe that in this novel area of Commission enforcement, the Commission should be cautious to ensure that the activity challenged is, in fact, an attempt to engage in a naked restraint of trade, rather than in a joint venture or other potentially efficient agreement. *See,* Quality Trailer Statement at 6-7. Here, the conduct alleged in the Commission's complaint to be a violation of Section 5 of the Federal Trade Commission Act is described as "an implicit invitation by [respondent for its competitor] to refrain from competition in the pricing of locomotive engine bearings sold in the United States aftermarket." Complaint, paragraph 9. At first blush, an "implicit" invitation might suggest something other than a solicitation to fix prices.

Two factors alleviate any such concern here. First, as the Analysis of Proposed Consent Order to Aid Public Comment notes, "[t]he challenged conduct did not relate to any proposed *bona fide* integration between the parties," Under such circumstances, it is difficult to envision what efficiency-enhancing motive there might have been for complaining to a competitor that its lower prices were "ruining the market place," and subsequently sharing comparative price lists with that competitor. Complaint, paragraph 8. Based on available information, as in Quality Trailer Products, this appears to be attempted price-fixing. Second, the theory of potential harm is strong in this case, in light of the 95 percent combined market share of the two competing parties to the discussion. Complaint, paragraph 7. While, as I have previously indicated, an "iron-clad" demonstration of potential harm is not an element of this sort of Section 5 offense, Quality Trailer Statement at 6-7, the presence of

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[1] *See* Concurring Statement of Commissioner Deborah K. Owen in the Matter of Quality Trailer Products Corporation (File No. 911-0068) ("Quality Trailer Statement").

potential injury (and, therefore, motive) makes the inference of an attempted price-fix more credible.

Finally, I would note that the order in this matter, like the order in Quality Trailer Products, could be construed to prohibit, in addition to price-fixing solicitations, an invitation to enter into a procompetitive joint venture that, incidentally, involves setting prices. Again, I interpret these constraints to be fencing-in provisions designed to facilitate enforcement of the order, rather than an intent by the Commission to discourage solicitations to joint venture, or to engage in other legitimate action that may involve price discussions. In another case, the Commission may wish to consider less restrictive relief, depending upon the needs of the company involved and the egregiousness of the offense.[2]

[2] Here, as in Quality Trailer Products, the order includes a proviso exempting certain conduct from the general proscriptions. The fact that the exempted conduct varies in the two cases (discussing prices with respect to certain sales between competitors vs. unilateral price changes and announcements thereof to non-competitors) illustrates the Commission's ability to fine-tune its mandates.

IN THE MATTER OF

ASFE

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

Docket C-3430. Complaint, June 11, 1993--Decision June 11, 1993

This consent order prohibits, among other things, a Maryland-based association of engineering firms from engaging in a variety of practices designed to prevent its members from participating in price competition, giving favorable pricing or credit terms, engaging in competitive bidding, or advertising. The order also requires the respondent to remove from its policy statements or guidelines any statements that violate the order.

Appearances

For the Commission: *Renee S. Henning, Ronald B Rowe* and *Norris E. Washington.*

For the respondent: *Richard J. Favretto* and *Kerry Edwards Cormier*, in-house counsel, 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 ASFE, the Association of Engineering Firms Practicing in the Geosciences (hereinafter sometimes referred to as "respondent" or "ASFE"), a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. ASFE is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland. ASFE has its principal office and place of business at 8811 Colesville Road, Suite G106, Silver Spring, Maryland. ASFE

is an association serving or representing geotechnical engineering firms and other engineering firms that practice in the geosciences. In 1986, ASFE had approximately 300 member firms. These members did work in geotechnical engineering. ASFE members have provided geotechnical engineering services or other engineering services for a fee. According to ASFE, in 1986, the business volume of ASFE members was about $368,000,000, and, in 1987, ASFE members were responsible for an estimated 80% or more of all consulting geotechnical engineering contracted for annually in the United States. In 1991, ASFE had approximately 330 member firms. Some ASFE members have provided geotechnical engineering services or other engineering services throughout the United States.

PAR. 2. Geotechnical engineering is the branch of civil engineering that deals primarily with foundations, soils, rocks, and other earth materials. Geotechnical engineers develop foundation design recommendations for dams, buildings, and other structures and provide other soil and foundation engineering services.

PAR. 3. ASFE's functions include substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, ASFE is a corporation within the meaning of Section 4 of the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been restrained as herein alleged, members of ASFE have engaged in competition among themselves or with others in the geotechnical engineering business or in other engineering businesses.

PAR. 5. 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. 6. In the late 1970s, ASFE implemented the first association peer review program in engineering. As part of the ASFE peer review process, ASFE peer reviewers have examined, among other things, ASFE members' policies or practices as to bidding, including competitive bidding; pricing; credit terms; and advertising. Policies or practices of ASFE members competing in

geotechnical engineering have been reviewed by other ASFE members competing in geotechnical engineering.

PAR. 7. Terra Insurance, Ltd. (hereinafter sometimes referred to as "Terra"), has provided, directly or indirectly, professional liability insurance to ASFE members. Firms that founded ASFE in the late 1960s also founded Terra or a predecessor to Terra. Terra shareholders have been ASFE members. Terra's geotechnical professional liability insurance program has been restricted to ASFE members. ASFE peer review has been a condition of obtaining or retaining Terra's geotechnical professional liability insurance program coverage.

PAR. 8. The application or approval process for obtaining professional liability coverage from Terra or an insurance firm chosen by Terra has taken into consideration an insurance applicant's policy or practice as to bidding, including competitive bidding; pricing; credit terms; and advertising. Terra or an insurance firm chosen by Terra has reviewed the amount of the applicant's work obtained on a bidding basis and the applicant's pricing. During that review, the insurance firm has given a reduced score in the application or approval process to an ASFE member considered to be engaging in too much bidding or to be charging too low prices. Low scores in the process have affected insurance applicants' likelihood of receiving Terra professional liability insurance.

PAR. 9. Members of other professional organizations, acting for themselves or on behalf of a client, have sometimes requested bids from ASFE members. ASFE and at least one national professional organization worked out an anti-bidding arrangement under which ASFE has asked ASFE members to notify ASFE of any bid solicitation from any of this organization's members. Pursuant to this arrangement, ASFE has reported to this organization bid solicitations from the organization's members, with the purpose of discouraging such bid solicitations through the intervention of this organization.

PAR. 10. Some ASFE members have declined to bid on a certain project with the knowledge, understanding, or agreement that

another member or another engineering professional would also decline to bid on that project.

PAR. 11. Some ASFE members have exchanged with, or have provided to, another member or another engineering professional competitively sensitive information, such as a fee schedule, salary schedule, contract, or other financial data. Members have given such information to other members or other engineering professionals through the ASFE peer review program, by telephone, by mail, or by other means.

PAR. 12. Respondent has acted as a combination of at least some of its officers or members, or has combined or conspired with at least some of its officers, its members, or others, to, among other things:

a. Impede or restrain bidding, including competitive bidding, through the use of a peer review program, an insurance program, or other means;

b. Raise prices through the use of a peer review program, an insurance program, or other means;

c. Refuse to submit bids to bid requestors;

d. Exchange price information, salary information, contract information, other financial information, or other information that facilitates anticompetitive collusion;

e. Impede or restrain credit, including interest-free credit, through the use of a peer review program, an insurance program, or other means; and

f. Impede or restrain advertising, including self-laudatory advertising.

PAR. 13. The aforesaid acts and practices of respondent have had the purpose, effect, tendency, or capacity of:

a. Raising prices of members of ASFE;

b. Hampering or restraining price competition or other competition in the provision of geotechnical engineering services or in the

provision of other services in the United States, in portions of the United States, or among members of ASFE;

c. Depriving the public of the benefits of competition by hampering or restraining price competition or other competition for such services; or

d. Hampering or restraining certain advertising by members of ASFE .

PAR. 14. The aforesaid acts and practices of respondent constituted, and now constitute, unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, will continue or recur in the absence of appropriate relief.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record

for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent ASFE, the Association of Engineering Firms Practicing in the Geosciences, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland. Respondent has its principal office and place of business at 8811 Colesville Road, Suite G106, Silver Spring, Maryland.

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. "*ASFE* " or "*respondent* " means ASFE, the Association of Engineering Firms Practicing in the Geosciences, a corporation, its predecessors, subsidiaries, successors, and assigns, and their respective directors, officers, committees, other organizational subgroups, agents, representatives, and employees, and their respective successors and assigns;

B. "*Bidding*" or "*competitive bidding*" means a method of procurement whereby one or more engineering professionals are asked to submit or do submit a partial or full bid, fee quotation, price quotation, cost estimate, cost proposal, or fee schedule, or a proposed partial or full bid, fee quotation, price quotation, cost estimate, cost proposal, or fee schedule (for work of which any part is to be or was performed by, or under the direction, supervision, or guidance of, an engineering professional). For purposes of this order, "bidding" or "competitive bidding" also means a request (to an engineering professional) for a partial or full bid, fee quotation,

price quotation, cost estimate, cost proposal, or fee schedule, or a proposed partial or full bid, fee quotation, price quotation, cost estimate, cost proposal, or fee schedule;

C. "*Engineering professional*" means an engineering firm, an engineer or other employee of an engineering firm, a design consultant firm, a design consultant or other employee of a design consultant firm, a design professional firm, a design professional or other employee of a design professional firm, a design firm, a designer or other employee of a design firm, a member of ASFE, or an employee of a member of ASFE;

D. "*Insurer*" means an insurance firm, a reinsurance firm, or a person that performs any underwriting service or any other insurance-related or reinsurance-related service;

E. "*Member*" means an engineering firm or other person that belongs to ASFE;

F. "*Or*" means "and/or." (In other words, for purposes of this order, "or" includes "and" and may have a disjunctive or conjunctive meaning; *provided, however*, that in sentences where "or" is preceded by "either," that "or" has only the disjunctive meaning.);

G. "*Peer review*" means the examination or review of any policies or practices of any engineering professional by another engineering professional or by the respondent; and

H. "*Person*" means a natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity.

II.

It is ordered, That respondent, individually or in concert with any other person, directly or indirectly, through any corporate or other device, in connection with any of respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, participating in, or carrying out any agreement, between or among

engineering professionals, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, bidding; or

B. Disseminating to any engineering professional any information relating to any specific, named or unnamed, engineering professional's intention or decision with respect to engaging in or not engaging in bidding.

III.

It is further ordered, That respondent, individually or in concert with any other person, directly or indirectly, through any corporate or other device, in connection with any of respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from restricting, regulating, impeding, declaring unethical, interfering with, or advising against any engineering professionals:

A. Engaging in or being asked to engage in price competition or bidding;

B. Offering or charging or being asked to offer or charge a low price, a price below another engineering professional's price, a reduced price, or any particular price;

C. Offering or granting or being asked to offer or grant interest-free credit or any other credit term; or

D. Engaging in or being asked to engage in advertising, other than false or deceptive advertising.

Nothing contained in Parts II and III of this order shall prohibit respondent from disseminating truthful and non-deceptive information relating to the effect of any method of procurement upon public health, safety, and welfare, or liability exposure, including information regarding advantages or disadvantages of any method of procurement, provided that, for a period of ten (10) years after the date this order becomes final, any such information shall be accompanied by a statement that respondent takes no official position with respect

to any method of procurement and that the ultimate choice as to the method of engaging the services of an engineering professional in any circumstance is a matter of independent judgment freely exercised by individual engineering professionals and their prospective clients.

IV.

It is further ordered, That respondent, individually or in concert with any other person, directly or indirectly, through any corporate or other device, in connection with any of respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from initiating, promoting, adopting, entering into, continuing, carrying out, or pursuing any peer review program; or other plan or course of action, that calls for or authorizes or that ASFE knows or has reason to know allows any review, evaluation, or consideration of any engineering professional's fee schedule; contract containing any pricing information or credit term; price proposal; or policy or practice concerning pricing, bidding or other method of procurement of the services of an engineering professional, or any credit term.

V.

It is further ordered, That respondent, individually or in concert with any other person, directly or indirectly, through any corporate or other device, in connection with any of respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from disseminating to any insurer any information relating to any engineering professional's fee schedule; contract containing any pricing information or credit term; price proposal; pricing; bidding or other method of procurement of the services of an engineering professional; credit term; or advertising.

VI.

It is further ordered, That respondent, individually or in concert with any other person, directly or indirectly, through any corporate or other device, in connection with any of respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from stating that any of the following activities affects any engineering professional's ability to obtain or retain insurance:

A. Engaging in or being asked to engage in price competition or bidding;

B. Offering or charging or being asked to offer or charge a low price, a price below another engineering professional's price, a reduced price, or any particular price;

C. Offering or granting or being asked to offer or grant interest-free credit or any other credit term; or

D. Engaging in or being asked to engage in advertising.

VII.

Nothing contained in this order shall prohibit respondent from:

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

B. Formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to advertising representations that are false or deceptive.

VIII.

It is further ordered, That, within ninety (90) days after the date this order becomes final, respondent shall remove from its policy statements or guidelines and from any of its governing documents or other publications any provision, policy statement, or interpretation of policy that is inconsistent with the provisions of Parts II, III, IV, V, VI, or VII of this order.

IX.

It is further ordered, That, for a period of five (5) years after the date this order becomes final, respondent shall maintain in its files a copy of the minutes of each meeting of its members and of each meeting of its board of directors; a copy of all correspondence relating to price competition, competitive bidding, other method of procurement of the services of an engineering professional, engineering professional fee or price or pricing, credit, or advertising; and a copy of all of its publications relating to price competition, competitive bidding, other method of procurement of the services of an engineering professional, engineering professional fee or price or pricing, credit, or advertising. Respondent shall make such copies of minutes, correspondence, and publications available for inspection and copying by representatives of the Federal Trade Commission upon written request and reasonable notice.

X.

It is further ordered, That, within forty-five (45) days after the date this order becomes final, respondent shall mail to each of its directors, officers, employees, and members a copy of the order and complaint in this proceeding.

XI.

It is further ordered, That, for a period of five (5) years after the date this order becomes final, respondent shall provide a copy of the order and complaint in this proceeding to each new employee of ASFE at the time that employee is hired and to each new applicant for ASFE membership at the time that applicant becomes a member of ASFE.

XII.

It is further ordered, That: (A) within ninety (90) days after the date this order becomes final, respondent shall 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) one year from the date this order becomes final and continuing annually for four (4) years thereafter and at such other times as the Commission may by written notice request, respondent shall 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.

XIII.

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

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I concur in the Commission's decision today to accord final approval to the Consent Order with the Association of Soil and Foundation Engineers ("ASFE"). I find more than sufficient reason

to believe that ASFE's actions violate Section 5 of the FTC Act. But I am concerned that the Consent Order with ASFE may be interpreted to permit the very activity it is aimed to prevent. ASFE's troublesome activities can be characterized accurately as a concerted campaign to prevent its members from bidding competitively against each other. In the place of competitive bidding, ASFE encouraged "negotiated contracts," in which an engineering firm is selected prior to any discussion of price. In its newsletter, ASFE has boasted of its widespread success in discouraging competitive bidding. Moreover, there is clear evidence that negotiated contracts result in higher prices than competitive bidding.

The actions of ASFE include a grass-roots campaign to discourage members from competitive bidding, another campaign to discourage customers (including local, state, and federal government agencies) from soliciting bids, a peer review program that criticized members for bidding and sometimes suggested price increases to members, and misrepresentations to members about the effect of competitive bidding on their liability insurance coverage.

In addition to the fact that this activity is facially egregious, it flies in the face of the Supreme Court's ruling in National Society of Professional Engineers.[1] In that case, the Court held unlawful a professional association's canon of ethics prohibiting its members from competitive bidding, finding: "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement . . .[2] The Court went on to reject the claimed defense that bidding adversely affected the quality of services, stating that such a defense was "nothing less than a full frontal assault on the basic policy of the Sherman Act . . .tantamount to a repeal of the statute."[3]

Even though ASFE did not forbid competitive bidding in a canon of ethics, it engaged in a concerted campaign to discourage bidding. This distinction can be relevant in cases in which the

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[1] 435 U.S. 679 (1978).

[2] *Id.*, at 692-93.

[3] *Id.*, at 695.

potential competitive consequences of restraints are ambiguous. Anticompetitive consequences may not always be inferred when an association does not compel adherence, and when the degree of adherence is ambiguous. But in this matter, we have evidence that ASFE's campaign was widely successful in achieving an anticompetitive result.

Egregious violations such as those of ASFE merit strong action by the Commission. I would have preferred a stronger and more explicit reference in the Complaint to ASFE's anticompetitive campaign. The Complaint's vague references to actions that "impede or restrain" bidding[4] do not specifically address the widespread and multifaceted campaign to thwart competitive bidding.

My concern with the Consent Order is with a possible interpretation of the "safe harbor" in Part III. While ASFE is ordered to "cease and desist from restricting, regulating, impeding, declaring unethical, interfering with, or advising against" bidding,[5] the safe harbor permits ASFE to disseminate "truthful and nondeceptive information relating to the effect of any method of procurement upon public health, safety, and welfare, or liability exposure, including information regarding advantages or disadvantages of any method of procurement . . ."[6] This safe harbor does not explicitly require substantiation, and it could be interpreted to allow unsubstantiated claims that otherwise violate the Order.

When the Commission enforces Section 5 of the FTC Act in consumer protection cases, we insist that an objective claim be supported by a reasonable basis for it to be "truthful and nondeceptive."[7] In concurring with the Commission's decision to accord final approval to the Order, I do not interpret the safe harbor in Part III to allow ASFE to make unsubstantiated assertions to members, customers, and potential customers that otherwise violate

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4 Complaint, paragraph 12.

5 Consent Order, Part III.

6 *Id.*

7 *See* FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 839 (appended to *Thompson Medical Co.* 104 FTC 648 (1984)).

the Order. In my view, ASFE cannot take advantage of the safe harbor unless it bears the burden of substantiating such representations. Absent such a requirement, it appears that much of ASFE's egregious behavior may be "fenced out" rather than "fenced in" to the proposed Order.

IN THE MATTER OF

CONAIR CORPORATION

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

Docket C-3431. Complaint, June 14, 1993--Decision, June 14, 1993

This consent order prohibits, among other things, a Connecticut-based manufacturer of personal health care and consumer electronic products from representing that sound waves emitted by the California Facial Skin Rejuvenating System, or by any substantially similar product that uses sound waves with a frequency of no more than 20 kilohertz, will firm and tone facial muscles or improve the efficacy of a facial skin clarifying toner or scrub. The order requires the respondent to have competent and reliable scientific evidence to support certain future representations it makes regarding sound waves emitted from any product.

Appearances

For the Commission: *Sylvia Kundig* and *Jeffrey Klurfeld.*

For the respondent: *Andrew Krulwich, Wiley, Rein & Fielding,* Washington, D.C.

COMPLAINT

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

PARAGRAPH 1. Conair Corporation is a Delaware corporation, with its principal office or place of business at 1 Cummings Point Road, Stamford, Connecticut.

PAR. 2. Respondent is a manufacturer of personal health care products and consumer electronic and kitchen appliances. It has

advertised, labelled, offered for sale, sold, and distributed the "California Facial Skin Rejuvenating System" ("the System").

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

PAR. 4. The System consists of a hand-held, sound wave device, a clarifying toner, an exfoliating scrub, and a moisture lotion. The individual uses the sound wave device to apply the clarifying toner and the exfoliating scrub. The System also includes instructions for facial exercises to be performed with the sound wave device.

PAR. 5. As advertised, the sound wave device referenced in paragraph four is a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. As advertised, the clarifying toner, the exfoliating scrub, and the moisture lotion are "cosmetics" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 6. Respondent has disseminated or has caused to be disseminated advertisements for the System including, but not necessarily limited to, a telephone promotion, a transcription of which is attached hereto as Exhibit A, a magazine advertisement which is attached hereto as Exhibit B, and a program-length television commercial, excerpts of which are attached hereto as Exhibit C. The advertisements contain the following statements:

A. "Surface treatments only get surface results. [The System] is designed to work on and beneath the surface of the skin, to help stimulate skin renewal, and maintain muscle tone. ... More importantly, sound waves help firm and tone facial muscles that have lost their elasticity." (Exhibit A).

B. "Best of all, [the System] firms underlying facial muscles for greater elasticity." (Exhibit B).

C. "[I]ntrasound waves penetrate to help tone and firm my face." (Exhibit C).

D. "[the sound wave device] helps the muscles that you are exercising to achieve the maximum benefit." (Exhibit C).

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph six, including but not

necessarily limited to the attached Exhibits A, B, and C, respondent has represented, directly or by implication, that the sound waves emitted by the sound wave device will "firm" and "tone" the user's facial muscles.

PAR. 8. In truth and in fact, the sound waves emitted by the sound wave device will not "firm" and "tone" the user's facial muscles. Therefore, the representation set forth in paragraph seven was, and is, 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 advertisements attached as Exhibits A, B and C, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph seven, respondent possessed and relied upon a reasonable basis that substantiated the representation.

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

PAR. 11. The advertisements attached hereto as Exhibits A and B contain the following statements:

A. "In addition, this unique skin-care system comes with three sonically-activated lotions to exfoliate, tone, and minimize the appearance of fine lines, for a radiant, younger-looking complexion." (Exhibit A).

B. "Sonically-activated lotions also help California Facial work its magic-cleansing, exfoliating and minimizing the appearance of fine lines." (Exhibit B).

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph eleven, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that the sound waves emitted by the sound wave device improve the efficacy of the lotions.

PAR. 13. In truth and in fact, the sound waves emitted by the sound wave device will not improve the efficacy of the lotions. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. Through the use of the statements contained in the advertisements referred to in paragraph eleven, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that at the time the respondent made the representation set forth in paragraph twelve, it possessed and relied on a reasonable basis that substantiated the representation.

PAR. 15. In truth and in fact, at the time the respondent made the representation set forth in paragraph twelve, respondent did not possess and rely on a reasonable basis that substantiated the representation. Therefore, the representation set forth in paragraph fourteen was, and is, false and misleading.

PAR. 16. The acts or practices of respondent, as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

Welcome to the world of California Facial. The only sound wave skin rejuvenating system. Surface treatments only get surface results. California Facial is designed to work on and beneath the surface of the skin, to help stimulate skin renewal, and maintain muscle tone. California Facial uses sound wave vibrations to help improve blood flow, brining a rich, nutritive oxygen supply to skin and muscle cells. More importantly, sound waves help firm and tone facial muscles that have lost their elasticity. In addition, this unique skin care system comes with three sonic activated lotions to exfoliate, tone and minimize the appearance of fine lines, for a radiant, younger-looking complexion. California's Facial brings out what's hidden deep in your face, the potential to look your youthful best.

To hear a location near you, press 1. To speak to a representative, press 2. To end this call, press 3. ("3" pressed).

California Facial is available at the following local stores: K-Mart, Wal Mart, Target, JC Penny, Sears, Price Club, and Costco. Thank you for calling!

EXHIBIT B


The Secret
of
Youthful Skin
is
Hidden Deep
in
Your Face
Now there's a skin care system that penetrates so deeply, it g[illegible] where even the most advanced moisturizers have never [illegible].
It's the California Faci[illegible] Rejuvenating System.
By using sound waves that work layers below the surface of your skin, California Facial stimulates skin renewal and brings a rich source of oxygen to plump up muscles and skin. Best of all, it firms underlying facial muscles for greater elasticity.
Sonically-activated lotions also help California Facial work its magic—cleansing, exfoliating and minimizing the appearance of fine lines.
So before you buy another "miracle" skin cream, bring home California Facial. And discover what's hidden deep in your face. Your youth.
CONAIR
CALIFORNIA FACIAL
SOUND WAVE
Skin Rejuvenating System
Ad Code 12702

EXHIBIT C

Excerpts from the program-length commercial "Conair Presents: Innovations in Health and Beauty."

[SUBSCRIPT] 1-800-527-5800

UNIDENTIFIED WOMAN: I'm 30-something! I used to spend a fortune and tons of time on professional facials to look younger, until I found California Facial. Love it! Feels more effective. The intra sound waves penetrate to help tone and firm my face. My skin looks younger. Imagine what a lifetime of facials would cost!

[SUBSCRIPT] INTRASOUND WAVES

NARRATOR: California Facial from Conair, the at-home professional facial.

UNIDENTIFIED WOMAN: And he thinks I'm 20-something!

NARRATOR: To order, call now. Your California Facial includes the sound emitter, two attachments, three special lotions, instruction book and application pad, equal to $1,000 in salon facials, an incredible value for only $49.95 plus shipping and handling. Order today and receive our free video on how to give yourself a California Facial. For fastest delivery, call now, or send check or money order to the address shown. Your California Facial comes with a 30-day money back guarantee.

PRINTED: 49.95 plus $9.95 S&H
Add applicable sales tax (No CODs)
1-800-527-5800
Or send Check or Money Order to:
California Facial
PO Box 10472
Waterbury, CT 06725-0472
30 day money back guarantee

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MARIO GONZALEZ, Director of Marketing, Conair: Yes. The tone and firmness of your face not only depends on the skin, but also on the underlying facial structure, the muscles.

COLLEEN GALIGHER, Host: Right, right.

GONZALEZ: Those muscles need to be kept in shape. They need to be worked out. California Facial provides a series of very simple and easy exercises highlighted in this booklet that are done in conjunction with the unit and this attachment.

In doing the exercises, you simply place the unit

GALIGHER: [unintelligible]

GONZALEZ: - - in place -- yes, you leave it in place, uh, and it helps the muscles that you are exercising to achieve the maximum benefit.

GALIGHER: Through the intrasound waves, is that what happens?

GONZALEZ: That is correct. Yes. So there you have it. California Facial is really very simple to use, it is a common sense system, and it is the combination of the sound waves, the creams and the exercises that make it so unique.

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

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

1. Respondent Conair Corporation is a Delaware corporation. Its principal office or place of business is at 1 Cummings Point Road, Stamford, Connecticut.

2. 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.

3. 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 Conair Corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of "The California Facial Skin Rejuvenating System" 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: (1) sound waves can or will firm or tone an individual's facial muscles, and (2) sound Waves will improve the efficacy of a facial skin clarifying toner or exfoliating scrub. For purposes of this order, "substantially similar product" shall mean any skin care product, or combination of products that includes a skin care product, that use sound waves emitting a frequency of no more than 20 (twenty) kilohertz.

II.

It is further ordered, That respondent Conair Corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any product or combination of products that use sound waves, including but not limited to intrasound or ultrasound, 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 sound waves can or will firm or tone an individual's muscles, unless at the time of making the representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the

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

III.

It is further ordered, That respondent Conair Corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any product or combination of products that use sound waves, including but not limited to intrasound or ultrasound, 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 sound waves can or will improve the efficacy of a topically applied product, unless at the time of making the representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate and reliable results.

IV.

It is further ordered, That the provisions of this order shall not apply to the printing on approximately 40,000 tubes of "Deep Penetrating Body Creme" and 40,000 tubes of "Muscle Soothing Gelle" which were manufactured prior to July 1, 1992, and shipped by respondent to distributors or retailers prior to January 10, 1993.

V.

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

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

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

VI.

It is further ordered, That the respondent shall, for ten (10) years from the date of entry of this order, 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 and dated statement acknowledging receipt of the order.

VII.

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

VIII.

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

IN THE MATTER OF

FONE TELECOMMUNICATIONS, INC.

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

Docket C-3432. Complaint, June 14, 1993--Decision, June 14, 1993

This consent order prohibits, among other things, a New York marketer of "900" number information services from misrepresenting premium offers, requires a preamble statement at the beginning of each children's message giving the child a chance to hang up without charge, and requires the company to provide a means for parents to prevent, or not be charged for, unauthorized calls by their children. In addition, the consent order prohibits the respondent from misrepresenting the ease with which a premium is obtainable and requires the disclosure of all material terms and conditions for obtaining any premium offers.

Appearances

For the Commission: *Toby M. Levin* and *Carol A. Kando.*

For the respondent: *Joel R. Dichter, Seham, Klein & Zelman,* New York, N. Y.

COMPLAINT

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

PARAGRAPH 1. Respondent Fone Telecommunications, Inc., is a New York corporation, with its principal office or place of business at 444 Madison Avenue, Suite 212, New York, New York.

PAR. 2. Respondent has advertised, offered for sale and sold information services to consumers, including children. Accessed by

the telephone through a "900" number exchange, respondent's information services for children have consisted of recorded stories or video game tips featuring animated or fictional characters (such as Santa Claus) along with recorded promotional messages. Advertisements designed to induce consumers to purchase these services have been broadcast on television across state lines.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and telephone messages for various information services for children, including but not necessarily limited to the attached Exhibits A-E. These aforesaid advertisements contain the following statements:

A. "I want you to hear Santa's secret message and find out how you can get a real letter from Santa and a special Christmas present from Santa Claus to you." (Audio, Exhibit A)

B. "Sing along with Santa and find out how you can get a present from Santa Claus." (Audio, Exhibit B)

C. "Call Santa's phone at 1-900-909-4300 to sing along with Santa and find out how to get a special present from Santa Claus to you." (Audio, Exhibit C)

D. "I'm startin' a new club and I want you to join. It's called the Junior Vampires of America . . . You'll hear scary monster stories . . . You'll learn all about my monster friends, learn how to get a free vampire patch and a list of special vampire tricks and secrets . . . Learn how to scare your friends and even yourself. Join Grandpa's Junior Vampire's Club and I'll make you a Junior Vampire." (Audio, Exhibit D)

E. "We've got all the latest clues on the Power Phone. Call now and find out how to get a free super power patch." (Audio, Exhibit E)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that children who complete a call to respondent's information service will readily and easily obtain the premium specified in the advertisement.

PAR. 6. In truth and in fact, children who complete a call to respondent's information service will not readily and easily obtain the premium specified in the advertisement because the child must: (1) complete a call to the information service; (2) record an address, given during the course of the recorded message announcement, to which a request must be sent to obtain the item; and (3) send a self-addressed stamped envelope to the address given during the message. This ordering information is given in a rapid and difficult to follow manner during the course of the recorded message. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. In its advertising for its information services for children, respondent has represented that children could easily obtain a premium by making a call to the information service. These advertisements failed to disclose that there are material terms and conditions for obtaining the premium, including but not limited to, the need for a writing implement to transcribe the ordering information. These terms and conditions would be material to the caller in deciding whether to purchase the service. Respondent's failure to disclose these terms and conditions was, and is, a deceptive practice.

PAR. 8. In the course of advertising, promoting, and selling its information services for children, respondent has induced children to call its story service and thereby incur charges, without providing any reasonable means for persons responsible for payment of these charges to exercise control over the transaction. This practice has caused such persons to pay these charges. Respondent's conduct as set forth above has caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This conduct was, and is, an unfair act or practice.

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.

EXHIBIT A

TAPE 2, #1

Number on screen VIDEO	AUDIO
Little boy	I called Santa
Little girl	Santa is that really you?
Little boy	Hi Santa
Santa in his chair	Ho ho ho. Hello boys and girls. Get your parents' permission and write down the phone number so you can call Santa's phone too. It's 1-900-909-4300. It's a long number because it's a long way to the North Pole. I want you to call to hear Santa's secret message and find out how you can get a real letter from Santa and a special Christmas present from Santa Claus to you. So write down my number so you can call Santa's Christmas phone. Ho ho ho
	VOICEOVER Call Santa's Christmas phone. Dial 1-900-909-4300. Two dollars the first minute, .45 each additional. Kids, ask Mom or Dad.

EXHIBIT B

TAPE 2, #3

VIDEO	AUDIO
(Number on screen) Santa in his chair, surrounded by kids singing into telephones, waving.	(kids and Santa singing) What do we do when Christmas is coming, Gotta call Santa, gotta call Santa, What do we do when Christmas is coming, Gotta call Santa's Christmas phone. VOICEOVER Get your parents' permission to call Santa's Christmas phone. CALL 1-900-909-4300. Sing along with Santa and find out how you can get a present from Santa Claus. (Kids and Santa singing) What do we do when Christmas is coming, Gotta call Santa, gotta call Santa, What do we do when Christmas is coming, Gotta call Santa's Christmas phone. (TWICE) VOICEOVER Two dollars the first minute, a dollar each additional. Kids, ask Mom or Dad.

EXHIBIT C

TAPE 2, # 5
(Number on screen)

AUDIO	VIDEO
Santa in chair singing with kids	(singing) It's Santa's Christmas party, pick up the phone and call us, Come join us all with Santa. And will sing Christmas songs. Call 1-900-909-4300. Call Santa's phone, call Santa's phone and we'll sing Christmas songs. (TWICE) VOICEOVER Hey kids get your parents' permission and call Santa's phone at 1-900-909-4300 to sing along with Santa and find out how you can get a special present from Santa Claus to you. Two dollars first minute, a dollar each additional. Kids, ask Mom or Dad.

EXHIBIT D

TAPE 3

Hi ya kids it's me, your Grandpa. I gotta tell ya, I'm starting a new club and I want you to join. It's called the Junior Vampires of America. I mean you'll hear scary monster stories. But to call you gotta ask your parents' permission and call this phone number 1-900-909-4300. You'll hear all about my monster friends, learn how to get a free vampire patch and a list of special vampire tricks and secrets. So call 1-900-909-4300. Learn how to scare your friends and even yourself. Join Grandpa's Junior Vampire's Club and I'll make YOU a junior vampire.

VOICEOVER:
Hey kids, call 1-900-909-4300. That's 1-900-909-4300 to hear Grandpa's scary stories and join the Junior Vampire's Club. That two dollars the first minute and .45 each additional. Ask Mom or Dad first.

EXHIBIT E

VIDEO
various quick edit shots of kids playing video games, video game screens, "CALL NOW," "SECRET TIPS," "FREE POWER PATCH"

AUDIO
VOICEOVER
Power Phone's back. And now it's better than ever. Yes, now you can power up your score on all of your latest and greatest Nintendo games. Like, POW, Bases Loaded, and Teenage Mutant Ninja Turtles. PLUS discover the incredible secrets of Gameboy, Power Glove. Call 1-900-909-0300. Power up Blaster Master, Super Mario Brothers II, power your Gameboy scores on Tetra, ____Waves, ____. It's the Power Phone for Nintendo players. Call 1-900-909-0300. For secret tips and clues and find put how you can get a free super power patch. Having fun with Gameboy? ready to take on the Power Glove? We've got all the latest clues on the Power Phone. Call now and find out how to get a free super power patch. 1-900-909-4300. We've got it covered on the Power Phone. Two dollars the first minute, .45 each additional. Ask Mom or Dad first. The power phone is an independent information source not affiliated with Nintendo. Nintendo and Nintendo products are registered trademarks of Nintendo America.

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 fact: set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purpose: 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 Fone Telecommunications, 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 444 Madison Avenue, Suite 212, 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

DEFINITIONS

For purposes of this order the term "*children*" or "*child*" shall mean a person of age twelve or under.

For purposes of this order, the term "*information service for children*" shall mean a telephone message accessed through a numbered exchange (*e.g.*, "900") for which a fee is charged, consisting of recorded statements promoted or sold primarily to children.

For purposes of this order, the term "*premium*" shall mean any item respondent offers to send to those who call its information service for children.

For purposes of this order, the term "*information service message*" shall mean any live or recorded story, program or other communication transmitted to callers of respondents information service for children.

For purposes of this order, the term "*video advertisement*" shall mean any advertisement intended for dissemination on television broadcast, cablecast, home video, or theatrical release.

I.

It is ordered, That respondent Fone Telecommunications, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or transmission of any information service for children in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, the ease with which a premium is obtainable.

II.

It is further ordered, That respondent Fone Telecommunications, Inc., its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or transmission of any information service for children in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing as specified below to disclose, clearly and prominently, whenever an offer of any premium is made, all the material terms, conditions and obligations upon which receipt and retention of the premium is contingent. Such terms, conditions, and obligations shall include, but not be limited to, the number of calls necessary to receive the premium, if more than one, and the need to have a writing implement and paper available to record the necessary information given during the information service message.

The disclosure shall be made in a manner understandable to children, and shall be made in the same medium in which the offer of the premium is made and, in addition, in any information service message.

III.

It is further ordered, That respondent, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing to be disseminated any advertisement in any medium for an information service for children that does not include the following statement:

"KIDS, YOU MUST ASK YOUR MOM OR DAD AND GET THEIR PERMISSION BEFORE YOU CALL. THIS CALL COSTS MONEY."

The above-required disclosure shall be presented in a manner designed to ensure clarity and prominence as follows:

A. In any video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The disclosure shall appear immediately following the first video presentation of the "900" telephone number, but in any event shall begin within the first fifteen (15) seconds of the advertisement. The audio portion shall be presented in a slow and deliberate manner. Each line of the video portion shall be at least as large as one-half of the size of the largest presentation of the "900" number that appears on the screen during the advertisement, shall be of a color or shade that readily contrasts with the background, and shall appear on the screen for the duration of the audio disclosure.

B. In any print advertisement, the disclosure shall be parallel to the base of the advertisement and shall be placed in close proximity to the 900 number. All lines of the disclosure taken together shall be the same size or larger than the largest presentation of the 900 number, but in any event the type size of each line of the disclosure shall be no less than 12 point, bold-face type.

C. In any radio advertisement, the disclosure shall be presented in a slow and deliberate manner and shall appear immediately following the first presentation of the "900" telephone number, but in any event it shall begin within the first fifteen (15) seconds of the advertisement.

Nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertisement in any medium.

IV.

It is further ordered, That respondent, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or

causing to be disseminated any advertisement in any medium for any information service for children that does not include a disclosure of the cost of a call to the information service. This disclosure shall be presented in a manner designed to ensure clarity and prominence. In any video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement.

V.

It is further ordered, That respondent, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing to be disseminated any information service message for children that does not include, at the beginning of the message, an introductory preamble that states in a slow, deliberate and clear manner the following:

"THIS TELEPHONE CALL COSTS MONEY. IF YOU DO NOT HAVE YOUR MOM OR DAD'S PERMISSION, HANG UP NOW AND THERE WILL BE NO CHARGE FOR THIS CALL."

VI.

It is further ordered, That respondent, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from billing or causing to be billed, or collecting any funds or causing any funds to be collected, for any call to any information service for children terminated within no less than five (5) seconds of the end of the introductory preamble, as required by paragraph V of this order.

VII.

It is further ordered, That respondent, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from inducing children to call their information service for children and thereby incur charges, without providing any reasonable means for the person responsible for payment of such charges to exercise control over the transaction. For purposes of this paragraph, if the respondent does not provide, prior to placement of any call by a child, a reasonable means for the person responsible for payment to avoid unauthorized calls, the provision of a reasonable means to exercise control over the transaction shall be the use of the respondent's best efforts to ensure that one-time refunds or credits are provided upon request for unauthorized calls made by children, as specified below. Best efforts shall include at least the following:

A. Contracting with the appropriate interstate common carrier or local exchange carrier to:

(1) Identify in all telephone bills containing charges for calls to respondent's information service for children each telephone call to such service by the characters "CHILD CALL;"

(2) Place in all telephone bills containing charges for calls to respondent's information service for children, clearly and prominently in close proximity to the itemization of those charges, a toll-free or local telephone number specified to be used for consumer inquiries concerning charges on the telephone bill; provided, that a general billing inquiry telephone number for customer inquiries concerning charges on the telephone bill shall satisfy this requirement;

(3) Refer all customers who call the toll-free number inquiring about the charges for respondent's information service for children

to their local exchange carrier for information regarding the availability of blocking in their jurisdiction; and

(4) Provide a one-time prompt and full credit or refund at the customer's request for all such calls, whether such request is made to the toll-free or local telephone number specified herein or in any other manner; provided, that respondent must contract with the carrier to provide a second prompt and full credit or refund to any customer who requests the first credit or refund during a period of the billing cycle where unauthorized calls have been made, but do not yet appear on the customer's bill, and subsequently requests a second credit or refund for the unauthorized call made before the date of the first request for a credit or refund;

provided, that if the interstate common carrier utilized by respondent employs local exchange carriers to provide billing inquiry services, respondent shall be in compliance with subparagraphs A(3) and (4) of the paragraph if its contract with the interstate common carrier provides that the interstate common carrier notify each local exchange carrier of the interstate common carrier's policies to:

(i) Provide the customer with information regarding the availability of blocking of 900 number calls; and

(ii) Provide upon request one-time refunds or credits for unauthorized calls by children, as provided in subparagraph A(4) of the paragraph.

B. In the event that respondent receives any information that the interstate common carrier has failed to fulfill its obligations under the contract required by subparagraph A of this paragraph, immediately notifying the interstate common carrier:

(1) Of the existence of the alleged failure(s);

(2) Of the carrier's responsibility to fulfill its obligations under the contract;

(3) Of the need to investigate and correct all past failures; and

(4) That if a pattern or practice of failures continues, respondent will terminate the use of said carrier for any information service for children; and

C. Terminating the use of said interstate common carrier for any information service for children, in the event that the interstate common carrier does not correct all past failures or continues to fail to fulfill its obligations under said contract.

D. Compliance with the requirements set forth in subparagraphs A-C of this paragraph is deemed to be satisfactory compliance with this paragraph.

Provided, that for purposes of this paragraph, the mere inclusion of any audio or video disclosure relating to parental authorization in advertisements or information service messages is expressly deemed not to be a reasonable means, prior to placement of any call by a child, for the person responsible for payment to avoid unauthorized calls.

VIII.

It is further ordered, That for three (3) years from the date of service of this order, respondent, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying: (1) all advertisements for information services for children and all corresponding information service messages; (2) a record of all credit or refund requests made for charges billed for respondent's information services for children; (3) all documents relating to compliance with paragraph VII of this order; and (4) all consumer complaints and dispositions thereof relating to respondent's information services for children.

IX.

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

X.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of respondent's operating divisions and any carrier(s) or other entities providing billing and/or collection service for their information services for children.

XI.

It is further ordered, That respondent shall, within sixty (60) days after service 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 it has complied with the order.